



The Application of the Non-Expropriation Guarantee in Light of the State's Policy Orientation towards Concession Contracts

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Abstract

Investment in real property — in all its forms — constitutes one of the most important pillars of the economy upon which the Algerian State relies to drive economic development. To that end, the State has established a set of legal guarantees designed to encourage and protect investors against the risks that may affect their ownership of the real property in which they invest.

The non-expropriation guarantee represents the most significant of these guarantees, as it obliges the State to refrain from taking any measure aimed at expropriating real property except, by way of exception, for the achievement of a public utility purpose — subject to essential conditions and principles that must be observed, as well as the payment of a fair and equitable indemnity, thereby protecting the operator of real property held by way of ownership.

However, the State's orientation towards the adoption of the concession contract as the sole mechanism for investment in private national property entails that the investor benefits only from a usufruct right rather than ownership. This diminishes the level of protection afforded to the investor, given the possibility of arbitrary State action upon the withdrawal or rescission of the concession contract — an instrument that is fundamentally incompatible with the application of the non-expropriation guarantee.

Keywords: Non-Expropriation Guarantee; Investment; Real Property; Private National Property; Concession Contract.

Introduction

Real property portfolios play a vital role in the realisation of investment projects in Algeria, making them the object of intense investor interest. Investors, however, remain exposed to the risk of political measures that may affect their ownership of the real property in which they invest. This consideration prompted the Algerian legislator to enshrine the non-expropriation principle in investment promotion laws, as a legal guarantee designed to encourage both domestic and foreign investment whose subject matter is real property in all its forms — given that an investment cannot be realised without the optimum and legally protected exploitation of the real property earmarked for that purpose.

Since the non-expropriation guarantee can only be applied in favour of investments founded upon the ownership of real property, private persons who invest in real property that they own are entitled to the benefit of this guarantee. The problem arises, however, with respect to private



national property earmarked for the realisation of investment projects, since the legislator has affirmed that the exploitation of such property is effected either through transfer-of-ownership contracts — in which case the investor benefits from the rights of usufruct or exploitation as well as the right of ownership — or through concession contracts, which confer only a right of usufruct without ownership.

The non-expropriation principle, enshrined in both the Constitution and legislation, constitutes a fundamental guarantee for encouraging investors and improving the investment climate in Algerian real property. The State's policy orientation towards adopting concession contracts as the sole mechanism for exploiting nationally owned property earmarked for investment projects, however, raises questions concerning the fate of this guarantee and its application to such investments. Herein lies the significance of this article: to elucidate the substance of the non-expropriation principle and the forms of real property exploitation that benefit from this guarantee.

The central research question is: What role does the non-expropriation guarantee play in providing effective protection for the exploitation of real property earmarked for investment, and to what extent does the State's orientation towards concession contracts affect this protection?

To address this question, the study is structured as follows: Section One examines the concept of the non-expropriation guarantee as a principle for encouraging investment; Section Two analyses the application of the non-expropriation guarantee to the exploitation of real property earmarked for investment.

1. The Concept of the Non-Expropriation Guarantee as a Principle for Encouraging Investment

Real property is one of the most important sectors to which the Algerian legislator devotes considerable attention, given its role in attracting investors — who nonetheless remain vulnerable to certain measures taken by the State within the bounds of the law that result in the deprivation of the investor's right of ownership over the real property concerned.

The expropriation procedure, in its various forms, constitutes one such measure that may jeopardise the investor's ownership, deterring investment in Algeria. It was therefore incumbent upon the legislator to provide guarantees to forestall expropriation or, failing that, to award appropriate compensation.

Accordingly, this section addresses the meaning of expropriation as a procedure that threatens the investment climate, before setting out the legal conditions prescribed by the legislator to guarantee against expropriation and their effects.

1.1. The Expropriation Procedure and Its Threat to the Investment Climate

Within the exercise of its sovereignty over the territories falling within its geographical domain, the State sometimes takes legal measures that result in depriving investors — whether domestic or foreign — of the right of ownership over real property, with a view to achieving a public utility



purpose or serving its development objectives. It is accordingly necessary to clarify the concept, forms, and procedures of expropriation.

1.1.1. Definition of Expropriation

Expropriation is defined as a measure taken by State bodies whereby private property is transferred to public ownership in exchange for compensation. An expropriation order ranks among the political measures taken by the public authority within the scope of its territorial jurisdiction for the purpose of achieving the public interest.¹

More precisely, expropriation is an administrative procedure conducted within the framework of the law and within the limits of the cases prescribed therein, by which a person is deprived of his real property in order to assign it to public utility in exchange for a fair indemnity. It is therefore an exceptional measure relating to real property in general and may not be resorted to except as authorised by law², subject to the condition that it is undertaken for the achievement of a public utility purpose and that a fair indemnity is paid to the owner of the property.

Two fundamental characteristics define expropriation:

➤ *The Exceptional Character of Expropriation.*

While Algeria recognises and affirms the right of ownership under its various fundamental laws, the exercise by the State of its right to expropriate for the public utility must occur exceptionally and within the framework of the conditions legally prescribed in this domain.³

➤ *The Connection of Expropriation to the Prerogatives of Public Authority.*

The right of expropriation is linked to the prerogatives of public authority enjoyed by the administration across various domains, enabling it to place limits upon private property and to transfer it to public ownership whenever the public interest so requires — albeit subject to specific conditions and procedures designed to protect individuals against unlawful administrative acts and the abuse of authority.⁴

1.1.2. Forms of Expropriation of the Investor's Real Property

The forms of expropriation differ in their broad sense. Insofar as they result in depriving the investor, wholly and either directly or indirectly, of the ability to invest his funds in real property, they fall within the scope of the non-expropriation guarantee. The principal forms are as follows:

➤ *Expropriation of Private Property for Public Utility.*

This consists in 'the State's acquisition of real property owned by private persons for reasons of public utility, by means of an administrative decision issued by the competent authority.' This procedure applies only to material real property; accordingly, notional real property such as

¹Aybout Mohend Oali, *Foreign Investments in Algerian Law*, Dar Houma, 2nd ed., Algeria, 2014, p. 267.

²La'mari Walid, *Legal Incentives and Barriers to Foreign Investment in Algeria*, (Master's Thesis), Faculty of Law, University of Algiers 1, 2010/2011, p. 88.

³Aybout Mohend Oali, *op. cit.*, p. 270.

⁴Aybout Mohend Oali, *op. cit.*, p. 271.



accessory real rights — including easement rights — is not susceptible to expropriation in this sense.⁵

The Algerian legislator affirmed in Article 677 of Order No. 75/58 of 26 September 1975 containing the Civil Code⁶, as amended and supplemented — that “.. **the administration has the right to expropriate all or part of real property ... for public utility in exchange for a fair and equitable indemnity.**”⁷

➤ ***Nationalisation.***

Nationalisation is an act of sovereignty by which the means of production and certain specified activities pass from individuals and private entities to the State for the purpose of exploitation in the service of the collective interest. Nationalisation may aim at the comprehensive elimination of all forms of individual ownership of the means of production — known as ideological nationalisation — or merely at the elimination of the dominance of foreign capital over the national economy, known as reformist nationalisation.

Article 678 of the Civil Code provides that 'a nationalisation order may not be issued except by virtue of a legislative provision, and the conditions and procedures for the transfer of ownership and the modalities of compensation shall be determined by law.'

➤ ***Confiscation.***

Confiscation may be defined as a measure taken by the public authority whereby it seizes ownership of all or part of the assets and financial rights belonging to a person without compensation.⁸ It may be administrative in nature, as a precautionary measure required by considerations of security, safety, and public health, or criminal, as a supplementary penalty accompanying a principal sentence. The distinguishing feature of confiscation relative to expropriation and nationalisation is the absence of compensation; it constitutes a penalty aimed at sanctioning an economically wrongful act.⁹

➤ ***Requisition.***

Requisition is a temporary measure taken by the public authority whereby it obtains a right of usufruct over certain private assets for a purpose relating to the public interest, in exchange for subsequent compensation paid by that authority to the owner of the assets.¹⁰

For requisition to be lawful, the State must exercise it exclusively in emergency and exceptional situations such as wars and civil unrest; in other circumstances, it is unlawful since the administration is presumed to resort to consensual means¹¹, in accordance with Article 679 of

⁵Hussein Nawara, Legal Protection of Foreign Investor Property in Algeria, (Doctoral Dissertation), Faculty of Law, Mouloud Mammeri University – Tizi Ouzou, 2013, pp. 44–45.

⁶Official Gazette, No. 78, issued on 30/09/1975.

⁷Hashem Omar Mohammad Sadaqa, Guarantees of Foreign Investments in International Law, Dar Al-Fikr Al-Jami'i, Alexandria, 2008, p. 30.

⁸Ibid., p. 36.

⁹Aybout Mohend Oali, op. cit., p. 276.

¹⁰Ibid., p. 278.

¹¹Hussein Nawara, op. cit., p. 53.



the Civil Code. The Algerian legislator regulated the procedures and provisions governing requisition in Articles 679 to 681 bis 3 of the Civil Code.

➤ **Usurpation.**

Usurpation is an extremely dangerous procedure since its purpose is to deprive the owner of his assets without observing the lawful procedures. It is contrary to the provisions of international law and is liable to create an unfavourable climate for investment and to place the State at odds with the international community. Developing countries that seek to improve their investment climate within a framework of economic development must accordingly avoid such procedures, which contravene the legal conditions and formalities — as Algeria has committed to do.¹²

1.1.3. Expropriation Procedures

The exercise by the State of its right of expropriation for public utility must not be arbitrary; it must comply with a set of procedures prescribed by law, failing which the measure is subject to judicial annulment — in order to protect investors in real property of all types.¹³

These procedures comprise the following stages:

- Declaration of Public Utility: a prior inquiry must be conducted by a commission to establish the existence of that utility;¹⁴
the declaration of public utility is then made by the issuance of a decision that must, under penalty of nullity, specify the objectives of the expropriation, the area and location of the property, the particulars of the planned works, and an estimate of the costs;¹⁵
- identification of the property and real rights to be expropriated, as well as the identity of the owners and holders of the rights concerned;¹⁶
- preparation of a valuation report on the property and real rights to be expropriated;¹⁷
- issuance of an administrative decision on the transferability of the property and rights to be expropriated;¹⁸
- issuance of an administrative order of expropriation for public utility.¹⁹

1.2. The Legal Conditions of the Non-Expropriation Guarantee

Within its investment promotion framework, the Algerian State has worked through its various laws to recognise the right of ownership and to guarantee that it will not be expropriated except within certain limits that require the payment of a fair indemnity to remedy the harm suffered. It

¹²Aybout Mohend Oali, op. cit., p. 278.

¹³Hussein Nawara, op. cit., p. 47.

¹⁴See Articles 4 to 9 of Law No. 91/11 dated 26/01/1991 on Rules Relating to Expropriation for Public Utility, Official Gazette, No. 21, issued on 28/05/1991.

¹⁵See Articles 10 to 15 of the same Law.

¹⁶See Articles 16 to 19 of the same Law.

¹⁷See Articles 20 to 22 of the same Law.

¹⁸See Articles 23 to 28 of the same Law.

¹⁹See Articles 29 and 30 of the same Law.



is therefore necessary to examine the legal basis of the non-expropriation guarantee and the effects that flow from it.

1.2.1. The Legal Basis of the Non-Expropriation Guarantee

The Algerian legislator enshrined the non-expropriation guarantee in its various fundamental laws. Article 22 of Law No. 16/01 of 6 March 2016 containing the Constitutional Amendment provides²⁰: **“Expropriation shall only be effected within the framework of the law and shall give rise to fair and equitable compensation.”**

Article 677 of the Civil Code likewise provides that “no person may be deprived of his ownership except in the cases and under the conditions prescribed by law ...”

In the context of encouraging both domestic and foreign investment in Algerian territory, the legislator confirmed this guarantee in Law No. 16/09 of 3 August 2016 on Investment Promotion.

²¹ Article 23 provides: “In addition to the rules governing expropriation, investments made may not be the subject of requisition except in cases provided for by the legislation in force. Such requisition and expropriation shall give rise to fair and equitable compensation.”

Moreover, many of the international conventions ratified by Algeria contain a non-expropriation guarantee. By way of example, Article 4 of the Agreement on the Promotion and Mutual Protection of Investments with the Belgian-Luxembourg Economic Union provides as follows:

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- Each Contracting Party undertakes not to take any measure of expropriation or nationalisation, or any other measure having the effect of directly or indirectly depriving investors of the other Contracting Party of investments owned by them on its territory.
- If public utility, security, or national interest imperatives justify derogating from paragraph 1 of this Article, the following conditions must be observed: (a) the measures must be taken in conformity with legal provisions; (b) the measures must not be discriminatory or contrary to a specific undertaking; (c) the measures must be accompanied by provisions for the payment of adequate and effective compensation.
- The amount of the compensation shall equal the real value of the investments concerned on the eve of the day on which the measures are taken or announced."

1.2.2. The Effects of the Non-Expropriation Principle

In order to confer legality upon an expropriation procedure, the national legal texts cited above and the international instruments embodied in investment agreements prescribe a set of formal

²⁰Official Gazette, No. 14, issued on 07/03/2016.

²¹Official Gazette, No. 46, issued on 03/08/2016.

²²Presidential Decree No. 91/345 dated 05/10/1991, comprising ratification of the Agreement concluded between the Government of the People's Democratic Republic of Algeria and the Belgium-Luxembourg Economic Union, relating to the Mutual Encouragement and Protection of Investments, Official Gazette, No. 46, issued on 06/10/1991.



and substantive conditions binding upon the State in application of the non-expropriation guarantee. Drawing on these texts and the prevailing views of legal doctrine and jurisprudence, these conditions may be classified into two categories:

➤ ***Principles to be Observed upon Expropriation:***

a) The Principle of Non-Discrimination. The principle of non-discrimination against foreign investors and foreign assets is enshrined in both international and domestic law. When expropriating foreign investors, the measure must form part of the implementation of the State's general policy for the achievement of the public interest, and must not constitute a punitive measure directed against a specific investor on grounds of nationality as compared with measures taken against other investors.²³

b) The Public Interest Requirement. The investor's real property may only be expropriated for the achievement of a public interest; the State resorts to this measure solely for the purpose of realising certain economic and social objectives. In practice, ascertaining the public interest raises several difficulties, and it is necessary to take into account the 'genuine intentions' of the State, consisting in the imperative of achieving economic and social reform.²⁴

c) Respect for the Principle of Legality. Reference has already been made to the legal procedures that the State is required to observe upon exercising its power of expropriation in order to protect investors in real property. In furtherance of the rule of law, the measures taken must conform to the legal provisions established for this purpose.²⁵

d) Non-Breach of a Specific Undertaking. States have moved, with a view to ensuring effective protection for their nationals investing in the territory of another state, to include a specific clause within the bilateral investment agreements binding the two states, to the effect that the ownership of the investor's real property shall not be disturbed by the State — regardless of its economic objectives. Where such a clause exists and is breached, international responsibility ensues.²⁶

➤ ***Provisions Governing Compensation for Expropriation:***

The obligation to pay compensation constitutes an important legal guarantee when the State exercises its right of expropriation, as it is designed to remedy the harm suffered by the investor who has been deprived of his ownership of the real property on which his investment project is being realised.²⁷

Although compensation is a right recognised internationally and domestically for the investor, its amount must be sufficient to eliminate all negative consequences of the measure to the greatest possible extent — a condition satisfied when the State pays adequate compensation.

²³Aybout Mohend Oali, op. cit., pp. 289–290.

²⁴Ibid., p. 292.

²⁵See expropriation procedures, previously explained.

²⁶Aybout Mohend Oali, op. cit., p. 294.

²⁷La'mari Walid, op. cit., p. 23.



The applicable forms of compensation are as follows: ²⁸

a) Fair Compensation. Fair compensation as recognised by the Algerian legislator rests upon an objective criterion: the compensation arising from expropriation procedures must cover all the consequences thereof, based upon the real value of the invested assets, including the real property concerned. ²⁹

b) Equitable Compensation. Equitable compensation is achieved when the amount genuinely reflects the desire to remedy the harm, taking into account the rights and obligations of both the State and the investor in respect of the real property. ³⁰

c) Prior or Immediate Compensation. 'Prior' compensation means that it is paid before the expropriation procedure is completed. However, the legislator waived this requirement under investment promotion laws and the 2016 Constitutional Amendment, owing to the practical difficulties and problems of its implementation. Nevertheless, the State remains under an obligation to pay compensation without delay or as soon as possible. ³¹

2. Application of the Non-Expropriation Guarantee to the Exploitation of Real Property Earmarked for Investment

Within the framework of economic development, the Algerian legislator has worked to encourage investment in real property of all types, granting privileges to any person who invests in real property owned by them — whether industrial, agricultural, or touristic — and guaranteeing a range of protections, the most significant of which is the protection of the investment and the non-deprivation of ownership.

With regard to national property, the legislator has since independence adopted several frameworks for investment therein. An investor in such property may exploit it either through transfer-of-ownership contracts — thereby acquiring the rights of usufruct or exploitation as well as the right of ownership — or through concession contracts that confer only a right of usufruct without ownership.

In keeping with the State's policy of retaining the real property portfolio within its assets, the Algerian legislator has made the concession contract the sole formula for the exploitation of real property earmarked for investment projects — a development that raises the question of the mechanisms for protecting the investor's right of exploitation under such contracts. ³²

It follows that the investor's exploitation of real property may confer a right of ownership, in which case the non-expropriation guarantee applies, or may consist in exploitation alone without ownership by way of concession.

²⁸Hussein Nawara, *op. cit.*, p. 103.

²⁹Aybout Mohend Oali, *op. cit.*, p. 343.

³⁰Hussein Nawara, *op. cit.*, p. 111.

³¹Aybout Mohend Oali, *op. cit.*, pp. 342–343.

³²Mustafawi Aida, *Legal Regulation of Tourist Real Estate in Algeria*, *Journal of Legal and Political Research and Studies*, No. 06, 2014, p. 173.



2.1. Forms of Real Property Investment Benefiting from the Non-Expropriation Guarantee

There is no doubt that the State's non-expropriation guarantee relates to real property exploited by way of ownership. Accordingly, the investments that benefit from this guarantee are the following:

2.1.1. Investment in Privately Owned Real Property

By virtue of the right of ownership and the powers of disposition, exploitation, and use that flow from it, the owner of real property — whether touristic, industrial, or agricultural — who invests in his property in compliance with the applicable laws and regulations may be regarded as an investor exploiting real property by way of ownership.

The Algerian legislator enshrined the principle of freedom of investment in Article 43 of Law No. 16/01 containing the Constitutional Amendment, which states: “Freedom of investment and trade is recognised and shall be exercised within the framework of the law.” Accordingly, the owner of real property is entitled to exploit it and is thereby considered an investor by way of ownership, benefiting from the non-expropriation guarantee.

Article 3 of Law No. 16/09 on Investment Promotion confirms that investments made under the provisions of that Law must be realised in compliance with the applicable laws and regulations — particularly those relating to environmental protection, regulated activities and professions, and the general exercise of economic activities. The real property owner is therefore required to complete all legal procedures for investment authorisation and to comply with the relevant legislation.

2.1.2. Investment in Private National Property by Way of Transfer of Ownership

Transfer, retransfer, and sale are all designations for a contract that produces the same result: the full and comprehensive transfer of ownership to the purchaser under the principles well-known in civil law. In the present study, this contract relates primarily to private national property belonging to the State or to local authorities, the ownership of which is transferred to the investor. What distinguishes these contracts is their inclusion of certain exceptional and atypical conditions relative to the general rules — such as transfer subject to a resolutive condition and by means of a specifications schedule.³³

The Algerian legislator provided for the possibility of transferring private national property in Article 4 of Order No. 06/11 of 30 August 2006, which determines the conditions and modalities for granting concessions and transferring land belonging to the private national property of the State and earmarked for the realisation of investment projects.³⁴

³³Boujarda Makhlouf, *Industrial Real Estate*, Dar Houma, 3rd ed., Algeria, 2009, p. 62.

³⁴Official Gazette, No. 53, issued on 30/08/2006.



Law No. 82/11 of 21 April 1982 on Private National Economic Investment³⁵ enabled the investor to benefit from a transfer contract for industrial real property within the activity zones specially established and developed for that investment.³⁶

With regard to tourist real property, Article 25 of Law No. 03/03 of 17 February 2003 on Tourism Expansion Zones and Tourist Sites³⁷, affirmed the possibility of transferring land constituting tourist real property to investors within the framework of the tourist development plan, subject to a specifications schedule precisely defining the investor's obligations.

As regards agricultural real property, Article 7 of Law No. 87/19 of 8 December 1987 on the Modalities for the Exploitation of Agricultural Land Belonging to National Property and the Determination of Producers' Rights and Obligations³⁸, provided for the right to own all assets constituting the investor's portfolio other than the land itself, the latter being transferred to investors for financial consideration.

Investment in real property by way of ownership — in all its forms — accordingly entitles investors to invoke the non-expropriation guarantee. It should be noted, however, that the Government abolished the legal provisions authorising the transfer of real property by virtue of Order No. 08/04 of 1 September 2008, which determines the conditions and modalities for granting concessions over land belonging to the private national property of the State and earmarked for the realisation of investment projects³⁹. Article 15(2) thereof provides that all provisions contrary to this Order⁴⁰ are repealed, confirming the definitive abandonment of transfer-of-ownership contracts owing to concerns about the depletion of the State's real property portfolio and the risk of the transferred property being diverted to purposes other than investment.⁴¹

Nevertheless, the non-expropriation guarantee must be affirmed in the context of these contracts, given that many of them remain in force and that disputes concerning them are numerous. The repeal of provisions on real property transfer does not operate retroactively and does not affect vested rights — including the right of ownership and its protection — by virtue of the principle of legislative stability enshrined in investment laws.

³⁵Official Gazette, No. 34, issued on 24/08/1982.

³⁶Boujarda Makhlouf, *op. cit.*, p. 63.

³⁷Official Gazette, No. 11, issued on 19/02/2003.

³⁸Official Gazette, No. 50, issued on 09/12/1987.

³⁹Official Gazette, No. 49, issued on 03/09/2008.

⁴⁰The Algerian legislature, by virtue of Article 2 of this Order, excluded agricultural lands from the application of its provisions — implying that exploitation of such lands through ownership transfer remained possible. However, the legislature reversed this position and issued Law No. 10/03 determining the conditions and modalities of exploiting agricultural lands belonging to the private state domain, Official Gazette, No. 46, issued on 18/08/2010, where Article 3 thereof stipulates that the concession (franchise) is the mode of exploitation of such lands, confirming the State's abandonment of ownership-transfer as a method for exploiting agricultural lands.

⁴¹Kahil Hayat, *Mechanisms for Exploiting Tourist Real Estate Designated for Investment*, *Annals of the University of Algiers 1 Journal*, No. 30, Vol. 1, p. 138.



2.2. Mechanisms for Protecting the Exploitation of Real Property Invested under Concession

By abolishing the real property transfer contract as an investment mechanism, the Algerian legislator has made the concession grant the sole formula for the exploitation of real property earmarked for investment. Order No. 08/04 — referred to above — governs the grant of concessions over land belonging to the private national property of the State earmarked for the realisation of investment projects, and prescribes the relevant modalities and procedures based on the specifications schedule.

The concession contract is defined as the contract by which the State, for a specified period, grants a natural or legal person subject to private law the right of usufruct over an available plot of land forming part of its private property, to be used primarily for the establishment of an investment project.

The concession contract may also be characterised as an administrative contract, given that one of its parties is the State represented by the administration of State property. It is a long-term contract and creates an accessory real right consisting of a usufruct.⁴²

It follows that the concession contract creates only a right of usufruct and exploitation, without conferring any right of ownership or power of disposition. An investor operating under this regime accordingly cannot benefit from the non-expropriation guarantee, since he is not the owner of the real property on which the investment project is being realised.⁴³

The obligation of non-expropriation constituted a robust guarantee for the protection of the right of exploitation of invested real property; the inapplicability of this guarantee within the framework of concession contracts raises numerous difficulties concerning the possibility of the State annulling the contract or withdrawing the concession to the detriment of the investor. This compels us to seek out mechanisms for the protection of the investor's exploitation of real property under concession.

The judiciary constitutes a fundamental safeguard for the real property investor against arbitrary State action in the exercise of its right to withdraw or rescind the concession contract. In all cases, the concession contract is rescinded by operation of law before the courts, given the existence of contracts creating vested rights for the investor.⁴⁴ Where the court determines that the State's rescission of the contract was arbitrary — for example, where the investor had fulfilled all his contractual obligations — the investor is entitled to compensation.⁴⁵

Conclusion

Through this examination of the application of the non-expropriation guarantee to real property earmarked for investment in light of the State's policy orientation towards concession contracts,

⁴²Boujarda Makhlouf, *op. cit.*, p. 70.

⁴³Kahil Hayat, *op. cit.*, p. 139.

⁴⁴Boujarda Makhlouf, *op. cit.*, p. 102.

⁴⁵*Ibid.*, p. 100.



we have arrived at a number of findings and recommendations, which may be summarised as follows:

- The promotion of the national economy passes essentially through the legal mechanisms provided by the Algerian State to encourage investment and improve the investment climate in real property. Since real property constitutes the most important domain for investment, the legislator recognised the protection of the right of ownership and guaranteed against its infringement through the constitutionally and legislatively entrenched non-expropriation guarantee.
- The non-expropriation principle — in all its forms — constitutes an effective guarantee for the protection of domestic and foreign investments, since expropriation is an exceptional measure that may only be effected within the framework of specific legally prescribed conditions and procedures, requires respect for the fundamental principles governing expropriation, and entails the payment of fair and equitable compensation in protection of the investor's vested rights over the real property.
- The application of the non-expropriation guarantee necessarily requires that the investor exploit the real property by way of ownership — either where the invested property is privately owned and the investor exploits it himself, or where the investor exploits private national property earmarked for investment projects under a transfer-of-ownership contract.
- Concession contracts are currently the sole legally recognised formula for investment in private national property; they are premised on the right of usufruct without ownership. This may prejudice the investor's rights in the event of arbitrary State action in withdrawing the concession, particularly given that the non-expropriation guarantee cannot be applied within the framework of a concession contract.
- An expropriation affecting real property invested by way of ownership gives rise to the State's obligation to pay fair and equitable compensation, thereby mitigating the severity of this measure and remedying the harm suffered by the investor. By contrast, there is no mechanism guaranteeing the award of fair compensation in the event of the State withdrawing the concession decision.

Recommendations

- The Algerian legislator should enact special protection provisions in the Investment Promotion Law in favour of investors exploiting real property of all types under concession, in the event of arbitrary State action upon the withdrawal or rescission of the concession contract — particularly given that the concession contract is currently the sole legally recognised mechanism for the exploitation of private national property earmarked for the realisation of investment projects.
- The Algerian legislator should also provide expressly for the investor's right to obtain fair and equitable compensation in the event of arbitrary State action in withdrawing or



annulling the concession contract, on the same basis as that afforded in the case of expropriation.

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- Law No. 87/19 dated 08/12/1987 on the modalities of exploiting agricultural lands belonging to the national domain and determining the rights and duties of producers.
- Law No. 91/11 dated 26/01/1991 on Rules Relating to Expropriation for Public Utility.
- Law No. 03/03 dated 17/02/2003 on Tourist Expansion Zones and Tourist Sites.



- Law No. 10/03 determining the conditions and modalities of exploiting agricultural lands belonging to the private domain of the State.
- Law No. 16/09 dated 03/08/2016 on Investment Promotion.