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Abstract:

This article addresses the protection of the foreign investor in Algeria from abuse in expropriation by reviewing the legal framework that guarantees the state's right to expropriate the foreign investor's property while respecting individual ownership and the public interest. The article reviews the forms of expropriation, whether individual or public, and the conditions of their legal validity to ensure administrative non-abuse. It also focuses on the safeguards established to protect the foreign investor from arbitrary state practices, highlighting the importance of fair and equitable compensation that covers damages resulting from expropriation and balances the rights of the state and the investor, thereby ensuring the attraction of foreign investment and enhancing confidence in the Algerian investment climate.

Keywords: foreign investor, abuse, expropriation, public interest, fair compensation

Introduction:

Foreign investment constitutes a fundamental source of economic growth and development in Algeria; however, it faces multiple risks, most notably expropriation by the state, whether for public purposes or due to arbitrary practices that may infringe on investors' rights. The Algerian legislator has enshrined the state's right to expropriate the foreign investor's property within a balanced legislative framework that protects individual ownership and ensures the public interest, defining legal controls and forms for the procedure and guaranteeing fair and equitable compensation.

Accordingly, our research problem is: How can the Algerian state reconcile its sovereign right to expropriate property with the protection of the foreign investor from abuse, while ensuring fair and equitable compensation that maintains investment attractiveness and achieves the public interest?

To clarify this, the study aims to provide a comprehensive perspective on protecting the foreign investor in Algeria from abuse in expropriation, by reviewing the legislative basis of this right, clarifying the forms and conditions of expropriation, the legal safeguards for investor protection, and analyzing mechanisms for fair and equitable compensation.

First: Legislative Basis of the Algerian State's Right to Expropriate Foreign Investors' Property

Some legal scholars argue that the justification for expropriating foreign investors' property lies in the evolution of the concept of ownership from an absolute right to a social function, transforming the relationship between owner and property into a tripartite relationship including society, allowing the state to regulate ownership in the service of public interest and economic policy.

The host state's right to expropriation is a principle enshrined in most Arab constitutions, including the Algerian Constitution. Article 17 of the 1976 Algerian Constitution, issued by Order 76-97 on November 22, 1976, stated: "Property shall not be expropriated except within the framework of the law... No expropriation for public interest may be opposed on the basis of any international agreement." This text shows that the right of expropriation by the Algerian state is constitutionally guaranteed. Subsequent constitutions, including those of 1989 and 1996, provided similar provisions under Article 20: "Property shall not be expropriated except within the framework of the law, and such expropriation shall entail prior fair and equitable compensation." Article 22 of the 2016 constitutional amendment maintained the same provisions, omitting the word "prior": "Property shall not be expropriated except within the framework of the law, and such expropriation shall entail fair and equitable compensation." The current 2020 constitution, in Article 60(2), states: "Property shall not be expropriated except within the framework of the law, with fair and equitable compensation." Thus, the current constitution recognizes the state's right to expropriate property legally and with fair and equitable compensation.

At the legislative level, Algeria has issued several texts regulating expropriation, some general and some specific to foreign investors, reflecting the legislator's balance between protecting individual property, the state's right to intervene exceptionally for public interest, ensuring legal security for investors, respecting economic sovereignty, and achieving developmental goals.

Article 677 of the Algerian Civil Code affirms the legality of the state's right to expropriate, stating: "...However, the administration has the right to expropriate all or part of real property or property rights for public benefit, in return for fair and equitable compensation." Article 2 of Law No. 19-11, establishing rules for expropriation for public benefit, issued on April 27, 1991, states: "Expropriation for public benefit is an exceptional method of acquiring property and real rights, and shall only occur if all other means fail." This indicates that expropriation for public benefit involving private property is by nature exceptional, based on depriving the owner of property compulsorily, in exchange for compensation in the name of the public interest, forming the legal basis justifying this administrative privilege.

Regarding investment law, Order 66-284, in Article 8, states: "The state may only reclaim its property when economic development requires it, and such reclamation must be pursuant to a legislative text, with compensation clearly determined in amount, timing, and transfer in the licensing decision." Similarly, Article 40 of Legislative Decree 93-12 on investment promotion provides: "Investments carried out may only be utilized by the administration in the cases stipulated by applicable law."

Order 01-03 on investment development stipulates in Article 16: "Completed investments may not be subject to administrative confiscation except in cases provided by applicable law." These texts show the Algerian legislator's hesitation between using "administrative confiscation" or "requisition" as a method of taking ownership, although administrative confiscation aims to expropriate without compensation.

Law 16-09 on investment promotion repealed Article 16 of Order 01-03, replacing it with Article 23: "In addition to rules governing expropriation, completed investments may only be seized in cases stipulated by applicable law, entailing fair and equitable compensation." This indicates that the Algerian legislator, in the 2016 investment law, used the terms "seizure" and "expropriation" as in the civil code, excluding "confiscation," likely to eliminate ambiguity from the earlier text.

The new investment law 22-18 reinstates the term "requisition" to express expropriation. Article 10 states: "Investment may not be requisitioned by the administration except in cases provided by law, and such requisition entails fair and equitable compensation according to applicable legislation."

Second: Forms of Expropriation and Legal Validity

Expropriation of foreign investors by the host state takes multiple forms, requiring examination of the main types and their legal characteristics as follows:

1. Expropriation of Private Real Estate for Public Benefit:

Algerian legislation, for the first time under investment law, guarantees foreign investors access to land needed for their projects. Article 6 of the new Investment Law 22-18 states: "Investment projects benefiting from incentives under this law may use land belonging to the private property of the state..." Despite this guarantee, private real estate may still be expropriated if public interest requires. Expropriation of private property for public benefit is a compulsory administrative action depriving the owner of property to achieve public goals, such as schools, hospitals, or highways, and is an exercise of state sovereignty within territorial jurisdiction. Expropriation outside this framework is illegal, subject to ordinary courts, and incurs administrative liability for damages.

It includes both nationals and foreigners, distinguishing between individual expropriation (limited to specific persons) and general expropriation (targeting community properties for economic or social purposes). General expropriation resembles nationalization but differs as it is linked to a specific public interest with compensation, while nationalization permanently transfers strategic assets to the state.

2. Nationalization:

Nationalization transfers private sector ownership to the public sector, such as banks or strategic industries, to protect national interests, with obligatory fair compensation. It is exceptional, occurring during major economic or political shifts. The state's right to nationalize reflects non-transferable territorial sovereignty, although it can be restricted. Encouraging and protecting foreign investment does not imply waiving this right, which is recognized in contemporary international law as a sovereign tool for public interest.

3. Confiscation:

Confiscation is an expropriation method depriving the investor of property without

compensation: "A measure intended to transfer property to the state by judicial ruling, forcibly from its owner without compensation." Algerian Penal Code Article 15 (June 8, 1966, as amended) defines confiscation as the final transfer to the state of property or its equivalent value. Confiscation applies to movable property, transferring ownership to the state permanently upon final judgment, without compensation, differing from public-benefit expropriation which is compensatory.

Confiscation is preventive, imposed as a sanction for unlawful acts, with ownership transferred to the state. It can be judicial or administrative:

- **Administrative Confiscation:** Carried out by the executive for security, safety, or public health reasons (e.g., hazardous products or harmful intellectual works), previously provided under Article 16 of repealed Order 01-03.
- **Judicial Confiscation:** Limited to ordinary court rulings as a penalty for criminal offenses, including investor property if involved in acts threatening state security, exempting the state from liability.

Both require legal authority granting the relevant body the power to act within prescribed limits.

4. **Seizure:**

Legislation allows the state to resort to seizure as a temporary means to obtain funds or services necessary for public needs. If voluntary means fail, the foreign investor may face expropriation at any investment stage via project seizure. Seizure is temporary, aimed at public security or national defense, granting the state usufruct rights over private property for a specific public interest, with compensation provided later. Unlike expropriation, seizure does not transfer ownership; property remains with the owner until the reason for seizure ends.

5. **Guardianship:**

Guardianship involves removing property from its owner or holder and placing it under another's possession for public benefit, temporary in nature, justified by public interest, and does not require state compensation. Articles 602–611 of the Civil Code govern guardianship, aimed at safeguarding disputed property, returning it post-dispute. Guardianship can be judicial (Article 603) or administrative, implemented to ensure continuity of public services, especially if the investor mismanages the project contrary to contractual obligations.

6. **Measures Similar to Expropriation:**

The state may apply legislative or administrative indirect measures limiting the foreign investor's ability to exploit assets without formal expropriation. These include enforcing claims on investor property, forcing project sale, restricting transfer of equipment, discriminatory taxation, or controlling permits and personnel. While not direct expropriation, these measures have similar effects. Algerian law recognizes such measures in bilateral agreements but does not explicitly include them in domestic investment legislation.

Third: Protection of the Foreign Investor from Arbitrary State Practices in Expropriation

- The international custom has established the right of the state to expropriate foreign property as an aspect of its territorial sovereignty, which obliges other states to respect the decisions issued in this regard. Expropriation of a foreign investor's property is among the most

prominent non-commercial risks that threaten their acquired rights, especially in developing countries suffering from political and economic instability, making this procedure a major concern for foreign investors when directing their investments there. Accordingly, the host state that resorts to expropriation is obliged to respect the constraints established by international custom, ensuring a minimum level of legal protection for foreign property, with the requirement to compensate the investor fairly and equitably for the expropriated property.

1. Restricting the Algerian State's Right to Expropriation to Protect the Foreign Investor:

A. Constraint of Public Interest: The state's authority to expropriate foreign investments is subject to respecting the condition of public interest; otherwise, its expropriation decision is considered null and void. The state may not take expropriation measures outside the legal framework, particularly regarding compliance with procedures and respect for the proper assessment of public interest, making the public interest both a limitation on its authority and a right protecting the foreign investor's property, and an essential condition for the legality of other procedures. If the purpose of expropriation procedures is to harm the interests and rights of the foreign investor, they are considered legally illegitimate.

The concept of public interest is inherently linked to the state's activity and primary objective, as its organs bear the primary responsibility for achieving this interest and ensuring the country's development across various sectors. It is responsible for establishing infrastructure, including roads, facilities, and equipment, making it the largest consumer of land compared to other actors. Despite the critical importance of the public interest condition as a constraint on the state's right to expropriation, the concept remains vague, as there is no precise definition in international law, domestic legislation, or even international arbitration jurisprudence.

The purpose of public interest is realized whenever its main objective is to serve the interest of the state as a political entity or one of its organs. However, the Algerian legislator did not set precise and absolute rules to define this concept, attributed to the impossibility of limiting public interest to specific acts, given that community needs are renewed and varied according to the evolution of time and place. Consequently, the concept of public interest remains flexible and variable, linked to societal development and increased state intervention in meeting collective needs. The legislator therefore left its assessment to the administration within the state's discretionary authority when evaluating land subject to expropriation and determining the project to which nationalization, temporary appropriation, or seizure operations apply, exercising its prerogatives in the public interest. The Algerian legislator only mentioned some cases where the benefit or interest was deemed public; for example, Article 2, paragraph 2, of Law No. 11-09 on expropriation provides: "Expropriation is only possible if it is carried out to implement operations resulting from the application of regulations such as urban development and planning, relating to the establishment of collective facilities, constructions, and major works of public benefit."

B. Non-Discrimination Constraint in Expropriation: The principle of non-discrimination in expropriation is among the most important guarantees for protecting foreign investment. It requires the state not to differentiate between its nationals and foreigners in this field, nor to discriminate between foreign investors themselves based on nationality. Discrimination in expropriation of foreign investors' property appears in two main forms: first, when the state expropriates the property of a foreign investor without affecting a national investor or domestic

projects; second, when it discriminates between foreign investors, expropriating one without applying the same procedure to another of a different nationality.

The Algerian legislator affirmed the principle of non-discrimination in the treatment of investors through Article 21 of Law 16-09 and paragraph 2 of Article 3 of Law 22-18 on investment. The purpose of this principle is not only to protect the foreign investor from state abuse during expropriation but also to ensure the principle of competition within the state's territory. Some scholars argue that the aim of respecting non-discrimination is not to legitimize expropriation procedures but to enhance protection of foreign investments and expand the scope of international responsibility that may fall on the host state. A state is considered abusive in exercising its right when it expropriates property based on nationality, religion, or ethnic affiliation. Conversely, some newly independent states may expropriate investments of former colonial powers as a form of compensation for colonial damages, but this does not exempt them from the obligation to provide fair compensation to the expropriated investors.

C. Duty of the State to Respect Legal Provisions in Expropriation: The state must respect its international obligations based on the principles of good faith, *pacta sunt servanda*, and the primacy of international obligations, while complying with domestic legal procedures. Accordingly, expropriation of a foreign investor's property contrary to a ratified treaty constitutes a violation of their rights and property, unless justified by force majeure or changed circumstances, as affirmed by the International Law Institute in its 1952 session.

This constraint represents a fundamental guarantee for the investor, particularly the foreign investor, as it ensures protection of their assets from any arbitrary measures taken by the public authority in violation of domestic law or international law norms regarding treatment of foreigners. Expropriation must be carried out exclusively by a competent authority and according to the law, providing genuine legal protection for investments.

4. Protecting the Foreign Investor through Guarantees of Fair and Equitable Compensation for Expropriation:

Every state is obliged to preserve and protect property within its territory, whether domestic or foreign, a duty established by international custom. This has led to a consensus on the necessity of compensating those whose property is expropriated. Constitutions of many states have prohibited or restricted expropriation, and, where allowed, require it to be accompanied by fair compensation. Although the state has the right to expropriate property, the legitimacy and acceptability of this procedure depend on compensating the investor for the resulting loss. Compensation is a fundamental principle in expropriation, whether considered an essential element or a subsequent effect, as transfer of ownership legally occurs only after payment of compensation covering the investor's direct loss.

1. Characteristics of Compensation: States undertaking expropriation of foreign investors must pay compensation, as guaranteed under public and international law. Scholars and courts have debated the concept of compensation that balances the rights of the host state exercising expropriation and the rights of the expropriated investor, whether it involves immediate compensation or what some describe as adequate, fair, and equitable compensation.

A. Adequate Compensation: Scholars interpret adequate compensation as fully corresponding to the economic value of interests affected by state expropriation. It may be

assessed by the value the state gained or by the amount a buyer pays to the project owner. Generally, adequate compensation represents the market value of the project expropriated at the time of expropriation. Under international law, it covers the commercial or actual value of the investment, determined objectively.

B. Immediate Compensation: Immediate compensation is the amount paid by the state directly to the foreign investor at the time of expropriation, without delay, with interest in case of late payment, ensuring protection of the investor's interests.

C. Effective Compensation: Effective compensation is compensation with real material and moral economic value usable by the investor, paid in a currency that achieves this purpose and does not cause actual loss. Compensation in local currency must enable the investor to reinvest in the same economic sector in the expropriating state. Compensation is effective only if paid in the investor's home currency or another convertible foreign currency.

D. Compensation under Algerian Law: Article 60, paragraph 2, of the current 2020 constitution provides: "Property may only be expropriated within the law and with fair and equitable compensation." Article 23 of Law 16-09 on investment promotion provides: "...this appropriation entails fair and equitable compensation." Article 10 of Law 22-18 on investment stipulates: "...appropriation entails fair and equitable compensation according to applicable legislation." Compensation is fair when it covers all actual damages to the investor objectively, and equitable when it considers the rights of both the investor and host state, including debts, with its assessment left to the state's discretion.

2. Methods of Assessing Compensation: Several recognized methods exist to determine compensation:

A. Market Value Method: Compensation is based on the market value of affected property at the time of expropriation, reflecting the prevailing market price. This method allows adequate compensation covering all investor losses.

B. Present Value of the Project Method: This method includes all invested funds plus expected profits, often used to increase compensation due, particularly when expropriation or nationalization is deemed illegitimate.

C. Set-off Method: This considers profits relative to the capital invested, as well as damages to the host state's economy due to non-fulfillment of obligations or repatriation of funds abroad.

D. Net Accounting Value Method: This calculates the project value after deducting depreciation and expenses, considering the difference between realized profits and those of a similar project in another country during the same period, based on present value elements.

E. Algerian Legal Methods: The Algerian legislator specified methods for assessing compensation in certain laws applicable to investment. Article 21, paragraph 1, on expropriation provides: "The amount of compensation must be fair and equitable, covering all damages and lost profits due to expropriation." Article 32 of Executive Decree 93-186, implementing Law 91-11, states: "Compensation must be fair and equitable, covering all damage caused by expropriation." In investment laws 16-09 and 22-18, compensation is described as fair and equitable, with further details determined by bilateral agreements regarding amount, timing, and payment methods.

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Conclusion: Finally, protecting foreign investors in Algeria is based on a delicate balance between state sovereignty and investor rights. The state has the right to expropriate property when necessary or to serve public interest, while being committed to providing fair and equitable compensation to safeguard investor interests and rights. Transparency in procedures, prevention of abuse, and objective assessment of compensation are fundamental pillars to strengthen investor confidence and attract foreign investment, achieving a balance between economic development and protection of private property.

Key Recommendations:

- Strengthen national legislation to clarify rules on expropriation and protect foreign investors.
- Ensure consistent provision of fair and equitable compensation to enhance investor confidence and investment attractiveness in Algeria.
- Strengthen administrative and judicial oversight of expropriation procedures to ensure legal compliance and prevent abuse.
- Develop an integrated legislative framework balancing public interest and investor rights, promoting economic development and reducing investment risks.

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