

CHAPTER 2

FOREIGN DIRECT INVESTMENT AND THE RIGHT OF STATES TO EXPROPRIATION FOR PUBLIC INTEREST

2.1. Introduction

Foreign direct investment is not a new concept; it has been there since the mid-nineteenth century and has become increasingly essential in the global economy, particularly in developing countries. In order to attract as much foreign investment as possible, whether in the form of capital, expertise, or competencies, host states began to construct more developed and consistent strategies with their economic environment. This has pushed for the signing of numerous investment treaties with standards of protection, such as clauses on expropriation, fair and equitable treatment (FET), full protection and security (FPS), national treatment (NT), and most-favored-nation treatment (MFN).¹³⁸ This chapter illustrates the coverage of international investment law on expropriation that is dependant on the relevant definitions of ‘investment’ covered in domestic laws and international investment treaties. It also examines the essential issue of host states' right to expropriation in international investment law, in the light of the concepts of sovereignty of host states and the need towards openness to foreign investment. Much emphasis is given to public interest as an integral requisite of lawful expropriation, and as we shall see in later chapters, the question of lawful and unlawful expropriation trigger tremendously the

¹³⁸ Mahyar, A. A., & Raisi, L. (2018). “*International Standards of Investment in International Arbitration Procedure and Investment Treaties*”. *Jurídicas*, 15(2). p. 13.

international responsibility of the state. This chapter sets the preliminary overview of covered investments, the interaction of domestic and international investment treaties in this regard, and the forms of expropriation commonly discussed in international investment law.

2.2. Covered Investments in Domestic Laws and International Investment Treaties

Under both domestic and international law, there is no consistency or agreement on how to define foreign investment.¹³⁹ The question of definition of investment relates directly to the jurisdictional coverage of investment treaties and the subject matter jurisdiction, before it can be decided by an international arbitral tribunal. During the drafting of the ICSID Convention itself, the definition of investment has been omitted to avoid unnecessary jurisdictional difficulties, and it was felt by the drafters that it was better left to the parties to decide what kinds of investments they would submit to the ICSID.¹⁴⁰

According to Juillard and Carreau, “the absence of a common legal definition is due to the fact that the meaning of the term investment varies according to the object and purpose of different investment instruments which contain it.”¹⁴¹ In relation to this, the absence of a specific definition will provide a wide scope of coverage, which may extend beyond protection of foreign investment property, to include investor’s undertakings,

¹³⁹ Mahyar, A. A., & Raisi, L. (2018). p. 14.

¹⁴⁰ Lopina, D. A. (1988). “*The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s*”. Ohio St. J. on Disp. Resol., 4. p. 114.

¹⁴¹ Carreau, D., & Juillard, P. (2007). “*Droit International économique*”. 3rd edition, Dalloz, Paris. p 403.

establishment of investment, contractual and quasi-contractual entitlements as well as investment returns as can be seen in investment arbitral tribunals.¹⁴²

In general, international investment law covers Foreign Direct Investment (FDI), which generally includes investments in the form of machinery, factories, equipment, and production projects carried out by the foreign investor, as well as the direct transfer of capital, experience, and foreign workers to work within the host state and carry out industrial, agricultural, and investment services to achieve the profit sought by the investor. This is to exclude Foreign Indirect Investment (FII) in the form of loans, bank facilities, shares, stocks, and financial bonds, which are made without the investor exerting control or participation in the organisation or management.

The main legal reference however, is made to the specific international investment treaties, and where other international instruments such as ICSID is involved, the relevant texts of such instruments. Tensions have been in the straddle of tests between the bilateral investment treaties and ICSID, the tribunals had to determine the appropriate notion of investment.¹⁴³ Another aspect of potential legal discussion in the determination of the definition of investment is when there are domestic legislations that provide interpretative guide to the definition of investment, which will be discussed in the preceding subsection.

¹⁴² Gelmetti, F (2013). p 11; Muchlinski, P., Ortino, F., & Schreuer, C. (Eds.). (2008). “*The Oxford Handbook of International Investment Law*”. Oxford University Press. p 153.

¹⁴³ *Ceskoslovenska Obchodni Banka v Slovakia*, Decision on Jurisdiction, 1 December 2000 (ICSID Case No ARB/97/4) (2000) 15 ICSID Rev 544. (*Ceskoslovenska Obchodni Banka v Slovakia 2000*); *Malaysian Historical Salvors v Malaysia*, Decision on the application for annulment, 28 February 2009 (ICSID Case No ARB/05/10) (*Salvors v Malaysia 2009*).

2.2.1 Covered Investments in Domestic Laws

Domestic laws relating to foreign investments vary significantly by countries. Not many countries have it in the form of legislations, as many are in the form of national investment policies such as in the form of investment incentives, fiscal advantages, opportunities for liberalization. At the same time, certain sectors such as natural resources are more regulated as compared to others. In the recent 2021 UNCTAD report, there are noticeable investment regulations and restrictions related to national security especially pandemic related measures which are likely to have growing impact on FDI in coming years.¹⁴⁴

In terms of the scope of investment, it is observed that domestic laws for the promotion of investments especially among developing countries, generally expanded the scope of foreign investment to be supported by guarantees and protection to ensure the flow of the largest possible amount of foreign capital, including direct and indirect investment.¹⁴⁵ The Jordanian law did not define the investment, but expanded the scope to include ‘economic activity’ within the jurisdiction. Article (2) of the Jordanian Investment Law states:

*“Economic Activity: Any industrial, agricultural, touristic, media, vocational or services activity including information technology...”*¹⁴⁶

Similarly, the Lebanese Investment Law 2001 refers investment as *“the investment project related to any sectors falling under this law”*.¹⁴⁷ It can be noted here that both Jordanian

¹⁴⁴ UNCTAD. 2021 World Investment Report 2021. p.111

¹⁴⁵ Eisemann, P. M. (1983). *“Madjid Benchikh. Droit International du sous-développement. Nouvel Ordre Dans la Dépendance”*. Paris, Berger-Levrault, coll. Mondes en devenir. pp. 130-131.

¹⁴⁶ Article (2) of the Jordanian Investment law.

¹⁴⁷ Article (1) para 4 Lebanese Investment Law No. (360) of 2001

and Lebanese legislators did not distinguish between foreign and national investments in their definition of investment in their laws but were generally defined without mentioning any difference between foreign and national investment.

The Saudi Arabia legislator approached foreign investment as “*investment of foreign capital in an activity licensed by this Law*”.¹⁴⁸ Factoring foreign capital as a description of foreign investment also appears in the Qatari Investment Law by stipulating “*the invested foreign capital in one of the authorised projects in accordance to the provisions of this Law.*”¹⁴⁹ This can be seen as an extensive scope of definition of investment, which may include a broad range of assets or the findings, monetary, financial, corporeal and moral. In this aspect, the Jordanian Investment Law defines foreign capital as, “*any amounts invested by a non – Jordanian whether it be cash, in-kind, or rights with financial value, including financial amounts transferred by it to the Kingdom, in kind assets, intellectual property rights, profits, returns and reserves and shares in its economic activities within the percentage range specified in the regulations issued pursuant to the provisions of the Law.*”¹⁵⁰

As for the Albanian Law it defines ‘foreign investment’ as “*every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor*” and this consists inter alia, real and personal property, tangible and intangible, or a company and rights that flow from every form of participation in a company, or loans

¹⁴⁸ Article (1)(f) Saudi Foreign Investment Law Royal Decree No. (M/1) dated 5/1/1421H (Corresponding to 10/4/2000AD).

¹⁴⁹ Article (1) Qatar Investment Law No. (13) of 2000.

¹⁵⁰ Article 41 Jordanian Investment Law.

and monetary obligations or obligations in an activity that has economic value and is connected with an investment; or a wide range of intellectual properties.¹⁵¹

Based on the examples of domestic legislations mentioned, we can say that there is no uniformed definition of foreign investment in domestic laws, but generally the trend is including the following matters, (a) monetary funds includes foreign exchange transferred from abroad to implement investment projects or to subscribe to securities, (b) funds in kind, such as machinery, equipment, spare parts, imported raw materials, and other imports necessary for establishing or expanding investment (c) moral rights such as internationally recognized patents and trademarks owned by a foreign or national non-resident who were required for the project to be established, (d) profits that are convertible abroad if reinvested in the host state, and (e) every legal or contractual right, as well as every license or permission granted in accordance with the laws.¹⁵²

2.2.2. Covered Investment in International Investment Treaties

One of the key questions is whether the term "investment" refers only to the transfer of foreign funds from one country to another, or if a wider range of conditions are required to be regarded a foreign investment. Against the differences and disagreements in reaching a comprehensive definition of foreign investment and the hesitancy that prevailed in the opinion of jurists, it became necessary to examine the definitions taken by the various legal texts in force in the form of international agreements related to investment.

¹⁵¹ Article (1)(3) Albanian Law on Foreign Investments. No.7764 of 2 November 1993.

¹⁵² Mona. M. (1990). "*International Protection of Foreign Direct Investment and the Role of Arbitration in Settling Investment Disputes*". Arab Renaissance House. p.76.

It is the usual practice for multilateral and bilateral investment treaties and trade agreements with investment chapters to include a definition of investment. They are usually broad, referring to “every kind of asset” followed by an illustration but usually non-exhaustive list of covered assets. Most of these definitions are open-ended and cover both direct and portfolio investment. Their approach is to give the term investment a broad, non-exclusive definition, and recognising that investment forms are constantly evolving.¹⁵³

A significant number of newer bilateral treaties include a broad definition of investment.¹⁵⁴ The US Model BIT of 2012 for example, which is echoed in the recent 2018 United States-Mexico-Canada Agreement (USMCA) defines ‘investment’ as follows:

“Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: a) an enterprise; b) shares, stock, and other forms of equity participation in an enterprise; c) bonds, debentures, other debt instruments, and loans; d) futures, options, and other derivatives; e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; f) intellectual property rights; g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law...”¹⁵⁵

¹⁵³ Yamaca-Small, C., & Liberti, L. (2008). “Definition of Investor and Investment in International Investment Agreements”. International Investment Law: Understanding Concepts and Tracking Innovations. p.49.

¹⁵⁴ Muchlinski, P., Ortino, F., & Schreuer, C. (Eds.). (2008). p.140.

¹⁵⁵ Article 1 US Model BIT of 2012.

The German Model BIT of 2008 contained a similar definition for investment.¹⁵⁶ Similar definition is found in the agreement between Jordan and Bahrain which was drafted following the US Model.¹⁵⁷ It can be noted that, the definitions are very broad and could potentially involve any kind of economic operation including contractual rights, tangible property, intellectual property, and rights conferred by law, such as licenses and permits, a company, stocks and shares, other forms of equity, bonds, debentures, and other forms of debt interest in a company, contractual rights, tangible property, intellectual property, and rights conferred by law, such as licences and permits.

Some other multilateral and bilateral investment treaties and trade agreements contain narrower definitions of investment for example those which focus only on a ‘closed list’ of investments or that have explicitly excluded certain kinds of business transaction from investment and made them out of the scope of the protection granted to investors.¹⁵⁸ An example of international agreement which focus only on a ‘closed list’ of investments¹⁵⁹ is the The ASEAN Investment Area Framework Agreement of 1998 expressly excludes portfolio investments from its scope.¹⁶⁰ Similarly, in the recent 2022 Regional Comprehensive Economic Partnership (RCEP), it specifies some form of debt that are less

¹⁵⁶ Article 1 German Model BIT of 2008.

¹⁵⁷ Article 1 (1) Jordan-Bahrain BIT 1996.

¹⁵⁸ Muchlinski, P. Ortino, F., & Schreuer, C. (Eds.). (2008). p. 148.

¹⁵⁹ Article 1139 of (NAFTA. 1994); Kurtz, J. (2002). “*A General Investment Agreement in the WTO-Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*”. U. Pa. J. Int'l Econ. L., 23. p. 713.

¹⁶⁰ Art 2 of Framework Agreement on the ASEAN Investment Area (AIA Agreement 1998) signed 7 October 1998. It states that, “This Agreement shall cover all direct investments other than: (a) portfolio investments; and (b) matters relating to investment covered by other ASEAN Agreements, such as the ASEAN Framework Agreement on Services”; see also UNCTAD, World Investment Report 1997 (New York and Geneva, United Nations, 1997) ch. III.

likely to have the characteristics of investment, and excludes some claims or property and order or judgment entered in a judicial or administrative action.¹⁶¹ A further significant exception arises when BITs extends protection to any kind of asset provided that: “the investment has been made in accordance with the laws and regulation of the contracting party receiving it ...”.¹⁶² Some agreements additionally exclude investments made in another contracting party's territory or investments held or controlled by a contracting party's investor on the other contracting party's territory.¹⁶³

Article 1139 of NAFTA provides a comprehensive list of assets relevant to business activities, with particular exemptions. Similarly, investments under NAFTA include FDI, portfolio investment (equity securities), partnership and other interests and tangible and intangible property acquired “in the expectation [...] of economic benefit”.¹⁶⁴ Loan financing is only protected when funds flow within a business group or when debt is issued on a relatively long-term basis (more than three years). Contract rights not falling under other categories of investment are covered only if they involve a “commitment of capital or other resources in the territory of a party [...] to economic activity in such territory”.

¹⁶¹ Regional Comprehensive Economic Partnership (RCEP) 2020. agreement to enter into force on 1 January 2022 (RCEP 2020) Chapter 10, Article 10.1.

¹⁶² See Chile-New Zealand BIT 1999; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*. ICSID Case No. ARB/03/4. 7 February, 2005. (*Industria Nacional de Alimentos v. Peru*. 2005); See too *Inceysa Vallisoletana, SL v. Republic of El Salvador*, ICSID Case No. Arb/03/26 Decision on Jurisdiction. 2 August 2006. (*Inceysa v. El Salvador*. 2006)

¹⁶³ Schreuer, C. (2005). “*Shareholder Protection in International Investment Law*”. https://www.univie.ac.at/intlaw/pdf/csunpublpaper_2.pdf . p 17; Article 1(6) The Energy Charter Treaty. 14 July 2014. “Investment means every kind of asset, owned or controlled directly or indirectly by an Investor and includes..... Investment refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as Charter efficiency projects and so notified to the Secretariat”.

¹⁶⁴ Article 1139 of NAFTA 1994.

State parties in bilateral investment treaties (BITS) may need to be more precise about the scope of investment protection so that investors should be able to determine if a particular transaction qualifies as an investment and hence qualifies for the benefits of protected foreign investment.¹⁶⁵ Certainty the scope of covered investment will guide host states to determine the kind of investments they undertake to protect and promote.¹⁶⁶

2.3. The Right of the State to Expropriate

The right to property is one of the main rights that is protected by all domestic and international legislations and laws since ancient times. Given its significance in attaining growth and prosperity, issues surrounding it have grown more complex, expanding and diverse, particularly those relating to foreign investment. Expropriation disputes are one of the worst things that may happen to a foreign investment because they involve substantial interference with the investor's property rights, which could put investments on hold.¹⁶⁷ Expropriation has been defined in the traditional international law as individual measures taken for a public welfare.¹⁶⁸ It refers to the “taking of the assets of foreign companies or investors by a host State against the wishes or without the consent of the company or investor concerned, and it includes the deprivation of the right to property”.¹⁶⁹ This concept has appeared in ancient times and has developed over the ages, known to all systems

¹⁶⁵ Douglas, Z. (2009). *“The International Law of Investment Claims”*. Cambridge University Press. p.190.

¹⁶⁶ Sattorova, M. (2011). p32.

¹⁶⁷ Gelmetti, F (2013). p22.

¹⁶⁸ OECD, p.3; Winters. K. (2015). p 9.

¹⁶⁹ Subedi, S. (2008). p 120. See also, *Ronald S. Lauder v. Czech Republic* (UNCITRAL). Award. 3 September 2001 (*Lauder v. Czech Republic* 2001) para 200.

regardless of the prevailing beliefs and ideologies, whether it was socialism or capitalism.¹⁷⁰

Despite the recognition towards the right of private property and its protection in the domestic laws and international laws and bilateral and multilateral treaties, this protection does not prohibit the right of the state to expropriation property under specific conditions.¹⁷¹ This right is the result of the interaction of three fundamental concepts, 1) the right to economic self-determination of States, nations, and peoples; 2) the right of nations to (economic) development; and 3) the permanent sovereignty of States, nations, and peoples over their natural wealth and resources (PSNR).¹⁷² Generally, the right to expropriate is part of the economic sovereignty of States.¹⁷³

This indicates that the act of expropriation of foreign investors property is not an illegal act in itself, provided that the following is observed:

- (a) For a public purpose;
- (b) In a non-discriminatory manner;
- (c) On payment of compensation; and
- (d) In accordance with due process of law and minimum standard of treatment.

¹⁷⁰ Nawara, H. (2017). "Legal Protection of Foreign Investor Property". National Center for Legal Affairs, Algeria. p32; Manour, A. (1998) "Principle of Sovereignty over Resources and Natural Wealths within the United Nations". Office of University Publications. Algeria. p 93.

¹⁷¹ Khayra, S. (1998). "The Nationalization and the Property of Foreigners". Egyptian Journal of International Law. Egypt. V. 19. p 8.

¹⁷² Ruzza. A. (2011). pp. 105-106.

¹⁷³ Baloro, J. (1987). "Some International Legal Problems Arising from the Definition and Application of the Concept of Permanent Sovereignty Over Wealth and Natural Resources of States". Comparative and International Law Journal of Southern Africa, 20(3). p. 337.

The Jordanian Constitution recognizes the right of the state to expropriate property within similar conditions.¹⁷⁴ Through a set of legislations such as the Jordanian civil law, the real estate ownership law,¹⁷⁵ and Jordanian investment law,¹⁷⁶ the law allowed expropriation of foreign investment within specified conditions.

Recognition of expropriation as means for states to achieve public interest, within the procedure that falls within its territorial jurisdiction is supported by international judicial practice. The Permanent Court of International Justice (PCIJ) states:

*“...one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that failing proof to the contrary, the territory is co-terminus with the Sovereignty.”*¹⁷⁷

In relation to this, the Permanent Court of Arbitration recognises the sovereign right of states to expropriate under international law as the following,

*“...the power of a sovereign state to expropriate, take or authorize the taking of any property within its jurisdiction which may be required for the public good or for the general welfare.....”*¹⁷⁸

Moreover, the 1992 World Bank Guidelines states that:

¹⁷⁴ Article 11 Jordanian Constitution. For similar provisions in other jurisdictions, see, Paragraph (2) of Article (23) Constitution of the Republic of Iraq 2005; Article (35) Constitution of the Egyptian Arabic Republic 2014.

¹⁷⁵ Article (1020) of The Jordanian Civil law; and Article (178) of the Jordanian Real Estate Ownership Law.

¹⁷⁶ Article (42) of The Jordanian Investment Law.

¹⁷⁷ *The North Atlantic Coast Fisheries Case (Great Britain / United States of America, PCA Case No. 1909-01. Award - 7 Sept 1910 (The North Atlantic Coast Fisheries Case 1909), para 180.*

¹⁷⁸ *Norwegian Shipowners' Claims, Norway v United States, Award, (1922) I RIAA 307, ICGJ 393 (PCA 1922), 13th October 1922, Permanent Court of Arbitration [PCA] (Norway v United States 1922) p332.*

“A state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance of good faith of appropriate compensation.”¹⁷⁹

From the above we can conclude that any expropriatory measure is considered legal and governed by well-established standards under customary international law, provided that the expropriation of property should be to achieve the public purpose, conducted in a non-discriminatory manner, according to due process of law, with the obligation not to infringe any prior contractual obligation, and payment of compensation.¹⁸⁰

The state’s right to expropriate property was included in most bilateral and collective treaties including treaties concluded by Jordan. Article 3 of the BIT between USA and Jordan provides that:

“1. Neither Contracting Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization (expropriation) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance

¹⁷⁹ World Bank, Legal Framework for the Treatment of Foreign Investment (1992), Volume II, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment. Available at <https://documents1.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf>. (retrieved on 26.1.2022)

¹⁸⁰ Ruzza, A. (2013). p 107; See, Isakoff, P. D. (2012). *“Defining the Scope of Indirect Expropriation for International Investments”*. Global Bus. L. Rev. 3. P. 191; Sornarajah. M. (2012). p. 364; Reinisch, A. (Ed.). (2008). *“Standards of Investment Protection”*. Oxford University Press. p. 173; Subedi, S. (2014). pp. 120-121.

with due process of law and the general principles of treatment provided for in Article II (3).”¹⁸¹

It is observed that the treaties explicitly contain provisions on expropriation and that it forms one of the most essential characteristics of protections in BITs.

2.4. Forms of Expropriation of Foreign Investments

Political risks are non-commercial risks to which foreign investments may be exposed, whether as a result of political changes or instability, or as a result of direct actions taken by the State or one of its administrative or political authorities with the goal of denying the investor direct access to his investment.¹⁸² The measures of expropriation in all its forms have been regarded as the most serious non-commercial political risks to foreign investments in host countries.¹⁸³

Despite the differences of opinions on the definition of the concept of political risks, it can generally be said that it involves sudden changes that affects investments due to a political event. Political risks are all events and political actions carried out by the state or its authorities in order to deprive the investor of his fundamental rights to invest, without being able to predict the duration of the occurrence or means to address or prevent, but only the right to claim compensation in accordance with the principle of fairness and justice.¹⁸⁴

¹⁸¹ Article 3 of Jordan -United States BIT 1997; Article 4 of Jordan-Egypt BIT 1996; Article 13 of Jordan-Canada BIT 2009.

¹⁸² Nawara, H. (2017). p 57.

¹⁸³ Hisham, K. (2000). “*Investment Guarantee Contract and Applicable Law*”. University Thought House. Cairo. p. 165.

¹⁸⁴ Sa'id, A. (1989). “*Investment Policy in the Arab Countries*”. Al Hilal Printing & Distribution House. Kuwait. p. 184.

The procedure of expropriation of foreign investments in all its forms involves unilateral acts taken by the host country or its authorities. Expropriation occurs directly or indirectly, and in both circumstances have the effect of depriving the owner of his property or prevents him from using it freely.¹⁸⁵ Thus, investment treaties covers two types of expropriation, firstly direct expropriation and secondly, indirect expropriations in the event of actions having equivalent effect to direct expropriation.

The identification of direct expropriation from indirect expropriation is obvious and the consequences are well defined. A formal transfer of title to the State or a third party, or an outright seizure from the investor, is direct expropriation. The act of expropriation is clear, the legal obligation to compensate is clear,¹⁸⁶ and typically the only problematic issue is how to calculate compensation.¹⁸⁷

However, indirect expropriation is not an easy one. It is more difficult to identify measures with equivalent effect because it is too broad and encompasses a huge circumstances of situations in which the state, through administrative or legislative procedures, causes a unilateral change in contract conditions, preventing the investor from recovering the expected business rents under the original contractual framework.¹⁸⁸ Even if the investor retains nominal ownership, such expropriatory measures by the government deprive the investor of the use and benefits of his or her assets.¹⁸⁹

¹⁸⁵ Nawara, H. (2017) p. 59.

¹⁸⁶ Gelmetti. F (2013) p.23.

¹⁸⁷ It is confirmed by Annex B 2012 US-Model “3. Article 6 [Expropriation and Compensation] addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.....”.

¹⁸⁸ Gelmetti. F (2013) p.23.

¹⁸⁹Annex B 2012 US-Model “...the second situation addressed by Article 6 [Expropriation and Compensation] (1) is indirect expropriation, where an action or series of actions by a Party has an effect

2.4.1. Direct Expropriation

The contradiction between the idea of sovereignty on the one hand, and openness to foreign investments as an effective component of developing countries and their economies on the other, is unavoidable, especially when it involves the expropriation of foreign investors in the heart of the state's sovereignty over its territory.¹⁹⁰ It must be noted that the decision to invest in any country depends on the degree of protection granted by the host countries to foreign investors, including protection relating to property ownership from the actions taken by the state.¹⁹¹

The host state may directly deprive the investor from its investment, either in the form of nationalization, acquisition or requisition, which are customary in both international law and the treaties.¹⁹² This study will explain the most important forms of direct expropriation as follows:

2.4.1.1. Acquisition

Expropriation of private property for public interest can be in the form of acquisition by the host state of real properties owned by private persons to achieving public interest

equivalent to direct expropriation without formal transfer of title or outright seizure"; See Abdallah, M. (2003). *“Damage Valuation of Indirect Expropriation in International Arbitration Cases”*. American Review of International Arbitration. pp. 454-459.

¹⁹⁰ Khairat, S. (1963). *“Nationalization and Foreigner’s Property”*. Egyptian Journal of International Law. Vol. 19. p. 8.

¹⁹¹ Nawara, H. (2017). pp 60-61.

¹⁹² Akasha, A. (2001). *“Legal Guarantees for the Protection of Foreign Investment, Prospects and Guarantees of Euro-Arab Investment”*. Bilal House. Beirut.

by an administrative decision issued by the competent authority.¹⁹³ It can also be by way of a measure or administrative act by which the State deprives any owner of his real private property whether for its interest or for the interest of a third person, and such a decision must be accompanied by compensation paid to the owner without delay, and must be justified for the purpose of public interest.¹⁹⁴

The most important characteristics of expropriation of private property for public interest are:

- It is an administrative decision of the state or its competent authority;
- It applies to real property only;
- It must be to achieve the public interest; and
- It must be accompanied by compensation paid to the investor affected.

The national law in Jordan for instance, on the administration at the acquisition for the public benefit provides a series of procedures.¹⁹⁵ These procedures are as follows:

- Declaration on public interest.¹⁹⁶
- Designation the properties and identify their owners.¹⁹⁷

¹⁹³ Omar, S. (2008). *“Guarantees of Foreign Investment in International Law”*. University Thought House. Alexandria. P 33; Ziad, K. (2014). *“Legal Advantages and Guarantees of Foreign Investment in Arab Investment Laws”*. Al-Nahda Al-Arabiya house. Cairo. p. 267.

¹⁹⁴ Hafal, I. (2015). *“Legal Status for Foreign Investor, Comparative Analytical Study”*. New University House. Alexandria. P. 94; for more see, 'Abdul Ghani, A. (1993). *“Administrative Law”*. University House for Printing and Publishing. Beirut. P. 259; Sa'd, K. (1993). *“The Expropriation of Property for Public Benefit Between Sharia and Law”*. al Salaam house for Printing & Publishing. Egypt. p. 88-89.

¹⁹⁵ Article (180) Jordanian Real Estate Ownership Law.

¹⁹⁶ Ibid. Articles (181- 182). The authority that wants to acquire the property declare of it desire to acquire a specific property, this declaration includes the objective of acquisition and the location of the property which want to acquire it or the part of the property which to be acquired, and a preliminary estimate of the total amount of the compensation and prove his financial ability to pay, the decision shall be published in at least two daily newspapers in accordance with the procedures required by law.

¹⁹⁷ Ibid. Article. (182). The administration must, within a specific period, investigate about the property to be acquired and its owners and prepare cadastral plan of property and a list of owners.

- Estimate the value of the properties to be acquired.¹⁹⁸
- Passing a decision of the acquisition.¹⁹⁹

One of the most important legal conditions is resorting to the methods of consensual or friendly resolution before resorting to acquisition of property. The authority must first try to obtain the property through the normal transactions, such as buying or renting.²⁰⁰ This condition is essential, relating to the rules of public order that can be raised by the judge on his own, since the acquisition of real property by the normal transactions is the general rule and resorting to acquisition is the exception.²⁰¹

2.4.1.2. Nationalization

Nationalization is a relatively a modern intervention, and one of the most dangerous political measures exposed to foreign investment in the territory of the host states. The effect of nationalization is the transfer the ownership of a private investment to the State in return of compensation. It refers to a higher domestic policy pursued by the government in order to shape its economic structure completely or partially by restricting private sector investment in certain significant industrial or agricultural projects to be incorporated in the public sector for public benefit.²⁰² It is also known as the compulsory transfer of ownership

¹⁹⁸ Ibid. Article. (182). This is done on the basis of the real value of the property according to its nature, location and actual use by the competent authority.

¹⁹⁹ Ibid. Article. (183). The decision of the Council of Ministers shall be published in the government Gazette and the publication is a clear indication that the project for which the property is intended to be acquired is a public benefit project.

²⁰⁰ Ibid. Article (180).

²⁰¹ Qarfi, R. (2016). p. 15.

²⁰² Ziad, K. (2014). p. 267.

of a particular entity by the state, as a result of legislation or administrative decision, in order for the state to administer it directly or subject it to its control for public benefit.

Nationalization differs from acquisition in that it involves a complete and immediate change of ownership without the need to go through the lengthy and complex procedures that acquisition entails. Domestically, the investor has no right to object or invalidate because it involves sovereign actions.²⁰³ It is normally decreed by the executive or legislative acts,²⁰⁴ and recourse to the domestic judiciary is often not effective.

2.4.1.3. Confiscation or Seizure

Confiscation is another form of non-commercial risks, which involves deprivation of the owner of his property without paying any compensation.²⁰⁵ It usually takes the form of penalties when investors break tax laws, customs, or financial regulations that are deemed illegal according to the state law. Confiscation will turn the possession of the wealth or property to the state.²⁰⁶

It is different from the nationalization and acquisition in that this measure is aimed to taking the property belonging to the foreign investor and does not relate to the investment project itself.²⁰⁷

²⁰³ Nawara, H. (2017). p. 62.

²⁰⁴ See *Lauder v. Czech Republic*. 2001, para 200. The Tribunal stated that, "In general, expropriation means the coercive appropriation by the State of private property, usually by means of individual administrative measures. Nationalisation involves large-scale taking on the basis of an executive or legislative act for the purpose of transferring property or interest into the public domain."

²⁰⁵ Hisham, S. (1981). P. 21.

²⁰⁶ Article 30 of the Jordanian Penal Code No. 16/1960

²⁰⁷ Khaled, J. (1999). p. 75.

2.4.2. Indirect Expropriation

Traditional risks no longer pose a significant threat to the private property right of foreign investors today. Instead, new and various forms have appeared by way of regulatory actions that affect foreign investors' private properties indirectly, which limits their right from exploiting the property and achieving profits, and prohibits the disposition of property or reduces the value of property, even though there is no real transfer the title of investment property from the investor to the state.²⁰⁸ These regulatory actions is referred to as indirect expropriation which is the central discussion of this thesis.

The term indirect expropriation is also interchangeably referred to as regulatory taking, compensatory taking, de facto expropriation,²⁰⁹ creeping expropriation, and measures tantamount to expropriation or having equivalent effect to nationalization or expropriation.²¹⁰

The definition of indirect expropriation has long been left to the arbitral tribunals. However, currently there are noticeable progressions of BITs for the purpose of better defining the characteristics of indirect expropriation or actions which are tantamount to expropriation.²¹¹ The United Nations Conference on Trade and Development (UNCTAD) defines creeping expropriation as:

²⁰⁸ Redfern, A., & Hunter, M. (2009). "*Redfern and Hunter on International Arbitration*". Oxford University Press. p. 497; Born, G. (2012). p. 430; De Luca, A. (2014). p. 61; R. Dolzer & Christoph Schreuer. 2012. p. 103.

²⁰⁹ Brownlie, I. (2003). "*Principles of Public International Law*". 6th ed. Oxford University Press. pp. 508-509.

²¹⁰ Kuprieieva, A. (2015). p. 8.

²¹¹ Gelmetti. F (2013). p.35.

“As the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. The legal title to the property remains vested in the foreign investor but the investor’s rights of use the property are diminished as a result of the interference by the State.”²¹²

Indirect expropriation may be in the form of non-payment, non-reimbursement, cancellation, denial of juridical access, actual practice to exclude, non-conforming treatment, inconsistent legal blocks, and so forth. The measure at issue is the expropriation itself, and not merely a sub-component part of expropriation.²¹³

Indirect expropriation occurs when regulatory actions, or a series of regulatory actions, deprive a foreign investor of his right to freely invest, use, or exploit property, limits or prohibits the disposition of property, or reduces the value of property, despite the fact that there is no real transfer of title from the investor to the state.

Article 11 of the MIGA Convention describes expropriation and similar measures as:

“any legislative action, or administrative action, or omission attributable to the host government omission attributable to the host government, which has the effect of depriving the holder of a guarantee of his ownership, or control of, or a substantial benefit from his investment, with the exception of non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activity in their territories.”²¹⁴

²¹² UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (Series on International Policies for Development United Nations 2005) 42.

²¹³ *Waste Management Inc. v United Mexican States ICSID Case No. ARB(AF)/98/2 Award. 2 June 2000* (*Waste Management v. Mexico. 2000*); Al-Adba, N. (2014). p. 110.

²¹⁴ Article 11 of “Multilateral Investment Guarantee Agency”. The MIGA Convention was submitted to the Board of Governors of the International Bank for Reconstruction and Development on October 11, 1985, and

Most international investment treaties contain provisions referring to indirect expropriation and measures equivalent or tantamount to expropriation.²¹⁵ However, international investment treaties do not define indirect expropriation. They generally refer to governmental measures that are ‘equivalent to’ or ‘tantamount to’ expropriation and provide guarantees against indirect expropriation.²¹⁶ For example, Article 1110 of NAFTA Convention provides that:

*“1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (expropriation), except; a) for a public purpose, b) on a non-discriminatory basis, c) in accordance with due process of law and Article 1105(1) and d) on payment of compensation in accordance with paragraphs 2 through.”*²¹⁷

An example of an indirect expropriation clause in the Jordanian context can be seen in Article 3 USA-Jordan BIT which provides that,

“1. Neither Contracting Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization (expropriation) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance

entered into effect on April 12, 1988. It was amended by the Council of Governors of MIGA effective November 14, 2010.

²¹⁵ Schreuer, C. (2005). *“The Concept of Expropriation under the ETC and Other Investment Protection Treaties”*. Transnational Dispute Management, 2(3). p. 3

²¹⁶ Ruzza, A. (2013). p 120.

²¹⁷ Article 1110 of (NAFTA): Expropriation and Compensation; See also, Article 13, Energy Charter Treaty; and Article 6 of US Model BIT 2012.

with due process of law and the general principles of treatment provided for in Article II (3).”²¹⁸

As for the internal laws in Jordan, the Jordanian Constitution provides that:

*“No property of any person may be expropriated except for purposes of public utility and in consideration of a just compensation, as may be prescribed by law”.*²¹⁹

The Jordanian Investment Law provides that:

*“no economic activity may be expropriated or 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”.*²²⁰

We can conclude from the foregoing that a critical aspect in the concept of indirect expropriation is the lack of a clear definition of what constitutes an indirect expropriation. If it is too broadly defined, host states may find it difficult to implement restrictions without facing lawsuits from foreign investors who claim their property has been expropriated. A too narrow definition, on the other hand, might allow greater freedom to act, but create disincentives for foreign investment. Until now, the vast majority of old-generation investment treaties include only a vague reference to indirect expropriation, with no further explanation.²²¹

²¹⁸ Article 3 Jordan -United States BIT 1997; Article 5 Jordan-Bahrain BIT 1996; see more in Article 5 of Jordan-Italy BIT 1996; Article 5 of Jordan-China BIT 2001.

²¹⁹ Article 11 Jordanian Constitution.

²²⁰ Article 42 Jordanian Investment Law.

²²¹ Kuprieieva, A. (2015). p. 8.