LEGAL PROTECTION FOR THE FOREIGN INVESTOR IN JORDAN IN LIGHT OF INTERNATIONAL AGREEMENTS

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ABSTRACT

Objective: This study seeks to determine the mechanism that the state undertakes to provide security for the foreign investor, and is the protection provided by the host country to the foreign investor commensurate with what the latter offers. The study also aims to introduce the concept of investment from a legal point of view, what international agreements have been exposed to, and the concept of guarantees of aspects of investor protection in the host country.

Method: The author adopted this study the descriptive-analytical and comparative approach, as well as the relevant international agreements.

Result: The Jordanian Investment Law No. 30 of 2014 and the Jordanian Investment Law No. 80 of 2019 amending Law No. 77 of 2016 granted the foreign investor sufficient guarantees to enable him to invest his money safely and securely inside the Kingdom.

Conclusion: The legal protection for the investor on which the decision to invest his money is based is the most important guarantee and facilities provided by the host country and in light of the increase in the movement of foreign investments between countries.

Keywords: investment, guarantees, foreign investor, host country.
Resultado: a Lei de Investimento Jordaniana n.º 30 de 2014 e a Lei de Investimento Jordaniana n.º 80 de 2019, que altera a Lei n.º 77 de 2016, concederam ao investidor estrangeiro garantias suficientes para lhe permitir investir o seu dinheiro de forma segura e segura no Reino,

Conclusão: A proteção jurídica do investidor em que se baseia a decisão de investir o seu dinheiro constitui a garantia e os mecanismos mais importantes proporcionados pelo país de acolhimento e tendo em conta o aumento da circulação de investimentos estrangeiros entre países,

Palavras-chave: investimento, garantias, investidor estrangeiro, país de acolhimento.

1 INTRODUCTION

The countries that seek to attract investment, including Jordan, do so to accelerate the economic wheel and stimulate its economic growth. Presently, investment has become an essential mechanism for any country that wants to give momentum to its economic growth, particularly developing countries. However, this ambitious objective could not be achieved without generous incentives and guarantees that provide foreign investors with security and the feeling that their funds and investments are securely safe (Al Ali et al., 2023).

The legal protection of investors is one of the factors on which the investment decision is based and a hosting country is required to provide guarantees and facilitations. In light of the increased foreign investments across borders, the importance of legal guarantees offered by hosting countries to foreign investors also increased. So, different countries embarked on a race to attract more foreign investors, and as the contest intensified, the ceiling of guarantees heightened more and more.

In order for the guarantees of protection to be more stable, most countries sought to create a unified international system providing necessary sufficient protection of the foreign capital, whether such a legal system was in the form of international conventions or a structural system of specialized institutions for guarantying investments.

The study was divided into two sections. The first section addressed the concept and guarantees of investor protection; while the second section discussed the legal sources of foreign investor protection.
2 THEORETICAL FRAMEWORK

2.1 CONCEPT AND GUARANTEES OF INVESTOR PROTECTION IN LAW

This section will discuss the legal and economic conceptualizations of investment, the concept of investment in light of international agreements, and guarantees of investor protection.

2.1.1 Investment: legal vs. economic concepts

First: Legal Concept of Investment:

No doubt that investment as a process has an integrated economic facet, and the various attempts to design a legal definition to organize the investment process have been futile. Most Arabian laws, including the Jordanian law, have been focused on foreign investment disregarding the national investments within the scope of the investment law. The difficulty in reaching a certain definition of investment resides in the fact that the investment process forms a combination of legal and economic factors. For instance, non-Jordanian Investment Organization Regulation no. 77 was published in 2017, and based on article 10 of the Investment Act no. 30 of 2014 in replacement of Regulations no. 54 of 2000 as amended that states the following “the purpose of these regulations is to identify the economic activities in which non-Jordanian are allowed to invest in (wholly or partially) whether by ownership, partnership or shareholding and what percentage of such ownership as well as the economic activities not allowed for foreign investors wholly or partially”. Obviously, the Jordanian legislator addressed the foreign investor and the percentage of ownership but did not provide a specific definition of investment. However, the investment was defined by a committee composed under international law that stated “investment is the transition of capital from the investing country towards a beneficiary country without a direct organization”. Unfortunately, this definition was not widely accepted by many of the jurisprudents who continued to disagree about the definition of investment (Duraid Mahmoud, 2006).

Second: Economical Concept of Investment

From a macroeconomic perspective, investment is considered among the material goods that are used to produce more production. This definition includes machinery, equipment, and changes in inventory (Mohammad Al-Killawi, 2008). Alternatively, investment can be defined as that part of the national product that was not used for the current consumption during a specific year, but used to aggregate capital assets of a
community to increase the capability of that country to produce goods. Great economist Keynes defined investment as being “the value of current production of capital goods and value of finished goods aggregated to the inventory; or else it is the net increase in real capital, equipment and goods (David W, 1981, Yulianto & Wijaya 2023). However, the UN Conference on Trade and Development UNCTAD defined foreign investment as “a long-term relationship reflecting the permanent interest and control of entity residing in an economy (i.e. an investor making foreign investment direct foreign investment necessitates that the investor shall exercise a significant influence on the management of the project embedded in the other economy. This definition is comprehensive and inclusive of both direct and indirect investment. Through this long-term relationship, the foreign individuals and businesses make investments that allow a direct inflow of foreign capital which was brought in by direct foreign investors (direct foreign project).

2.1.2 Concept of investment under the international agreements

The Washington Convention of 1965 was one of the major conventions that dealt with investment, under which the International Centre for the Settlement of Investment Disputes (ICSID) was founded to resolve international disputes among countries. Despite the subject of the convention is an investment, no specific definition was introduced, leaving the definition of investment to the arbitration courts to define it by the case considered.

Another definition was presented by the Seol Convention that established the International Agency of Investment, where Article 12 stated that investment refers to “investment valid to guaranty equity, mid-term and long-term loans provided by co-owners of a project or a form of direct investment specify by the board of directors”

The Unified Collective Agreement on Arab Capital Investment of 1980 defined investment as “utilization of the Arab Capital in one of the economical development fields for purpose of accomplishing revenue in the party country’s territory other than the country the Arabian investors has its nationality”. However, according to publications of the UN Conference on Trade and Development UNCTAD and the Organization of Economic Development and Development OECD, foreign investment refers to “that sort of international investment reflecting a person (whether natural or artificial) residing within an economy (the investor) a permanent interest in an institution residing in another economy (foreign investment institution) and the permanent interest refers to a long-term
relationship between the foreign investor and the institution“, or it is the transition of funds from abroad to the hosting countries for purpose of gaining profits by the foreign investor and increase the production for the hosting country“ (Abdulaziz Saad Yahia, 2002)

The definitions discussed above point out that foreign investment is associated with the cross-border transition of capital. However, the mere transition of capital from one country to another is an investment, as such funds could be in the form of donations or grants but not investment. As a result, it is difficult to have a specific and clear-cut definition of the investment because it is variable and differs by the economic conditions both on the national and international levels.

2.1.3 Guarantees of investor protection

The concept of investment guarantees indicates mechanisms implying a promise by the hosting country to protect the foreign investor’s rights within the framework of free practice of investing, and non-discriminated treatment of a foreign investor against the national investor. So, the major guarantees offered to foreign investors in the hosting country are the following:

First: Equality between Indigenous and Foreign Investors:

The Jordanian legislator did not differentiate between Jordanian and non-Jordanian investors as provided in Article 41 paragraph C of the Investment Act no. 30 of 2014 that stated “for purpose of applying the provision of this statute, non-Jordanian investors shall be dealt with as the Jordanian investors”, and the equality between indigenous and foreign investors is based on the pretext of facilitating the practice of the economic and commercial activity by all persons irrespective of nationality. In reality, this equal treatment between national and foreign investors implies openness to foreign investments and draws on the international law of investment that requires a hosting country not to favor the national over the foreign investor.

However, Article 10 of the Jordanian Investment Act granted any non-Jordanian person the right to invest in Jordan by ownership or shareholding based on specific bases and conditions in virtue of a regulation issued to that purpose provided that the economic activities shall be specified and the percentage of sharing to which non-Jordanian investor is entitled.
The Prime Ministry’s decision no. (742) on 20/6/2016 approved the investment protection and enhancement between the Republic of Iraq and the Hashemite Kingdom of Jordan that was mutually signed on 25 December 2013 in Baghdad. Additionally, Jordan signed other bilateral agreements such as the mutual enhancement and protection of investment between Jordan and Czech Republic signed on 17 November 1997; and the agreement signed by Jordan and Netherlands for mutual protection and enhancement of investments on 20 September 1997. Similarly, an agreement was signed on 16 June 1998 between Jordan and Morocco on the protection and enhancement of investments, and the bilateral agreement was signed by Jordan and Qatar in Amman on 28 Jan 2009, to protect and boost investments. However, there are many similar agreements signed by Jordan with other countries aiming at protection and encouragement of investment. The purpose of such mutual agreements is to protect investors and encourage investments among signing countries.

Second: Freedom of Investment Practices:

The investment climate is critical to attracting foreign investors, based on which the investor can develop his investment agenda. The sovereignty of a state on its natural resources and economic wealth gives freedom for a state to identify what sectors are allowed for foreign investors and which sectors are blocked for a foreign investor. Article (3) of non-Jordanian Investment Organization Regulations no. 77 of 2016 stated that non-Jordanian investor may possess any project or economic activity both wholly or partially or contribute thereat with any percentage without breaching the requirements of national security, public order, public manners, or public health excluding activities specified in articles (4), (5) and (6) of that regulations which adds restriction on such ownership or possession. The Jordanian legislator allowed 50 percent of capital for some economic activities to be owned by a foreign investor, and set the ceiling of no more than 49 percent of capital of some activities to be owned by a foreign investor.

Meanwhile, the legislator stated that non-Jordanian investors may not get engaged wholly or partially in any project of such economic activities as quarrying of stones, security service, guarding, firearms trade, ammunition import, repair and private shooting service, trade in fireworks, import use and bakery or any kind.

The Free Trade Agreement signed in October 2000, and took effect in January 2010 contributed to growth of trade between the United States and Jordan because its enhanced bilateral economic ties by eliminating the customs royalties, removed the
obstacles impeding bilateral exchange of goods and services of both Jordan and USA. In addition, the agreement provided a high level of protection of intellectual property rights, organizational transparency and effective enforcement of policies related to labor and environmental issues.

The Free Trade Agreement represents the backbone of the bilateral partnership between the United States and Jordan aiming at realizing the common interests, progress, and creating stability and security. The Free Trade Agreement leveraged the trade exchange between the United States and Jordan as the United States represents one of the biggest five commercial partners to Jordan, and the figures are increasing.

The goal of the Free Trade Agreement is not only to increase trade of goods between both countries, but also trade of services and creation of jobs. Since signing the agreement, Jordan showed commitment with its responsibilities specified in the agreement by developing a legislative environment boasting trade and investment. In this context, Jordan applies a series of legal and organizational reforms for purpose of protecting intellectual property rights, improve the standards of work and environment, and improve dispute settlement procedures.

However, the free trade agreement includes no specific section for the investment. Rather, a bilateral investment agreement was previously signed between Jordan and the United States. Both the free trade and the investment agreements between Jordan and the United States had far-reaching effect in creation interest and investment opportunities for the benefit of both sides. Jordan today hosts some of the American private giants like AES, Albemarle, Cargill, Microsoft, Cisco, Delmont, etc. Jordan’s efforts to diversify its sources of energy created investment opportunities which were attractive to the American companies like First Solar, Hecate that stand as success stories American companies could achieve in this field. The potentials of investment are great in the fields of renewable energy, and energy storage as promising fields of investment. In addition, there are promising investment opportunities in the communications & IT, energy, health, security, and transport.

Noteworthy, Jordan was among the first countries to sign on Paris and Berne agreement and WTO conventions related to trade like TRIPs, WIPO accessed by Jordan in 1996, WPPT, and UPOV https://www.google.com/search?q=%D9%85%D8%AD%D8%B7%D8%A9+%D8%A A%D9%88%D9%84
Third: No Dispossession Guaranty:

The international conventions in course of protection and encouragement of the foreign investment were careful about setting the appropriate framework to organization such protection by identifying the contents of such protection, the elements of remuneration to which entitled the foreign investor in case of dispossession, and describing the features of such remuneration upon maturity in terms of comprehensiveness, effectiveness, and prompt of payment. The bilateral stressed such remuneration as well as fairness. For instance, the agreements signed by Jordan and Algeria in 1996 on mutual protection and encouragement of investment dealt with dispossession through nationalization in article (5):

1. The benefits from the investments made by the first party’s investors include full protection and security as well as revenues realized on the territory and maritime area of the other contracting party.

2. The contracting parties shall not take measures of dispossession, nationalization or any other measure that may result in direct or indirect dispossession by the other party’s investors regarding the investments they own on their territory or maritime area, unless for public utility, and such measures were taken in accordance with undiscriminating legal procedures. Dispossession measures shall be accompanied by appropriate and actual remuneration the value of which shall be determined based on the real value of such investments evaluated based on the value of investments dominating the market in the day in which such measures were taken or announced. The value of remuneration and method shall be made maximally by the date of dispossession, and such remuneration shall be actual and payable at prompt without delay, and freely transferrable. The interest accrued as a result of such remuneration upon the payment date shall be computed based on the official interest rate of the special drawing rights as specified by the International Monetary Fund (Article (5) of paragraph (1, 2) of the Agreement signed by Jordan and Algeria regarding investment encouragement and protection, signed in Amman 1966)

Jordan signed a free trade agreement with Singapore in 2004, and aimed, in addition to enhance the bilateral trade relationships, the agreement sought to open opportunities for the exported Jordanian products to all world countries relying on accumulation of country of origin with countries concluded free trade agreements with
Jordan and Singapore. Additionally, Jordan signed in the same year Agadir Trade Agreement with Egypt, Morocco, and Tunisia. In 2009, Jordan signed a Free Trade Agreement with Canada that entered into force by first March 2011, and also signed with Iraq a number of memorandums covering different sectors such as education, health, energy, transport and trade.

The Jordanian Investment Act no. (30) of 2014 provided in article (42) that “dispossession of property or activity is prohibited or subjection to any procedures may conduit threat unless the expropriation was in service of the public interest provided payment of fair remuneration to the investor in a transferrable currency without a delay”

2.2 LEGAL SOURCES OF PROTECTION FOREIGN INVESTOR

The non-commercial risks facing foreign investments in the hosting countries, particularly the developing countries, are among the most significant obstacles that preclude inflow of foreign capitals. This situation necessitates that hosting countries are required to offer guarantees for foreign investors, where the government gives warranties to protect the investor’s funds against any non-commercial risks. The following section discusses sources of protection for the foreign investors both international and domestic sources.

2.2.1 International sources

The idea of securing investments on the international level has emerged in a consequence of the efforts exerted by many countries to develop comprehensive and unified rules to protect foreign investments from risks that may happen in a hosting country. The efforts to find out legal methods to protect foreign investment continued and latterly took the form of international conventions accessed by many world countries in an attempt to reach comprehensive and unified provisions and rules to secure foreign investment, taking into account the approval of countries exporting and importing capital (Hussein Al Mugi, 1992). The early beginning of such efforts was 1929 when an international conference under the control of the League of Nations to consider the treatment of foreigners’ issue, but the conference failed to reach an agreement.

A decade later, the UN Conference was convened in 1948 and enacted the Havana Charter for International Trade Organization. The charter failed and was criticized for favoring the interests of the countries importing capitals, and refusal of the UN President
to refer it to the Congress for ratification (Ali Hasan Melhem, 2002). In 1948, the Economic Convention of Bogota was signed by Latin American countries that stressed on fair treatments, non-discrimination, and subjection of the foreign capital to the national laws, which led to objection by the capital exporting countries as occurred with Havana Convention.

In 1949, the international Chamber of Commerce published the International Code of Fair Treatment that prohibited any administrative or political act implying a discrimination impeding investment and fair remuneration in case of expropriation. The codes that provided for guarantee of transfer of capital and profits were unsuccessful because the countries exporting capital disapproved it (Ali Hasan, 2002). Then the Investment Protection Agreement was published in 1959 had the same destiny of the International Trade Codes (Ali Hasan, 2002).

In 1961 Harvard University proposed the responsibility of states regarding damages afflicting the economic interests of foreigners. The project was discarded because favored foreign investors. The Organization for Economic Co-operation and Development OECD proposed the protection of foreign property but was not accepted by all countries. The decision made by the Institute of International Law in 1967 regarding the legal position of capital investments at developing countries and emerging agreements and the decision made in 1979 regarding agreements between a state and a foreign person, where the institute acknowledged nationalization and dispossession for purpose of public advantage in return of fair remuneration, and the responsibility of the contracting countries to the foreign investor. In 1974, the UN General Assembly made its decision 3281 to adopt a Charter of Economic Rights and Duties of States that clearly reflected the view of the developing countries.

In light of the earlier discussion, the author can see that the international community failed to set up a collective international agreement to regulate foreign investments that is because of the difficulty associated with balancing the need for a fair and effective treatment of foreign investment, from a hand, and respecting the sovereignty of the host country, from another, especially in the developing countries. As a result, the world countries differed in their attitudes towards foreign investments, leading to difficulty in setting up international techniques for foreign investments (Hesham Khaled, 1980). Despite successive endeavors, the countries failed to set up a comprehensive legal framework to protect foreign investments which resulted in inconsistent economic
interests between the countries exporting capital and the importing countries. The meaning is the failure of the international community to develop an integrated system regulating foreign investments, which opened the door wide to international agreements to fill the gap.

2.2.2 Internal sources

Considering the importance of legal guarantees in protecting the rights and capital of a foreign investor and the generated profits, many countries sought to embed in its legislation provisions providing protection to investors. This attitude reflects the desire of states to encourage investment and attract foreign investors. However, the investor's decision whether to invest in a country or another depends on the balance between the expected profits and inherent risks, and what guarantees are offered by the hosting country as represented by its national legislation governing the investment. So, the national legislation of the hosting countries contains provisions to protect the foreign investor's funds from inherent risks and impediments, especially considering the intense competition among foreign investors in the developing countries, and the parallel competition among hosting countries to offer facilitations and protection of the investor from any inherent risks (Rida Abdussalam, 2002). A well-established guaranty is one that is entrenched in the constitution such as guaranty of free trade and industry, guaranty of private property, guaranty of being harmless without a law, and only in return of a fair remuneration. This situation provides such guaranties a constitutional protection considering that the constitution is the overarching law in a state and the source of every legal activity.

3 METHODOLOGY

The author adopted this study the descriptive-analytical and comparative approach, as well as the relevant international agreements.

4 RESULTS AND DISCUSSION

The current investment laws in Jordan deals with the national and foreign investors on equal foot, excluding the following cases:

- Periodical publications shall be owned by a Jordanian national or an entity entirely owned by Jordanians.
- No foreigner shall take possession whether partially or wholly in an investigation agency, security, sport clubs (excluding the health clubs), stone quarry used for building, customs clearance service, and land transport. However, the Council of Ministers may approve foreign possession in such projects based on recommendation from Investment enhancement Committee composed on senior officials at the Ministry of Trade and Industry, Income Tax Department, Customs, private sector and Investment Enhancement Corporation. To qualify for the exemption, the Council of Ministers shall feel high value to the national economy, and be Jordanian labor intensive projects.

- Foreign investors are entitled to fifty percent of the ownership of a number of businesses and services including printing/publication, maintenance service, repair aircraft and sea ships.

The Jordanian constitution considers that the government has three separate and independent branches one of them is the judicature, and the Jordanian laws are neutral regarding foreign and national investors (Paragraph (g) of article 42 of the Jordanian Investment Act provided that “to the purpose of application of this stature non-Jordanian shall be treated the same as Jordanian investor)

The USA law or judicial orders has no authority in Jordan; however, the judgments made by the American courts or the international arbitration committees can be supported by successful submission to the Jordanian courts for enforcement of court orders. Usually litigants complain of delays in the legal proceedings, and the same applies to enforcement of Jordanian laws and orders in the United States. However, the following laws and regulations govern the investments in Jordan, most importantly the Companies Act, Investment enhancement Act, Jordanian Investment Act no. 30 of 2014 and the regulations organizing foreign investment in Jordan

1. The Jordanian legislator did not discriminate between Jordanian and non-Jordanian investors and dealt them equally on the ground that equal treatment of Jordanian and foreign investor supports easiness of practicing the economic and commercial activities.

2. The investment climate in Jordan is a critical factor in attracting foreign investors based on which the investment policy can be made.

3. There is no all-inclusive definition of what safeguards should be and what contractual guarantees are needed in specific.
4. Disparity in the agreements that imply affording foreign investors certain guarantees which reflect the tendency of the government to create an attractive investment environment.

5. There are non-economic risks facing the foreign investment in the hosting countries, especially the developing countries that preclude inflow of foreign funds.

5 CONCLUSION

The earlier discussion fully demonstrated the legal and economic concept of investment and the role of contractual guarantees implied in the international treaties in safeguarding foreign investors from the theoretical and practical aspects and offering sufficient safeguards for creating a secure, safe, and efficient investment environment, and the following section provides the related results and suggested recommendations.

There is a need to conclude various agreements with the investing countries since foreign investors need sufficient safeguards to protect the investments. It is necessary to create attractive investment climate for the foreign investors. The need to reduce risks encountered by foreign investors and to facilitate the procedures related to money transfer and investments.
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