

Challenges in Advancing the Principle of Investment and Trade Freedom beyond the Hydrocarbon Sector: Legal and Policy Responses



Nadir ARTBAS^{1*}

Faculty of Law and Political Science Department of Law

University of Tizi Ouzou - Algeria¹

Submission date: 01/08/2025 Acceptance date: 15/10/2025 Publication date: 30/12/2025



Abstract:

Attracting, enhancing, and sustaining foreign investment is a multifaceted undertaking, particularly for any economy in a growth phase. Compelling evidence supports the case for foreign direct investment: foreign investors can create employment opportunities, introduce capital and advanced technology, facilitate knowledge transfer, assist local companies in integrating with global value chains, and, more generally, propel economic growth forward.

However, these potential benefits do not automatically materialize, nor are they guaranteed. Therefore, the aim of investment policy is not to prioritize one over the other, but to establish synergies between them across value chain at the local, regional, and global scales. This implies that regulatory reform should not focus solely on domestic legislation but also ensure consistency between national legislation and international investment agreements which increasingly regulate production and investment flows at both national and international levels.

Keywords: Investment freedom, alternative development paths, investment project, banking and investment, investment obstacles.

تحديات تطوير مبدأ حرية الاستثمار والتجارة خارج المحروقات وسبل المواجهة.

الملخص: يعد جذب الاستثمار الأجنبي وتعزيزه والحفاظ عليه أمرا معقدا - لاسيما لأي اقتصاد في مرحلة نمو-، وتوضح الأدلة حالة قوية للاستثمار الأجنبي المباشر: فيمكن للمستثمر الأجنبي توفير فرص عمل، واستقدام رأس مال والتكنولوجيا، ونقل المعرفة، ومساعدة الشركات المحلية على التكامل مع سلاسل القيمة المضافة العالمية، ودفع النمو الاقتصادي قدما بصورة عامة، غير أن هذه الفوائد المحتملة لا تتحقق من تلقاء نفسها، وهي أيضا ليست مضمونة.

لذلك ليس الهدف من سياسة الاستثمار هو الاختيار بين الاستثمار المحلي والأجنبي، وإنما الربط بينهما عن طريق سلسلة القيمة المضافة على المستويات المحلية والإقليمية والعالمية، ويعني هذا أنه يجب ألا يقتصر



تركيز الإصلاح التنظيمي على القوانين المحلية، ولكن ينبغي أن يسعى أيضا لتحقيق الترابط بين هذه القوانين واتفاقيات الاستثمار الدولية التي تحكم على نحو متزايد الإنتاج على المستويين المحلي والدولي.

الكلمات الدالة: حرية الاستثمار، السبل البديلة للتنمية، المشروع الاستثماري، المصرف والاستثمار، عراقيل الاستثمار.

Défis liés au développement du principe de liberté d'investissement et de commerce en dehors du secteur des hydrocarbures et moyens d'y remédier.

Résumé : Les investissements étrangers est une tâche complexe, en particulier pour toute économie en phase de croissance. Des preuves convaincantes plaident en faveur des investissements directs étrangers : les investissements directs étrangers peuvent créer des emplois, apporter des capitaux et des technologies, transfère des connaissances, aides les entreprises locales à s'intégrer aux chaînes de valeur mondiales et plus, généralement stimuler la croissance économique.

Cependant, ces avantages potentiels ne se matérialisent pas automatiquement, ni ne sont garantis. Par conséquent, l'objectif de la politique d'investissement n'est pas de choisir entre investissement nationaux et étrangers, mais plutôt de les relier tout au long de la chaîne de valeur aux niveaux local, régional et mondial. Cela implique que la réforme réglementaire ne doit pas se concentrer uniquement sur la législation nationale, mais également s'efforcer d'assurer la cohérence entre ces lois et les accords internationaux d'investissement qui régissent de plus en plus la production aux niveaux locale et international.

Mots Clés ; liberté d'investissement, voies de développement alternatives, projet d'investissement, banque et investissement, obstacles à l'investissement.



Introduction

As a result of the financial crisis faced by the Algerian state, entrenching the principles of investment and trade freedom has become imperative. Particularly in light of the country's economic difficulties, the decline in oil prices, and the weakening of state revenues, the authorities were compelled to reassess the existing legal frameworks. This marked the beginning of the state's gradual retreat from direct economic intervention, followed by the constitutional amendment of 1996,¹ which radically altered the situation and ushered in a new era of economic liberalization .

This principle was enshrined in the Constitution under Article 37 of the 1996 Constitution. It was later reaffirmed and reformulated in 2016² Constitution, which renamed the principle of freedom of trade and industry the principle of investment and trade freedom, aimed at fostering prosperity, encouraging competition, and preventing monopolistic practices.

This constitutional recognition of the principle of investment and trade freedom constitutes a safeguard against infringements, whether originating from the state or private actors. The legislature sought to remove barriers that could impede private enterprises from participating in the development process.

This prompted the Algerian legislature to enact numerous legal provisions aimed at encouraging investment, among which Law No. 22/18 on investment stands out as particularly significant. Furthermore, Law No. 23/17 was issued to define the conditions and procedures for granting economic land belonging to the state's private domain to carry out economic projects.³ Additionally, Executive Decree No. 23/486 specified the components of economic land belonging to the state's private domain designated for investment projects and eligible for concession.⁴ These legal instruments aim to provide investors with strong guarantees, particularly concerning industrial and tourism land, which had previously posed significant challenges for investors to access.

¹ Presidential Decree No. 96-438 of 7 December 1996, on the promulgation of the constitutional amendment text ratified by the referendum of 28 November 1996, *Official Journal*, no. 76, 8 December 1996; amended and supplemented by Law No. 02-03 of 10 April 2002, *Official Journal*, no. 25, 2002; further amended and supplemented by Law No. 08-19 of 15 November 2008 on the constitutional amendment, *Official Journal*, no. 63, 16 November 2008.

² Law No. 16/01 of 6 March 2016, on the constitutional amendment, *Official Journal*, no. 46, 2016; amended by Constitutional Amendment No. 20/442 of 30 December 2020, *Official Journal*, no. 82, 30 December 2020.

³ Law No. 23/17 of 15 November 2023, establishing the conditions and procedures for the allocation of economic land belonging to the state's private domain for the realisation of investment projects, *Official Journal*, no. 73, 2023.

⁴ Executive Decree No. 23/486 of 28 December 2023, defining the components of economic land belonging to the state's private domain designated for investment projects and eligible for concession, *Official Journal*, no. 85, 2023.



This context gives rise to the following research question:

What are the challenges facing the principle of investment and trade freedom outside the hydrocarbon sector?

To address this issue, the present study is structured into two chapters: the first discusses the entrenchment of the principles of investment and trade freedom in Algerian legislation (the first topic), while the second focuses on the development of investment projects and the obstacles they encounter (the second topic).

THE FIRST TOPIC:

The Entrenchment of the Principles of Investment and Trade Freedom.

The abundance of financial institutions in a country reflects the diversity of its economic sectors and their active contribution to revitalizing the national economy. Conversely, a decline in financial institutions may impede investment and in turn, adversely affect economic development. This dynamic is particularly evident in developing countries, whose economies often depend on foreign currency inflows.

In light of this reality, (the first section) defines the principle of investment and trade freedom, followed by an examination of the legal framework governing this principle and its contribution to promoting development (second section).

First section: Definition the Principle of Investment and Trade Freedom under Algerian Law.

This principle constitutes a fundamental legal for economic competition, reflecting the freedom of individuals to engage in investment and commercial activities. It was formally recognised under the 1996⁵ Constitution and reaffirmed in the 2016 Constitution.⁶

It is worth noting that the Algerian legislature did not provide a definition of investment in the early of independence, particularly in Law No. 63/77.⁷ Instead, the legislator merely specified the areas of application of the legal provision, focusing exclusively on direct investments.⁸

However, with the enactment of Law No. 01/03 on the Promotion of Investment in 2001, investment was defined as follows:

"The acquisition of assets within the framework of creating new activities, expanding production capacities, or undertaking rehabilitation or restructuring; participation in the capital of an enterprise in the form of cash or in-kind

⁵ See Article 37 of the 1996 Constitution of Algeria, as previously cited.

⁶ See Article 43 of the 2016 Constitution of Algeria, as previously cited.

⁷ Law No. 63/277 of 26 July 1963, on the Investment Code, *Official Journal*, no. 53, 1963. (Repealed)

⁸ Hajara, Rabihat. *Investment Freedom in Foreign Trade*. PhD diss., Faculty of Law, Mouloud Mammeri University, Tizi Ouzou, 2016–2017, p. 23.



contributions; or the recovery of activities within the framework of partial or total privatisation."⁹

Although this definition is incomplete, limited to the economic dimension without addressing the legal aspect, it nonetheless paved the way for new economic activities and reflected a broader expansion of investment and trade freedom.

Among these areas are:

➤ Investment in the telecommunications sector, regulated by Law No. 2000/03, which established the rules governing postal and telecommunications services.¹⁰

➤ Investment in the mining sector, opened to private actors by Law No. 01/10 on the Mining Code.¹¹

➤ Investment in the civil aviation sector, regulated by Law No. 98/06 on civil aviation.¹²

In addition to the aforementioned sectors, new investment areas also emerged, including the company Stream, responsible for operation and maintaining the tramway system and *SEAAL*, which manages water and sanitation services in Algiers in partnership with the French company *SUEZ*, among other newly established enterprises.

With the enactment of Law No. 16/09 of 2016 on the Promotion of Investment, this repealed Law No. 01/03, most provisions remained similar to the earlier law, except for certain innovations introduced to align with the globalisation and technological progress.

The principle of investment and trade freedom is generally defined as:

"The development and organization of a chosen activity without restriction or hindrance, through lawful means, thereby allowing market mechanisms to function freely."¹³

The Algerian legislature did not stop at this point but instead relied on several constitutional and legislative provisions to entrench the principles of investment and trade freedom. This principle was clearly and explicitly clarified and reinforced with guarantees to ensure its effective implementation. The most recent of these guarantees is stipulated in Law No. 22/18, dated 24 July 2022, concerning investment,¹⁴ which repealed Law No. 16/09 on investment.

⁹ Law No. 01/03 of 20 August 2001, on the Promotion of Investment, *Official Journal*, no. 47, 2001. (Repealed)

¹⁰ Law No. 2000/03 of 5 August 2000, establishing the general rules relating to postal and telecommunication services, *Official Journal*, no. 48, 2000.

¹¹ Law No. 01/10 of 3 July 2001, containing the Mining Code, *Official Journal*, no. 35, 2001.

¹² Law No. 98/06 of 27 June 1998, concerning Civil Aviation, *Official Journal*, no. 48, 1998.

¹³ Law No. 16/09 of 3 August 2016, concerning Investment, *Official Journal*, no. 46, 2016. (Repealed)

¹⁴ Law No. 22/18 of 24 July 2022, concerning Investment, *Official Journal*, no. 50, 2022.



In light of the provisions enacted, the principle reinforces competitive freedom, requiring that every investor be able to operate without hindrance, barriers, or state-imposed restrictions on competition, thereby advancing towards comprehensive economic liberalization.¹⁵

Accordingly, investment freedom entitles every trader to choose the location, duration, and type of business activity they wish to pursue, whether individually or collectively.

Thus, this principle essentially corresponds to economic freedom in its broad sense, while in its narrower sense; it encompasses the freedom of commercial and industrial activity.

Second section: The Banking Sector's Influences on Investment and Trade Freedom.

In line with the requirements of trade and industry liberalisation and the opening of the market to both foreign and national investors, significant effects have been observed in the banking sector, particularly in the modernisation of banking institutions and their operations. This evolution was notably reflected in the enactment of the Monetary and Banking Law No. 23/09, dated 21 June 2023,¹⁶ as evidenced by several key points:

- **The modernisation** of the banking system and **the** enhancement of its regulatory and supervisory functions enable it to keep pace with international developments in the banking field.
- Emphasis in the law on the governance of the Bank of Algeria, including the adoption of a fixed-term mandate system for the governor of the Bank and their deputies.
- **The establishment** of a national committee tasked with developing a national payment strategy to promote the advancement of payment methods.
- Modernisation of the banking services industry:
- The scope of banking operations has expanded, both locally and globally, which has positively impacted the budgets of these institutions and increased their profit margins through such expansion.
- Creation of a central bank digital currency (*the Algerian digital dinar*).
- **The establishment** of the Financial Stability Committee entrusted with oversight and monitoring duties.
- Regulation of Islamic banking operations.
- Orientation towards financial derivatives:

¹⁵ Ayoub, Mohamed and Ali. *Investments in Algerian Law*. Algiers: Houma Publishing House, 2012, pp. 188–189.

¹⁶ Law No. 23/09 of 21 June 2023, concerning the Monetary and Banking Law, *Official Journal*, no. 43, issued on 27 June 2023.



- This refers to the expansion of available banking activities and services, such as issuing negotiable certificates of deposits.
- Borrowing from outside the banking system (long-term).
- Diversification of granted loans.
- Creation of banking holding companies.
- Securitisation:
- This involves converting banking debts into tradable financial securities.
- **New** investment avenues, such as financing the privatisation process in non banking sectors, should be opened.
- **The incorporation of globalisation** concepts within the banking sector facilitated the introduction of these financial derivatives.
- Commitment to the capital adequacy standard, as a benchmark for measuring market risk, is required by the Basel Committee's regulations.¹⁷
- Increased competition within the banking market following the liberalisation of trade in banking services.
- Contribution to the expansion of monetary policy control beyond central banks.¹⁸

Second topic:

The Development of Investment Projects and the Obstacles they Face.

Pursuant to Law No. 22/18 on the Promotion of Investment, the Algerian legislature sought to provide a range of legal and financial guarantees to both national and foreign investors with the aim of revitalizing the national economy.

Accordingly, the notion of an investment project will first be defining and its key characteristics outlined (First section), followed by an analysis of the principle obstacles to investment and trade freedom (Second section).

First section: Defining the Investment Project

The significance of the principle of investment and trade freedom has been affirmed through its incorporation into numerous constitutions and legal texts by the legislature. It is considered as a safeguard of public freedom guaranteed by the Constitution and must not be infringed. Accordingly, it must be regulated by legislative authority through rules and guarantees that allow investors to exercise this freedom within the law, thereby organising economic life and creating an environment conducive to investment activity.

This issue will be addressed through an overview of the meaning of the investment project (1) and its characteristics (2).

¹⁷ Abdel-Muttalib, Abdel-Hamid. *Globalisation and the Economics of Banks*. Egypt: University House, 2001, p. 37.

¹⁸ Abdel-Muttalib, Abdel-Hamid. *Globalisation and the Economics of Banks*, previously cited, p. 41.



1- Meaning of the Investment Project

The term “investment project” is generally defined as follows:

“The process of allocating resources to an industrial or financial project with the expectation of generating cash flows over multiple periods to enhance the enterprise.”¹⁹

Alternatively, some define it as:

“An investment project is an integrated set of activities and operations that utilize limited resources and from which monetary or non-monetary returns are expected.”²⁰

From these definitions, it is evident that the investment project is essentially a venture aimed at promoting investment and fostering economic openness. This is achieved by adopting economic liberalization mechanisms to stimulate the movement of capital and goods in both directions-national and international.²¹

Such projects positively contribute to strengthening economic development, which is closely tied to real per capita output. They represent a process aimed at expanding human choices by increasing national income and per capita income through the enhanced productive capacity.

Following the shift toward a market-oriented economy and the state's gradual withdrawal from the direct production of certain resources and services, while simultaneously encouraging the private sector and providing guarantees under the legal framework, new vitality has been injected into the private enterprise. This, in turn, has led to a marked increase in the share of private investment within gross domestic product.²²

2- Characteristics of the Investment Project

Therefore, several characteristics of the investment project may be identified:

- **With respect of investment expenditures**, this refers to the total costs incurred or required by the project owner to bring the project into existence. These expenses are not confined to the project’s initial establishment but also include all necessary outlays from inception until sufficient financial returns are generated to ensure its continuity.
- **Regarding project duration**, this is a crucial characteristic: the project owner must calculate the project lifecycle from the investment decision to the point at which it generates cash flows sufficient to cover expenses and yield profit.

¹⁹ - Farkous, Mohamed. *The Budget Forecast as an Effective Management Tool*. Ben Aknoun: University Publications Office, 1995, p. 169.

²⁰ - Hamdi, Kamel. *Analyse bancaire de l'entreprise*. 44th ed. Essalem, Algeria, 2000, p. 9.

²¹ - Balout, Hussein Ibrahim. *Project Management and the Economic Feasibility Study*. Beirut: Dar Al-Nahda Al-Arabia, 2002, p. 54.

²² Lotfi, Amin El-Sayed Ahmed. *Feasibility Study of Investment Projects*. Alexandria: Publishing and Distribution House, 1998, p. 32.



- **With respect to financial resources or liquidity**, this refers to the funds available to the project, whether held in the company reserves or in bank accounts. These include incoming cash flows from sales and the collection of commercial instruments, as well as outgoing flows such as wage payments and operational expenses.

➤ **Regarding residual value**, this refers to the cost associated with relinquishing the project in the event of its sale or the decision to change its line of activity. The value of such a transaction should exceed the total cost of establishing the project, thereby generating profit. If the value falls below total expenditures, the result is deemed a loss.

Second Section: Obstacles to Investment and Trade Freedom.

Despite the efforts made by countries seeking to diversify their economic activity beyond the hydrocarbon sector and encourage investment, many continue to suffer from numerous impediments and constraints that undermine the role of investment and trade freedom in revitalizing the economy, whether at the natural level (1), the administrative and economic level (2), or the legal level (3).

1- Legal Obstacles

The state, through its Law No. 22/18 dated 24 July 2022 concerning investment,²³ as well as Law No. 23/17 dated 15 November 2023, which sets out the conditions and procedures for the allocation of economic land belonging to the state's private domain for the realisation of investment projects, has established a series of legal guarantees and frameworks.²⁴

Executive Decree No. 23/486 of 28 December 2023, which defines the components of economic land belonging to the state's private domain designated for the implementation of investment projects and eligible for concession,²⁵ has provided several advantages aimed at facilitating the use of land for investment purposes. Moreover, several entities have been created to assist in granting approvals for land acquisition requests.

Among the most prominent of these bodies is the *CALPI* Agency,²⁶ which is authorised to respond to land acquisition requests submitted by investors for

²³ Law No. 22/18 of 24 July 2022, concerning Investment, previously cited.

²⁴ Law No. 23/17 of 15 November 2023, establishing the conditions and procedures for the allocation of economic land belonging to the state's private domain for the realisation of investment projects, previously cited.

²⁵ Executive Decree No. 23/486 of 28 December 2023, defining the components of economic land belonging to the state's private domain designated for investment projects and eligible for concession, previously cited.

²⁶ It is responsible for responding to investor applications at the wilaya (provincial) level. It is, of course, required to provide a list of lands designated for investment projects, highlighting the technical specifications of each plot.



investment purposes. However, several shortcomings can be noted in the functioning of this agency and similar institutions, including:

- Limited availability of land and lack of competition.
- High cost of land designated for investment purposes.
- **The inefficient** allocation of land to approved activities **lacks** rationality.
- Lack of transparency in the procedures governing land allocation.²⁷

2- Economic Obstacles

Despite the abundance of legal instruments offering investment incentives at both the domestic and international levels and the facilitation measures granted without discrimination between local and foreign investors, several deficiencies remain. The most significant among them include the following:

➤ Reliance on hydrocarbon revenues as the primary source of income poses a major challenge to investment and renders the economy vulnerable to fluctuations that affect other sectors.

➤ Excessive debts burdens, coupled with the inability to service capital interest, may threaten the sustainability of investment projects.

➤ A cumbersome and complex administrative system, particularly owing to bureaucracy and overlapping authorities.

➤ Prevalence of corruption, including bribery and nepotism.

➤ The private sector, despite its added value, remains confined mainly to SMES.

➤ Weak infrastructure and insufficient facilities are essential for the proper functioning of the economy.²⁸

The emergence of the informal market and the inefficiency of the labour force, in addition to weak political and economic stability and the resulting difficulties in accessing industrial land, all hinder the flow of investment.

Moreover, the burden of fees and taxes placed upon investors at the outset of their projects, along with issues such as double taxation and the ambiguity of tax legislation, further impedes investment initiatives.²⁹

The risk of market instability resulting from fluctuations in collateral and financial assets must not be overlooked.

²⁷ Ben Hammouda, Mahboub, and Ben Qana, Ismail. "The Land Crisis in Algeria and Its Role in the Development of Foreign Investment." *Al-Bahith Journal*, no. 5, 2007, p. 6.

²⁸ Hamdi, Fella, and Hamdi, Meriem. "Foreign Direct Investment Between Legal Incentives and Restrictive Realities." *Journal of Investment*, no. 6, University of Mohamed Khider, Biskra, n.d., p. 340.

²⁹ Mansour, Zine. "The Reality and Prospects of Investment Policy in Algeria." *University of Chlef Journal*, no. 2, n.d., p. 142.



3-Legal Obstacles

Investors often face difficulties in navigating the legal and regulatory frameworks governing investment, thereby increasing uncertainty and reducing willingness to invest under such conditions. This may lead to:

- Difficulty in obtaining permits and licences.
- Lack of transparency.
- Absence of legislative and legal stability.
- Numerous economic and social challenges persist.
- Inflation risks are seen in investments in government bonds.
- Legal and political risks also arise, such as government intervention through regulations controlling the pricing of private goods or the imposing bans on certain products.
- Risks related to the type of economic activity, such as in the cement industry, may face legal challenges related to environmental protection regulations.

Conclusion

It is therefore evident that the Algerian state has undertaken significant efforts to encourage investment by fostering a favourable environment and establishing a comprehensive legal framework of incentives to promote investment. This is particularly significant given the intensifying global competition, especially among developing countries, to attract foreign direct investment.

As such, investors place great importance on the provision of various types of guarantees, as they tend to trust governments that demonstrate legislative stability and consistency in legal texts. This has prompted the Algerian legislature to open up to foreign investment through the free movement of foreign capital and by ensuring that expropriation may only occur under legal frameworks and stringent procedures. In cases of expropriation, the state is obliged to guarantee fair and equitable compensation to the investor.

Moreover, attention must be given to judicial matters, as the legislator has provided a range of guarantees, including the possibility of resorting to specialised bodies outside the ordinary judicial system, thereby offering essential safeguards for foreign investors.

Recommendations

- Ensuring the establishment of an appropriate administrative, political, and economic environment that supports the effective implementation of the principles of investment and trade freedom.
- Avoid emulating ineffective models and refrain from unquestioningly imitating the French system, which has demonstrated its shortcomings.
- Promote the Diversification of foreign capital sources to reduce dependence on any single country.
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