

**INDIRECT EXPROPRIATION AND COMPENSATION IN  
INTERNATIONAL INVESTMENT LAW, JORDANIAN LAW AND  
ISLAMIC LAW PERSPECTIVES**

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## AUTHOR DECLARATION

I hereby declare that the work in this thesis is my own except for quotations and summaries which have been duly acknowledged.

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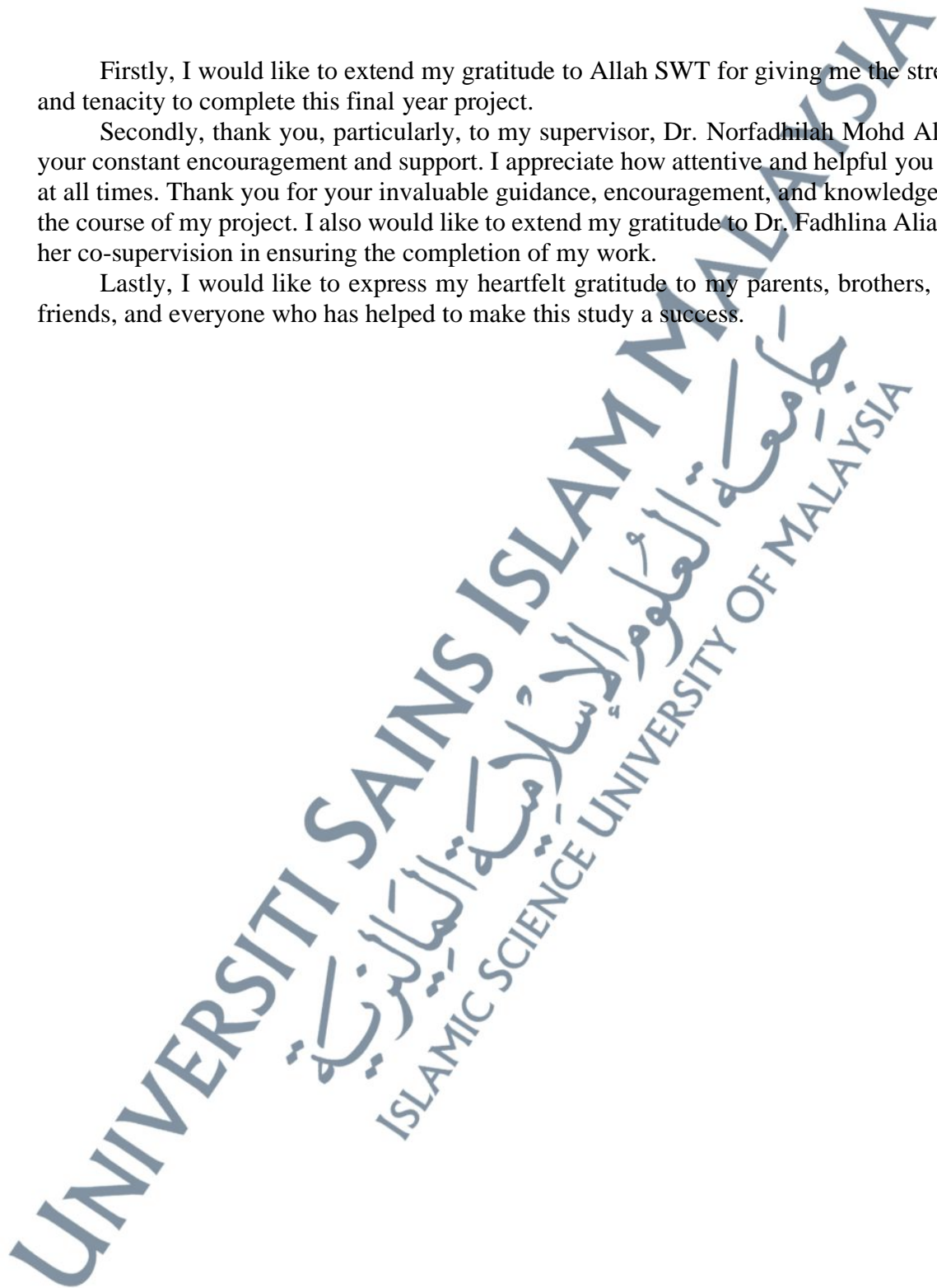
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## ABSTRAK

Perlindungan terhadap perampasan tak langsung (*indirect expropriation*) dalam perjanjian pelaburan antarabangsa adalah satu topik perbahasan yang kompleks. Pertikaian yang wujud berkaitan isu ini berpunca daripada ketiadaan peruntukan yang khusus dan terperinci dalam perjanjian-perjanjian pelaburan antarabangsa tentang skop perlindungan terhadap perampasan dan kaedah penentuan pampasannya. Panel-panel timbang tara antarabangsa diberi budi-bicara yang agak luas dalam mentafsirkan dan menentukan perlindungan terhadap perampasan tak langsung dan kaedah pampasannya. Keadaan ini menyebabkan pemakaian aras perlindungan berbeza-beza dan tidak konsisten, justeru menjadi cabaran kepada pelabur-pelabur asing melindungi pelaburan mereka, dan kepada negara tuan rumah dalam mentadbir dan melaksanakan fungsi kawal selia di peringkat domestik. Penyelidikan ini bertujuan mengkaji pemahaman doktrinal mengenai standard perlindungan terhadap perampasan tak langsung dan kriteria penentuan pampasan berkaitan. Ini adalah berdasarkan jurispruden keputusan kes-kes timbang tara, teks perjanjian pelaburan bilateral dan multilateral antarabangsa serta perbincangan ilmiah para cendekiawan dalam bidang tersebut. Penyelidikan kualitatif ini mengambil pendekatan menyeimbangkan kepentingan persaingan antara tuan rumah dan pelabur asing. Hasil penyelidikan ini mendapati wujud kesamaran dan pentafsiran yang tidak konsisten dalam menentukan perampasan tak langsung dan kaedah penentuan pampasan dalam undang-undang pelaburan antarabangsa. Kajian ini mengetengahkan pendekatan-pendekatan baharu dalam pentafsiran perkara tersebut. Penyelidikan ini juga mengutarakan sudut pandangan Islam yang memberi pemahaman menyeluruh tentang obligasi pelaburan antarabangsa dalam meraikan pemilikan individu, mementingkan tanggungjawab bersama serta peranan negara sebagai tuan rumah dalam menjaga kepentingan awam daripada sudut pandang keadilan sosial. Natijahnya, penyelidikan ini menggariskan dan menjelaskan kriteria pentafsiran perampasan tak langsung dan kaedah pampasan yang diperlukan, dan turut mencadangkan model peruntukan perundangan yang boleh diguna pakai oleh negara Jordan dalam perjanjian pelaburan bilateral atau multilateral pada masa hadapan.

## ABSTRACT

Indirect expropriation has proven to be a complex area of debate in international investment law. The disputes arising from indirect expropriation stem from the fact that most of the bilateral and multilateral investment treaties do not include specific articles and sufficient guidance to regulate and compensate for indirect expropriation. As a result, the arbitral tribunals are given wide discretion in terms of interpreting and determining the scope of indirect expropriation and the consequential compensation. This has resulted in inconsistent awards which lack a sense of interpretative direction for investors in protecting their investments and host states in defining and exerting their regulatory space. The aim of this thesis is to develop a doctrinal understanding of indirect expropriation and the criteria for the determination of compensation based on the jurisprudence of arbitral decisions, the texts of bilateral and multilateral investment treaties and scholarly discussions in the field, from the perspectives of international investment law, Jordanian Law and Islamic Law. This qualitative study is conducted from a balanced point of view between competing interests of host countries and foreign investors. Findings of this research confirm the existence of ambiguity and inconsistency in the determination of indirect expropriation and its compensation under international investment law and highlights the emerging approaches in the interpretation thereof. This thesis also draws insights from the principles of Islamic law to arrive at a holistic understanding of international investment obligation, which recognizes private ownership of investors, the collective responsibilities and the host state's role in the spheres of public interest and social justice. Consequently, this study sets out and clarifies the necessary criteria for indirect expropriation and compensation, and further suggests a model clause for the Hashemite Kingdom of Jordan to apply in relation thereto, in future bilateral or multilateral investment treaties.

## المُلخَص

من المؤكد أن المصادرة غير المباشرة موضوع معقد ومثير للنقاش في قانون الاستثمار الدولي، تنشأ النزاعات المتعلقة بالمصادرة غير المباشرة عادة من حقيقة أن معظم معاهدات الاستثمار الثنائية والمتعددة الأطراف لا تتضمن مواد محددة وإرشادات كافية لتنظيم المصادرة غير المباشرة والتعويض عنها، وينتج عن ذلك منح هيئات التحكيم سلطة تقديرية واسعة من حيث تفسير وتحديد نطاق المصادرة غير المباشرة والتعويض المترتب عليها، وقد أدى ذلك إلى اتخاذ أحكام غير متسقة تفتقر إلى التفسيرات الكافية التي تساعد المستثمرين في حماية استثماراتهم من جهة والدول المضيفة في تحديد وممارسة حيزهم التنظيمي من الجهة الأخرى. تهدف هذه الأطروحة إلى تطوير الفهم العقائدي للمصادرة غير المباشرة ومعايير تحديد التعويض عنها على أساس فقه قرارات التحكيم ونصوص معاهدات الاستثمار الثنائية والمتعددة الأطراف والمناقشات العلمية في هذا المجال من منظور قانون الاستثمار الدولي والقانون الأردني والشريعة الإسلامية. أجريت هذه الدراسة النوعية من وجهة نظر توازن بين المصالح المتنافسة لكل من الدول المضيفة والمستثمرين الأجانب. تؤكد نتائج هذه الدراسة على وجود غموض وتضارب في تحديد المصادرة غير المباشرة والتعويض عنها بموجب قانون الاستثمار الدولي وتسلب الضوء على الأساليب الناشئة في تفسيرها. تستمد هذه الأطروحة أيضاً رؤى من مبادئ الشريعة الإسلامية للوصول إلى فهم شامل للالتزامات قانون الاستثمار الدولي الذي يعترف بالملكية الخاصة للمستثمرين والمسؤوليات الجماعية ودور الدولة المضيفة في مجالات المصلحة العامة والعدالة الاجتماعية، وبالتالي تحدد هذه الدراسة وتوضح المعايير الضرورية لتحديد حدوث المصادرة غير المباشرة والتعويض الناتج عنها، وتقدم كذلك نموذج يمكن للمملكة الأردنية الهاشمية تبنيه وتطبيقه فيما يتعلق بمعاهدات الاستثمار الثنائية أو متعددة الأطراف المستقبلية.

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BITs	Bilateral Investment Treaties
CLS	Critical Legal Studies
ECHR	European Convention of Human Rights
ECTHR	European Court of Human Rights
EU	European Union
FCNs	Treaties on Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FII	Foreign Indirect Investment
FIPA	Foreign Investment Promotion and Protection Agreement
FMV	Fair Market Value
FTAs	Free Trade Agreements
GATT	The General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ISDS	Investor-State Disputes Settlement mechanism
MAI	The Multilateral Agreement on Investment
NAFTA	North America Free Trade Agreement
OECD	The Organization for Economic Co-operation and Development
PBUH	Peace be upon him
PSNR	The Declaration on Permanent Sovereignty over Natural Resources
RA	God be pleased with him
UDHR	The Universal Declaration of Human Rights
UNCITRAL	United Nations Commissions on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nation General Assembly
VCLT	Vienna Convention of the Law of Treaties
WTO	World Trade Organization