

## CHAPTER 7

### CONCLUSION AND RECOMMENDATIONS

#### 7.1. Conclusion

This study reveals the position of the international law in dealing with claims of indirect expropriation and how it would affect Jordan in its regulatory affairs. The lack of coherence in the international law approaches in determining indirect expropriation and compensation create a big ambiguity as to the coverage of the protection and the liability of host states. The study of indirect expropriation in international investment law conducted in this thesis took into account two primary considerations, treaty practice and arbitral practice. Other international standards from state practices, the UN resolutions and opinions of scholars are also instrumental in understanding the jurisprudential development of the law.

As can be seen throughout the chapters, the major concentration in addressing this subject matter falls in two limbs, firstly whether the measure is necessary in the public interest, and secondly whether fair compensation is paid to the investor. The first limb is a constant cursor that plays an important role in the entire assessment process because it appears as a determinant of lawful expropriation and is critical in determining appropriate compensation.

The critical question of public interest give rise to another category of regulatory measure, that is non-compensable regulatory measures. It is therefore observed that the straddle is real between the investors and the host state on whether a measure is a *bona fide* public interest in investment arbitration cases, as it could significantly impact the

amount of compensation accorded to the investors. The difference in the approaches or doctrines has further resulted in ambiguity and inconsistency in the arbitral tribunals awards about what should be considered compensable indirect expropriation, and what should be considered non-compensable regulatory measures.

Table 3: Criteria of Regulatory Measures and Compensation

Types of Measures	Criteria	Compensation
Unlawful Indirect Expropriation	<b>Non-Compliance</b> <ul style="list-style-type: none"> <li>• not for public purpose.</li> <li>• discriminatory manner.</li> <li>• non-payment of compensation</li> <li>• not in accordance with due process of law.</li> </ul>	Reparation/ Compensation
Lawful Indirect Expropriation	<b>Compliance</b> <ul style="list-style-type: none"> <li>• for public purpose.</li> <li>• non-discriminatory manner.</li> <li>• with payment of compensation</li> <li>• in accordance with due process of law.</li> </ul>	Compensation
Non-Compensable Regulatory Measures	<b>Reference to IIAs</b> <ul style="list-style-type: none"> <li>• explicit inclusion in IIAs</li> <li>• precursor of public interest from the deliberation of the tribunals</li> </ul>	Non-Compensable

Moreover, the arbitral tribunals awards were also ambiguous and inconsistent regarding the amount of compensation that the host state must pay to the foreign investor in the event that the regulatory actions taken by the host state are considered indirect expropriation. This has led to the impossibility of anticipating the arbitral tribunal's decision in the event of a dispute between the host state and the foreign investor regarding indirect expropriation and compensation for it. As a result, it has a negative impact on the investment environment and the state's sovereignty over its

territory, as foreign investors may refrain from investing in the host state out of fear of being subjected to such measures without compensation, and the host state may be deprived of its right to exercise its sovereignty and implement necessary regulatory actions and legislation in the public interest out of fear of paying huge compensation.

The current practice in determining indirect expropriation depend on the doctrines adopted by the tribunals, namely the sole effects doctrine, police power doctrine, and the proportionality approach. The adoption of each doctrine result to different consequences.

Table 4: Criteria of Determining Indirect Expropriation Based on Arbitral Doctrinal Approaches

<b>Approaches/ Doctrines</b>	<b>Criteria</b>	<b>Compensation</b>
<p>Sole Effect Doctrine</p> <p>(Assessment as to the effect of the measure. No consideration of intent/ motivation/ justification of the regulatory measure)</p>	<p>Treaty and Arbitral Practice</p> <ul style="list-style-type: none"> <li>• removal of all effects of ownership</li> <li>• measures having equivalent effect to expropriation</li> <li>• when the measure affect renders property valueless</li> <li>• equivalent or tantamount to expropriation</li> <li>• degree of effect - substantial loss</li> <li>• deprived investor from the whole or a significant part of its investment value</li> <li>• severe involvement with investor's rights</li> <li>• severe economic impact</li> <li>• impairs investment rights, ownership, use, enjoyment or management</li> </ul>	<p>Full Compensation</p> <p>Or</p> <p>Fair / Just compensation</p>
<p>Police Power Doctrine</p> <p>(Assessment as to the purpose of government action as sovereign right)</p>	<p>Compliance</p> <ul style="list-style-type: none"> <li>• for public purpose/ welfare.</li> <li>• non-discriminatory manner.</li> <li>• according to the due process of law</li> <li>• <i>bona fide</i> measure</li> </ul>	

	<p>Areas of Measure</p> <ul style="list-style-type: none"> <li>• domestic health</li> <li>• safety</li> <li>• environment</li> <li>• other measures in IIAs</li> </ul>	Non-Compensable
<p>Proportionality Doctrine</p> <p>(Assessment to balance the competing interests between the public and private domain of foreign investment law)</p>	<p>Treaty and Arbitral Practice</p> <ul style="list-style-type: none"> <li>• explicit mention in preamble/ expropriation clause/ annex e.g. sustainable development goal</li> </ul> <p>Compliance</p> <ul style="list-style-type: none"> <li>• for public purpose/ welfare.</li> <li>• non-discriminatory manner.</li> <li>• according to the due process of law</li> <li>• <i>bona fide</i> measure</li> </ul> <p>Proportionality test</p> <ul style="list-style-type: none"> <li>• there must be a causal relationship between the action and the purpose</li> <li>• the measure is necessary/ are there alternative actions?</li> <li>• the measure causes the least damage to the competing interest</li> <li>• existence of public interest is not a sole factor.</li> <li>• Adverse effect of the economic value of the investment does not by itself establish indirect expropriation</li> </ul>	Appropriate Compensation

This thesis has gone a great length in explaining these different approaches. The sole effect doctrine which aimed at giving the highest protection possible to foreign investors received much debate. It was accepted widely in the past, together with full compensation, where it was adopted by most multilateral and bilateral investment treaties, arbitral tribunal awards, and writings of jurists. However, this doctrine has been subjected to a lot of criticism afterwards for the lack of attention to the necessity

and purposes of states taking regulatory measures. Such treatment will inevitably lead to a deprivation of the sovereign authority of the host state to take necessary regulatory measures to protect the environment, public health and sustainable development.

On the other hand, the police powers doctrine aims to give the greatest possible protection to the state's right to sovereignty over its territory. This doctrine focuses on the purposes of taking regulatory actions for public interest, without giving much attention to the economic effect of the action on foreign investments. This doctrine emphasizes that such regulatory measure conducted in good faith and in a non-discriminatory manner, may not be considered indirect expropriation regardless of their economic impact on foreign investment. However, it was not without criticism, particularly from foreign investors who claimed that such an approach would deprive them of the protections provided by investment treaties. Furthermore, the adoption of this doctrine will place the burden of achieving public interest solely on foreign investors.

The proportionality approach seeks to reconcile and achieve a balance between the state's right to sovereignty over its territory in order to achieve public interest on the one hand, and the right of the foreign investor on the other. This approach is gaining increasing attention in academia and practice, and it is beginning to be widely adopted in many modern and advanced multilateral and bilateral investment treaties. The only obvious challenge is the claim that this doctrine has no legal basis and that applying it will result in the arbitrators being granted a great deal of discretionary power. Despite criticism of the proportionality doctrine, this thesis contends that it is by far the most

appropriate approach for allowing balanced assessments of all relevant factors from both states and investors, and it is the most compatible with sustainable development.

This thesis investigates the wide range of compensation standards for foreign investment, from unlawful expropriation to lawful expropriation. In recent years, there has also been considerable debate about the standard of compensation that must be applied in cases of lawful expropriation, which has become the focal point of the conflict between capital-exporting and capital-importing countries. Capital-exporting countries sought to apply the full compensation standard, which ensures the greatest possible protection for its citizens' investments, whereas capital-importing countries sought to apply less effective standards than (full compensation), allowing states to take expropriation and regulatory actions without fear of paying exorbitant sums as compensation.

Treaty and arbitral practice were divided into three different compensation standards; full, fair or just, and appropriate compensation. The appropriate compensation approach provides flexibility in the assessment of compensation and ensures room for *bona fide* measures to be heard, discussed and weighed against protection towards foreign investors. It provides enough freedom for host states to exercise sovereignty over their territories without depriving investors of the compensation that they are entitled to.

Table 5: Criteria of Assessment of Compensation in Indirect Expropriation

Treaty Practice	Criteria	Compensation
<p>Unlawful Expropriation</p> <p>Insertion of ‘prompt, adequate, and effective compensation’ (Hull Formula)*</p>	<ul style="list-style-type: none"> <li>• The right to restoration Or</li> <li>• Fair market value (FMV) not limited to the time of taking/ expropriation.</li> <li>• To wipe out all the consequences of unlawful expropriation (<i>lucrum cessans</i>)                             <ul style="list-style-type: none"> <li>- Loss of future profit</li> <li>- Increase of value after the taking until the date of award</li> <li>- Legal Expenses</li> </ul> </li> </ul>	<p>Reparation (In addition to this, some investors push for punitive/ moral damages)</p>
<p>Indirect Expropriation (1)</p> <p>Insertion of ‘prompt, adequate, and effective compensation’ (Hull Formula or “just compensation” or “adequate compensation” in IIAs.*</p>	<ul style="list-style-type: none"> <li>• Fair market value (FMV)</li> <li>• Limited to the time of taking/ expropriation.</li> <li>• include Loss of future profit</li> </ul>	<p>Full Compensation (Close to reparation)</p>
<p>Indirect Expropriation (2)</p> <p>Insertion of “prompt and effective”, or “fair compensation”, or “equal to the value of investment prevailing in the market at the time of expropriation” *</p>	<ul style="list-style-type: none"> <li>• the price of hypothetical willing and able buyer</li> <li>• does not include loss of profit</li> <li>• equal to the real value of the investment on the day of dispossession.</li> </ul>	<p>Fair Compensation</p>
<p>Indirect Expropriation (3)</p> <p>Insertion of “prompt and effective” compensation, “appropriate and actual compensation”*</p>	<ul style="list-style-type: none"> <li>• take into account the relevant laws and regulations</li> <li>• “a case by case, fact based inquiry”</li> <li>• economic impact is not a stand alone criteria</li> </ul>	<p>Appropriate Compensation (Compensation may range from zero to full compensation)</p>

\* The terms may differ, but these are the main characteristics of the IIAs.

The inclusion of Islamic law in thesis provides valuable input to the corpus of knowledge in this area. The lack of a specific discussion on the subject demonstrates the dynamic and universality of Islamic concepts and principles that apply at all levels

of governance. It must be recognized that the Islamic law is not confined to reciprocal obligations, but places the concept of justice (*‘adālah*) in all of its dealing. Hence the treatment accorded to nationals or non-nationals are alike, and compensation must be given when it is due. The concept of justice is still being debated in terms of its structural manifestation in international investment law. This is because arbitral tribunals are mandated by treaties, and, unlike judges at the International Court of Justice who uphold the concept of justice, they are expected to deliver awards solely on the basis of such mandate. However, because international investment law is a hybrid of public and private international law, it should allow for more integrative interpretation, with a greater emphasis on the public good rather than purely economic considerations. Here, reference to Islamic law is paramount as it provides a great balance in preserving both individual rights to property and public interest.

Table 6: Contribution of Islamic Law in Indirect Expropriation

General Principles of Islamic Law	Possible Contribution of Islamic Law in Indirect Expropriation and Compensation
<ul style="list-style-type: none"> <li>• Preservation of Individual’s rights to property.</li> <li>• Preservation of public good (<i>al-maslahah</i>).</li> <li>• Justice (<i>‘adālah</i>).</li> <li>• Proportionality</li> <li>• The protection of life, progeny, maintenance of intellect (mind) and preservation of property and wealth (<i>maqāsid al-sharī‘ah</i>)</li> <li>• Islamic legal maxims on prevention of greater harm.</li> </ul>	<ul style="list-style-type: none"> <li>• The application of the principle of public good (<i>al-maslahah</i>) in determining legitimacy of regulatory measures for public interest.</li> <li>• The application of protection of private property (<i>tamlīk</i>) and the obligation to pay the price upon taking by the state.</li> <li>• Encouragement of consensus with the affected owners and allow the owner bargaining and negotiating over the price.</li> <li>• The application of principle of Justice (<i>‘adālah</i>) overseeing international</li> </ul>

<ul style="list-style-type: none"> <li>• Sanctity of Contract</li> </ul>	<p>investment relationships in compensation.</p> <ul style="list-style-type: none"> <li>• Islamic promotion of compensation payment without postponement, because postponement violates the justice of compensation.</li> </ul>
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This thesis provides many valuable examples relating to the matter of expropriation during the time of the Prophet PBUH and how compensation was dealt with during the time. Circumstances that permit takings were also developed by the scholars, which include taking of food in the state of hunger/ thirst, preservation of agriculture from perishing, preservation of price of goods against monopolists, provision of public space, mosques or roads and fortification or defence.<sup>965</sup> The application of Maqāsid al-Sharī<sup>h</sup> and the Islamic legal maxims (Al-Qawā<sup>id</sup> al-Fiqhiyyah) which were developed by Muslim jurists from the sources of the shari<sup>h</sup> provides a very versatile interpretative mechanism to guide the jurists in search of legal standing on expropriation matters. Islamic legal maxims such as “public interest takes precedence over private interest” (*al-Maṣlahah al-<sup>c</sup>Ammah Tūqaddam <sup>c</sup>alā al-Maṣlahah al-Khāṣah*), bearing private harm to pay public harm (*Yuḥtamal al-Darar al-Khāṣ li Daf' al-Darar al-<sup>c</sup>Ām*), bearing the lower harm in order to avoid whichever is more severe (*Al-Darar al-Ashadd Yuzāl bi al-Darar al-Akhaf*), necessities permit prohibitions (*al-Darurāt Tubīḥu al- Maḥzūrāt*) and what the duty cannot be done without it, it is a duty (*Ma La Yatim al-Wajib illa bihi fahuwa Wājib*) - are instrumental in determining complex matters such as expropriation

<sup>965</sup> See discussion in Chapter 5 by Maliki jurist Al-Hattab. Al-Ḥaṭṭab, Muḥammad. A. (1995). p. 255. See also Al- Sūyūṭi, Jalal Al-Din. A. (1959). *Al Ashbāh wa al- Nazā'ir*. Muṣṭafa Al-Ḥalabi Press. Egypt. p. 453

and public governance. Compensation in Islam is also based on justice and fair assessment, promoting consensus with the affected owners and allow the owner bargaining and negotiating over the price of his property.<sup>966</sup> Under the purview of justice, Islam promotes payment of compensation without postponement, because postponement violates the justice of compensation.<sup>967</sup>

Jordan has developed a number of domestic laws to regulate foreign investments. This shows Jordanian pragmatic approach in creating a better investment climate. This study examines the international investment treaties entered into by Jordan and discovers that most of the treaties belongs to the first generation treaties which contain full compensation standard and a broad drafting of indirect expropriation coverage. Newer treaties have attempted to include indirect expropriation in quite a detailed manner, which provides better expectation predictability. A number of emerging criteria can also be seen from these new treaties which requires arbitral tribunals to consider grounds of public interest such as to protect human, animal or plant life or health, the conservation of living or non-living exhaustible natural resources, prudential reasons relating to finance, compliance to the local laws, health, safety and environmental measures, public morals, fraudulent practices, protection of privacy and protection of national treasures of artistic, historic or archaeological value.

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<sup>966</sup> Al-Baihaqi. (n.d). p. 304; Al Azraqi. (1983). pp. 28-69. Al-Mawardi Ali. M. (1973). p. 162.

<sup>967</sup> Ṣaḥīḥ al-Bukhari. Hadith No. 3906. Book 63, Hadith 131. Chapter: The Emigration of the Prophet PBUH to Al-Madina. <https://sunnah.com/bukhari:3906> (accessed on 14 February 2022)

Table 7: Emerging Criteria in Jordanian Indirect Expropriation Clauses

Emerging Treaty Practice	Emerging Criteria In Jordanian IIAs
<p>Detailed Clauses on Indirect Expropriation</p> <p>Insertion of Appropriate Compensation</p> <p>Insertion of Annex on Indirect Expropriation</p> <p>Insertion on State Goals / Concerns in Preambles</p>	<ul style="list-style-type: none"> <li>• protect human, animal or plant life or health</li> <li>• the conservation of living or non-living exhaustible natural resources</li> <li>• prudential reasons relating to finance</li> <li>• compliance with the local laws,</li> <li>• health</li> <li>• safety</li> <li>• environmental measures</li> <li>• public morals</li> <li>• fraudulent practices</li> <li>• protection of privacy</li> <li>• protection of national treasures of artistic, historic or archaeological value</li> </ul>

In Jordanian IIAs, there is no one standard on indirect expropriation and compensation standards. It is also noticeable, albeit slowly, that treaties are moving away from the risk of being interpreted solely on the basis of the sole effect doctrine. The application of the proportionality doctrine in modern investment treaties is a new emerging trend.

Another noticeable feature of Jordanian IIAs is that some are written in more than two languages, most often Arabic and another foreign language. Some treaties have different translations and uses of words, which could cause major issues, particularly when estimating the value of compensation in the event of an indirect expropriation dispute.

## 7.2. Recommendations:

Through research and analysis of the problems surrounding the issue of indirect expropriation of foreign investment and compensation for it, this study concluded a set of recommendations to be included in Jordanian IIAs which are mentioned as follows:

- *A clear definition of covered investment:* This study recommends the necessity of stipulating in the domestic laws and multilateral and bilateral investment treaties a clear definition of covered foreign investment. This definition must include the types of investments that should enjoy the protection of domestic laws and multilateral and bilateral investment treaties in a manner which commensurate with the objectives and investment policies of the state and the economy.

- *A clear stipulation of indirect expropriation:* As for the definition of indirect expropriation of foreign investment, the criteria in determining it, and the distinction between it and the non-compensable regulatory measures, this study recommends the insertion of a clear description that would provide adequate guidance for the parties.

- *Insertion of the Proportionality Principle:* This study also recommends the adoption the proportionality principle in expropriation clauses as a determinant of indirect expropriation. This is essential to ensure balance between the state's right to sovereignty over its territory and the achievement of its public interests, and the foreign investor's right to benefit from the investment.

- *A clear stipulation of provision that demarcates between compensation for lawful expropriation and unlawful expropriation:* The articles must explicitly

differentiate the standards of compensation for unlawful and lawful expropriation to remove ambiguity and over-compensation in assessment.

• *Insertion of appropriate compensation as the standard for compensation:* The insertion of appropriate compensation as a standard in determining the value of compensation is important due to its flexible nature that allows case-by case and factual assessment of circumstances. The range of compensation is not rigid to full compensation, but may range between paying full compensation and not paying compensation at all to the investor, given the circumstances of each case separately.

• *A careful assessment of existing Jordanian IIAs with a prospect of renegotiations and amendments:* This study recommends the need to develop existing IIAs in line with the new types of disputes related to the protection of foreign investment from indirect expropriation.

• *A proposed model for Jordanian IIA:* This study proposes the need of a model for Jordanian IIAs. In terms of indirect expropriation, this thesis proposes an expropriation clause to be adopted by Jordan, taking into account all observations contained throughout this thesis.

#### **Proposed Expropriation Clause for Jordanian IIAs**

Article (x):

1. A state may not indirectly expropriate an investment owned by a foreign investor in its territory except: a) for a legitimate public interest; b) on a non-discriminatory basis; c) in accordance with due process of law; and d) on payment of appropriate compensation when it is proven that the regulatory action taken from the state is an indirect expropriation for foreign investment.

2. Indirect expropriation is: The actions or set of sequential regulatory or legislative actions taken by the host state which have a severe and permanent impact on foreign investment indirectly, that “is not commensurate with the interest to be achieved from it,” whether it deprive the investor from his right to exploit, use or dispose of his investment freely, prevents the investor from achieving the desired profit from the investment, or reduces the value of the investment, even though there is no real transfer the title of investment property from the investor to the host state or a third party.
3. For the purposes of this law, the proportionality doctrine adopts in determining the indirect expropriation of foreign investment.
  - a) The proportionality doctrine means: a doctrine that balances between protecting the rights of the state to performing its sovereignty over its territory for achieving the public interest, and protecting the rights of the investors at the same time, by studying each case individually and through several stages, begins with an analysis of the negative effects of regulatory actions, and ends with an analysis of the proportionality between the purpose of the regulatory action and its negative effects.
  - b) The determination whether a regulatory action or a series of regulatory actions of the state constitutes indirect expropriation in Paragraph 2 requires a case-by-case, fact-based inquiry, and taking into account the application of the following stages:
    - 1). The “substantial deprivation of the regulatory action” test, which includes the degree and duration assessments;
    2. The "legitimacy of the regulatory action" test, to determine whether it was non-discriminatory, taken in a bona fide and in accordance with due process of law;
    - 3). The "a causal relationship between the adopted legitimate regulatory action and its purpose" test, to determine whether this regulatory action actually serves a legitimate public purpose and achieves this objective;
    4. The "necessity" test, to determine whether this regulatory action was necessary, and was the only and the least restrictive for the investment;
    - 5). The " strict sense of proportionality" test, to determine whether this regulatory action involves proportionality strict sense, and whether the action’s effects on the investment was

proportionate or it was too severe relative to the public interest that the state sought to be realized.

4. For the purposes of this law, the appropriate compensation standard adopts in determining the compensation value for the indirect expropriation of foreign investment. The appropriate compensation standard means:

A flexible standard which may range from the payment of full compensation includes the (fair market value of the investment, profits lost, interest, and any other damages), to the payment of no compensation at all, taking into account the specific circumstances of each case, and laws that are considered pertinent.

It should be noted that this model is not strictly binding on the state and that it can adopt it with some modifications it deems appropriate.

It should be noted that this proposed clause has included the elements deemed important by this thesis and can be adopted as a basis for improvement of Jordanian expropriation clauses.

Finally, this thesis contributes to the body of knowledge on the interpretation of indirect expropriation and examines the nature of existing treaty and arbitral practices on the subject. It has provided the essential elements found in treaty and arbitral practices and established them as criteria for learners, practitioners, investors, and the Jordanian state to consider when implementing regulatory measures and assessing their international rights and obligations. This study is an academic effort to develop the doctrinal

embodiment of indirect expropriation, and it is hoped that it will be useful in practice and academia.

