

The State of the Foreign Investment in Algeria: A Critical Analysis of the Legal Framework during the period 1962-2016

L'état de l'investissement étranger en Algérie: une analyse critique du cadre juridique pendant la période 1962-2016

Dr Mostéfaoui Sofiane¹, Pr Yousfat Ali ² Dr Ben Ayad Mohamed Samir³

¹ University of Ahmed Draia , Adrar – Algeria,

² University of Ahmed Draia, Adrar – Algeria

³ University of Sidi Belabes, Algeria,

Received:14/02/2020 Accepted:16/11/2020 publication :30/11/2020

Abstract:

The economic development is a constant debatable issue as its involves many factors in setting up its bases. In this context, different conceptions had been envisaged in an attempt to examine the best channels to ensure the well-being of individuals, increase economic performance and improve its competitiveness. One of the dynamic and crucial drivers of economic development is what is known by foreign direct investment especially in this era where the economies are considerably opened and highly interlinked. By this sense, the advantages of foreign investment to meet the development challenges are strictly conducted by how far the host economy is suitable to gain these advantages. This paper tends to analyze the legal aspect as one of the basic factors to benefit much from this international investment; and the research aspiration is to highlight the extent to which Algeria had maintained an appropriate environment for the foreign investment.

Keywords: Foreign Direct Investment, Legal Aspect, Algeria

I- Introduction :

Foreign Direct Investment (FDI) is considered as the most important route of finance especially for developing countries. The noticeable position held by FDI unlike the other financing aspects (grants, credits, portfolio investment) comes fundamentally from the properties of the investment per se and the positive effects brought to the receiving countries. By this sense, it plays a role in reducing the saving and the exchange gaps and contributes in increasing the level of the resource optimal exploitation. This target could not be achieved only under a business environment where the managerial and technical skills are provided. In this context, the foreign direct investment which implies either the full ownership of the project by the foreign or the partial property can boost the economic and the corporate growth through the transfer of technology and managerial experience as well as improving the host industries via the increase of competition.

Algeria for instance strived to be an attractive environment for the foreign direct investment by the enactment of laws and legislations and offering incentives that captivate the attention of the foreigner.

II– The Jurisdiction Aspect of Foreign Direct Investment in Algeria:

The jurisdictional aspect sets out the diverse legal treatments of the investment projects realized or to be realized under the scope of FDI. It is therefore a strong platform to create a favorable investment climate for both the home and the host countries. By this consideration, the legal aspect comprises all the procedures of obtaining licenses to invest, the sectors to invest in as well as the nature of the invested companies. In addition to all these statements, it clarifies the commitments that the foreigner should respect in doing business in that foreign country in addition to the rights and the advantages recovered. Moreover, the legal aspect underlines the mechanisms of treating the foreigner equally with the host investor and the possibility of such preferential treatments that the foreigner enjoys under the agreements and conventions concluded between the host and the home country. The examination of the legal aspect in Algeria respects the following sub-headings:

- Chronology of the foreign investment laws in Algeria from 1962 until 2016
- Agreements between Algeria and foreign countries regarding the foreign investment

III- Chronology of Foreign Investment Laws in Algeria From 1962 Until 2016:

Algeria had expressed an intense interest to the investment as an engine for growth and prosperity. For this reason, it attempts to encourage all sorts of productive investment and in this context, the foreign direct investment is no longer considered as an exception. With respect to the FDI projections arguing that this kind of investment brings technology and managerial know how and all forms of expertise in one hand; and the need of the Algerian economy to the real factors of development on the other; the authority was pushed to enact investment laws in order to protect the national interests and incentivize the foreign investor to make projects in Algeria. In an attempt to grasp more the legislative and the legal evolution of the investment in Algeria, we base our analysis on a description of the investment law package issued from 1962 until 2016. This package includes the following laws and legislations:

- Investment law of 1963
- Investment law of 1966
- Law of the national private economic investment 1982
- Law of the establishment and the management of the joint companies 1986
- Law of managing the national private economic investments 1988
- Law of money and credit 1990
- Law of investment and investment liberalization policy 1993
- Order № 01- 03 about the investment development 2001
- Order № 06-08 amending and supplementing the order of 01- 03, 2006

- Law № 16-09 about the investment development

III-1- Investment Law of 1963:

The investment law of the year 1963 tends to pave the way for a good platform of investment by creating incentives to the productive investment and delimiting the guarantees and the obligations imposed on the investors. In addition to this, law of 1963 determined the state intervention scope in the investment sphere. It should be noted that law 1963 was interested much by the foreign capital as a form of an investment. The aim of the statements recapitulated by this law is to boost production via the contribution of the foreign capital. In fact, the law is composed of six (06) sections; each one of them treats the participation of the foreigners through a specified angle. Namely, the sections are: Preliminary disposition, General guarantees, Approved companies, Conventional companies, Public interventions, Transfer of capital, income and employment, Miscellaneous. The law of 1963 is inevitably a document that encourages the foreigners to establish their projects in Algeria. What pushed the authorities at that time to draft such a law is the strong belief in the foreign investment as a good factor of economic growth. This belief is reflected clearly by the articles 3-4-5-6-7 in which the liberalization to undertake business projects for foreigners is claimed. In addition to this, freedom of the movement and residence of persons having jobs in the foreign companies or involved in their management is ensured by law. Moreover, the equality of law treatment is also guaranteed between the foreigners and locals especially in fiscal matters. The law of 1963 tackled the issue of expropriation only within the framework of the legal dispositions, and the operation takes place just the amount of the net profits reaches the amount of the imported capital. Even if the expropriation occurs, it gives right to a fair compensation. All these statements and indications are only under the full compliance with the legal and regulatory governing order. In addition to above incentives afforded, the law of 1963 presents different guarantees and indications to respect for both the agreed and the conventioneer companies as well as it determine obviously the scope of the authority intervention in the economic sphere. Instead of what is mentioned above, this law allows the companies to transfer their profits and capital (article 30); but in cases where the company wants to invest these profits in other investment projects or purchase of the necessary equipment, it enjoys a tax exoneration in attempt to encourage the establishment of real economic projects (article 33). However, the law of 1963 was not compatible with the economic system that the country adopted (socialism) and the beginning of the nationalization era. The discordance to apply the law effectively on ground had been confirmed by the subsequent laws.

III-2- Investment Law of 1966:

This law comes to consolidate the economic orientation of the country and to define the private capital contribution in the economic development. In this sense, the law gives the possibility for the national and the foreign investors alike to engage in investments in tourism and industrial sectors; and this potentiality is given only under the general target represented by expansion of the productive capacity and the contribution in economic growth. However, the state is the sole agent having the initiative to undertake investment in key sectors of the economy and it has also the right to participate in the capital of the mixed economy. In fact, this law works to restrain the investment of the private capital; and this latter must be complied in terms of the objectives and regulatory scope to the country legislation (articles 02- 03- 04- 06). In addition to this, the law states clearly that companies have the full right to appoint foreign specialist employees in order to fulfill their needs; but this appointment is bounded and determined by the licensing decision and it must take into account the national competencies (article 09). As the country looks for capital which enhances

the productive capacity and boosts the economic growth whether it is national or foreign under the country legislation, it advocates evidently the equality principle of law treatment especially in fiscal matters (article 10). Moreover, article 21 delineates the licensing considerations for foreign companies by having a suitable financial scheme and contributing to the national economic growth and the upgrade of the national competencies. In addition to these considerations, the foreign company is subject to others which are: the capacity to open foreign markets for export, the level of the profits generated and the level of the local raw materials' exploitation (article 21)

III-3- Law of National and Private Economic Investment 1982:

This law comes to confirm the economic orientation of the country and the management of the investment projects should follow the objectives of the national development and it is determined within the framework of the national chart. In this context, the article 08 noticed that the investment projects must have the objectives of expanding the production capacity and contribute effectively in job creation as well as the fulfillment of the citizens' requirements. However, what is remarkable in this law is the attempt to restrict the liberalization of the private investment particularly. The article 9 of the law 1982 noted that this kind of investment should be integrated with the national investments under the national development plans. Additionally, the law 1982 shows evidently in the article 10 that the license is no longer granted to the national private economic investments only under the priorities of the national development plan and its objectives. In this context, the license and the approval clauses are clearly defined by the articles 13-14-15-16-17

The law 1982 indicates in article 23 of the financial privileges' section that more incentives' measure should to be undertaken in the field of credit grating and taxes collection for the benefit of the private investors who are involved in business activities for the export; and in the case when the investor wants to invest his hard currency capital. Instead of this, the law includes explicitly a number of facilities granted to private investors when they commit to the legislation and the regulatory framework. These facilities are represented by getting lands, equipment and the economic and technical assistance (articles 24-25). One of the basic contributions of this law is that it paves the way for a good combination between the public and private sectors under the condition of expanding the economic growth of the country.

III-4- Law of Managing the National Private Economic Investments 1986:

The title of this law exhibits an implicit meaning of the articles included. In fact, this law comes to manage the economic situation at that period by consolidating the business platform and the combination aspect of the both the national and private sectors. This orientation is conditioned by the situation the characterized the economic arena via the decline of the oil prices and the restriction of the investments magnitude. Therefore, this law comes to manage the situation by amending some articles of the previous law (law 1982). For instance, the articles 02 and 03 had clearly defined the scope of the mix companies as shareholding companies which is committed to the commercial law and a part of its capital is held by the national socialist companies. This statement means implicitly that even if the possibility of the mix companies is existed but it must follow the legislation and the general perspectives of the country economic orientation (article 03). In an attempt to advance the consolidation of the nexus public-private companies in boosting the economic growth, the law of 1986 claims in the article 05 that the foreign investor in mix companies has the right to participate in the company management and the decision making process; and this right is only possible within the framework of both the company chart and the commercial law. Moreover, the foreign investor enjoys the right to transfer part of the non-invested funds, the eligible part for transfer of the

foreigners' income and the indemnity in nationalization cases (article 05). What is grasped from this article is that the authority crossed the way gradually towards building up an incentive platform for the foreign investor to participate really in the economic development. This issue is obviously mentioned in the subsequent articles of this law especially those concerned by fiscal privileges, such as the decrease in the value of the transfer taxes and the taxes on the industrial and commercial profits (article 12). Instead of the above privileges, the law forwards the possibility of other exemptions and rights according to the importance and the priority of the sector in enhancing the development of the country (article 10).

III-5- Law of Managing the National Private Economic Investments 1988:

The law of 1988 brings a definite agenda of the activities undertaken by the private national sector and instead of this; it focuses on the privileges and exemption afforded to the private sector according to the priority paradigm. By this sense, the article 03 asserts that the industrial and service activity undertaken by private companies gives the latter a package of fiscal and financial privileges. These privileges are determined by the finance law and they include the provision facility of the equipment and the raw material as well as the facility to get the necessary lands for establishing projects (article 03). Moreover, the law indicates that it is no longer possible for the private investments to engage in the economic sectors considered strategic. These strategic sectors are related to the banking system, mining, insurance system, iron and steel industry, air and rail as well as maritime transport. Generally, the private investment is exempt from engaging in all activities having relationship with the management of the national property (article 05). In addition to this, this law determines the responsibilities of the private industrial activities to the economy by creating jobs, realizing the economic combination between its entire sectors by providing the necessary equipment and the raw materials as well as the semi-final goods. It is included the interest of managing and upgrading the national competencies in mastering the diverse techniques (article 07). In general, the law of 1988 gives a clear picture about the intention of the authority towards the private sector as an important engine for the economic growth and the creation of basic platform for a good alliance between the public and the private sector to boost the growth is more than a necessity.

III-6- Law of Money and Credit 1990:

The law of money and credit had been widely considered as an agenda for a new wave of the economic development through the movement of foreign capitals in one hand and the establishment of rules that manage the central bank and the financial institutions on the other. By this sense, it arranges the issue of the foreign capital participation into two broad categories: rules that determine the foreign capital in the financial side of the economy and those regulating the participation of foreign capital in the real side (investment) of the economy. For the former category, the article 127 claims that the establishment of a foreign bank or a foreign institution is only possible under the license delivered by the money and credit council. Additionally, the following article (128) emphasizes this issue by stating that the license given to the foreign capital participation in banks and financial institution is conditioned by respecting the equal treatment principle of the Algerians and the Algerian institutions. It is clearly grasped from this two articles the setting up of a bank or a financial institutions is not restrained but this kind of investment must be complied with the rules prescribed and the license given. At the real side, this law delineates the different kinds of capital (national versus foreign) according to the location paradigm. In fact, the articles 181 and 182 come to determine the process by which the capital is distinguished. For instance, article 181 states clearly that any economic agent having business outside the country is considered as non-resident

and contrarily to this, the residence consideration of any agent is based on the establishment of his business inside the country. Instead of this, the law of 1990 allows the non-residents to transfer their capitals to Algeria in an attempt to finance any economic activity beyond the scope related specifically to the state or predetermined by a clear legal text. The aim of this flexibility in capital movement is to increase the employment rate and improve the level of the Algerian competencies as well as ensuring the stock exchange (article 183). A deep analysis of the law articles especially those concerned by the capital movement and the stock exchange implies that the authority paved the way for investment liberalization except the strategic sectors which the state holds the initiative to make projects and the flexibility of the capital movements. The latter issue may encourage to a large extent the economic growth and boost the efficiency magnitude.

III-7- Law of Investment and Investment Liberalization Policy 1993:

This law comes to consolidate the tenets of the previous and to set up a real and a strong investment platform capable to resolve the negative reflects of the Algerian economy at that period. The principle of the law 1993 is expressed explicitly by the article 03 in which the liberalization to undertake investment project is stated by respect the legal and the regulation system adopted. Instead of this respect, the investment projects must be declared and this step allows the investors to enjoy benefits, advantages and guarantees. As an example, the article 17 recapitulates the fields of privileges that the declared investments enjoy such as: exemption from property transfer tax for the real estates realized within the investment framework; the exemption of the real estate's properties used for establishing investment projects from the property and the exemption from the value added taxes for the goods integrated in the investment process. An examination of these privileges put forward the idea that the intent of the authorities at that time is to enhance the investment whether national or foreign and to create a favorable institution (Agency of Investment Development) accompanying the realization and the progress of these projects (article 07, 08, and 09)

III-8- Order № 01- 03 about the Investment Development 2001:

This order comes to set the rule applied on the national and foreign investments in productive activities and those established under privileges or licenses. It tends to emphasize the importance of the investment liberalization paradigm by granting extra- privileges. In this sense, the article 04 of this law had shown explicitly that establishment of investment is fully liberalized by taking into account the legislation as well as the regulation about the predetermined activities and those protecting the environment. Under these circumstances, the investments realized enjoy another favorable package of privileges and exemptions instead of what is mentioned by the previous law. As an example, the law 2001 advocates the application of reduced custom fees on the imported equipment used for making investment projects. This privilege is joined to another concerning the exemption from the value added taxes applied on goods and services integrated in the investment process (article 09).

In an attempt to encourage the foreign investment, the law of 2001 indicates that the foreign investors are treated by the same manner as the Algerian investors in terms of duties and rights (article 14), and any disturbance between the foreign investor and the Algerian state is resolved by the competent judicial authorities except the cases where the Algerian authority concludes agreements with the foreign part in terms of settlement and arbitration (article 17). In addition to the favorable incentives given to both the national and foreign investment, this legal document devotes an entire chapter to the institutions accompanying the investment process. These institutions are: the national council of investment (articles 18, 19, 20), the national agency for investment

development (articles 21, 22) and the one stop shop (article 23, 24, 25, 26 and 27). An examination of this legislation demonstrates that the authority wants to stimulate the investment whether national or foreign and this is the only way to boost growth and improve the living standards of the individuals.

III-9- Order № 06-08 Amending and Supplementing the Order of 01- 03, 2006:

As the heading suggests, this order is about supplementing such legal articles mentioned by the previous legal document. In this context, the intention of liberalizing and enhancing the investment as an engine of the economic growth remains the same. The article 4 for instance proclaims that the full liberalization to engage in investment projects is guaranteed, and this consideration is possible under the respect of the legislation and environment law. As a reward, the investments respecting the prescribed procedures (the legislation and the declaration requirement) enjoy a favorable package of incentives and guarantees. As an example of these incentives, the article 9 outlines the cases of exemptions, such as: exemption from the custom fees applied on the imported goods used in the investment projects, exemption from the value added taxes applied on the goods and services integrated in the investment process, the exemption from the property transfer fees applied on the investment real estates, exemption from the companies' profits taxes and the tax on the professional activity. This catalyst package tends to create environment for the investment as the core of any economic development.

III-10- Law № 16-09 about the Investment Development 2016:

This legal document treats the national and foreign investments established for producing goods and presenting services. The law of 2016 determines the meaning of the investment by two definite cases. The first case is about the purchase of assets for new investments or the expansion of the productive capacities while the second describes the participation in the companies' shareholding process (article 2). In addition to this, the law of 2016 emphasizes the respect issue of the legislation and the laws protecting environment and it indicates that liberalization of the investment defined by the law is then ensured (article 03). The prescribed types of investment defined by this law are also a subject of an incentive package. The latter is clearly described by eliciting the following different cases: exemption from the custom fees applied on the imported goods used in the investment process, exemption from the value added taxes applied on the investment goods and services, exemption from the property transfer fees applied on the investment real estates and the exemption for ten years from the real estate tax applied on the properties used for the investment projects. In addition to these incentives, the law of 2016 reveals the different guarantees provided to encourage the investment process. As an example, the guarantee to transfer capital already imported via the banking system under the respect of the ceiling determined by the total cost of the project (article 25). Moreover, in cases of a disturbance or a conflict between the foreign investor and the national authority, the competent judicial authority is the only institution responsible for resolving the problem except the case where the national authority concludes specific agreements (article 24). Furthermore, this legal document delineates the different responsibilities of the national agency for investment development as well as its different parts. According to the article 26 the national agency for investment development is responsible for the registration of investments, promote the investment inside Algerian and outside by a good communicative network, exploit and improve the investment opportunities in addition to the regional potentialities, facilitate the establishment and the accomplishment of the business projects. The authority assumed by this agency makes it a core institution to escort the evolution of the investment projects in Algeria.

In addition to the investment declaration as a condition to benefit from the incentive and guarantees package determined by law, the article 58 of the complementary law finance (2009) indicates that the foreign investments must to be declared. Moreover, it is stated the establishment of the foreign investment is no longer possible through the partnership paradigm only when the national participation accounts for at least 51% of the social capital. In this sense, the national participation encompasses different partners.

IV - Conclusion:

According the analysis presented above, it is clearly to argue that both the level and the scope of foreign direct investment in Algeria are still weak. This image is persistent despite the diversity of the opportunities and the sectors that could be considered as backbones for fruitful investments. The reason behind this failure in attracting more foreign investment refers to the obstacles that face the investors as well as the high level of corruption and the quality of the institutions that inhibit harshly the development initiatives. This picture is demonstrated much more by the positions occupied by Algeria in terms of Global Competitiveness. As a result of this, for the economy to enjoy a high capacity of attraction, it must fulfill two conditions: a clear economic ideology and good infrastructure and institutions. The former condition means that the host country should demonstrate an acceptance to the international investment as a way to boost the economic growth. This is got only by how far the ideology adopted in the economy is compatible with the characteristics of this kind of investment. The second condition is related to the institutions as good or bad incubators for the foreign investment. In this sense, improving the quality of these institutions to attract the investment becomes more than a duty.

V- Bibliography:

Official Journal of the state of Algeria №. 10 of December 28th, 1962

Official Journal of the State of Algeria №. 30 of April 10th, 1962

Official Journal of the State of Algeria №.29 of May 10th, 1963

Official Journal of the State of Algeria №.53 of August 2nd, 1963

Official Journal of the State of Algeria №.66 of August 14th, 1964

Official Journal of the State of Algeria №.51 of June 14th, 1966

Official Journal of the State of Algeria №.80 of September 17th, 1966

Official Journal of the State of Algeria №.110 of December 30th, 1966

Official Journal of the State of Algeria №.40 of May 16th, 1967

Official Journal of the State of Algeria №.82 of October 6th, 1967

Official Journal of the State of Algeria №. 109 of December 31th, 1970

Official Journal of the State of Algeria №.34 of August 24th, 1982

Official Journal of the State of Algeria №.34 of August 20th, 1986

Official Journal of the State of Algeria №. 35 of August 27th, 1986

Official Journal of the State of Algeria №.2 of January 13th, 1988

Official Journal of the State of Algeria №. 28 of July 13th, 1988

Official Journal of the State of Algeria №. 16 of April 18th, 1990

Official Journal of the State of Algeria №. 64 of October 10th, 1993

Official Journal of the State of Algeria №.14 of February 28th, 2001

Official Journal of the State of Algeria №. 47of August 22nd, 2001

Official Journal of the State of Algeria №. 52 of August 27th, 2003

Official Journal of the State of Algeria №. 47of July 19th, 2006

Official Journal of the State of Algeria №. 64 of October 11th, 2006

Official Journal of the State of Algeria №. 46 of August 3rd, 2016