

The legal development of the foreign investment path in Algeria

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Abstract:

The development and growth in Algeria did not take a regular path, as some economic and political measures affected making laws about the investments, mainly the foreign. In this context, this paper focuses on the three phases of the foreign investment in Algeria, starting from the socialist era, passing by the transitional period, and ending with the liberal phase. Findings show that Algeria witnessed big intellectual and legal changes in the foreign investment to attract money and technology. Besides, it is necessary to maintain the investment environment, and to protect and develop the estate because it is a non-renewable rare resource.

Keywords: foreign investment; socialism; transition; liberalism; advantages; drawbacks.

Introduction:

For the juristsⁱ, the foreign investment is any project that is owned by a foreigner. This ownership may be complete or partial, as the investor may have shares that allow him to manage the project from the production phase until the exploitation. On the other hand, the economistsⁱⁱ see that it is using the available capitals and savings in a foreign state to make profits in the host state, even on the detriment of the internal economic structure and the environment. Thus, this investment revolves around the ownership of the production means and the profits without any consideration to the real interests of the developing states and the aspirations of their peoples. This is the concept that has been prevailing in the newly-independent states in the 1950s and 1960s.

This paper shall focus on the legal background of the process of regulating the foreign investment in Algeria throughout its three phases, namely the socialist, transitional, and liberal. In this regard, after independence, the legislative authorities worked on enshrining the economic independence in managing the state issues through the principle of the priority of the public investment in funding the national

economy, and through adopting the mixed economy partnershipsⁱⁱⁱ in some limited economic sectors that are related to the direct foreign investment, taking into account the stringent control of the movement of the money from and to Algeria. Then in the second phase, the legislator distinguished between the national and foreign investments, and subjected the latter to the dominance of the national public companies, as the shares of the national company had to exceed 51% of the project. Finally, the free investment and the fair treatment of the public, private, national, and foreign investors were adopted.

Based on what was said, we raise the following problematic, “how was the position of the foreign investment in the Algerian legal system from independence until the issuance of the investment promotion law?” We shall answer this question using the descriptive method and the legal analysis. Besides, we divide the study into three chapters; the 1st revolves around the position of the foreign investment during the socialism, the 2nd is about the transitional phase, while the third tackles the liberal era.

Section one: the foreign investment during socialism:

Algeria adopted socialism as an economic and political system after independence until 1989 (when the referendum on the constitution was held). During this era, the foreign investment was regulated by order 66-284 and law 82-13.

A) the foreign investment in the light of order 66-284:

Based on the provisions of the National Charter of 1964, the Algerian legislator saw the contribution of the foreign investment to the economic development as a necessary measure, and subjected it to the national sovereignty (but this investment in the fuels sector was not possible). Its contribution to the national development takes place in the mixed economy partnerships, with consideration of the methods that guarantee the public interests instead of the local bourgeois and liberal interests (based on the premise and logic of the National Charter of 1964). Thus, the foreign investor had to abide by a term-sheet that obliged him to technically train the local Algerian staff to qualify them to manage the state issues regarding the economy, funds, accountancy, etc^{iv}.

Order 66-284 on the investments defines the foreign investor as any moral or natural person holding a foreign nationality. In this context, he enjoys a set of privileges, namely^v:

- The investment is allowed in the sectors of industry and services, as long as the legal and organizational laws are respected.

- The ownership cannot be forfeited, unless by a judicial provision or law.
- The foreign investor has the right to the customs protection and to get bank loans to purchase the necessary machinery.

These incentives are necessary but insufficient to attract the necessary number of foreign investments to contribute to the national economy. In this regard, there were only two foreign investments in that era due to the low incentives, the legal instability, and the stringent regulations on the foreign investment, mainly the administrative control regarding the money flows from and to Algeria. Special administrative organizations were established to monitor the activities of the foreign companies starting from the date of license until starting the ordinary annual activity.

Besides, order 66-284 was not widely applied due to the social and political instability after independence. Thus, the foreign investors doubted the credibility of the investments law, mainly when the authorities decided to nationalize many economic sectors. Furthermore, this law was not followed by regulations that show the methods of applying the provisions. In front of this failure, it was necessary to think about a new law for investments to cover the foreign investment. Hence, law 82-13 on the mixed economy partnerships was issued.

B) the foreign investment in the light of law 82-13:

In the light of the legal and political atmosphere in Algeria during the 2nd phase of socialism, the legislator distinguished between the national and foreign investments through devoting special laws for each. In this regard, the foreign investment was regulated by law 82-13 of 28/08/1982 on the mixed economy partnerships, while the national economy was regulated by law 82-11 of 31/08/1982 on the national economic investment. This showed the Algerian legislator's unacceptance of the foreign investment and the imposed segregation^{vi}. The foreign investor was allowed to act only under the mixed economy partnerships, which are narrow and undesired in the advanced states, mainly that the foreign companies are subject to the dominance of the national ones, as provided for by Article 22 of law 82-13 on the mixed economy companies, which adds that the share of the national companies must not be less than 51%, regardless the financial potentials and the technical and managerial abilities of the foreign company^{vii}.

Therefore, any foreigner who wants to invest in Algeria had to comply with law 82-13, supplemented and complemented by law 86-13 of 28/8/1986, through founding joint-stock companies in the light of the mixed economy companies. Besides, he had to abide by the applicable investment law, namely making an agreement and contract between the representatives of the national company and of

the foreign. We must point that, under this law, the partners may be two; one is the foreign investor and the other is the national. In addition, the share of the national must be more than 51% to allow the company to legally direct and control the projects. In fact, these restrictions do not attract the investors, mainly that the duration of the partnership and investment had to not exceed 15 years, and might even be reduced through the dissolution of the project under consent of the two parties. Moreover, the new point included in law 82-13 on the mixed economy companies is that the foreign investments in Algeria cannot be carried out unless under a mixed economy company. Furthermore, the law translates the will of the legislator to impose the national control on the foreign investments, and shows his recognition of their importance in the local economy, mainly in the technology transfer^{viii}.

The Algerian laws were Algerianized in 1973 (all along with Tunisia, where the laws were Tunisianized, and Morocco, where the laws are Moroccanized, as part of the Maghreb legal renaissance) through reformulating and writing all the laws in Arabic and in an Algerian spirit and mentality, according to order 73-29 of 05/07/1973, which abolished law 62-157 that extended the application of the French laws, except the segregative ones or those that violate the national supremacy. In construction, for instance, order 75-67 on the construction license and lands division for construction was issued on 26/09/1975 and abolished the French decree of 13/12/1958 on the plans, rules, and licenses of construction. This legislative activity shows the Algerian attachment to the national identity. In this regard, socialism was the political and economic prevailing creed and required reliance on the national savings, not the openness on the foreign investment.

Section two: the foreign investment during the transitional period:

This period marked the transition from the socialism into the liberalism. It was critical, as Algeria found itself facing many crises. Therefore, the main question was about how to correctly preserve the gains of the past and maintain the future aspirations. To explain this issue regarding the foreign investment, we must shed light on the foreign investment in the light of the stand by agreement and the foreign investment in the light of the legislative decree 93-12.

A) the foreign investment in the light of the stand by agreement:

After the oil prices shock in 1986 and the financial deficit, and to restabilize the economy and achieve more sustainability, Algeria resorted to the International Monetary Fund and signed the stand by agreement in Paris on 30/05/1989. In this context, the officials of the Fund found out that the management mechanisms in

Algeria were not scientifically grounded and that they needed review according to specific methods and conditions^{ix}. Hence, the Algerian government had to find alternative solutions to overcome the economic, political, and security crises that hit the state. The foreign investment was one of the choices in the discussions of the supreme authority. Such investment would restabilize the payments balance through attracting the rare funds at that time. Nevertheless, the then applicable investment law was not adequately efficient to meet the target goals. Consequently, the cash and loan law was the only possible solution. It expressed the will of the officials to shift towards the foreign investment and open up to the foreign companies and investments in Algeria to attract money and techniques^x. In this context, the cash and loan law no° 90-10 of 14/04/1990 was not a new reformulation of the investment law; rather, it was a special law for the Algerian banking and monetary system. It tackled the provisions of the foreign investment in Articles 181 to 192 to regulate the movement of the funds and the exchange market.

The early 1990s witnessed a renaissance, or a revolution, in the philosophy and thought of the Algerian law. The winds of change affected the legal system. Nevertheless, we shall focus only on the aspects related to the foreign investment, as follows:

- Law 90-25 of 18/11/1990 on the estate orientation abolished all what is related to the Agricultural Revolution through recognizing the principle of restoring the nationalized lands by their real owners and rejecting the notion that the state must manage all the details. Besides, the state embraced the notion that the new Algeria regulates the social issues and treats all the citizens as adult individuals, not minors, as was the case during socialism.
- Law 90-29 of 01/12/1990 on the construction provided for a set of mechanisms (licenses and plans) that aimed at the optimal management of the estate and the protection of the environment.
- Law 90-30 of 01/12/1990 on the national properties distinguished between the state public properties and the state private properties. Besides, it regulated the state estate portfolio and the related organizations through acquisition or waiver, mainly the foreign and national investors.

B) the investment in the light of the legislative decree 93-12:

In the second half of the transitional phase, mainly in 1993, the market economy was adopted through the legislative decree that supplements and complements the trade law, the legislative decree that supplements and complements the civil procedures law, and the legislative decrees on the estate promotion to

liberate the national economy. The aim behind the legislative decree 93-12 of 05/10/1993 on the investments promotion was encouraging the direct foreign investments, and the indirect ones that manifest in the partnerships with the private and public national companies. Thus, the foreign investment was enlarged after it had been limited to the mixed companies during socialism^{xi}. This law granted the foreign investor many choices, such as the individual activity or the collective one in partnership with Algerian public or private companies according to the potential outcomes of the project. Hence, the investment law of 1993 enshrined the freedom of investment and granted many privileges and guarantees to the foreign investor, unlike the previous laws of the socialist era.

However, the free investment principle faced restrictions as well, as Article 03 of the legislative decree 93-12 provided that the investments were to be carried out freely, in accordance with the applicable law. On the other hand, Article 01 stated that the investments should be carried out within the economic activities of producing goods and providing services, which are not explicitly exclusive to the state or its branches, or to any moral person appointed by a legislative text. Hence, this Article shows that the investors cannot work in some fields, and that the foreign investor, under the investment freedom principle, can work in the legalized licensed activities after getting the license from the competent administration^{xii}. The license is a permission from the public administration to allow the foreign investor to exercise an economic activity to guarantee the security and public order, and to maintain the public health and the environment.

The foreign investment might be in the touristic sector and the secondary sectors. However, investment in the vital strategic sectors was exclusive to the national companies, in accordance with the executive decree 97-320 that shows the methods of applying Article 43 of the legislative decree 93-12. The latter grants the foreign investor many privileges, including the estate rights, to encourage him, such as:

- Exemption from the tax on property transfer of all the estate purchases in the light of the investment.
- The application of a fixed fee on the registration rights, with a reduction of 5% for the constituent acts and capital increases.

Despite that the legislative decree 93-12 was based on the freedom and encouraged the foreign investment, the reality showed its failure. It was until 2001 that a new law that aimed at developing the economy through the foreign investment was issued.

Section three: the foreign investment during the liberal ear:

This era witnessed openness to the foreign investment, as seen in order 01-03 and law 16-09.

A) the foreign investment in the light of order 01-03

Order 01-03 of 20/08/2001 on developing the investment in Algeria was part of the economic reforms launched by the state. It did not bring about new concepts; rather, it reinforced the application of the principles enshrined by the investment law of 1993^{xiii}, mainly the freedom of investments. Thus, the foreign investor had an absolute freedom and the administrative license was abolished, as provided for by Article 3/2. Besides, it provided for the equal treatment of the national and foreign investors regarding the investment rights and freedoms, with consideration of the provisions of the conventions between Algeria and the state of the foreign investor, as provided by Article 14 of order 01-03.

In addition, the order opened all the economic sectors for the foreign investments to end the monopoly of the public administrative, industrial, and commercial companies. On the other hand, order 01-04 on the regulation and management of the economic public companies, all along with other legislative and organizational texts, tackled the general legal frame that governs the investments. Under this order, the private national companies and the direct ones can start their activities in the vital sectors that had been exclusively directed by the state and its companies. This new orientation of the state goes with the international premise of the state's gradual withdrawal from the economic cycle, and leaving it to the free initiatives^{xiv}. This step attracts the national and foreign private investors because it adapts the investment and financial and commercial regulations to the international market requirements.

The motivational role of the state intervention in regulating the foreign investments manifests in the foundation of a national council for investment, changing the Agency of Promoting Investment into the National Agency of Developing Investment to inform the investors about the availability of the estates, managing the investment estates, collecting all the information for the estate data bank established at the ministry in charge of promoting investments, representing the agency in the local authorities in charge of the economic estate, simplifying the systems and measures of investment, and keeping away the complexity in investments^{xv}.

In this context, the agency receives the declaration of the investor, records it in a special record, and immediately gives him a deposit certificate regarding all the activities that are not subject to a pre-license^{xvi}. As for the activities that need a pre-

license, the competent state representative receives the investors' files and certifies that. Then, the administration assigned with granting licenses directly informs the agency within one month of its notification by the agency. Besides, the organizations in charge of the investment estate, and the representative of the investments committee, identify and promote the places through informing the investor about the available built and non-built estates that may be used in the project. As for the construction representative, he helps the investor carry out the formal requirements of getting the construction license. Moreover, the investor who has a concession contract is exempted of the fees of transferring the property in the light of the concerned investment^{xvii}.

Law 01-20 of 12/12/2001 on the sustainable development is a solid basis for the national and foreign investments because it does not cover a specific city or municipality (law 90-29); rather, it covers the whole state whose surface is 381.2 Km². Thus, the estate is available and represents no problem. In addition, the legal guarantees of the legislative stability is active for 50 years; it is the period programed for incarnating PAT agenda^{xviii} provided for in law 10-02 on the National Scheme of the Development and Sustainability of the Territory^{xix}.

B) The investment in the light of law 16-09

Under the severe competition between the developing states to attract the foreign investments, the interest of the Algerian legislator in this competition increased. In this regard, the constitutional amendment of 2016 confirmed the principle of the freedom of investment and trade, as Article 43 provides that the trade and investment are free in accordance with the applicable law, and that the state improves the business atmosphere and encourages the companies to prosper without segregation to achieve the national economic development. This step is the outcome of the economic needs to achieve the sustainable development. The question of free investment turned into a choice enshrined by the constitutions of 2016 and 2020^{xx}, not a legal or legislative issue

This recognition is a constitutional guarantee to the foreign investments. Besides, the investment law 16-09 of 03/08/2016 includes incentives, protection, privileges, and guarantees. However, this law, as the other laws that set the legal frame of the National Agency for Developing the Investment, did not show the relation between the agency and the state properties administration. As for the mechanisms and conditions of directing the investment estate to benefit of a concession contract, it is necessary to clarify the relation that links the two organizations to prepare the estates meant for investments and simplify the measures of getting them^{xxi}.

On the other hand, the articles that determine the new role of the National Agency for Developing Investment show that its role is limited to the promotional motivation through informing the investors about the availability of the lands and managing the estate portfolio. Besides, the investment law reconcentrated the tasks of the Agency to make it a specialized pole in boosting the investment, leading to the amendment of the frame of regulating the foreign investments and reorganizing the incentives system mentioned in law 01-03 on the investment development. In this context, law 16-09 aims at cancelling the interventions between the legal system and granting concessions. Thus, instead of studying and granting the concessions to the operators, the Agency monitors the national and foreign registry. In addition, it informs and improves the investors to found new companies and projects, and determines the projects that deserve exceptional concessions and conventions.

The beginning of the procedures in the unique office takes place through granting the necessary documents to the investor and the center of supporting and developing the companies, which is represented by the National Agency for Developing the Small and Middle-sized Companies, and to an official of the National Agency for Developing Investments^{xxii}. Besides, the new law simplified and limited the measures of starting investments to just a registration request submitted to the National Agency for Developing Investments, which grants a receipt, as provided by Article 8/3, to allow the investor to get administrative and other concessions. Moreover, law 16-09 assigned the national council for investment with determining the strategies, setting the big orientations of the investment policy, and ratifying the investment conventions^{xxiii}.

As for the motivational procedures to attract the foreign investments, they are a set of exemptions during the implementation and exploitation of the project, as provided by Article 12 of law 16-9, as follows^{xxiv}:

1- The application phase incentives:

- Exemption from the customs fees regarding the imported products required for the investment.
- Exemption from the added value regarding the imported or locally purchased goods and services required for the investment.
- Exemption from the fees of the estate transfer and of the registrar required for the investment.

2- The exploitation phase incentives:

- Exemption from the revenues tax.

- Exemption from the fees on the professional activity.
- 50% reduction of the annual rent tax by the state properties department.

We can say that in the light of the absence of a clear vision regarding the foreign investment, the Algerian legislator had issued different laws since independence, until the last law on the promotion of investment. These laws were turning in the cycle of the Algerian state's withdrawing into itself fearing the violation of the national supremacy, and the notion of the openness to the external world, mainly to the foreign investment. In this context, we see that the state is gradually moving towards embracing the new concepts of the economic globalization.

Conclusion:

In fact, even if the foreign investment has many drawbacks, it is necessary because all the previous Algerian economic experiences failed, starting from the public companies, moving to the mixed economy, and ending with the loans and debts restructuration, which affects the state independence from the international banks and organizations that monopolize money. Thus, the reliance on the self and on the oil revenues can be valid for a limited period of time. Nevertheless, the continuity of this political premise is a misconception and lack of outlook of the future courses based on the international and domestic data. Hence, the solution, we believe, is finding economic alternatives, including the foreign investment, which requires a special legal atmosphere and the four guarantees, namely:

- The fair treatment of the national and foreign companies regarding the duties and rights, including the fees, taxes, and investment estate.
- The legislative stability and rejection of the repetitive amendments to spread trust amid the investors and make them feel they face no risks in the long or short-terms.
- Avoiding estate forfeiture, unless in accordance with the applicable law, i.e., by a judicial ruling and after guaranteeing a fair compensation.
- Guaranteeing the transfer of capitals from the host to the mother state in accordance with the international conventions.

On the other hand, we see that it is necessary to protect the environment because it may be violated by the businesses. In this regard, the environment with its liquid, gaseous, and solid elements is the right of the future generations. Hence, it is a must to review paragraph 02 of Article 01 of the decree 15-19 on the construction contracts, which states, “ these documents do not concern the basic structures protected by the national security guards, and include the military basic structure

meant for executing the basic tasks of the Ministry of National defense. Besides, they do not concern some basic structures that have a strategic nature and are part of the ministerial departments, organizations, and institutions”. This means that there are many national and foreign projects where it is not possible to get a construction pre-license, which is the main legal tool to measure the effect of the investment project on the environment and the nature. This study should include the ecological aspects, the achievement plans, and the methods of exploitation, not only the technical and economic aspects.

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^{vii} Amel Zaidi, op. cit., p. 220.

^{viii} Ibid, p. 221.

^{ix} The rescheduling means that a new debt substitutes an old one based on conditions and negotiations monitored by the International Monetary Fund that imposes the reform program and the restructuring.

^x Due to the socialist trend of some legislative authority representatives, and to the negative attitude towards the foreign investments and the belief that the economic development projects must be exclusive for the public authorities, if the state abandons the control role, it means that it loses its national supremacy.

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^{xiv} Ibid., p. 200.

^{xv} Aliouche Karboua Kamel, op. cit. , p. 103.

^{xvi} Ibid., p. 105.

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^{xxii} Ibid.

^{xxiii} Ibid., pp. 118-119.

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