

CHAPTER 1

INTRODUCTION

1.1. Research Background

One of the most essential rights enjoyed by human beings is the right to property. It is an elementary right derived from natural law.¹ The right to property is embedded in Article 17 of the Universal Declaration of Human Rights (UDHR) as a recognition of its importance.² This right is adopted and recognised in Article 11 of the Hashemite Kingdom of Jordan Constitution of 1952.³ The Jordanian constitution emphasizes on the protection of private property and prohibits expropriation except in the case of public interest with adequate compensation to the person or entity who suffered property damages as determined by the law.⁴

¹ Demsetz, H. (1967). "Toward a Theory of Property Rights". *American Economic Review*, 57(2). pp. 347-359; Bell, A., & Parchomovsky, G. (2004). "A Theory of Property". *Cornell L. Rev.* 90. p. 541. The moral order, according to Aristotle, includes the right to property. He criticized Plato's preference for common property, claiming that private property should take precedence since it encourages people to focus on their own affairs rather than intruding excessively in the affairs of others. This motivation, according to Aristotle, is the product of a natural self-love, such that only respect for private property may develop the vital virtue of property liberality. Aristotle, for example, saw the right to exclude as a crucial component of property rights because it permitted owners to demonstrate virtue by relinquishing this right and sharing the benefits of property ownership with others.

² The Universal Declaration of Human Rights (UDHR), signed 10 December 1948.

³ Article 11 Constitution of the Hashemite Kingdom of Jordan 1952.

⁴ Hyajna, A & Al Adwan, A. (2012). "Equitable Compensation as a Condition for the Legality of the Acquisition in Light of the Provisions of the Jordanian Acquisition Law". *Sharia and Law Sciences*. 39(2). p. 472.

Special provisions concerning the regulation of expropriation, how to determine the value of compensation resulting from expropriation and the legal guarantees for expropriation are contained in the Jordanian Civil Law 1976 and the Jordanian Real Estate Ownership Law 2019. Article 178 of the Jordanian Real Estate Ownership Law, Article 1020 of the Jordanian Civil law and Article 42 of the Jordanian Investment Law, stipulate that private property may not be expropriated except for public interest with equitable compensation.⁵ Article 190 of the Jordanian Real Estate Ownership Law 2019, also regulates the value of compensation, its terms and conditions assessed.⁶

The right to property is not absolute. The recognition of property right does not prevent states from expropriating private property when there is legitimate public interest, provided that equitable and fair compensation is paid to the owner of the property expropriated, whether they are citizens or foreigners.⁷ Such an action must be based on the right of the state, in this case, a form of state practice of sovereignty over its territory.⁸ This essentially means that there should be a balance between; firstly, the right of property and

⁵⁵ The Jordanian Real Estate Ownership Law No. (13) of (2019). Article (178) stipulates that, “No real estate shall be acquisition except for a project that achieves public benefit and in return for fair compensation and in accordance with the procedures set forth in this chapter.”; The Jordanian Civil Law No (43 of 1976). Article 1020 provides that: “1- The ownership of any person shall not be requisitions without lawful cause. 2- The property of any person can’t be acquired except for public benefit and subject to equitable compensation as prescribed in the law”; The Jordanian Investment Law No (30 of 2014), Article 42 provides that: “no economic activity may be expropriated nor be subjected to any procedures that lead to this end unless the expropriation is made for the prerequisites of the public interest provided an equitable compensation is paid to the investor by a convertible currency without delay.”

⁶ Article (190) of the Jordanian Real Estate Ownership Law.

⁷ Gibson, C. S. (2015). “*Yukos Universal Limited (Isle of Man) v The Russian Federation 1: A Classic Case of Indirect Expropriation*”. ICSID Review-Foreign Investment Law Journal, 30(2), p. 306; Article 1110 of the North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States, signed 17 December 1992, Can. T.S. 1994 [entered into force 1 January 1994] (NAFTA. 1994).

⁸ Wei, S. (2015). “*Expropriation in Transition: Evolving Chinese Investment Treaty Practices in Local and Global Contexts*”. *Leiden Journal of International Law*. 28(3). p. 587.

the investment interests of the owner, and secondly the right of the host state to sovereignty over its territory to seek public interest.⁹

Within the domestic state matters, expropriation and determination of compensation for its citizen's property is an internal matter subject to the absolute territorial sovereignty of the laws of the state. However, it would be different if the state takes such action against foreign investment.¹⁰ In such cases, it will only be brought to the local judiciary and the national laws if there is no obligation under international agreements, bilateral or multilateral investment treaties or clauses in the investment contract between the foreign investors and the host state to subject the dispute to international arbitration.¹¹

Moreover, the prohibition of expropriation of foreign investments has long been known as a basic international guarantee and an integral part of the international minimum standards.¹²

The guidelines of expropriation actions have been one of the most controversial international law issues.¹³ The early stage of the modern era on expropriations in the

⁹ Segger, M. C. C., Gehring, M. W., & Newcombe, A. P. (Eds.). (2011). *"Sustainable Development in World Investment Law"*. (Vol. 30), *Kluwer Law International* BV. P. 686; Gutbrod, M., & Hindelang, S. (2006). *"Externalization of Effective Legal Protection Against Indirect Expropriation"*. *The Journal of World Investment & Trade*, 7(1), p. 325; Nikièma, S. H. (2012). *"Best Practices: Indirect Expropriation"*. *International Institute for Sustainable Development*. p. 22; Henckels, C. (2012). *"Indirect Expropriation and The Right to Regulate: Revisiting Proportionality Analysis and The Standard of Review in Investor-State Arbitration"*. *Journal of International Economic Law*, 15(1). p. 255.

¹⁰ Nikièma, S. H. (2012). p. 1.

¹¹ Sadiq, H. (2001). *"Law Applicable to International Trade Contracts"*. University Thought House. Alexandria. p. 581; See article 43 of the Jordanian Investment Law, which states that: "No economic activity may be expropriated nor be subjected to any procedures that lead to this end unless the expropriation is made for the prerequisites of the public interest provided an equitable compensation is paid to the investor by a convertible currency without delay."

¹² Dolzer, R., & Schreuer, C. (2012). *"Principles of International Investment Law"*. Oxford University Press. p. 120; See also Miles, K. (2013). *"The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital"*. Cambridge University Press. p. 464.

¹³ Dolzer, R. (2002). *"Indirect Expropriations: New Developments"*. *NYU Envtl LJ*, 11. pp. 64 - 68.

international investment context have centered largely on direct takings of property such as acquisition or seizures of property. The abolition of state-granted natural resource concessions and large-scale nationalization of essential industries held by foreign investors, led to issues on the adequate value of compensation to be paid.¹⁴ However, during the last several decades, nationalisations decreased dramatically and the concept of direct expropriation today is considered a settled issue in international law,¹⁵ including its obligatory requirement of compensation.¹⁶

Recently, a number of claims under the international investment law and bilateral investment treaties (BITs) are based on the conception of indirect expropriation.¹⁷ Indirect expropriation arises when government legislations or regulatory actions deprive a property holder from enjoying or benefiting from his property, limits or prohibits the disposition of property, or reduces the value of property, without transferring the title of property.¹⁸ The

¹⁴ Baughen, S. (2006). "Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven". *Oxford Journal of Environmental Law*, 18(2). p. 209; Cotula, L. (2015). "Expropriation Clauses and Environmental Regulation: Diffusion of Law in the Era of Investment Treaties". *Review of European, Comparative & International Environmental Law*, 24(3). p. 278.

¹⁵ Appleton, B. (2002). "Regulatory Takings: The International Law Perspective". *NYU Envtl LJ*, 11(35). p. 40; See further, Small, Y. (2004). "Indirect Expropriation' and the 'Right to Regulate' in International Investment Law". OECD Working papers on international investment. p. 3.

¹⁶ Been, V., & Beauvais, J. C. (2003). "The Global Fifth Amendment-NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Takings Doctrine". *NYUL Rev.* 78, 30. pp. 47-48.

¹⁷ *Methanex Corporation and United States of America, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005. (Methanex v United States 2005), at Part IV, Chapter D, para 15; Metalclad Corporation v The United Mexican States, ICSID Case No. ARB (AF)/97/1, August 2000. (Metalclad v. Mexico. 2000.), at paras 106-07, 111; Tecnicas Medioambientales Tecmed S.A. v The United Mexican States, ICSID Case No. ARB (AF)/00/2, May 2003. (Tecmed S.A. v. Mexico. 2003.); Yukos Universal Limited (Isle of Man) v The Russian Federation, UNCITRAL, PCA Case No AA 227, July 2014. (Yukos Universal v Russia 2014)*

¹⁸ Redfern, A., & Hunter, M. (2009). "Redfern and Hunter on International Arbitration". Oxford University Press. p. 497; Born, G. (2012). "International Arbitration: Law and Practice". Kluwer Law International. p. 430; De Luca, A. (2014). "Indirect Expropriation and Regulatory Takings: What Role for the Legitimate Expectations of Foreign Investors. General Interests of Host States in International Investment Law". Cambridge University Press, Cambridge. p. 61; R. Dolzer & Christoph Schreuer. (2012). p. 103; UNCTAD. "Taking of Property". UNCTAD (2020). Series on Issues in International Investment Agreements II. p. 78;

current debate in the field of indirect expropriation focuses on state regulations that interfere with foreign investment private property rights without including any physical state taking or transfer of legal title from the owner. It could be stated that, the main topic of discussion in this sphere is differentiation between compensable indirect expropriation acts, and non-compensable regulatory measures, in addition to the way indirect expropriation can be determined.¹⁹

See also. Parkerings-Compagniet AS v Lithuania, Award on jurisdiction and merits, (ICSID Case No ARB/05/8), Award - 11 Sept 2007, (Parkerings v Lithuania 2007).

¹⁹ Dolzer, R., & Schreuer, C. (2012). p. 120; Muir, A. T. (2015). "The Use of the Proportionality Principle to Distinguish Compensatory Indirect Expropriation from Regulatory Measures". Selected Works. Georgetown University Law Center. p. 3; Isakoff, P. D. (2012). "Defining the Scope of Indirect Expropriation for International Investments". Global Bus. L. Rev., 3. p. 209; Newcombe, A. (2005). "The Boundaries of Regulatory Expropriation in International Law". ICSID Review - Foreign Investment Law Journal. 20(1). p. 3; Alwkel.H. (2021). "Detection Criteria the Indirect Expropriation of Foreign Investment Within the Framework of International Law and Arbitration". International Journal of Jurisprudence, Judiciary and Legislation, Volume 2, Issue 1. P. 136; Prislán, V. (2021). "JUDICIAL EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW". International & Comparative Law Quarterly, 70(1). P. 174; Ebrahimpooradel Asanjan, A., & Soleymani, M. (2021). "Interaction and Confrontation of Indirect Expropriation and Regulation of the Host State". Public Law Studies Quarterly, 51(2), p. 820; Ranjan, P. (2020). "COVID-19, India and Indirect Expropriation: Is the Police Powers Doctrine a Reliable Defence?". Contemporary Asia Arbitration Journal, 13(1). P. 221; Bělova, A. (2020). p. 3-7; Malakotipour, M. (2020). "The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: A Call for a Legislative Response". International Community Law Review, 22(2). pp. 238-239; Artamonova, I. (2020). "The Distinction Between Indirect Expropriation and Taxation Measures as Derived from Arbitration Tribunal Case-Law". Mezhdunarodnoe pravosudie. IJ № 1 (33). vol.10, no.1. P. 127; Ranjan, P. (2019). "Police Powers, Indirect Expropriation in International Investment Law, and Article 31 (3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay". Asian Journal of International Law, 9(1). pp. 99-100; Zhu, Y. (2019). "Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space". Harv. Int'l LJ, 60. pp. 377-380.

1.2. Problem Statement

The concept of direct expropriation is a recognized act in international investment law, Jordanian law, and Islamic Law,²⁰ as long as it is established pursuant to public interests without discrimination and for equitable compensation.²¹ The problem arises when the acts are not regarded as direct expropriation clearly and explicitly, but appear in the form of specific conducts of the state as regulatory measures pursuant to public interest, and have the effect of depriving the investors of peaceful enjoyment of their property, limits or prohibits the disposition of property, and greatly reduces the value of property without adequate compensation.

The issues of defining indirect expropriation and distinguishing it at a regulatory measure, and determining the amount of compensation to be paid, are currently considered as the primary topics of debate in international investment law. This debate has occurred as a reason of the decline in direct expropriation and the increase of multilateral and bilateral investment treaties that have expressly provide provisions governing direct expropriation and compensation of the property.²² It is firmly established under international law, that a foreign investor is entitled to compensation as defined in international law in the case of indirect expropriation of the investment he owns.²³ However, the main question in this issue

²⁰ Al-Mawardi, Ali. M. (1973). *“Al-Aḥkam al-Sulṭaniyyah”*. Third edition. Mustafa Al-Ḥalabi. Cairo. p. 206; Ibn Kathir, Ismail. K. (1990). *“Al Bidāyah wa al Nihāyah”*, Part VII. Knowledge Library Beirut. p. 152; Al-Maliki, Al-Mawwāq (1994). *“Al-Tāj Wa Al-Iklīl Li Mukhtaṣar Khalīl”*. First Ed. Vol. 6 Dar Al Kutub Al ‘Imiyyah. p. 42.

²¹ Article 17 Universal Declaration of Human Rights; Article 11 of the Jordanian Constitution.

²² Mostafa, B. (2008). *“The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law”*. Austl. Int'l LJ, 15. p. 267.

²³ Christiansen, H. (2004). *“OECD Directorate for Financial and Enterprise Affairs, Personal Communication”*; See also Nikièma, S. H. (2013). *“Compensation for Expropriation. Winnipeg, Canada”*.

is the ambiguity on how to determine the regulatory actions amounting to indirect expropriation and how to determine the amount of compensation to be paid under international investment law and Jordanian law,²⁴ in order to differ it from regulatory measures.²⁵ This causes many concerns in the context of investment disputes as regulatory actions are regarded as regulatory measure resulting to no compensation being paid to the investors.²⁶

Although the numbers of indirect expropriation cases are growing, the body of jurisprudence on indirect expropriation and how to determine the amount of compensation to be paid is relatively undeveloped, further explaining the broad debates on where international law currently stands on the matter.²⁷ In this regard, one particular problem is that, relying on provisions of the bilateral investment treaties (BITs), tribunals have adopted different approaches to determine indirect expropriation and how to evaluate the property in terms of compensation in various cases with regards to public policy concerns, for instance, environment concerns, public health and human rights.²⁸ This has led to inconsistencies in tribunal decisions in disputes submitted by investors affected from regulatory actions.²⁹ The tribunals considered the regulatory action as a compensable

The International Institute for Sustainable Development. p. 1; Muir, A. T. (2015). p. 5; Winters. K. (2015). p. 6.

²⁴ Dolzer, R. (2002). p. 90; Mostafa, B. (2008). p. 267; Newcombe.A. 2005. p. 2; Gutbrod, M., & Hindelang, S. (2006). p. 327.

²⁵ Newcombe.A. 2005. p. 25; Been, V., & Beauvais, J. C. (2003). p. 53.

²⁶ Higgins, R. (1982). *“The Taking of Property by the State: Recent Developments in International Law”*. Collected Courses of the Hague Academy of International Law. p. 331

²⁷ Lindskoug. P. (2006). p. 7.

²⁸ Pupolizio, I. (2016). *“The Right to an Unchanging World–Indirect Expropriation in International Investment Agreements and State Sovereignty”*. *ICL Journal*, 10(2). p. 150.

²⁹ Wei, S. (2015). p. 582.

indirect expropriation and gave the investors different forms of compensation in some claims,³⁰ while in other claims, considered the regulatory action as non-compensable regulatory measures.³¹

From the above explanation, it is clear that there is a confusion in defining the concept of indirect expropriation, how to determine the payment of the compensation and to distinguish between such concept and the non-compensable regulatory measures in both the international investment law and the states' domestic laws. Indeed, these inconsistencies and ambiguities in the tribunal's decisions have casted doubt on both states and investors on the predictability of the law if issues like these arise.³² Such inconsistencies and ambiguity in the tribunal's decisions, have led the investors to be less encouraged to invest in foreign countries for fear of taking such action which may weaken the value of his investment and deprive them the peaceful enjoyment of their properties and benefit from it.

States are asserting strongly that there are increasing restrictions on their freedom to conduct and restrictions on their sovereignty over their territory by interpretations of tribunals on indirect expropriation under investment treaties. In some cases, the courts attach great importance to the interests of foreign investors³³ and very little consideration for environmental and other non-investment considerations which the host states invoke as

³⁰ *Metalclad v Mexico* 2000, paras 106–07, 111; *Tecmed S.A. v. Mexico* 2003; and *Yukos Universal v. Russia* 2014.

³¹ *Methanex v. United States* 2005, Part IV, Chapter D, para 15; *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, March 2006. *Saluka v. Czech Republic*. 2006 paras 254–65, 275–76.

³² Al-Mukhaizeem, B. (2016). "The Dilemma of Indirect Expropriation of Host States and the Right to Regulate in the International Investment Sphere". *Legal Issues J.* 4(1). p. 20

³³ Born, G. (2012). p. 419.

a justification for their regulatory measures.³⁴ It is observed however that international investment law in the past was interpreted in favor of the investors and sought to protect foreign investment, and the trend is slowly geared towards protecting the environment and the public interests of States.³⁵

The dispute in the area of indirect expropriation is not limited to determining whether the taken action by the state is an indirect expropriation of property or just a regulatory measure. It goes beyond that to include the extent of the issue of compensation that the State shall pay in the event that the regulatory action is deemed to be an indirect expropriation. Since the method and basis used to estimate the value of compensation, it will have an obvious effect on the amounts that the state must pay.³⁶ In addition, the problem is not to determine whether the state should pay compensation for the regulatory action taken or not, but to determine the basis and methods of estimating the value of compensation which must be paid to the investor.

Generally, indirect expropriation can be lawful or unlawful. The lawful indirect expropriation is an acceptable legitimate act and not considered as a sanction under international law, while the unlawful indirect expropriation is an unacceptable international wrongdoing. Scholars generally agree that compensation of lawful and unlawful expropriation cannot be of the same value. Therefore, the distinction between lawful and

³⁴ Ibid. 420. See also. Al-Mukhaizeem, B. (2016). p. 21, and Nikièma, S. H. (2012). p. 22; See. *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, ICSID Case No ARB/84/3, May 1992. (*SPP v. Egypt*, 1992.) para 227; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, (ICSID Case No ARB/97/3), August 2007 (*Vivendi v. Argentina* 2007), para 7.5.21; *Metalclad v. Mexico*. 2000, paras 106–07, 111.

³⁵ Nikièma, S. H. (2012). p. 21. See *Methanex v. United States*. 2005, Part IV, Chapter D, para 15; *Saluka v. Czech Republic* 2006, paras 254–65, 275–76; *Yukos Universal v. Russia*. 2014; *Tecmed S.A. v. Mexico*. 2003.

³⁶ Nikièma, S. H. (2013). p. 1.

unlawful expropriation is important for valuation purposes since the resulting value of compensation may be different.³⁷ Notably, most of the compensation provisions fall under bilateral investment treaties (BITs) and other international investment agreements (IIAs), deal with lawful expropriation and usually do not contain separate provisions of compensation for unlawful expropriation. Moreover, there is no consensus on the compensation standard that should be applied in cases of lawful expropriation.

During the last few years, there has been an extensive debate over the standards of compensation which are applied in the case of lawful expropriation. This specific issue has been a basic dispute between capital-exporting countries and capital-importing countries, where the former would prefer to apply full compensation standard that guarantees the highest potential of its citizens' investment, on the other hand, the capital importing countries would want to avoid full compensation standard, allowing them to take expropriation and regulatory actions and dismissing the risk of paying exaggerated amounts of compensation.

In relation to this, some scholars such as Dolzer observed that if the adopted action is at the limit of regulatory measures, there will be no compensation for the aggrieved investor.³⁸ Others debated that the damaging effect of the state's regulatory measures should be compensated even if their goal is to protect the public health or for environmental

³⁷ Ripinsky, S., & Williams, K. (2008). *"Damages in International Investment Law"*. BIICL. p 65; Sornarajah, M. (2017). p 426-439; Marboe, I. (2017). p. 83; Marboe, I. (2015). p 1062.

³⁸ Dolzer, R., & Schreuer, C. (2012). p. 102; Nikièma, S. H. (2012). p. 21.

purposes.³⁹ Unfortunately, no unanimity on this issue has been reached in international investment law.

The Jordanian law does not provide provisions on indirect expropriation, since it merely regulates acquisition and compensation for it and regulatory measures. Further, the majority of bilateral investment treaties signed by Jordan with other countries did not contain provisions regulating indirect expropriation and specifying how indirect expropriation is determined. These agreements contain different standards to determine the compensation resulting from the expropriation of foreign investment.⁴⁰

Thus, the scope of indirect expropriation has largely been left to international courts and arbitral tribunals to determine based on general rules of international law,⁴¹ as this is due to the absence of the provisions in the Jordanian laws and bilateral investment treaties regulating indirect expropriation. Therefore, the general rules of international law are applied because of the inadequacy of Jordanian laws and treaties to deal with this dispute⁴² and these rules of international law are applied in determining whether the state's regulatory actions are indirect expropriation or regulatory measures and all of the unregulated matters by the Jordanian laws and treaties if they fall under indirect expropriation.

³⁹ Born, G. (2012). p. 430.

⁴⁰ Agreement Between the Government of Saudi Arabia and the Government of Hashemite Kingdom of Jordan for Encouragement and Mutual Protection of Investment 2017 (Jordan-Saudi BIT 2017); Agreement Between the Government of State of Palestine and the Government of the Hashemite Kingdom of Jordan for Promotion and Protection of Investments 2012 (Jordan-Palestine BIT 2012); Agreement Between the Government of Sultanate of Oman and the Government of Hashemite Kingdom of Jordan for Encouragement and Reciprocal Protection of Investments 2007 (Jordan-Oman BIT 2007).

⁴¹ Small, Y. (2004). pp. 6-7; Geiger, R. (2002). "Regulatory Expropriations in International Law: Lessons from Multilateral Agreement on Investment". *NYU Env'tl LJ*, 11, 94. p. 473; Appleton, B. (2002). p. 40.

⁴² Sadiq, H. (2001). p. 581.

1.3. Research Objectives

The following are the research objectives:

- 1- To study the criteria that would construe state regulatory actions as indirect expropriation under international investment law;
- 2-To identify the standards of determining compensation arising from indirect expropriation in international investment law;
- 3-To study the position of Islamic law on indirect expropriation and compensation;
- 4-To examine the position of Jordanian laws and bilateral investment treaties on indirect expropriation and compensation for it and make recommendations on developing these concepts.

1.4. Research Questions

Based on the discussion above, the present research intends to address the following research questions:

- 1- How should states construe regulatory actions as indirect expropriation under international investment law?
- 2- How are standards of compensation be determined arising from indirect expropriation in international investment law?
- 3- How does Islamic law determines indirect expropriation and compensation in international investment law?

4- How Jordanian laws and bilateral investment treaties deal with indirect expropriation and compensation for it, and what are the recommendations to develop these concepts?

1.5. Significance of the Study

This study reflects the importance of promoting international investment and the value of attracting foreign investors to invest in the host state through achieving stability in investment transactions, consistency, juristic opinions, jurisprudence, and arbitral tribunal's decisions when dealing with indirect expropriation claims, and the resulting compensation. The significances of the study are elaborated in two key points as follows:

1.5.1. Stabilization and Encouragement of International Investment

Foreign investment has expanded in many countries to more than 59% of the value of investment. When observing the contribution of two thirds of the global FDI stock, the lion's share of foreign investments has been taken by the industries of Finance, Business Services and Telecommunication.⁴³ Over the past years, cross-border investment has exceeded 1.75\$ trillion in 2016.⁴⁴ Foreign direct investment is regarded as an engine for economic growth, and developing a State's productive potential,⁴⁵ besides providing a new

⁴³ UNCTAD. World Investment Report. 2017. *“Investment and the Digital Economy”*. UNCTAD/WIR/2017, pp. 2 - 21. https://unctad.org/system/files/official-document/wir2017_en.pdf

⁴⁴ Ibid. p. 2.

⁴⁵ Bossche, P. & Zdouc, W. (2017). *“The Law and Policy of the World Trade Organization: Text, Cases and Materials”*. Cambridge University Press. p. 20.

source of foreign skills, information, technology, experiences, and foreign currency revenue.⁴⁶

The criteria that determine indirect expropriation and the resulting compensation plays great importance in enables both foreign investors and the host state to have a clear understanding of the differences between indirect expropriation and regulatory measures that are considered within the regulatory powers of the state. It will also provide some predictability in compensation. Any uncertainty as to indirect expropriation in this nature would reduce the turnouts of foreign investors to invest abroad for fear of exposure to such investment procedures without receiving a fair and equitable compensation. In order to attract foreign investors and thereby participating in the international market economy, developing states especially have to guarantee the stability of the investment climate in their territories,⁴⁷ to which frequent regulatory measures are obviously not conducive.⁴⁸

It is useful to remove the ambiguity in the international investment law and the applicable Jordanian laws and bilateral investment treaties for the purpose of consistency and clarity to distinguish between indirect expropriations and regulatory measures of the state. It is also useful for the foreign investors to assess the situation when there is exercise of sovereign powers, which affect the property of investor. As a result, the investor would know when he has the right to claim for compensation for indirect expropriations of his

⁴⁶ Subedi, S. (2014). “*International Investment Law, International Law*”. Oxford University Press. p. 741; Winters. K. (2015). p. 7; Nawafleh, A. S. (2010). “*The Legal Framework for Foreign Direct Investment in the Hashemite Kingdom of Jordan*”. *The Journal of World Investment & Trade*, 11(1) p. 109.

⁴⁷ Nawafleh, A. S. (2010). p. 111.

⁴⁸ Gutbrod, M., & Hindelang, S. (2006). p. 62; Hoffman, A, K. (2008). “*Indirect Expropriation, in A. Reinisch (ed. by), Standards of Investment Protection*”. Oxford University Press. p. 151.

property and how to estimate the value of compensation.⁴⁹ Hence, removal of ambiguity increases certainty for the foreign investors and the host state, enhance the confidence and reduces disputes which is very expensive and time-consuming.

1.5.2. Consistency and Predictability of Jurisprudence in International Law

The determination of clear and established criteria to distinguish between indirect expropriation and regulatory measures and the compensation that the host state must pay is of great importance in the coherence of decisions of the arbitration tribunals in disputes relating to indirect expropriation. It would assist adjudicators to adopt a coherent approach in decisions, of investment disputes on indirect expropriation and to estimate the value of compensation, where the host state should pay for the harm against the investor. It also allows the tribunals to address investment and public utilities properties in a balanced manner.⁵⁰ So far, although the numbers of international indirect expropriation cases are growing, the body of jurisprudence on indirect expropriation and compensation is relatively undeveloped.⁵¹

As of the current position of international investment law, the arbitral decisions have become inconsistent and unpredictable, further explaining the broad debates on where international law currently stands on the matter.⁵²

⁴⁹ Newcombe. A. (1999). p. 3.

⁵⁰ Kuprieieva, A. (2015). p. 3.

⁵¹ Lindsoug.P. (2006). p. 7.

⁵² *SPP v. Egypt*. 1992, at para 227; *Vivendi v. Argentina*. 2007, at para 7.5.21; *Metalclad v. Mexico*. 2000, at paras 106–07, 111; *Middle East Cement Shipping and Handling Co Sa v Arab Republic of Egypt*, (ICSID

1.6. Research Scope

This study focused on the concept and the criteria of indirect expropriation, in addition to the valuation of compensation of the underlining asset as a result of expropriation according to international law and Jordanian laws and its international investment treaties, and Islamic law. The research is limited to indirect expropriation and regulatory measures taken by the host state in the face of the investment owned by a foreign investor within its territory. Regulatory measures and expropriation taken by the State towards its citizens are outside the scope of this study as it is considered an internal matter.

Further, this study is limited to actions taken by the state which have adverse effects on the foreign investments only. This does not include private property used for non-investment purposes, such as cars and houses owned by foreigners for personal use.

1.7. Research Methodology

This research is a qualitative study employing doctrinal legal research methodology which includes:

1.7.1. Doctrinal Analysis

The doctrinal analysis approach applied in this study involves studying the contents of primary sources relating to indirect expropriation and the estimation value of

Case No ARB/99/6), April 2002. (Middle East Cement v. Egypt.2002.); Compania del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica Case No ARB/96/1, February 2000 (Santa Elena v. Costa Rica.2000).

compensation in international investment law, Jordanian laws and its investment treaties, and Islamic law. This includes the texts of bilateral and multilateral investment treaties and international arbitral tribunal decisions under the International Convention of Settlement of Investment Disputes (ICSID) Convention, UNCITRAL and other auspices which uphold the sources general principles of laws and international practice. The collection of sources is derived from digital sources, such as from the collections in United Nations Conference on Trade and Development (UNCTAD) Investment Hub Policy, LexisNexis and Hein Online. The secondary sources referred to are journal articles, conference proceedings, investment reports and books, either in the form of printed, visual, digital and any other retrievable format in the area of international investment law. As for the study of indirect expropriation from the Islamic perspective, this research employs analysis of contents taken from the primary texts of the Quran and the Sunnah and the study of secondary sources of Islamic law contained in the texts and its interpretation via discussions of Muslim jurists in the field of Islamic Jurisprudence.

1.7.2. Comparative Analysis

This study will compare the context of legal provisions in the international agreements and the multilateral and bilateral investment treaties relating to indirect expropriation and compensation. This involves careful analysis of the coverage of the provisions in light of the context of the treaties. It analyses whether there are lessons and better practices of drafting and interpretation that could well suit the purposes of international investment law, with a view of balancing the interest of host states and the

investors. The study of the various investment treaties in relation to indirect expropriation is undertaken based on the common economic philosophy of liberalisation, protection of property rights and expropriation with compensation. This research revolves around comparison of tests and standards which exists in indirect expropriation clauses in investment treaties and arbitral practice, in the attempt to identifying the emerging principles and lessons that can be learnt in developing the jurisprudence on indirect expropriation.

1.8. Literature Review

Most of the writings on state regulatory actions which affect foreign investors are within the discussion of international investment law, under direct or indirect expropriation. Among the prominent writers in the field who have written on international investment law on indirect expropriation are Dolzer, R , Newcombe, A , Schreuer, C , Sornarajah, M, Redfern, A & Hunter, A, Born,G , Subedi, S, Ranjan, P, and Hoffman A. K., who are generally in consensus on the ambiguity of the concept of indirect expropriation, its application, the exact scope of state regulatory powers over its territory that would or would not give rise to indirect expropriation under international investment law. Accordingly, the material reviewed are classified into the following subthemes which facilitate the researcher to identify and synthesize what has been discussed on the subject matter, and the gaps that exist.

1.8.1 Indirect Expropriation

Sornarajah, pointed out that the main focus of this challenge is the issue of the relationship between the state regulatory authority and the legal protection of foreign investment in the international investment law.⁵³ Indirect expropriation is difficult to be defined where a broad interpretation would provide more protection to foreign investors. In this aspect, Born, and Redfern & Hunter indicated that indirect expropriation arises when government legislation or regulatory actions prohibit the owner of the investment to enjoy or benefit from his investment, or prohibit and deprive him to dispose of his property, or reduce the value of investment, without having to transfer the ownership title.⁵⁴ The importance of foreign investment and the benefits it brings to society is highlighted by Subedi in the context of the need of determining the criteria of indirect expropriation in the stability of international investment. Where there is confusion in determining the indirect expropriation and to distinguish it from regulatory measures in the context of investment disputes and adopting the regulatory measures from Courts and arbitral tribunals that results to non-payment of compensation by the State.⁵⁵

Crawford pointed out that the need to the balance between the investors and states' rights in the frames of the investment protection is currently "one of the most significant challenges facing international investment law".

Born indicates that the uncertainty in determining the criteria of indirect expropriation refrains the host states from taking specific regulatory actions which are necessary for

⁵³ Sornarajah, M. (2012). p. 374

⁵⁴ Redfern, A., & Hunter, M. (2009). p. 497; Born, G. (2012). p. 430.

⁵⁵ Subedi, S. (2014). p. 741; Hoffman, A, K. (2008). p. 151.

public interest or national development for fear of its obligation to pay compensation.⁵⁶ The states also assert that there are increasing restrictions on their freedom to act within their regulatory authority due to the uncertainty of international courts and arbitral tribunals' decision and directions which would likely consider the disputes concerning indirect expropriation to the benefit of the investors while at the expense of the host states', social and environmental concerns and other considerations.

This study differs from previous studies as it primarily focuses on indirect expropriation and its doctrines in investment law, Jordanian laws, Jordanian Bilateral Investment Treaties, and Islamic law. In addition to the standards of determining the compensation which the State must pay to the investors as a result of taking such action.

With regards to direct expropriation, most of the bilateral investment treaties provide the provisions of the need to pay to the owner of the investment as compensation for direct expropriation,⁵⁷ and this view has been accepted by Gutbrod, Hindelang & Kim, and Small.⁵⁸

R. Dolzer pointed out that the conflicts in the 1970s and 1980s were concentrated on direct expropriation and its other forms such as nationalization, requisition and also related to procedures for the compensation involved. The reliance on direct expropriation on the jurisprudence on compensation should be limited as direct expropriation is a popular claim in the 1970s and 1980s, something no longer a trend today.⁵⁹

⁵⁶ Born, G. (2012). pp. 419-420.

⁵⁷ Dolzer, R. (2002). p. 64; Dolzer, R., & Bloch, F. (2003). "*Indirect Expropriation: Conceptual Realignment*". *Int'l LFD Int'l*, 5, 155. p. 159.

⁵⁸ Gutbrod, M., Hindelang, S., & Kim, Y. I. (2009). p. 293; Small, Y. (2004). p. 2; Gutbrod, M., & Hindelang, S. (2006). p. 60.

⁵⁹ Dolzer, R. (2002). p. 64.

Due to this, as rightly indicated by Mostafa, the issue of defining and regulating the question of indirect expropriation and determining the criteria of indirect expropriation has become the dominant issue in international investment law at the current time, and this view has been accepted by Dolzer, Lindsoug and Nikiema.⁶⁰

In most cases, the determination of indirect expropriation is related to the facts. Small indicated that determining whether the regulatory action is an indirect expropriation or not requires the court to conduct a comprehensive and accurate examination of each case and treaty terms, and this view is agreed with Dolzer view.⁶¹ Kuprieieva, Winters and Ruzza indicate that courts have used different approaches to determine indirect expropriation in many prominent issues of public policy and protection of the environment since there is no agreed definition of indirect expropriation in international law, and the failure of international treaties governing investment disputes in making a fundamental distinction between indirect expropriation and regulatory measures.⁶² The studies have attempted to address the controversies between the rights of the investor to compensation and the rights of the State. Weiner indicates in this regard that there is tension in the law of international investment between the protection of foreign investment from one hand and to protect the

⁶⁰ Mostafa, B. (2008). p. 268; R. Dolzer. (2002). p. 90; Suzy H. Nikièma. (2012). p. 2; Patrik Lindsoug. (2006). p.6.

⁶¹ Small. Y. (2004). p. 2; Dolzer, R. (2002). p. 65.

⁶² Kuprieieva, A. (2015). p. 1; Winters. K. (2015). p. 84; Ruzza, A. (2013). p. 1; *See Metalclad v Mexico* 2000; *LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1). Award dated 25 July 2007 (*LG&E v Argentina* 2007); *Middle East Cement v Egypt* 2002; *Santa Elena v Costa Rica* 2000; *Phillips Petroleum Co. Iran v Iran. Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company*, IUSCT Case No. 39. June 1989 (*Phillips Petroleum Co. Iran v Iran* 1989).

sovereign authority of the state on its territory from the other hand.⁶³ Newcombe found that earlier studies on the position of (BITS), international investment agreements, and arbitral tribunal decisions in disputes relating to indirect expropriation, have concluded that they have not developed solutions on how to distinguish between indirect expropriation and regulatory measures.⁶⁴ Lindskoug indicated that free trade agreements are vague and provide open provisions about the determination of indirect expropriation.⁶⁵

Machova, M indicated that bilateral and collective investment treaties have given a lot of protection to foreign investments and employ a broad interpretation of what constitutes indirect expropriation, resulting in regular clashes with host states over their right to regulate investments,⁶⁶ where states are usually afraid of the broad interpretation given to indirect expropriation as the application of its protection collides with their regulatory framework.⁶⁷ The study analyzes the doctrines created by arbitral tribunals in indirect expropriation cases with further examination carried out with respect to innovative suggestions from contemporary scholars on the potential changes of these doctrines. Alwkel.H points out that the determination of indirect expropriation is based on several pillars, including the right of the state to regulate and sovereignty over its territory, and the right of foreign investors to protect their investment. This has led to a lot of difference in the bilateral investment treaties provision and arbitral tribunals award.⁶⁸ Santikko, J points

⁶³ Weiner, A. S. (2003). "Indirect Expropriations: The Need for a Taxonomy of Legitimate Regulatory Purposes". *Int'l LFD Int'l*, 5, 166. p. 166.

⁶⁴ Newcombe, A. (2005). pp. 3 - 4.

⁶⁵ Lindskoug.P. (2006). p. 6.

⁶⁶ Machova, M. (2020). p. 16.

⁶⁷ Ibid. p. 29.

⁶⁸ Alwkel.H. (2021). p. 140.

out that, the question of when regulatory action may amount to expropriation has taunted arbitrators and legal scholars for several decades. The concept of indirect expropriation has had a long history of controversy.⁶⁹ The controversy culminates in the tension found between the promised standard of protection and the legitimate regulatory interests of the host state. The study has aimed to answer the question of when regulatory actions amount to expropriation, and concluded that the appropriate way of determining the line when regulation action amounts to expropriation is, by following the sole effects doctrine.

Other studies have focused on the sole effects doctrine and the analysis of the arbitral decisions on indirect expropriation that were based on such sole effects doctrine,⁷⁰ and concluded that this criterion is more appropriate to determine indirect expropriation. A person who did the research about the sole effects doctrine, was Mustafa, who disputed that the sole effects doctrine should be taken in determining whether the government action is an indirect expropriation of property. This criterion is more consistent with jurisprudence and the public international law, and he further pointed out that this criterion able to avoid division in the general concept of expropriation by following a unified approach to dealing with direct expropriation and indirect expropriation. He is also of the view that the adoption of the sole effects doctrine does not mean depriving the state of its right to regulate, but it shall be obligated to pay compensation in the event that the damage to the investment resulting from the taking of the regulatory action where such damage is equal or close to

⁶⁹ Santikko, J. (2019). p. 63.

⁷⁰ *SPP v. Egypt*. 1992, at para 227; *Vivendi v. Argentina*. 2007, at para 7.5.21; *Metalclad v. Mexico*. 2000, at paras 106–07, 111; *Middle East Cement v. Egypt*. 2002; and *Santa Elena v. Costa Rica*. 2000.

the damage resulting from the direct expropriation.⁷¹ Although it is convincing to believe that sole effects doctrine is more appropriate to determine indirect expropriation and to distinguish it from regulatory measures, he admitted that this criterion needs to be developed, and it is still unclear until now.⁷² Dolzer concluded through a brief survey of the judgments issued in cases relating to the determination of indirect expropriation that the sole effects doctrine was applied in most of the disputes in the past. He then criticized that the sole effects doctrine could be inconsistent with environmental needs which are at the forefront of international debate. Finally, he pointed out that the defenders of this criterion believe that they do not object to the protection of the environment itself, but they consider that the host states must pay for this protection, not the investor.⁷³ Santikko concluded that the suitable way of determining the line when regulation action amounts to expropriation is, by toeing the line of the sole effects doctrine.⁷⁴ Isakof sees throughout his analysis of the issue in the case of *Philip Morris Asia Ltd. v. Australian Government*⁷⁵, that the court applied the criterion of the sole effects doctrine and adopted its decision accordingly in this dispute, when the regulatory state action was reasonably predictable to the investor. He suggested that the courts should take one criterion for determining indirect expropriation and the standard should be the sole effects doctrine because it is the most appropriate criterion for that. However, he further suggested another condition which is the investor's

⁷¹ Mostafa, B. (2008). pp. 266-268.

⁷² *Ibid.*, p. 295.

⁷³ Dolzer, R. (2002). pp. 90-93.

⁷⁴ Santikko, J. (2019). 63.

⁷⁵ *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12). March 2017. (*Philip Morris v. Australia*. 2017).

inability to anticipate or predict in advance the possibility of the host State taking such regulatory actions.⁷⁶

Other studies have found that the police powers doctrine is the most appropriate criterion for determining indirect expropriation and distinguishing it from regulatory measures. The studies also analysed the bilateral investment treaties and the arbitral decisions adopted this criterion⁷⁷. Papaniskis indicated that the police power criterion should be used in determining indirect expropriation because it is more compatible with sustainable development and environmental protection, which have become one of the most important matters of recent international law.⁷⁸ Weiner sees the need to adopt the police powers doctrine, which focuses on the public interest and object of public care which the regulatory actions are taken for it when determining indirect expropriation, since the sole effects doctrine fails to give sufficient weight to the importance of state authority in regulating public purposes.⁷⁹ However, it is indicated that the police powers doctrine has not been broadly developed, as clear guidelines should be developed in defining specific categories of public objectives accepted by developed states and developing States which are necessary to achieve these objectives without having to pay compensation to the investor for the damage suffered as a result of these actions.⁸⁰ Dolzer noted that there is a need to find a criterion that proportionate, with the desire to preserve the environment, because preservation of environment has becoming increasingly frequent, and the criteria

⁷⁶ Isakoff, P. D. (2012). p. 190.

⁷⁷ *Methanex v. United States*. 2005, at Part IV, Chapter D, para 15; *Saluka v. Czech Republic*. 2006, at paras 254–65, 275–76; and *Chemtura v. Canada*. 2010.

⁷⁸ Segger, M. C. C., Gehring, M. W., & Newcombe, A. P. (Eds.). (2011). p. 328.

⁷⁹ Weiner, A. S. (2003). p. 166 -167.

⁸⁰ *Ibid.* p. 175

of determining indirect expropriation has to keep abreast with these new developments he is of the view that the Police Powers criterion is more capable of keeping abreast with this development of attention to the environment and public interest and is more consistent with the rules of international law.⁸¹

Giannakopoulos and Louizaki refer to the tendency of international investment agreements and bilateral investment treaties to increase attention and to protect the right of the state to regulate, as it has adopted the criterion of police powers indirectly, which includes an exception to the rule that compensation should be paid for damage to investors as a result of taking regulatory actions that seek to achieve a specific group of public interests.⁸² This study attempted to determine the cases in which the state is entitled to take regulatory actions without obligation to pay compensation to foreign investors who have been affected by these acts, in accordance with Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and Canada agreement 2016.⁸³ Small, Nikièma, Al-Mukhaizeem, and Pupolizio, were of the view that the police power approach would recognize the right of the State to protect a range of main public interests, such as environment, human health and Social interests, without obligation to pay compensation to the investor for the damage suffered as a result of such action taken to protect these interests. This helps the states to develop plans to achieve sustainable development freely without fear of paying large compensation to investors.⁸⁴ Nikièma

⁸¹ Dolzer, R. (2002). pp. 92-93.

⁸² Giannakopoulos, C. (2017). "*The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach*". Graduate Institute of International and Development Studies. p. 3.

⁸³ Giannakopoulos, C. (2017). p. 34.

⁸⁴ Small, Y. (2004). p 22; Nikièma, S. H. (2012). p. 21; Al-Mukhaizeem, B. (2016). pp. 19-20; Pupolizio, I. (2016). p. 161.

confirms that international investment law in the past was interpreted in favor of the investor and seeks to protect foreign investment, while at this time it is geared towards protecting the environment and the public interests of States.⁸⁵ Ranjan & Anand have concluded throughout their examination of the role of the criterion of police powers in decision-making on cases of indirect expropriation by the courts and international arbitral tribunals, but this criterion is still unclear and needs to be developed, otherwise its usage in determining indirect expropriation will be questionable.⁸⁶ Malakotipour, M. promotes to implying the mitigated police powers doctrine in order to recognize indirect expropriation and argued that in order to direct arbitral tribunals to apply this doctrine, states should codify the nuanced approach of the police powers doctrine in their indirect expropriation clauses.⁸⁷ Ranjan, P, has studied the police powers doctrine and concluded that this doctrine alone is not suitable for determining indirect expropriation because the state has accepted to place restrictions on it in bilateral investment treaties, and suggested to apply “substantial deprivation” test,

This test has been set to ensure the adverse effect on foreign investment will not constitute any expropriation, except the case of foreign investment’s substantial deprivation.”⁸⁸ Then in a later study, she changed her position and recommended the application of the police powers doctrine.⁸⁹

⁸⁵ Nikiéma, S. H. (2012). p. 21.

⁸⁶ Ranjan, P., & Anand, P. (2016). “*Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law*”. In *Judging the State in International Trade and Investment*. p. 148.

⁸⁷ Malakotipour, M. (2020). p. 338.

⁸⁸ Ranjan, P. (2019). p.124.

⁸⁹ Ranjan, P. (2020). p. 221.

As for Bělova, he pointed out that, focusing on the protection of foreign investment has an unpleasant side effect, where it can restrict the state in the performance of its regulatory authorities. He pointed out that some scholars or commentators called this as a (regulatory chill) or (regulatory freeze), which leads to the state's reluctance to take the necessary regulatory measures for fear of being obliged to pay compensation for indirect expropriation. It also leads to the state's failure to fulfill their obligations to maintain sustainable development and protect health and the environment.⁹⁰

Newcombe opined that there is an urgent need to establish a criterion that properly balances the sovereign right to the State with the rights of foreign investors so as to provide a minimum standard of protection to investors against indirect expropriation. He also pointed out that the Sole Effects criterion that obligates the state to pay compensation in all cases where investors have suffered significant damage, is an ineffective criterion and does not provide sufficient flexibility for the host State to regulate and take care of its public interests. Meanwhile the adoption of the criterion of police powers, which requires the State to no obligation of paying compensation to the investor for damage suffered as a result of regulatory actions taken to achieve a public interest without obligation to apply the minimum standards of protection to foreign investment, may give host states an opportunity to take opportunistic action seek to harm the foreign investors under the pretext of achieving the public interest without pay compensation⁹¹, and this has been agreed with the opinion

⁹⁰ Bělova, A. (2020); Shekhar, S. (2016). "Regulatory Chill: Taking Right to Regulate for a Spin". *Centre for WTO Studies Working Paper*, (27). pp. 13-15; Ruggie, J. (2011). "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework". *Netherlands Quarterly of Human Rights*, 29(2). p. 12.

⁹¹ Newcombe, A. (2005). pp. 40-42.

of Gutbrod, Hindelang & Kim, and Henckels.⁹² Nikièma, Luca, Small, Henckels, Teodora, Louizaki; they have indicated that the courts and arbitral tribunals had sometimes taken the criterion of proportionality in determining whether the regulatory action was taken by the host state and caused great damage to the investors and indirect expropriation of property.⁹³ They found that the criterion of proportionality is the most appropriate, more effective and accurate to achieve the appropriate balance between the interests of the host State and the interests of investors.⁹⁴ Kuprieieva opined that the criterion of proportionality is more compatible with sustainable development and is more transparent and developed than other criteria, because it takes into consideration the economic impact of the regulatory action on investment and the purpose of public care for this action.⁹⁵ Teodora sees that the criterion of proportionality does more than just reconciling the interests of investors and host States. Rather, it defines the line between legitimate government regulation and excessive interference with the rights of individuals, and considers that the courts and arbitral tribunals should analyze three elements when applying this criterion (adequacy, necessity, strict proportionality). They must examine the appropriateness of this action with the interest it seeks, and then to figure out whether this action is the least damaging way to achieve the purpose, and then try to achieve a strict proportionality between the interests of the parties.⁹⁶ Winters, Louizaki, indicated that modern practices tend to apply the criterion

⁹² Gutbrod, M. Hindelang, S. & Kim, Y. I. (2009). p. 42; Caroline Henckels. 2012. p. 224.

⁹³ Tecmed S.A. v. Mexico. 2003, para. 119.

⁹⁴ Nikièma, S. H. (2012). p. 22; De Luca, A. (2014). p. 1; Small, Y. (2004). p. 22; Henckels, C. (2012). p. 224; Muir, A. T. (2015). p. 28; Louizaki, C. (2017). p. 44.

⁹⁵ Kuprieieva, A. (2015). p. 116.

⁹⁶ Muir, A. T. (2015). p. 28.

of proportionality when determining indirect expropriation,⁹⁷ and Winters found that the reason is not that this criterion is ideal, but because of the shortcomings of the sole effects criterion and the criterion of police powers criterion. The proportionality criterion still has some shortcomings, and therefore is susceptible to criticism and is still unclear to use effectively in disputes relating to indirect expropriation.⁹⁸

Malakotipour, M pointed out that, the challenges faced by the sole effect and the police power doctrine have guided to arising of a fairer space to identify indirect expropriation named as proportionality doctrine, and concluded that although the intermediary approach in a proportionality analysis may seem preferable for recognising an indirect expropriation this doctrine is not without problems.⁹⁹ Hailemariam. F. points out that the proportionality doctrine must be adopted in determining indirect expropriation, and it can be benefited from role of courts in the course of developing the proportionality doctrine in determining indirect expropriation.¹⁰⁰ The proportionality doctrine differs from the sole effect doctrine in that they do not put the "effect" element as the decisive factor. Rather, they place the effect element into a broader framework requiring a balance with other elements.¹⁰¹

⁹⁷ Louizaki. C. (2017). p. 44; Winters. K. (2015). p. 86.

⁹⁸ *Ibid.* p. 86.

⁹⁹ Malakotipour, M. (2020).

¹⁰⁰ Hailemariam.F. (2019). pp, 94-95.

¹⁰¹ Wang, Y. (2017). "*Indirect Expropriation and One Belt One Road Initiative: A Pivotal Issue for the Implementation of China's Refreshed Strategy for Foreign Investment*". *China and WTO Review*, 3(1). P. 130; Mekelle, E. (2019). pp. 100-101.

1.8.2 Compensation

As for the compensation for indirect expropriation and the standards of estimating the value of compensation, many studies have not been into this topic directly and specifically, either in international law, Jordanian laws, or Islamic law, where studies have been limited to determine the cases in which the state must pay compensation without going on the standards of estimating the value of compensation.¹⁰² Moreover, some studies researched in compensation for direct expropriation without addressing the issue of compensation in indirect expropriation.

Opalawu talked about the compensation standard for expropriation in general and opinion that although there are many rules governing compensation, there are still some questions on this issue may arise. In general, the various methods of compensation that make it difficult and complex to determine the value of compensation in international law, and the problem is not to determine whether the state should pay compensation for the regulatory action taken or not, but another problem arises when determining the basis and methods of estimating the amount of compensation which must be paid to the investor.¹⁰³ In some cases, the Court or arbitral tribunals oblige the host state to pay full compensation to the investor for taking regulatory actions that have caused large damage.¹⁰⁴ In other cases,

¹⁰² Alwkel.H. (2021); Bělova, A. (2020); Machova, M. (2020); Malakotipour, M. (2020); Ranjan, P. (2019); Santikko, J. (2019); Hailemariam.F. (2019); Ranjan, P., & Anand, P. (2016); Winters, K. (2015); Kuprieieva, A. (2015); Al-Adba, N. M. (2014). “*The Limitation of State Sovereignty in Hosting Foreign Investments and the Role of Investor-State Arbitration to Rebalance the Investment Relationship*”. The University of Manchester (United Kingdom).

¹⁰³ Opaluwa. G. (2011). pp. 15-16.

¹⁰⁴ *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* 1989, ILR, Vol. 95. July 1990 (*Biloune v Ghana* 1990) p. 209; *Metalclad v Mexico* 2000, paras 106–07, 111; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8. May 2005 (*CMS v Argentina*. May, 2005).

compensation is limited to the payment of the book amount of the investment¹⁰⁵ or the future profits of the investment are deducted from the amount of the compensation or maybe it will less than the full market value of the investment.¹⁰⁶ Kumsa, G. K has mentioned the compensation standard for expropriation in general and indicated that, “the critical point concerning expropriation is the compensation”. Most of states laws have this requirement in their laws of expropriation. As a result, the constraint of compensation payment is no more disputable. Rather the contention lies in what truly constitutes compensation and its adequacy, fairness, or appropriateness.¹⁰⁷

Ghassemi, A, has mentioned the compensation standard for expropriation in general, whether it is lawful or unlawful and indicated that, the issue of compensation is one of the most controversial areas in international law. and indicated that the United States Court of Appeals for the Second Circuit stated that there are several strongly held views on the standard of compensation, and that international law is far from clear. The rules of customary international law relating to the determination of the nature and amount of the compensation to be paid, as well as the conditions of its payment, are less well settled. They were and still are, the object of heated controversies, the outcome of which is rather confused. Furthermore, the opinions on this issue are deeply divided.

Sornarajah talked about the compensation standard for expropriation in general and indicated that, the issue of compensation is controversial, and, on this issue, bilateral

¹⁰⁵ *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5 January 2007 (*PSEG v. Turkey*. 2002.); and *MidAmerican v OPIC* 1999 para 59.

¹⁰⁶ *INA Corporation v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 161. Aug 1985. (*INA Corporation v. Iran* 1985).

¹⁰⁷ Kumsa, G. K. (2011). p. 62.

investment treaties make law as between the parties but make no contribution to the formation of common norms of international law.¹⁰⁸ Christie, K. Ogut, E. and Turtoi mentioned the compensation standard for expropriation in general, and concluded that, no one measure or method can cover all of the possible factual scenarios.¹⁰⁹ Moheisen was of the opinion that the recognition the investment law to compensate for expropriation is not incompatible with the possibility of performing a simplified or deferred loss and does not prevent the state from paying the value of compensation in its local currency or any other currency. The adoption of the principle of fair compensation nevertheless is still ambiguous as to the fact that the context differs from one state to another. It is also concluded through his study that international agreements have adopted several criteria for determining the value of compensation, some have taken the market value criterion for investment and some have taken the criterion of the economic value of the investment.¹¹⁰ In relation to this, there are many other studies which provide overviews on the complex issue of expropriation, with less concentration on indirect expropriation.¹¹¹

¹⁰⁸ Sornarajah, M. (2010). *The International Law on Foreign Investment*. 3rd Edition. Cambridge University Press. pp. 208-209.

¹⁰⁹ Christie, K. Ogut, E. and Turtoi, R. (2019), p. 240.

¹¹⁰ Moheisen, S. (2016). pp. 86-87.

¹¹¹ Ratner, S. R. (2017). *Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/unlawful Distinction*. American Journal of International Law, 111(1). pp. 7-56; Khachvani, D. (2017). *Compensation for Unlawful Expropriation: Targeting the Illegality*. ICSID Review-Foreign Investment Law Journal, 32(2), pp. 385-403; Chinen, M. A. (2016). *The Standard of Compensation for Takings*. Minn. J. Int'l L., 25, p. 335; UNCTAD, F., & Treatment, E. (2012). UNCTAD Series on Issues in International Investment Agreements II. United Nations, Geneva; Eissen, V. (2011). *The Oxford Handbook of International Investment Law*. Edited by Peter Muchlinski, Federico Ortino, and Christoph Schreuer. Oxford; New York: Oxford University Press, 2008. pp. lxx, 1282. ISBN 978-0-19-923138-6. UK290. 00. International Journal of Legal Information, 39(1). pp.93-96; Mafi, H. (2011). *Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*. The International Journal of Humanities, 18(1); Subedi, S. P. (2008). *International Investment Law Reconciling Policy and Principle*. Oxford and Portland, Oregon; Merrill, T. W. (2002). *Incomplete Compensation for Takings*. NYU Envtl LJ, 11, 110; Rafat, A. (1969). *Compensation for Expropriated Property in Recent International Law*. Vill. L. Rev., 14, 199.

Even in studies that dealt with the issue of compensation for indirect expropriation, they differed in viewpoints, where some supported the application of the full compensation standard and others supported the application of the fair compensation standard or appropriate compensation standard. They also pointed out the need to differentiate between lawful indirect expropriation and unlawful indirect expropriation in terms of compensation.

Newcombe mentioned that the problem of indirect expropriation could not be addressed without a comprehensive study of the basis for assessing compensation, and reasons why a local and international law would compensate for certain regulatory actions and not others.¹¹² Aisbett, Karp, & McAusland have noted that the value of compensation should be determined based on the principle of national treatment of foreign investors, which requires that foreign investors must be treated in terms of the valuation of compensation in the same circumstances at least as local investors. Considering that, the requirement of national treatment and non-discrimination made it difficult for the host State to impose stricter conditions on a foreign Investor.¹¹³ Nikièma, and Aisbett, Karp & McAusland, pointed out that the (BITS) were limited to include the provision of compensation for indirect expropriation without mentioning to any provisions on special rules and the basis which has to be followed when assessing the amount of compensation, and they recommended that States should take into account the accuracy and clarity in formulating of the items relating to compensation when they conclude (BITS), and putting

¹¹² Newcombe, A. (2005). p. 40.

¹¹³ Aisbett, E., Karp, L., & McAusland, C. (2010). "Compensation for Indirect Expropriation in International Investment Agreements: Implications of National Treatment and Rights to Invest". *Journal of Globalization and Development*, 1(2). p .23.

clear criteria in estimating the value of compensation, particularly in relation to indirect expropriation.¹¹⁴

Faccio, S. researched on the compensation for indirect expropriation and focused on the compensation for unlawful indirect expropriation, and supported the view that full compensation should not be paid in the case of lawful indirect expropriation and that applying of fair or appropriate compensation standards would be better for both parties, as It balances the interests of both parties.¹¹⁵ Zhao, S indicated that, under international law, it is a compulsory obligation for a host State to compensate an injured investor for its expropriatory measures. The capital-exporting countries favor a full fair market value compensation formula, the capital-importing countries are inclined to choose a (just or appropriate) compensation which normally less than full compensation.¹¹⁶ Teodora recommended that the criterion of proportionality is used in determining expropriation, since this criterion is not limited to determine whether the regulatory action taken by the host State is not only indirect expropriation, but also used to determine the value of compensation in a way that balances the interests of both parties. The application of this criterion may require the host State to pay less than the fair market value of the investment if there is a necessary interest of the State to intervene by taking regulatory action, which this is not an excessive burden on investors.¹¹⁷

¹¹⁴ Nikiema, S. H. (2013). p. 16; Aisbett, E., Karp, L., & McAusland, C. (2010). p. 23.

¹¹⁵ Faccio, S. (2020). "Indirect Expropriation in International Investment Law. *Between State Regulatory Powers and Investor Protection*". Houtschild International. Volume 25 of La ricerca del diritto nella comunità internazionale.

¹¹⁶ Zhao, S. (2015). pp. 91-93.

¹¹⁷ Muir, A. T. (2015). p. 4.

1.8.3 The Position Under Islamic Law

In the collection of literatures in Islamic jurisprudence, most studies relating to takings of private property to achieve the public interest in the Islamic law has been from the viewpoint of internal regulation of states, without addressing expropriation of investments, whether national or foreign, or whether the expropriation is direct or indirect.¹¹⁸

Discussions stems primarily on the concept of ownership and the position of Islamic law on the right to property and the protection granted by Islamic law to property in general.¹¹⁹

In terms of foreign investment and its relation to Islamic law, discussions have been on the matters of encouragement,¹²⁰ legality,¹²¹ Islamic investment¹²² and dispute resolution.¹²³

¹¹⁸ Al-'Ajami, M & Belyah. M. (2020). "*Naz' Al-Mulkiyyah li al-Manfa'ah Al-'Āmmah min Wijhat Nazar Al-Fiqh Al-Islāmī*". Majallah Kulliyah Al-Shari'ah wa Al-Qānūn bitafhnaa Al-Ashraf – Al-Daqahliya. 22(1); 'Abdul Kafi. M. (2015). "*Naz' Al-Mulkiyyah Li al-Manfa'ah Al-Khāshah wa Qaḍāyā Al-Ta'wīd fi Al-Fiqh Al-Islāmī wa Al-Qānūn Al-Madanī Al-Lībī*". International University of Islamic Sciences. Jordan; 'Abduallah. A. (1998). "*Naz' Al-Mulkiyyah li Al-Manfa'ah Al-'Āmmah*". Majallah Majma' Al-Fiqh Al-Islāmī. Issue 4; Muḥammad, Al-Ḥaj Naṣir. (1988). "*Muṣaddarāt Al-Mulkiyyah li Al-Manfa'ah Al-'Āmmah. Baḥth Muqaddam li Majma' Al-Fiqh Al-Islāmī*". 4th Ed. Majalat Al-Majma' Al-Fiqhy. Jeddah.; Shamam. M. (1988). "*Naz' Al-Mulkiyyah li al-Manfa'ah Al-'Āmmah*". Majalat Mu'jam Al-Fiqh Al-Islāmī. Issue 4.

¹¹⁹ Bayez, H. (2013). "*Himāyāt Al-Mulkiyyah Al-Khāshah*". Maktabat Zayn li al-Muḥāmāh. Beirut; Al-Suwan, A. (2011). "*Al-Ḥimāyah Al-Dustūriyyah wa Al-Qanūniyyah li Haq Al-Mulkiyyah Al-Khaṣah*". Bayt Zahran. Amman; Zughdawi, m. (2005). "*Nizām Al-Mulkiyyah wa Naz' Mulkiyyatiha fi Al-Sharī'ah Al-Islāmiyyah*". Majalat Jam'at Al-'Amir 'Abd Al-Qadīr li al-'Ulūm Al-Islāmiyyah; Al-Qaisy, M. (2005). "*Mausū'āt Huqūq Al-Insān fi Al-Islām*". (n.p); Al-'Abadi, A. (2000). "*Al-'Aqārāt fi Al-Sharī'ah Al-Islāmiyyah*". Muṣ'asasāt Al-Risalah li al-lībā'ah wa Al-Nāhir. Beirut t; Isma'il, ḥ. (1978). "*Al-Mulkiyyah Al-Khāshah fi Al-Islām*". Majallat Al-Sharī'ah wa Al-Qanūn.

¹²⁰ Sumiran, M. (2019). "*Tashjū' Al-Istithmār fi Al-Fiqh Al-Islāmi Dirāsāt Muqāranah ma' Al-Qanūn Al-Urdunī*". Dirasat Al-Sharī'ah wa Al-Qanūn, Volume 46. Issue 1.

¹²¹ Abu Sa'da, a. (2012). "*Ḍamānāt wa Hawāfīz Al-Istithmār Al-Zirā'iy fi Al-Fiqh Al-Islāmī*". Maktabat Al-Wafā' Al-Qanūniyyah. Alexandria; Isma'il, A'. (2010). "*Ḍamānāt Al-Istithmār fi Al-Fiqh Al-Islāmī wa Taṭbīqātihi Al-Mu'āshirah*". Dar Al Nafā'is. Amman.

¹²² 'Aḥḥ, A. (1995). "*Ma'ayir Istithmār Al-'Amwāl fi Al-'Islām*", Majallat Al-Iqtisād Al-Islāmī, Dubai, Al-Bank Al-Islāmī; Abu Al-Sa'ud, m. (1981). "*Al-Istithmār Al-Islāmī fi Al-'Aṣr Al-Ḥāḍir*", Majalat Al Muslim Al Mu'āshir, Kuwait, Volume. 28; Al-Hawāri, S. (1980). "*Barāmij Tamwīl Al-Istithmār wa Al-Mushārakah Al-Islāmiyyah*," [n.p], Jeddah.

¹²³ Jum'ah, A. (2014). "*Tanzīm Al-Istithmār Al-'Arabi fi Al-'Arāḍi Al-Ṣaḥrawiyyah fi Al-Fiqh Al-Islāmī wa Al-Qanūn Al-Urdunī wa 'Aliyāt Faḍ Al-Munāza'āt Al-Nāshi'ah 'anhu*". Dirāsāt fi Al-'Ulūm Al-Sharī'ah wa Al-Qanūn, Volume 41 Supplement 1; Al-Zuqaili, A'. (2005). "*Ḥukm Istithmār Ghayr Al-Muslimīn fi Al-*

However, the encounter between investment arbitration and shariah law is not new. It is in fact one of the earliest issues back in the 1950s in the modern development of investment arbitration relating to oil concession disputes involving Muslim countries. The position of Islamic law, whether it is sufficient to be the governing law of the arbitrations was discussed in *Petroleum Development (Trucial Coast) Limited v Sheik of Abu Dhabi*¹²⁴ and *Ruler of Qatar v International Marine Oil Co. Ltd*¹²⁵. Both awards disregarded Islamic law as a source of reference and concluded there is no settled body of legal principles applicable to the construction of modern commercial instruments. Decisions along this line was *Saudi Arabia v Arab American Oil Company (ARAMCO)*.¹²⁶

The Islamic law gained reference in more recent international law cases with the increase of involvement of non-western judges. In the *North Sea Continental Shelf cases*¹²⁷, *Gabdikovo-Nagymaros Project (Hungary v. Slovakia)*¹²⁸ and *Aegean Sea Continental Shelf (Greece v. Turkey)*¹²⁹, reference were made to a number of international law principles which are established principles in Islamic law.¹³⁰ The interaction of Islamic law and

Duwal Al-Islāmiyyah". Al-Majalat Al-Urduniyyah Li al-Dirāsāt Al-Islāmiyyah. Volume 2. Issue 3; Al-'Abadi, A. (2000).

¹²⁴ *Petroleum Development (Trucial Coast) Limited v Sheik of Abu Dhabi* 1 Int'l and Comparative L. Q. 247 (Part 2) (April 1952); Award of August 1951, 18 I.L.R., (1951), p. 144.

¹²⁵ *Ruler of Qatar v. International Marine Oil Co. Ltd.*, 20 I.L.R. 534 (1953); Award of June 1953, 20 I.L.R., (1953), p. 534.

¹²⁶ 27 I.L.R., (1963), p. 116; Al-Jumah, K. (2002). Arab State Contract Disputes: Lessons from the Past. Arab Law Quarterly, 17(Part 3), 215-240.

¹²⁷ 7 ICJ Reports 1969, 132-134, para. 33; and 139, para. 38

¹²⁸ ICJ Reports 1997, 96-97.

¹²⁹ ICJ Reports 1978, 56.

¹³⁰ Reference to Islamic principles can be seen for instance from views by Judge Ammoun, Judge Tarazi and Judge Weeramantry in various cases related to equitable principles in Islam, justice, diplomacy and others. See also book by Judge Weeramantry Weeramantry, C. G. (1988). *Islamic Jurisprudence: An International Perspective*. Springer.

international law is also taking place in international conferences and literatures.¹³¹ The recognition of the Islamic international law body of *Siyar* appears in many writings, although much has been in the context of law of war, humanitarian law and human rights.¹³²

On a wider perspective, literatures on Islamic law are found in the context of international commercial arbitration.¹³³ Islamic concepts on compensation, and states' responsibility for public interest are articulated in other writings in the field of Islamic law.¹³⁴ These writings are valuable in the general perspective, but literatures on the specific area of international investment law relating to expropriation is still under-developed. There is already a need for a more comprehensive discussion in the field of international investment law, especially as questions of global good, sustainability, and social justice gain prominence. Islamic law has the potential to contribute significantly to the development of law and international norms.

¹³¹ International Law Association Reports of Conferences (2018). *Islamic Law and International Law*. 78, 1038-1089; See also Badr, G. M. (1982). *Survey of Islamic International Law*. American Society of International Law Proceedings, 76, 56-61.

¹³² Baderin, M. (Ed.). (2017). *International law and Islamic law*. Routledge; Al-Zuhili, S. W. (2005). *Islam and international law*. International Review of the Red Cross, 87(858), 269-283.

¹³³ Bhatti, M. (2018). *Islamic law and international commercial arbitration*. Routledge; Faisal M. Kutty (2012). *The Shari'a Factor in International Commercial Arbitration*. Juris Legal Information. Arbitration Law. York University.

¹³⁴ Abu Zayd, B. (2019). *Al-Muthaman fi Al-'Aqār li al-Maṣlahah Al 'Āmmah*. Dar Al-Amal. Irbid; Wahba. A. (2008). *Naḍariyyāt al Ḍamān*. 2nd Edition. Dar Al-Fikir. Damascus; Salah.K. (1990). *Factors affecting the estimation of compensation for a harmful act*. Baghdad University. Baghdad.; Gamal El Din. A. (1966).

1.8.4 The Position under Jordanian Law

In terms of the criteria used to estimate the value of compensation for acquisition in Jordanian law, there is a scarcity of research on the subject in general. The studies included only on the dealing with the subject of fair and adequate compensation as a condition of the legality of the acquisition without deepening the subject on the criteria used in estimating the value of compensation. There are a few researchers who have tried to address this issue. According to Hyagna and Aledwan, Jordanian law requires a flexible approach to assessing compensation, and states must not resort to acquisition unless absolutely necessary and after exhausting all other options with the least harm to the owners. The Jordanian legislature should establish clear criteria for determining the value of fair compensation, taking into account various factors and objective considerations, rather than relying solely on economic basis.¹³⁵

Al-Henayna et al. pointed out that the Jordanian acquisitions law emphasizes on some basic principles that must be observed when estimating the value of compensation.¹³⁶ One of which most important is fair compensation which includes evaluation of the value of property, the nature and the usage thereof. If the state imposes any rights or restrictions on property ownership, the state must compensate in a proportionate manner. Persons who have lost a beneficial interest right of the property that has been expropriated must be compensated, and compensation is not limited to the owner of the property alone.¹³⁷ Much

¹³⁵ Hyagna, A & Al 'Edwan, A. (2012). pp. 476- 482; Article 11 of the Jordanian Acquisition Law No (12 of 1987); Article 192 (A) of the Jordanian Real Estate Ownership Law 2019.

¹³⁶ Al-Henayna, O. Shatnawi, F. (2015). "*Acquisition of Private Property for Public Benefit in Jordanian Legislation*". Sharia and Law Sciences. (42)3. p. 1061; Article 193 of the Jordanian Real Estate Ownership Law.

¹³⁷ *Ibid.*

of the sources are contained in the bulk of bilateral investment treaties entered into by Jordan as can be seen extensively in Chapter 6.

1.9 Thesis Structure

This research consists of seven chapters. The first chapter provides the structure of the thesis, which includes the research background, problem statement, research objectives, research questions, research significance, research scope, research methodology and literature review.

The second chapter explains the concept of foreign investment which are considered 'covered investments' under international investment law and the interpretative problems surrounding it. It also shows the extent of recognition of the state's right to expropriate foreign investment in national laws and international investment law, and explains the familiar forms of expropriation, namely direct expropriation and indirect expropriation. This chapter provides the foundation of discussion of indirect expropriation of foreign investment for the remaining part of this thesis, which will shed light in the discussion on determining indirect expropriation and its compensation.

The third chapter addresses the most contentious issues concerning the doctrine to be used in determining whether the state's regulatory actions are compensable indirect expropriation of foreign investment or simply non-compensable regulatory measures. The three main doctrines in indirect expropriation that are discussed are the sole effects doctrine, the police power doctrine and the proportionality doctrine. It also explains the mechanisms

for applying each of these doctrines, the position of international law toward it, and the extent to which each of these doctrines can achieve justice and balance between the state's and the investors' interests. This chapter analyses the application of the proportionality doctrine in determining indirect expropriation and suggests moving forward in adopting this doctrine and benefiting from the lessons that can be drawn from multilateral and bilateral investment treaties, arbitral tribunal awards, and jurisprudence that support its adoption.

The fourth chapter discussed the ambiguities and inconsistencies about the standard in estimating the value of the compensation as a result of its indirect expropriation of his investment. It particularly analyses the applicability of the three main standards for estimating the value of compensation for indirect expropriation, which are full, fair or just and appropriate compensation standards. It emphasises the preferred approach that could address the nature of indirect expropriation cases better and achieve balance between the state's and the investor's interests.

The fifth chapter discusses the concept of expropriation in Islamic law in general, the Quranic and prophetic guidance in state affairs when regulatory measures are needed for the public interest. This chapter also studies the practices during the time of the pious caliphs, and the relevant Islamic principles and legal maxims that relates to state governance for public interest. It also contains discussions about the Islamic perspectives regarding compensation for expropriation.

The sixth chapter discusses the position of the domestic Jordanian laws on the protection of foreign investment. It also analyses Jordanian bilateral and multilateral

investment treaties entered into with specific analysis on the nature of its indirect expropriation clauses. This chapter discovers that there is no uniformity in the bilateral and multilateral investment treaties signed by Jordan on the compensation standard used in estimate the value of compensation for legal indirect expropriation, and that there is a tendency to move away from the full compensation standard and to apply the fair and appropriate compensation standards.

Finally, the seventh chapter concludes the findings of this research and provide a set of recommendations to address the ambiguities and inconsistencies surrounding the determination of indirect expropriation and compensation for it. As a result, this input may help arbitrations in achieving a balance between the interests of both the state and the foreign investors. Furthermore, it offers useful recommendations for Jordanian international investment law practice, particularly in concluding or renegotiating investment treaties, as guidance when enacting regulatory measures affecting foreign investors, and in understanding the interpretation of BITs and international investment treaties in relation to indirect expropriation.