

LEGISLATIVE STABILITY AS A PILLAR TO ENSURE INVESTMENT IN ALGERIAN LEGISLATION

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Abstract:

The legislative stability clause in investment contracts is considered a crucial and fundamental safeguard for investors, serving as an important means of attracting both national and foreign investments to the host country. This clause benefits both parties—the host state and the investor—equally. However, investment contracts are concluded between two parties: the host state and the foreign investor. The state, as an entity under public international law, exercises authority and sovereignty that enables it to unilaterally amend or repeal its internal legislation. Consequently, the two parties in such agreements are inherently unequal.

Keywords: Legislative stability requirement, investment contracts, investment guarantees, acquired rights.

INTRODUCTION

The condition of legislative stability is an important guarantee for the stability of the investment climate in any country. It works to alleviate investors' fears of losing their privileges and attempts to subject the contract to a fixed and specific law from the moment the contract is concluded until it expires. By implementing this guarantee, the investor feels that they are protecting themselves from the risks resulting from legislative instability in those countries. The focus of these risks lies in the contract or investment project being subjected to amendments in the law regulating the investment contract. This is based on existing legal texts in the host state's laws, which stipulate granting the foreign contracting party all the advantages determined and stipulated in the laws related to investment, with a commitment to maintain these even if this law is amended.

Importance of the Study

The importance of studying the condition of legislative stability arises from its impact on encouraging local or international investment, which requires legislative stability as a basic guarantee to maintain their acquired rights. This condition aims to alleviate investors' fears of losing their privileges and attempts to subject the contract to a fixed and specific law from the moment of its conclusion until its expiration. Despite the agreement of both the states and investors on the establishment of this condition, which has become enshrined in all investment contracts, its application has sparked many disputes between the state and the investor regarding the concept of the condition, its criteria, its legal nature, and the consequences arising from it. These disputes may cause losses not only to the investor but also to the host state, especially since the majority of investment guarantee contracts do not include the issue of stability, which increases the risks for both parties.

Research Problem

Based on the above, the following research problem can be posed: **How has the Algerian legislator dealt with the condition of legislative stability as an incentive for investment?**

To answer this problem, we decided to divide the research into two main axes: the first will address the position of the Algerian legislator on the condition of legislative stability, and the second will focus on the forms of violation of this condition.

First Axis: The Position of the Algerian Legislator on the Condition of Legislative Stability



The legal and judicial systems often face criticism based on several factors, mainly related to the proliferation of legal texts or the instability of laws due to frequent amendments, which undermines investors' confidence in the entire legal system. Attracting foreign investments requires not only legal stability, which often leads to economic stability, but also political stability, as the latter clearly reflects on legal stability. The world witnessed nationalization of natural resources in the last century, which had negative effects on many foreign investments in those countries, driven by political motives that were translated into legal rules. This situation led to the emergence of the stability condition in international contracts, whereby this condition included not subjecting the investing party in the international contract to any new laws adopted by the state that affect the interests of the contracting party, thereby promoting the spread of the condition of legislative stability.

First: The Meaning of the Condition of Legislative Stability

The condition of legislative stability refers to the commitment of the contracting state with the investor, in the case of state contracts or the host state for investment in general, to stabilize and ensure the legal system governing the investment or the subject of the investment contract. This means that the investor is safeguarded from any subsequent legislative amendments that may affect the legal rules governing the investment, whether they pertain to the entire body of legal rules related to investment or are limited to some of them.¹

It is also defined as a legal tool through which foreign investors are protected from the risks of legislation whenever the state attempts to amend it with new legislation. This protection is achieved by freezing the state's legislative role in its relationship with the foreign investor². The condition of stability and legislative stability establishes the applicable law on the contract as it was at the time of its conclusion, excluding any future amendments that may arise between the foreign state party, particularly in the area of investment contracts and economic development³. It serves as a guarantee found in international contracts and national legislation of the contracting state, excluding the obligation to issue new laws or substantive amendments that affect the contract law, which could disturb the economic balance of the contract and harm the investor's interests. Thus, this condition is included in the contract when the state is a party to it, under an agreement with a natural or legal person, whereby the state commits to prevent amendments from being applied to the law governing the contract concluded between the two parties.⁴

It should be noted that the amendments intended for exclusion are those that reduce or harm the acquired rights and legal positions, negatively affecting the financial situation of the investor. Consequently, there is no harm from amendments that consolidate or enrich those rights.

Second: The Effectiveness of the Condition of Legislative Stability as a Guarantee for Investment

The primary aim of including the condition of legislative stability is to achieve legal stability and security and to safeguard the expectations of the investor contracting with the state. The implementation of any amendments or cancellations to the law in effect at the time of concluding the investment contract could lead to a reversal of the contractual balance, directing the economics of the contract in favor of the state and causing harm to the investor.⁵

The condition of legislative stability is considered a positive guarantee for the investor, benefiting them more than the host state, as it serves as a guarantee and provides sufficient

¹ Ahmed Abdel Karim Salama, *International Contract Law*, 1st Edition, Dar Al Nahda Al Arabiya, Cairo, 2001, p. 319.

² Al-Amin Sherit, *The Right to Permanent Sovereignty over Natural Resources*, University Publications Office, Algeria, 1985, p. 220.

³ Article 02, Executive Decree No. 93-186, dated July 27, 1993, amending and supplementing the application of Law No. 91-11 on expropriation for public utility, Official Journal No. 51, issued on August 1, 1993.

⁴ Article 03 and 04, Law No. 91-11, dated May 25, 1991, concerning expropriation for public utility, Official Journal No. 21, issued on May 8, 1991.

⁵ Article 13, Law No. 22-18, dated July 24, 2022, related to investment, Official Journal No. 50, issued on July 28, 2022.



protection against legislative changes. The foreign investor reaps benefits because it keeps them away from any legislative amendments that may occur in the legal system for investment in the host state where they operate, thus providing reassurance regarding their investment projects. These conditions play a significant and crucial role in the flow of investments, aiming to provide absolute protection for the foreign contracting party throughout the duration of the contract. These conditions are always in favor of the foreign partner more than the host state because they guarantee adequate protection and instill confidence in their investment projects, encouraging capital inflow to developing countries, thereby ensuring the investor's peace of mind regarding their projects.⁶

It is noted that the conditions of legislative stability are not sufficient to face the legislative policy of the host state for investment, as the state can resort to enacting new legal rules subsequent to any contractual or legal provision that deprives the condition of legislative stability of its legal value. Hence, there has been doctrinal debate about the validity of including such a condition in either investment laws or in the contract regulating the investment.⁷

The effectiveness of the guarantee of legislative stability conditions lies in strengthening the negotiating position of the investor when referring any dispute regarding the contract to a certain court or arbitration body. This condition can exert its legal power as it encourages reaching compromises or settlements, as the expected cancellation that violates such contractual conditions would create a special right to compensation. The amount of compensation must be significantly higher than in ordinary cases because the existence of such conditions is closely related to investment and must be taken into account when estimating appropriate compensation. Elements of compensation should include losses suffered by the investor and missed profits that could have been obtained, without denying the state's right to exploit its resources and direct them toward better exploitation and the public interest according to the state's economic strategy.

Third: The Algerian Legislator's Approach to the Condition of Legislative Stability

Algeria has worked to establish this guarantee through its investment system, so that the investor continues to benefit from the provisions of the law in effect when embarking on their investment project, despite the review of the legal system for investments. Such amendments shall only apply if the investor expressly agrees to them, and they are generally only required if these amendments include additional privileges and incentives in tax, monetary, customs, or other areas.

1. Regarding Investment Legislation

The Algerian legislator has emphasized this condition through the legislative decree regarding the promotion of investment in 1993, which stated that reviews and cancellations that may occur in the future regarding executed investments do not apply unless explicitly requested by the investor⁸. The order related to investment development in 2003 stipulated that no reviews or cancellations that may occur in the future on investments executed under this order apply unless explicitly requested by the investor. It is noted that it merely replicated the previous provision⁹. The latest law of 2016 did not deviate from this rule, explicitly enshrining this guarantee that the effects resulting from a review or cancellation of this law that may occur in the future do not apply to investments executed under this law unless the investor explicitly requests it¹⁰. The latest investment law states in Article 13 that the effects resulting from the review or cancellation of this law that may occur in the future

⁶ Article 15, Ordinance No. 01-03, dated August 20, 2003, concerning investment development, Official Journal No. 47, issued on August 22, 2001.

⁷ Article 22, Law No. 16-09, dated August 3, 2016, related to investment promotion, Official Journal No. 46, issued on August 3, 2016.

⁸ Article 39, Legislative Decree No. 93-12, dated October 5, 1993, concerning investment promotion, Official Journal No. 64, issued on December 31, 1993.

⁹ Article 52, Law No. 20-07, dated June 4, 2020, containing the supplementary finance law for 2020, Official Journal No. 33, issued on June 4, 2020.

¹⁰ Article 64, Law No. 16-01, dated March 6, 2016, containing the constitutional amendment, Official Journal No. 14, issued on March 7, 2016.



do not apply to investments executed under this law unless the investor explicitly requests it¹¹. This constitutes a guarantee the state itself, as a concession and explicit commitment, restricts its legislative authority. Thus, we find that this guarantee achieves a balance between the state and the investor in terms of the applicable law.

It is noted that the Algerian legislator has clearly adopted the guarantee of legislative stability and permanence in the legal investment system. Amendments or repeals affecting the investment law do not apply to completed investments unless expressly approved by the investor, and such expression must be clear and based on their request. Naturally, this request will arise in cases where the investor believes that their interest lies in the application of the new law to their project rather than the old law.

2. Regarding Investment Agreements

Algeria has enshrined the condition of legislative stability through numerous international investment agreements that it has concluded, both as a guarantee for these contracts and agreements and for itself at the same time. Algeria has sought to enshrine this guarantee by adopting an economic openness policy since the 1990s, thereby opening the doors wide for foreign direct investment. Believing in the necessity of providing all essential conditions to encourage and guarantee investment within its territory and across all economic sectors, Algeria has signed numerous bilateral and multilateral agreements with various countries, regardless of their political systems and strategic orientations. The aim of all this is to encourage and motivate foreign investors to invest in Algeria.

The Algerian-French agreement stipulates that no party shall take any measure to revoke ownership or nationalization or any other measures that would harm the assets or ownership of the contracting parties¹². The Algerian-Tunisian agreement stipulates that any actions taken for expropriation shall entail immediate and appropriate compensation, and the compensation amount must be equivalent to the actual value of the concerned investments on the eve of the day these measures were taken or the day these measures became known to the public. This compensation is to be effectively paid without delay and is freely transferable. This compensation includes an amount paid to compensate for any unjustified delay in payment caused by the contracting party that executed the expropriation.¹³

The investment agreement signed between the National Agency for Investment Development and Support and Orascom Telecom places the Algerian state under an obligation, after signing this agreement, not to take any special arrangements concerning the company that would directly reconsider the rights and privileges granted under this agreement unless explicitly requested by the investor.¹⁴

From previous practical experience regarding this guarantee, it is noted that the Algerian legislator has not respected this guarantee in many cases, as it changes laws according to economic conditions. Whenever an emergency occurs in the economic field, it hastens to issue new laws, which is reflected in the numerous amendments made to investment laws. This increases investors' fears in their dealings with the state and contributes to destabilizing the desired investment climate in general, evidenced by the introduction of the right of pre-emption before relinquishment and limiting it to a prior license from the government only in cases of transfer to others and in specific sectors.¹⁵

Second Axis: Forms of Breach of the Legislative Stability Condition

The exposure to the condition of legislative stability, or legislative permanence, or the principle of legislative freezing—regardless of its naming—can take several forms, all aiming to avoid affecting the investment contract concluded between the state and the investor and the acquired

¹¹ Duraid Mahmoud Al-Samarrai, *Foreign Investment: Obstacles and Legal Guarantees*, 1st Edition, Center for Arab Unity Studies, Beirut, 2006, p. 241.

¹² Duraid Mahmoud Al-Samarrai, *Previous Reference*, p. 241.

¹³ Hossam Mohamed Gamaleldin, *Study of Rules of Damage Compensation in International Arbitration - Towards Adequate Damage Compensation, Law*, University of Pantheon-Sorbonne, Paris I, 2014, pp. 141-148.

¹⁴ Maysaa Hisham Al-Samarrai, *Legal Regulation of Foreign Investment*, Zain Legal Publications, 1st Edition, Beirut, Lebanon, 2018, p. 121.

¹⁵ MohandOu Ali Aibout, *Foreign Investments in Algerian Law*, Homa Publishing House, Algeria, 2012, p. 314.



rights therein. Therefore, the problem encountered with this guarantee remains the same: the extent to which the state is committed not to change the contract concluded with the foreign party, whether it pertains to direct changes to the contract through amendments or indirectly through the issuance of new legislation affecting the governing law.

First: Review and Amendment of Laws

The essence of the condition of permanence or legislative stability is the stability of the contract's terms over time and space, without affecting the contract under this condition. The state commits not to amend the contract itself unilaterally, using its privileges as an executive authority. Thus, the condition of non-interference with the contract forms a kind of immunity enjoyed by the foreign party contracting with the state against what the state benefits from its authority due to its administrative status. This aims to stabilize the agreed-upon law with its provisions and rules that were applicable at the time of the contract's conclusion, even in cases of disputes between the investor and the host state, excluding any amendment to the rights arising from this contract.

When a law is repealed, investments made before its repeal continue to benefit from the advantages that previously existed. If the investor has an interest in applying the new law, they may accept it as it is more favorable to them, as stated in the laws related to investment. The effects resulting from the review or repeal of this law that may arise in the future on investments made under this law do not apply unless explicitly requested by the investor.

A close example of the situation of legal instability and the fluctuation of the Algerian legislator in dealing with the condition of legislative stability is the case with Orascom Telecom Algeria, which established its investment under the legislative decree of 1993 concerning the promotion of investment, which stipulated in Article 39 that reviews and repeals affecting the investment do not apply unless explicitly requested by the investor. The breach of this guarantee was demonstrated by the use of the right of pre-emption, which was later established, despite the fact that this investor was protected by a previous law stipulating and approving this condition. The application of the extraordinary profits tax retroactively led to a dispute between Maersk and Algeria at the International Disputes Court, along with Sonatrach being sued by Anadarko, with both companies demanding the permanent cancellation of the tax. However, the negotiations between the two parties resulted in confirmation to maintain the tax unchanged, despite intense negotiations that concluded with a mutual agreement. Anadarko expressed its intention to settle the compensation issue by reinvesting its receivables in Algeria. The minister clarified that Sonatrach main gain was maintaining the extraordinary profits tax, as it insisted on not waiving this demand despite both companies' initial refusal to pay this tax, noting that the Italian company Eni, which is a party to the contract signed between the three companies and Sonatrach, did not participate in similar complaints against Sonatrach, as it refused to file any lawsuits. As for the agreement recently signed between the three parties and published in the official gazette, the minister announced that the two international arbitration courts for investment disputes, where the two complaints were filed in Paris and Washington, had been notified to halt all procedures related to the disputes after the agreement was ratified by all parties.

It is observed that practically, the Algerian legislator has not respected the guarantee of legislative stability significantly. It changes laws according to social and economic conditions, as the negotiations that ended with the signing of a mutually agreed upon agreement saw the American company Anadarko express its willingness to address the issue of compensation by reinvesting its dues obtained in Algeria. The minister explained that Sonatrach primary gain was maintaining the additional profits tax, emphasizing that they did not concede this demand despite the two companies' refusal to pay under Article 52 of Law No. 20-07, dated June 4, 2020, which includes the supplementary finance law for 2020, published in the Official Journal No. 33, issued on June 4, 2020.

Initially, this tax was imposed, indicating that the Italian company Eni, which is a party to the contract signed among the three companies and Sonatrach, did not participate in filing similar complaints against Sonatrach, as the Italian company refused to raise any lawsuits. Regarding the agreement signed among the three parties and recently published in the official gazette, the minister announced that the two international arbitration courts concerning investment disputes, where the



two complaints were filed in both Paris and Washington, were informed to suspend all proceedings related to the two disputes after the agreement was ratified by all parties.¹⁶

It is noted that, in practice, the Algerian legislator has not significantly respected the guarantee of legislative stability; it alters laws according to social and economic conditions. Whenever an emergency occurs in the economic field, it hastily issues new laws that may contradict previous commitments. Numerous events serve as evidence of this, and whatever guarantees the Algerian legislator granted concerning legislative stability are essentially negated through the continuous revision of investment laws in close intervals.

Secondly: Affecting Acquired Rights

By acquired rights, we refer to those rights that are part of the financial obligations of the investor, becoming an integral part of them, making them inseparable as they have produced their effects within it. Generally, we can say that acquired rights are those rights from which a person benefits within a specific legal framework, which cannot be affected by other recent laws¹⁷. A portion of legal doctrine argues that the state's responsibility for its contractual obligations arising from an investment contract is moral, rather than legal, because it exercises its authority over its territory as a manifestation of sovereignty.¹⁸

As for its content regarding the guarantee, it is that foreign investments benefit from certain advantages considered acquired rights that the state must respect, as they represent for it a stable international norm. Affecting these rights entails international responsibility and the state's obligation to fully compensate for damages inflicted on the investor. Thus, the measures taken by the state, such as nationalization and expropriation under its sovereignty, although legitimate, fundamentally contradict its obligation to respect acquired rights¹⁹. One of the most notable consequences of this right is the right to dispose of property, which is a primary right of the investor. The investor must be granted the freedom to manage his investment project and perform all legal actions concerning it. These actions are not intended to change the nature of the investment but enable the investor to manage his project as he sees fit. The right to manage the investment project is one of the main guarantees provided by law to both national and foreign investors.

In this context, the Algerian legislator stated that expropriation can only occur within the framework of the law²⁰, and that private property is guaranteed like other freedoms²¹. However, the law concerning the promotion of investment has not this right been distinct from comparative legislations, as the law related to the promotion of investment in 2016 stipulates that expropriation and confiscation shall result in fair and equitable compensation. It can be inferred from this text that the legislator allowed the expropriation of foreign investors but linked it to the existence of public benefit while protecting the rights of the investor through fair and equitable compensation, and this expropriation can only occur under conditions set by law.

¹⁶ Mortada Abdul Razzaq Suleiman, *Legal Persons in Private International Relations - Oil Relations and OPEC Countries*, 1st Edition, Tripoli Scientific Library, Tripoli, Libya, 2010, p. 402.

¹⁷ Article 05, Presidential Decree No. 06-404, dated November 14, 2006, concerning the ratification of the agreement between the Government of the People's Democratic Republic of Algeria and the Government of the Republic of Tunisia, on the mutual promotion and protection of investments, signed in Tunis on February 16, 2006, Official Journal No. 73, issued on November 19, 2006.

¹⁸ Article 05, Presidential Decree No. 94-01, regarding the ratification of the agreement between the Government of the People's Democratic Republic of Algeria and the Government of the Republic of France, on the mutual encouragement and protection of investments, and the exchange of related letters, Official Journal No. 01, issued on January 2, 1994.

¹⁹ San Obeid Mohammed Al-Maamouri, *Stability Clause and the Role of Arbitration in Petroleum Contracts*, Message of Rights Journal, Volume 1, Issue 2, College of Law, Karbala University, Iraq, 2009, p. 172.

²⁰ Shantoufi Abdel Hamid, *Conditions of Stability in Investment Contracts: An Applied Study of Some Algerian Investment Contracts*, Master's Thesis in Law, Faculty of Law, Mouloud Mammeri University, TiziOuzou, 2009, p. 88.

²¹ Executive Decree No. 01-416, dated December 20, 2001, approving the agreement between the Algerian state, represented by the National Agency for Investment Promotion and Support, and Orascom Telecom, Official Journal No. 80, issued on December 26, 2001.



The practical reality for countries receiving investments is that they acknowledge and affirm the right to compensation due to nationalization or expropriation. The requirements of contemporary international economic cooperation compel host countries for investments and capital to recognize the right to compensation for these actions, which has been affirmed in their internal laws and regulations as well as in bilateral investment agreements²². This has also been established by the Algerian legislator in its investment system. Furthermore, the issue of assessing compensation is no longer of great concern as it was in the past century, as most developing countries rarely resort to nationalization and expropriation measures for fear of negatively affecting the overall investment climate, which deters investors, especially foreign ones. Therefore, the prevailing trend in compensation is in the area of agreements that take into account the real value of nationalized assets.²³

It is observed that the guarantees provided by the Algerian legislator regarding compensation for expropriation and nationalization measures are better than many principles and rules in international law. However, this protection does not solely depend on the method of compensation but also encompasses features considered equally important, including the methods of assessing compensation itself. If the state delays in paying compensation, it may lose its value and become economically useless.²⁴

CONCLUSION:

Foreign investment generally requires guarantees, benefits, and facilitation. These factors are essential for attracting and encouraging investment by instilling a sense of reassurance and trust in foreign investors, as well as reducing the risks faced by the investment project. According to the general principle in contractual transactions, as contracts govern the parties involved, no contract may be amended or terminated without the agreement of the parties. Given that these contracts produce effects that grant rights to the parties or third parties, these rights should not be infringed upon; otherwise, the infringer incurs liability requiring compensation.

One of the most notable and important guarantees is the condition of stability, which means maintaining the applicable law on the contract as it was at the time of the contract's conclusion, excluding any amendments that may arise in the future between the state and foreign parties, particularly in the field of investment and economic development contracts. The stability of the law governing investment is of great importance in attracting foreign investors, as investors pay close attention to the legal system governing their investments and whether it aligns with their interests. Consequently, their inclination to invest in a country depends on the legal system governing investment at that time and its stability.

The Algerian legislator has emphasized this condition through its legal system, from the constitution to regulatory and application decrees, as well as laws related to the promotion of investment, which generally stipulate those revisions or cancellations that may arise in the future concerning investments executed under this decree can only be applied if explicitly requested by the investor. However, it seems that Algeria has often failed to respect this principle despite its inclusion or ratification in most bilateral and multilateral investment agreements.

From the above, this research paper allows us to reach the following conclusions:

- Legal stability is an important factor in attracting both foreign and national investments.

A country's ability to attract foreign or domestic investments is fundamentally linked to the effectiveness and suitability of its economic structure and financial system.

²² Mahmoud Fayyad, The Role of the Stability Clause in Protecting the Foreign Investor in Energy Contracts, Scientific Paper presented at the 21st Annual International Scientific Conference on Energy between Law and Economics, College of Law, United Arab Emirates University, Al Ain, on May 20-21, 2013, p. 606.

²³ See the Official Website of Sonatrach: <https://sonatrach.com/presse>.

²⁴ Article 04, Presidential Decree No. 03-525, regarding the ratification of the agreement between the Government of the People's Democratic Republic of Algeria and the Government of the Kingdom of Denmark on the mutual promotion and protection of investments.



- The state, as a sovereign entity, may relinquish some of its authority and powers in amending its legislation at a certain time; it can amend or repeal and issue new legislation related to public benefit without absolving itself of liability for any damage that may be incurred by the investor.
- Despite the Algerian legislator enacting a range of laws aimed at attracting investment, incorporating numerous legal guarantees and financial benefits, the level of foreign investments recorded has often not met the desired ambitions. This is frequently attributed to the numerous amendments affecting the investment legal framework, creating a sense of fear and apprehension among investors regarding the risks to their capital.

Additionally, we can outline some suggestions to improve the effectiveness of these guarantees in Algeria as follows:

- There is a necessity to strengthen the substantive legal rules that enhance legislative stability, particularly by minimizing revisions to the legal framework for investment that favor the investor.
- In the event of revising any acquired rights of the investor, appropriate compensation should be established to cover losses incurred by the investment and any potential profits foregone.
- The establishment of other legal means aimed at reassuring the investor should be created instead of merely relying on this condition. This includes negotiating the scope and application of new rules and minimizing their impact on the acquired rights of investors, thereby enhancing investment indicators within the state.

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