

# **PROMOTING INVESTMENT IN THE NON- HYDROCARBON SECTOR AS A MEANS TO ACHIEVE ECONOMIC DIVERSIFICATION**

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## **Abstract:**

The hydrocarbon and the oil sector, in particular, constitutes the main component of the Algerian economy. However, with the emergence of the crisis and the negative effects resulting from the sharp drop in oil prices in global markets, have prompted the Algerian legislator, in an attempt to revive the national economy, to amend the constitution and search for alternatives, the most important of which was to enhance investment through providing for its freedom and its environment control. This has led to the emergence of an investment legislative trend to achieve economic diversification, as Algeria has enacted a number of laws related to investment promotion by granting many incentives and guarantees for investors in order to promote the investment sector and the domestic economy.

**Keywords:** guarantees, incentives, diversification, investment alternatives.

**المخلص:** يشكل قطاع المحروقات والنفط بصفة خاصة المكون الأساسي للاقتصاد الجزائري، بيد ان الازمة الاقتصادية والآثار السلبية التي نجمت عنها إضافة الى انخفاض أسعاره في الأسواق العالمية انخفاضا ملموسا دفعت بالمشروع في محاولة منه لإنعاش الاقتصاد الوطني، الى تعديل الدستور والبحث عن بدائل اهمها الإستثمار بالنص

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## Promoting investment in the non-hydrocarbon sector as a means to achieve economic diversification

على حريته وضبط مناخه مما نتج عنه بروز توجه تشريعي استثماري لتحقيق التنويع الاقتصادي، حيث سنت الجزائر جملة من القوانين المتعلقة بترقية الاستثمار بمنح عديد الحوافز والضمانات والاعفاءات للمستثمرين بغية النهوض بالقطاع الاستثماري والاقتصاد الوطني.

**الكلمات المفتاحية:** الضمانات، الحوافز، التنويع، الاستثمار، البدائل.

### Introduction:

The issue of economic diversification, including investment in non- hydrocarbon sector, is an important topic if we take into account that the economies of many countries primarily depend on a single product, and Algeria is one of them as it depends heavily on oil revenues in its exports as well as for its budget<sup>1</sup> financing.

Indeed, any imbalance in fuel prices is deemed to affect the domestic economy<sup>2</sup>. This is what has prompted the State to seek to diversify its economy through providing an appropriate investment climate regulated by a consistent and constitutionally sound Act, in addition to the laws regulating trade companies including finance, banking and tax laws<sup>3</sup>.

The Algerian government has also adopted, since the oil crisis of 1986, a number of economic and legal reforms aimed at reaching economic autonomy and getting out of dependency on the hydrocarbon sector, by relying on stimulating foreign and national investments through various advantages and guarantees, as well as the involvement of several

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<sup>1</sup> Yanis Ainas, Nacer Ouarem, Saïd Souam, Hydrocarbons: An Asset or an Impediment to Algerian Development? In Revue Tiers Monde Volume 210, Issue 2, 2012,p1.

<sup>2</sup>DHAIF Ahmed, Ahmed Azzouz (2018). “*waqie altanwie alaiqtisadii fi aljazayir waliat tafeileah lithaqiq tanmia aliqtisadia mustadima*” (**The reality of economic diversification in Algeria and the mechanism for activating it to achieve sustainable economic development**) Journal of North African Economics: Issue 14, N° 19, P. 21.

<sup>3</sup>BOUGUERCH, Hajira (2013). “*Altahfizat aljibayiya lilitithmarat al'ajnnabia fi aljazayir*” (**Tax incentives for foreign investments in Algeria**). University of Algiers1: Faculty of Law, PhD thesis, p. 83.

sectors in this investment process. The State has also encouraged investment in the agricultural and tourism sector, in order to exploit the natural resources of the country in such a way to achieve the desired trend and objective with a view of activating economic diversification in the non- hydrocarbon sector. The question raised is : has Algeria succeeded in its plan to activate investment as an alternative to oil, and to what extent has it achieved the desired economic diversification?. We have sought to answer these questions in this article by addressing the incentives for investment in the non- hydrocarbon sector in the first section, Then the legal guarantees to encourage this type of investment to reach economic diversification in the second section, following in all, a descriptive approach for the description of the investment process – related phenomenon then, an analytical approach aiming at the study of several investment- related legal texts on a basis of a comparative approach.

### **Section I: Incentives for investment in the non-hydrocarbon sector**

Law No. 16-09<sup>1</sup> relating to investment is the latest legislative move to promote investment in non- hydrocarbon sector, which was issued simultaneously with economic reforms aimed at changing the growth pattern within the framework of the economic diversification policy pursued by the government<sup>2</sup>, This has included some facilities and tax privileges granted to institutions in order to diversify their activity<sup>3</sup>. Section one of this research will address the blacklisting of failing firms which

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<sup>1</sup>Law No16/01 of March 1, 2016, containing the constitutional amendment, Algerian Official Gazette No. 14 of March07,2016,for more see :Presidential Decree n 20/442 of December 30, 2020 containing the constitutional amendment, Algerian Official Gazette No. 82

<sup>2</sup> LABDI, Kheira ; MEZIANI, Mohamed (2017). “al'iitar alqanuni lilistithmar bi al jazayar, qitae almahruqat namudhajan” (*The legal framework for investment in Algeria, the hydrocarbon sector as a model*) Journal of Real Estate Law and the Environment, Issue 9, p. 17.

<sup>3</sup>LEMOUCHI ,Zahia (2018). “al'iimtiizat aljibayiya kamadkhal litahqiq altanwie al'iintajii bi al jazayar” (*Fiscal privileges as an entrance to achieve productive diversification in Algeria*). Scientific Journal of the University of Algiers 3: Issue 11, p. 1.

are excluded from benefiting from investment incentives. Then, we will discuss in the second section, the advantages provided for in favor of investors based abroad to encourage them to invest in Algeria, and, ultimately, we will discuss the role and the effectiveness of this incentive mechanism in fostering the national economy<sup>1</sup>.

### **1- Black lists excluded from the investment incentive scheme**

The investment aims to attract the largest number of foreign and national investors<sup>2</sup>, in order to ensure a favorable investment environment in which the investor evolves with full trust and confidence and reassurance regarding his invested funds. Through the experiences of economies undergoing economic transformation<sup>3</sup>, it was confirmed that removing obstacles from the tax system is more important than expanding exemptions to attract investment. <sup>4</sup>Taxes are one of the most important components of the investment environment, especially since the investor prefers investing in the host country, which gives him tax privileges<sup>5</sup>.

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<sup>1</sup> Cecilia Camporeale, Roberto Del Ciello and Mario Jorizzo, Beyond the Hydrocarbon Economy: The Case of Algeria, Available from: <https://www.intechopen.com › chapt.>

<sup>2</sup> MOSTEFAOUI, Hadjer . “siasat jadhb al istithmar wa madaa najahiha fi 'itaar tabany al dawla al jazayiria likhiar altanwie al iqtisadii” (*the policy of attracting investment and its success in the context of the Algerian state's adoption of the option of economic diversification*). Faculty of Law: National Forum on legal mechanisms to activate economic diversification in Algeria.

<sup>3</sup> KSSOURI, Rafika (2011). “al nizam alqanunii lil istithmar al'ajnaabii fi alduwal alnaamiat” (*The legal system of Foreign Investment in developing countries*). University of Batna: Faculty of Law, PhD thesis, p. 5.

<sup>4</sup> ABDESSALEM ,Reda (2002). “muhadidat al istithmar al'ajnaabii easr aleawlama, dirassa maqarina litajarib sharq wa janub sharq asia wa amrika al laatinia mae altatbiq ealaa misr” (*Determinants of foreign investment in the age of globalization, Comparative study of the experiences of East and Southeast Asia and Latin America with application to Egypt*). Mansoura University: Thesis, p. 320.

<sup>5</sup> KESSAB, Amina (2015). “athar al munafasat aldaribia ealaa tadafuqat al istithmar al'ajnaabii almubaashir ladaa dual almaghrib al arabii khilal alfatra 1999/2012” (The impact of tax competition on foreign direct investment flows in the Maghreb countries during the period 1999/2012. University of Algiers 1: PhD Thesis, p. 63.

With reference to Law No. 16-09 related to investment promotion, we find that the legislator has worked on defining a list of excluded activities dealt with in subsection one, and excluded goods and services enumerated under the second subsection . Accordingly, these activities, goods and services do not benefit from the advantages granted to the investor under Executive Decree 17-101<sup>1</sup>.

### **1-1- businesses excluded**

These businesses are listed in article 4, appendix I of decree 17-101, which are carried out under a tax regime other than the real profit regime and these are activities not subject to registration in the commercial register. In addition, the businesses excluded from the advantages are those which fall outside the scope of the special law 16-09 relating to the promotion of investments and which are not entitled to benefit from the advantages provided for by a legislative or a regulatory text, as well as businesses that have their own benefit scheme.

### **1-2- Goods and Services Excluded**

All goods subject to the financial accounting system, other than those included in the fixed asset accounts, are excluded, except for the exceptions provided for in the aforementioned decree as well as the goods under fixed asset accounts' chapter listed in the second appendix of said decree, unless they constitute an essential element for carrying out the business (Article 5 of aforementioned Executive Decree No. 17- 101)<sup>2</sup>.

Refurbished supplying goods, including refurbished production units, under Legislative Decree No. 93-18 bearing the Finance Law for the fiscal year 1994<sup>3</sup>, are also excluded from the

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<sup>1</sup>Algerian Official Journal ( 2016), Issue 46.

<sup>2</sup> Executive Decree No. 17/101, dated March 5, 2017, specifying the negative lists and the minimum amounts to benefit from the benefits and the modalities of applying the benefits to various types of investments, Algerian Official Gazette, No. 61, dated March 8, 2017.

<sup>3</sup>Legislative Decree No. 93-18 of December 30, 1993, which includes the Finance Law of 1994.

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advantages, except for land and real estate<sup>1</sup>, as well as goods resulting from existing investments, while Imported Supply goods benefit from the investment advantages, if they are not listed among excluded items stipulated in Article 5 of the Decree. Also excluded are renewed assets which constitute foreign shares in kind entering into the process of transferring businesses from abroad without prejudice to the legislation determining the age of the assets when they are recovered, in addition to assets released for consumption after exercise of the purchase option within the framework of the international rental credit, provided that these goods have entered the national territory in new condition.

As for the transfer of activity from abroad, it is the process of recovering a group of goods considered as a necessary basis for the exercise of a business that can benefit from the advantages and their release for consumption according to the terms provided by the decree. The legislator has excluded from the procedure provided for in Article 6 (1) goods imported individually.

When comparing the list of excluded goods mentioned in Decree No. 07-08, which has been repealed, the scope of the extension of the current text for the businesses excluded from the benefit of the advantages, in particular in the field of services, it appears clearly, that the number of such businesses under the previous text was only 64 and this number has doubled in the current text to reach 174 businesses, which means that many activities were excluded.

### **2-Advantages granted to attract investors**

The legislator has divided these advantages into types according to Law No. 16-09, as follows:

#### **2-1-General advantages:**

Are all the advantages common to all usable investments mentioned in article 12 of law 16-09 granted to all investments

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<sup>1</sup> Giacomo Luciani,unsustainable but why? Economic diversification in the MENA, OXFORD ENERGY FORUM ,JUNE 2019: ISSUE 118 Available from:<https://www.oxfordenergy.org/wpcms/wpcontent/uploads/2019/06/OEF-118.pdf>.

except those classified in the black lists, where all investments benefit from the advantages resulting in two stages<sup>1</sup>.

**A- Completion stage:** It includes a number of exemptions, including exemptions in customs and tax rights, such as exemption from the value-added fee in relation to imported or locally<sup>2</sup> acquired goods and services that directly enter into the achievement of the investment, and exemption for a period of ten years from real estate fee on real estate properties, which are included in the investment framework starting from the date of acquisition and others, and the legislator has also linked benefiting from these incentives and advantages to registering with the National Investment Development Agency and obtaining a registration certificate that allows investor to obtain the advantages that he is entitled to with the concerned departments, provided that the actual consumption of the achievement advantages related to the registered investment is subject to registration in the commercial registry, possession of the tax identification number, and submission to the real tax system (Article 9 of aforementioned Law No. 16-09).

**B-Operating Stage:** based on a report prepared by the tax authorities, the project is inspected at the request of the investor for a period of three years, during which he benefits from exemption from tax on corporate profits, exemption from fees on professional activity, in addition to a 21 percent reduction in the annual rental royalty amount determined by the state property authorities<sup>3</sup>, and for this purpose, the legislator has set a period of 3 years to benefit from these tax exemptions to encourage foreign investments at the beginning, provided that the investor is then subject to the actual taxation regime if his investment is not classified among the investments of special

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<sup>1</sup> ZERROUK, Youcef ; REGGAB, Abdelkader (a) “damanat wa hawafiz al istithmar al'ajnnabii fi al jazayir wifq alqanun 09-16” (*Guarantees and Incentives for Foreign Investment in Algeria According to Law 09-16*). Journal of Legal and Social Sciences: Issue 8, p. 108.

<sup>2</sup> ZERROUK, Youcef ; REGGAB, Abdelkader. (b)

<sup>3</sup> BOUSSOUFA, Zahra (2019). “al istithmar fi 'iitar alnashatat al iqtisadia al muqanana” (*Investment in the Framework of regulated economic activities*). University of Algiers 1: Faculty of Law, PhD thesis p. 250.

importance that are entitled to receive additional advantages under the investment law<sup>1</sup>.

## **2-2-Special advantages:**

It is a system specific to some investments only, due to their special nature, which the legislator has singled out for additional advantages in Article 13 of the Investment Law, namely:

### **A-The investments achieved in the southern regions and regions that require a special contribution from the state.**

These are all projects that receive support from the state and are undertaken by the National Investment Fund, which is managed by the National Investment Development Agency, such as investing in a tough desert or mountainous areas. The advantages are also divided in this area into two phases:

**A-Completion stage:** In addition to the general advantages mentioned above, investments in this stage benefit from advantages related to the expenditures of the necessary basic facilities, and from a reduction in the amount of the annual rental fee determined by the state property authorities under the title of the land survey through the privilege for the achievement of investment projects over 10 years, if these projects are established in the high hills or areas that require a special contribution from the State, for a period of 15 years and the investments be established in the south, provided that the annual rental fee raises to 50% of the royalty amount after this period.

**B-Operating stage:** The legislator has specified the exemption period from 3 to 10 years for these investments regarding the exemption from tax on corporate profits and exemption from fees on professional activity, provided that these benefits become effective from the effective operating date shown in the inspection report prepared by the competent tax authorities at the request of the investor.

### **B- Concessional investments and/or job- inducing**

Tourism, industrial and agricultural activities can benefit from the mentioned advantages in addition to fiscal and financial incentives, and the investor also benefits from the best

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<sup>1</sup>ZERROUK, Youcef ; REGGAB, Abdelkader. (c) , p.110.

incentives in the event that the advantages are of the same nature, whether under the applicable legislation or in accordance with the investment law, and the investments that create more than 100 permanent jobs for the first period of investment registration to the end of the first year from the beginning of the operating stage, benefit from, for a period of 5 years from tax on corporate profits exemption and for a period of 5 years from the fee on professional activity<sup>1</sup> exemption.

### **3- Exceptional advantages for important investments for the national economy**

The exceptional advantages for the benefit of investments of particular importance for the national economy were mentioned in the fourth section of chapter two, which linked them to the condition of concluding an investment agreement negotiated between the investor and the National Agency for the Development of Investments after the approval of the National Investment Council, as stipulated in article 17 of the Investment Law 16-09 in its third paragraph, on the qualification criteria for investments with a particular importance for the national economy. The Regulations governing the terms and content of the processing of the file for the request to benefit from the exceptional advantages have not yet been published, the regulatory texts of Ordinance 01-03 remain in force until the publication of the new regulatory decrees. .

It appears that the time between the promulgation of the Investment Law n°16-09 and the promulgation of the regulatory texts is very long, some implementing texts relating thereto have been published, namely the decrees 17-100 to 17-105, However, no other regulations were enacted, knowing that most of the provisions of Law 16-09 referred to a regulation, which made it difficult to implement the new law<sup>2</sup>.

Among the exceptional advantages granted to these investments are the expansion of the period of exemption from tax on corporate profits and fees on professional activity for a period of

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<sup>1</sup>ZERROUK, Youcef ; REGGAB, Abdelkader. (d) , p.111.

<sup>2</sup> BOUSSOUFA, Zahra (b): pp. 253-254.

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up to 10 years, in addition to the advantages mentioned in Article 18 of the Investment Law<sup>1</sup>.

### 2-3- The role of incentives in advancing national economic development

It is undeniable that national and foreign investment is one of the most important pillars of economic development, as it contributes to increasing job opportunities, training workers and providing them with skills and competencies to assimilate modern production techniques, transfer technology and improve the balance of payments by increasing exports. This can only be achieved if the State is able to provide the most appropriate guidance for it and is able to assess its economic benefits, draw up an appropriate policy, and create a suitable climate for it by designing a legislative framework that ensures maximizing the benefit from the advantages<sup>2</sup>.

Algeria has made great efforts in creating and providing the investment environment by issuing a number of laws and providing attractive tax incentives<sup>3</sup>, as the fiscal stimulus policy seeks to achieve various goals that benefit the national economy and society, which can be summarized as follows:

**A-Economic objectives,** Providing an appropriate and incentive investment environment makes it possible to increase local and foreign investments, to double the competitiveness of local institutions on foreign markets by exempting exported products from a set of local taxes and to encourage exports in the non-hydrocarbon sector by exempting them from all taxes. , which

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<sup>1</sup>GUILLERMO José García Sanchez, The hydrocarbon industry.s Challenge to international investment law, a critical approach, Harvard International Law Journal, Vol. 57 Legal Studies, Research Paper Series, Number 2, Spring 2016.

<sup>2</sup>AYACHE, Zoubir; ABABSA, Soumaya (2015). "dawr alhawafiz aldaribia fi jadhb al istithmar al'ajnbii al mubaashir fi al jazayir" (**The role of tax incentives in attracting foreign direct investment in Algeria**). Journal of Financial and Accounting Studies: Issue 4, p. 1.

<sup>3</sup> DJEBBARI , Chawki (2015). "mutatalabat tahsin munakh alaitithmar al'ajnbii almubashir fi aljazayir" (**Requirements for improving the climate of Foreign Direct Investment in Algeria**). Journal of Economic and Financial Studies: Issue 8, p. 1

leads to a broadening of the tax base In the long term, in the perspective of an effective and appropriate tax relief policy, because this policy would increase the productive branches and the level of their activity, and this increase corresponds to the expansion of the tax base and the number of taxpayers, which leads to an increase in its revenues and consequently, an increase in the revenues of the public treasury. This tax policy also achieves a balance of investments in terms of activity, by directing it towards priority activities for political development, which means achieving a balance of investments in all sectors.

In the light of the foregoing, the purpose of this new policy aims at reducing the tax burden so that economic institutions can be able to self-finance and build- up their capital<sup>1</sup>.

**b- Social goals,** Tax benefits provide financial resources that allow economic agents to reinvest them in the form of other productive branches or to create small businesses while trying to balance investments internally by directing some of them towards remote areas for development and promotion purposes.

Algeria did not stop there, but has rather sought to provide guarantees in order to offer a comfortable climate for investment, thus gaining independence from the only sector on which it has always relied economically, which is the subject of the next section below.

## **Section II: Investment guarantees for the non- hydrocarbon sector**

### **1-Legal guarantees:**

The second part of the incentives approved by the legislator with a view to achieving an investment climate, which make it possible to activate economic diversification, are the guarantees granted to investors, so that all investments covered by the law on investments in Algeria benefit from protection and a guarantee throughout the national territory<sup>2</sup>. These guarantees

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<sup>1</sup> TIOUA, Abdelouahab (2017). “athar al tahfizat aljibayiya ealaa al istithmar alsinaei” (*The impact of tax incentives on industrial investment*). University of Algiers 3: Master Thesis, Faculty of Economics, Commercial Sciences and Management Sciences, p. 61.

<sup>2</sup>ABD EL GHAFOR, Moad (2019). “qanun al istithmarat wal muassasa al khasa” (*Law of investments and the private enterprise*). University of Algiers1 : Faculty of Law, PhD thesis,p. 260.

consist of the following: equal treatment of national and foreign investors, ensuring legislative stability, as well as guaranteeing the protection of the investor's real estate assets and ensuring the transfer of capital abroad.

### **1-1- Equal treatment between national and foreign investors**

The text of Article 21 of the Investment Law refers to the provisions of the bilateral<sup>1</sup>, regional and multilateral agreements, which may prompt the State to grant additional privileges or guarantees to an investor, whether physical or moral and whether he holds the nationality of a Member State , party of said agreements with Algeria. This is dictated by the provisions of international public law in international conventions and treaties, and in this respect, a distinction shall be made between discrimination of treatment and difference of treatment, because the State receiving foreign capital reserves the right to accord special treatment to an investor without intending to distinguish it from other investors, in order to achieve its economic objectives and interests, and because the receiving State tries to direct economic businesses according to its development objectives and priorities. So, for this reason, it sometimes takes discriminatory measures in order to control and direct the activities of foreign investors, for considerations related to the interest of the State as well as to the capacities of the national economy, which constitutes an exception to the principle of applying equality to foreign investors, because it is possible for Algeria to conclude an international agreement with a country or several countries to grant additional mutual benefits for its investors<sup>2</sup>.

### **1-2- Ensuring Legislative Stability**

This is stipulated in Article 22 of Law 16-09, which includes the inability to apply henceforth ,revisions or cancellations to investments made within the framework of a particular law.

The above-mentioned article protects investors from changes in the Algerian legislation related to investment, and from this, the

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<sup>1</sup>AMIROUCHE, Fethi (2017). Al itar al qanuni lilistithmar fi dhil alamr 16/09” (*The Legal Framework for Investment under Order 16-09*). Algerian Journal of Legal and Political Sciences: Volume 57, Issue 2.p 537.

<sup>2</sup> ZERROUK, Youcef ; REGGAB ,Abdelkader (c): P.102.

principle of legislative stability is based on the idea of the stability of the legal system, and on the state's commitment not to change the framework of its legislation under which the investment was completed. So, if the State reserves its sovereign right to amend or cancel any law, if necessary, to keep pace with economic developments, or to meet its economic needs, the investor will enjoy, according to the principle of non-retroactivity of laws, an acquired right to be subject to the legislation in force in order to complete his investment project<sup>1</sup>, and this is what was confirmed by the legislator in the Investment Law 16-09, where he recognized under Article 35 of it, the right of the investor to retain his acquired rights under the legislation prior to the issuance of the law<sup>2</sup>. However, this guarantee includes an important exception based on the investor's explicit request to apply the new law if he considers that the new provisions adopted by the State are more compatible with his investment policy that serves his interests. This is considered another guarantee in the interest of the investor through which he can benefit from the new law in addition to benefiting from the guarantee of the non-retroactivity of laws<sup>3</sup>, given that he enjoys an additional incentive guarantee that makes him free to choose the appropriate law for his investment project<sup>4</sup>.

The investor may stipulate in the investment contract a legislative<sup>5</sup> freezing clause in order to maintain a balance in the contractual relationship by freezing the legislative and regulatory framework in which this contract will be implemented and by not freezing the content of the agreement<sup>6</sup>,

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<sup>1</sup> ABD EL GHAFOR, Moad (b): P.100.

<sup>2</sup> HASSAINI, Lamia (2017). "mabda'e eadam al tamyiz bayn al istithmarat fi al qanun al jazayirii" (*The principle of non-discrimination between investments in Algerian law*). Bejaia University: Faculty of Law and Political Sciences, PhD thesis, p. 101.

<sup>3</sup> OUALI, Nadia (2015). "al nizam al qanunii al jazayirii lil istithmar wa madaa faealiatuhu fi istiqtab al istithmarat al' ajnabia" (*The Algerian legal system for investment and its effectiveness in attracting foreign investments*). Algeria : Mouloud Mammeri University, Faculty of Law Doctoral thesis, p. 226.

<sup>4</sup> HASSAINI, Lamia (b) : P.103.

<sup>5</sup> KSSOURI, Rafika (b) : P.191.

<sup>6</sup> AIBOUT, Mohand Ouali (b) : P.128.

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while avoiding the impact of changes in the law applicable to the contractual relationship that the State makes to achieve its economic development objectives and keep pace with its developments in various fields, in order to avoid surprising the investor, in particular foreign investors, with possible conflicts due to legislative changes<sup>1</sup>.

In addition to the above, legislative stability requires the fulfillment of two conditions, namely: not making many changes to the national investment law, by increasing, decreasing or canceling some of its items, on the one hand, and ensuring the consistency of legal texts to avoid conflicts, on the other.

The transparency and clarity of the laws, the stability of their rules and their compilation in a single law is an important element in gaining investor trust. Consequently, legal certainty is considered one of the most important components of the modern state based on the stability of existing legal systems without the investor being exposed to sudden behaviors likely to destroy his legitimate expectations. and destabilize his legal status<sup>2</sup>.

### **1-3- Protection of the investor's real estate ownership and the transfer of capital abroad**

The ownership of the investment is one of the most important issues for investors, especially the foreign investor, who pays it a great importance when choosing a place and making the decision to invest in a particular country.

The investor, especially the foreigner, always focuses on the effectiveness of the guarantees and protection provided by this country regarding property ownership, and any breach in there may make him cancel his decision to invest, regardless of the profit opportunities. Compensation is an essential element because expropriation without compensation is considered a

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<sup>1</sup> MOSTEFAOUI, Hadjer (b) : pp. 8-9

<sup>2</sup>BOUDJELTI, Azeddine (2017). “*aliaat airtibat munakh alaistithmar bialamin alqanuni*”. (*The Mechanisms of the Investment Climate Link to Legal Security*). University of Algiers 1: Faculty of Law, Study Day on Legal Security in Algeria, December 5<sup>th</sup>.

seizure. Expropriation can be defined as “a procedure taken by State bodies according to which private property is transferred to public property in exchange for compensation.” The decision to expropriate property is considered among the political procedures taken by the public authority within the limits of its regional jurisdiction in order to achieve the public interest, so that it does not affect the principle of individual ownership and does not prevent the exercise of the right to property<sup>1</sup>.

Like all other countries in the world, Algeria has established the principle of compensation in the event of deprivation or restriction of the property of the investor, whether in its internal legislation or by international agreements. It has concluded with its economic partners in order to promote mutual protection. The Algerian constitution of 2016 includes provisions aimed at protecting private property and therefore imposing restrictions on the public powers of the State in the event that they are exposed to the property of persons, by the need to fulfill the condition of interest public that demands expropriation, as well as the availability of the formal condition represented by the issuance of the expropriation decision by the competent authority in exchange for fair and equitable compensation<sup>2</sup>.

The legislator has also developed more than this before the last amendment to the constitution, since the latter stipulated that compensation should be anticipated, while the current amendment deleted the term "anticipated" and returned its quality to the legislation in force in matters of expropriation, therefore, compensation is the normal form of repair for the damage resulting from the expropriation and shall be fair and just<sup>3</sup>. This was enacted by Law No. 11-11, amended and supplemented in Article 21/2 thereof, relating to expropriation for public utility, by which the State has the right to requisition

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<sup>1</sup> AIBOUT, Mohand Ouali (b): P.267.

<sup>2</sup>LEBBIK, Chawki. “damanat jadhb al istithmar al'ajnbii lil jazayir ealaa daw'alqanun 16/09 almutaaliq bitarqiat al istithmar” (*Guarantees of Attracting Foreign Investment to Algeria in the Light of Law 16-09 relating to Investment Promotion*). Journal of Legal Studies and Research Issue8,246

<sup>3</sup>MABROUK, Abdenmour (2018). “damanat al istithmar al'ajnbii fi al tashrie al jazayirii” (*Foreign Investment Guarantees in Algerian Legislation*). Journal of Economics, Management and Commercial Sciences: Issue 2, pp. 292-306.

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properties but on the other hand, it is obliged, in accordance with domestic and international law, to repair the damage caused to the foreign investor by reason of his deprivation, direct or indirect, of his money invested in the State<sup>1</sup>.

To conclude with, the legislator has completely abolished the term administrative expropriation, which was mentioned in the investment development law 01-03, although it provided for compensation in return, but confiscation is an arbitrary punishment by the State through seizing the properties of the foreign investor without compensation, which was a constitutive obstacle to foreign investment in Algeria, because it is unreasonable for the investor to invest his money and carry out his project of investment to end up to end up seeing his property seized by the State for free.

As for the guarantee of the capital transfer abroad, this is considered a right. It can be considered as one of the most important guarantees provided by the host country to the investor, and it is a prerequisite for attracting foreign capital. This right is endorsed by Decree 93-12, then Ordinance 01-03, and enacted by Ordinance 11-03 relating to Money and Credit Law, as amended.

Finally, it is clear that Law 16-09 on the promotion of investments is the most encouraging for this guarantee<sup>2</sup>.

As for the terms and conditions of retrocession, they were fixed by the regulation 05-03 of the Bank of Algeria of June 6, 2005 relating to foreign investments. The invested capital and the product resulting from investments made from capital shares in the form of shares in cash imported through the banking channel

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<sup>1</sup>MESSABIH, Fatima (2016). "aham al damanat al tashrieia lil istithmar al'ajnbii fi majal nazea almiikia wal takhfif min al aebae al daribi" (***The most important legislative guarantees for foreign investment in the field of expropriation and reducing the tax burden***). Journal of Algerian Public and Comparative Law: Issue 3, p. 27.

<sup>2</sup>BOUSSOUFA, Zahra (2017). "al damanat al malia al mamnuha lil mustathimiri al'ajnbii" (Financial guarantees granted to the foreign investor). Algerian Journal of Legal and Political Sciences:, Issue 3, N° 54, p. 578.

and denominated in freely convertible currency, are regularly listed by the Bank of Algeria and sold in favor of the investor <sup>1</sup>.

As for these shares whether in cash or in kind, it is stipulated, that their value be equal to or greater than minimum limits which are determined according to the total cost of the project, which means that the legislator limits the guarantee of the retrocession of the capital, in the sense of law's infringement if the capital contribution intended for the investment is worth less than the set limits. The specified minimum is not transferable abroad, in accordance with Article 16 of Executive Order 17-101, and this provision has also been extended in this law to guarantee the transfer of the actions in kind carried out.

Indeed, paragraph 3 of article 25 specifies the application of the transfer guarantee as well as the minimum ceilings mentioned in the first paragraph above, on actions in kind carried out according to the forms provided for by the legislation in force, provided that such shares are of external origin and subject to valuation in accordance with the rules and procedures governing the incorporation of companies<sup>2</sup>.

It seems that the legislator has adapted the reinvestment of capital, interest and dividends, which are declared convertible into foreign investment, i.e. accepting the income resulting from the initial capital of the investor as foreign shares from which foreign investment can be made. In addition to the actual net income resulting from the disposal in the event of realization or liquidation of the investments of foreign origin, even if it exceeds the funds invested at the outset. From here, it becomes clear that this factor is also very important in encouraging foreign investment, and we can see that this guarantee granted foreign investors the freedom to transfer capital, and the net real income resulting from it within the limit of the initial cost of the

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<sup>1</sup> RAHMOUNI, Abderezzak; OUALI, Abdellatif (2010). "daman tahwil ruuws al'amwal almustathmara fi al jazayir lil kharij" (Ensuring the Transfer Abroad of the Capital Invested in Algeria). Journal of Professor Researcher (Majallat al ustad al bahit) for Political Legal Studies: Issue 10, pp. 283-282.

<sup>2</sup>RAHMOUNI, Abderezzak; and OUALI, Abdellatif (b): p 283.

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sale or liquidation, even if it exceeds the original value of the investment. In return, the organization of all these financial operations is entrusted to the Bank of Algeria, which oversees this process and grants a license to do so in accordance with the requirements of the State financial policy regulations<sup>1</sup>.

### **2-Judicial guarantees**

The legislator has provided for both judicial and legal guarantees, intended to settle disputes granted to investors and relating mainly to the means that can be implemented to settle disputes that may arise between them and the host country due to the special nature of investment disputes.

In order to examine these guarantees, we will review each of the guarantees of recourse to national justice, in section one, and then discuss in the second section the possibility of resorting to arbitration to settle investment disputes.

#### **2-1- Guarantee of resorting to the national judiciary**

The right to resort to the judiciary to seek protection is one of the principles enshrined in states for their nationals, including Algeria, which seeks to preserve their right to settle disputes that occur between the host country and investors in accordance with the principle of national sovereignty, and it is a right guaranteed in the Constitution and the Civil and Administrative Procedures Code.

Referring to Law No. 16-09, the first to hear disputes in the first instance is the national judicial power, which is part of the general rule in matters of judicial competence pursuant to article 41 of the law on civil and administrative procedures, and it also extended the jurisdiction of national justice to obligations arising outside Algerian territory when one of the parties is Algerian in accordance with the provisions of article 42 of the code of civil and administrative procedure , which demonstrates the adherence of the State to the principle of national sovereignty over its territory by applying Algerian law through

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<sup>1</sup> BOUDJELTI, Azzedine (b).

national justicial institution to any obligation binding one foreign party and to all obligations created by the Algerian citizens even if these obligations are concluded outside the national territory without leaving any prejudice to its sovereignty. The explicit position of the State has been set out in the text of article 24 of the above-mentioned law 16-09. This text makes of the Algerian judicial authorities the original and competent body to resolve all investment disputes that may arise between the foreign investor and the State represented by its various institutions.

Extrapolation of the reality indicates that the foreign investor prefers to resort to private arbitration, which the parties usually resort to on the basis of a special agreement between the State and the foreign investor, which includes the condition of conciliation and private arbitration or international arbitration in the event of a dispute or the possibility for the parties to resort after the dispute, to private arbitration and this is what we will explain below<sup>1</sup>.

## **2-2- Guarantee of the possibility of resorting to arbitration to settle investment disputes**

Often, the investor, especially the foreigner, prefers to resort to arbitration<sup>2</sup> to get rid of the restrictions that exist in the legal systems of the different countries, provided that the disputes are settled with the least possible publicity and publication and to reduce the problem of conflict of interest between different laws<sup>3</sup>.

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<sup>1</sup>OUENNOUGH, Nabil (2017). “waqie al damanat al qanunia al muqarara lil iastithmar fi al tashrie al jazayirii” (***The reality of legal guarantees for investment in Algerian legislation***). Research Journal: Issue 11, pp. 228-229.. 228

<sup>2</sup>Kathryn Gordon, investment guarantees and political risk insurance: institutions, incentives and development OECD investment policy perspectives 2008 – ISBN 978-92-64-05683-1 – © OECD 2008, p102.

<sup>3</sup>FTISSI, Shamama (2018). “aldamanat al qadayiya li taswiat munazaeat al istithmar fi zili al qanun al jazayiri” (***Judicial Guarantees for the Settlement of Investment Disputes under Algerian Law***). The Academic Journal of Legal and Political Research: Issue 4, p. 339.

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As for Algeria, it has refused international arbitration because it is contrary to the requirements of national sovereignty. Consequently, the disputes were submitted to the jurisdiction of the national courts, within the framework of the provisions and rules of domestic law. Despite this, public institutions have agreed to include the arbitration clause in contracts concluded with foreign economic operators, despite the absence of any legal text allowing recourse to international arbitration in its relations with foreign countries. However, after the initiation of economic reforms, the position of the Algerian legislator changed concerning international arbitration, which became a means of attracting foreign investment. So, he had to devote it to domestic law after being convinced of its effectiveness in the field of dispute settlement, particularly in the field of international trade, starting with Law 12-93 relating to investment, and ending with Law 16-09, which provides for investment arbitration in article 24 thereof.

When resorting to arbitration, the Algerian legislator requires the availability of an arbitration agreement, as well as the link between reconciliation and arbitration, although reconciliation is a friendly and non-binding means of resolving disputes, it precedes arbitration. Arbitration is viewed by most people interested in legal affairs as a special way of resolving disputes away from ordinary litigation, and the parties' recourse to arbitration shall be subject to a prior agreement between them, so that the arbitration agreement may be included as a condition in the provisions of the investment contract or in an agreement independent of the investment contract.

In the same context, the legislator dealt with the terms of implementation of the arbitration agreement by the president of the competent regional court in the country or of a foreign enforcement court abroad, all with the aim of providing more guarantees to foreign investors, and regulating international arbitration within a legal framework as a recognized means of settling disputes with investors. It should also be noted that despite the effective role played by judicial guarantees in building investor trust, whether national or foreign, the legislator has imposed a number of restrictions that hinder investment as a

vital process in Algeria, such as the right of pre-emption instituted for the State and the rule of partnership which the legislator enacted through the provisions of the finance law to reduce the scope of this rule by imposing it in strategic sectors, as determined by the regulations, which will ensure an increase in the flow of foreign capital from Algeria.

## **Conclusion**

We conclude with a set of results that can be summarized in the orientation of Algeria towards the search for alternative sectors to the hydrocarbon sector in order to achieve economic diversification by encouraging investments and a fair competition. . The country has also developed strategies and legal mechanisms to achieve national economy, stability and progress in development, as well as promulgating strict legal provisions that impose safeguards and provide incentives to encourage foreign investment in the non- hydrocarbon sector.

The national guarantees provided by the legislator remain insufficient to ensure the necessary protection of the investment, hence the need to seek more effective mechanisms through the conclusion of international agreements in order to ensure the protection of the investor.

Based on the foregoing, we suggest the following:

- The legislator shall improve the business climate in Algeria and direct investments towards alternative hydrocarbon sectors, which are characterized by several advantages through providing more incentives and legal exemptions.
- Spreading legal awareness and management among national and foreign investors and rejecting all forms of administrative and bureaucratic corruption.

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