

Reconciling the Sovereignty, the State and Non- Expropriation

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Abstract

The protection of the private property of foreign investors is an indication of the extent of the economic and financial guarantees for the foreign investor, and the restrictions imposed on expropriation of such ownership that countries provide to a wide segment of traders and industrialists in their commercial and industrial activities. This has been proven by several international courts in their rulings in special cases of expropriation, including the American and French courts and many others. The research came up with the most important recommendations for documenting confidence in financial transactions, preserving the foreign investor's ownership, and promptly adequate compensation for the investor.

Keywords: Politics - sovereignty - independence - expropriation - foreign investor – government.

1. Introduction

The property right is described in the legal jurisprudence as an all-encompassing right, but this right may not, in fact, represent an appropriate framework to provide legal security for the foreign investor in his relationship with the country in which he invests. This right is often subject to prejudice and extortion by the state, using different legal systems and tools when there is a conflict of interests between the investor and the interests of the state, which may see the continued ownership of the investment project by the investor cause a threat to its interests in a way that is not commensurate with the returns.

The issue of expropriation between countries in the disputed borders causes political and security disturbances, for example, what happened between Guinea and Gabon around the island of Mabane, which affects investment flows to those areas¹. (Patrice Mundonga Moeti, Maritime Geopolitical Dynamics in Central Africa, 2018)

According to that, we pose the following question:

How can the law balance the conflicting interests of the investor and the country hosting the investment?

This question leads to several sub-questions, which are listed as follows:

¹ Patrice Mundonga Moeti, "Maritime Geopolitical Dynamics in Central Africa, Brief Thoughts on the Disarmament of the Maritime Boundary between Gabon and Equatorial Guinea", Publié in Res militaris, Vol: 8, issue 2 summer, 2018: P: 2.

- What is the concept of expropriation? What are the legal restrictions on expropriation?
- What is the position of some Arab legislation on the restrictions imposed on expropriation?
- Can the law reconcile the restrictions of expropriation and the right of state sovereignty?
- What is the impact of legal restrictions on expropriation on attracting foreign investors?

In our attempt to answer these questions, we will rely on the following design:

1. Prohibition of expropriation of foreign investors.
 - 1.1. The absolute prohibition of expropriation.
 - 1.2. The conditional prohibition of expropriation with non-discrimination.
 - 1.2.1. Conditional Prohibition of Expropriation.
 - 1.2.2. Conditions for owning the real estate of a non-national commercial project.
2. The obligation to pay compensation.
 - 2.1. Compensation in the event of confiscation and nationalization.
 - 2.1.1. Compensation in the event of confiscation.
 - 2.1.2. Obligation to compensate in case of nationalization.
 - 2.2. Compensation in the event of expropriation for the public benefit.

1.1 Prohibition of expropriation of foreign investors

In this context, the issue of the absolute prohibition of expropriation of the foreign investor is clarified and the extent of its importance in attracting the foreign investor,

then the conditional prohibition of expropriation is discussed with non-discrimination.

1.2 The absolute prohibition of expropriation.

It is necessary to define the nature of expropriation as "a privilege granted to the administration to obtain the ownership of real estate owned by private law persons or the original real rights forcibly and transfer it to the public ownership of the state in return for fair compensation."² (Draed Al-Samarrai, *Foreign Investment Obstacles and Guarantees*, 2006). We note in the definition the requirement of fair compensation unless we notice it in the laws of several Arab countries, where compensation is after a long period of time, which loses the status of compensation, including compensation for property owners in Medina and Mecca after the royal decision to expand the Two Holy Mosques, which confirms the need to activate the role of accounting by the World Trade Organization Global protection for foreign investors from abuse of the right of expropriation.

The absolute prohibition also means that the Investment Law expressly prohibits the expropriation of foreign investment, and we can observe this trend through the Investment Guarantees and Incentives Law in Egypt, which states that "companies and establishments may not be nationalized or confiscated."³ (Article N°1 of the Investment Guarantees and Incentives Law of Egypt, 1998). Those guarantees decided by the Egyptian legislator for the foreign investor are not effective and serious in providing safety, as they are in violation of the provisions of the Egyptian Constitution, which stipulates that nationalization is not permissible except for considerations of the public interest and fair compensation.⁴ (Article N° 25 of the Egyptian Constitution, 1991)

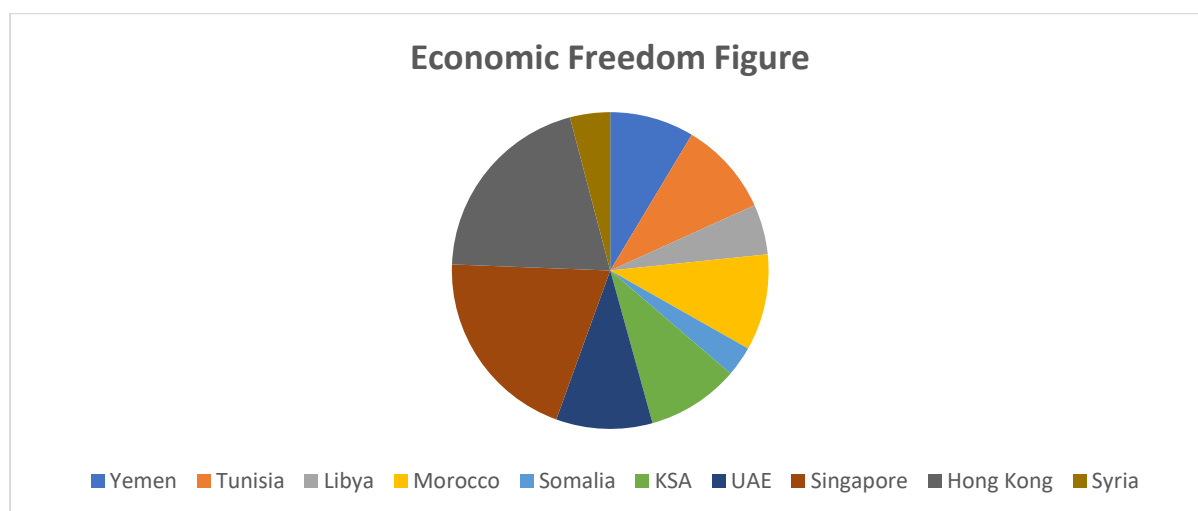
² Draed Al-Samarrai, "Foreign Investment Obstacles and Guarantees", Center for Arab Unity Studies, 2006: p: 106.

³ Article, "N°1" of Investment Guarantees and Incentives Law of :1998: Egypt: p:1.

⁴ Article, "N°25" of the Egyptian Constitution issued in September :1991: p: 5.

This confirms that these guarantees were established only to encourage investment flows to Egypt, and they are not effective as they lose the character of transparency. As for the prohibition imposed by the law on expropriation by means of confiscation, it is legitimate as it is based on a reasonable legal justification as it leads to depriving the investor of his commercial project without compensation.⁵ (Article N° 49 of the Egyptian Constitution, 1981). The Yemeni Investment Law explicitly enshrines this trend if it is decided that "projects may not be nationalized or seized, nor may their funds be confiscated, confiscated, frozen, or imposed without judicial custody."⁶

It appears from this text that Yemeni law imposes an absolute prohibition on expropriating a foreign investor's property through nationalization or administrative confiscation without a court ruling. This is the same approach followed by the foreign investment system in Saudi Arabia, which stipulates that it is not permissible to confiscate the investments of the foreign investor, in whole or in part, except by a court ruling.⁷ (Article N° 13/a of the Yemeni Investment Law N°. 22, 1991). The same applies to the investment promotion law in both Sudan and Jordan, as it decides that foreign investment may not be expropriated by the method of nationalization or confiscation.⁸ (Article N° 17 of the Investment Promotion Law in Jordan, 1990 & Article N° 17/1 of the Sudanese Investment Promotion Law, 1999). Despite the guarantees for the foreign investor in several legislations, the investment law remains an internal law in its presentation of amendment and cancellation without entailing any legal responsibility on the shoulders of the state that issued the legislation, as this is not considered a violation of the rules of international law. Through the foregoing, the investment and property protection law for the investor should be a somewhat stagnant law, and that a sufficient period of notice should be given about any changes in the articles of this law, which increases confidence between the state and the investor, and this is almost non-existent in Arab countries. Therefore, we note that Arab countries Among the least safe countries to invest in, in addition to political instability and lack of economic freedom, compared to other countries, for example, Singapore and Hong Kong, and the following figure illustrates that.



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⁵ Article, "N° 49" of the Egyptian Constitution in :1981: p:8.

⁶ Article, "N° 13/a", of the Yemeni Investment Law, "N° 22" in :1991: p:5.

⁷ Article, "N° 11", of the Foreign Investment Law in Saudi Arabia in, :2000: p3.

⁸ Article, "N° 17", of the Investment Promotion Law in Jordan in, :1990: p: 5. & See Article, "N° 17/1", of the Sudanese Investment Promotion Law in, :1999: p: 5

Through this figure, it becomes clear the lack of economic freedom in the Arab countries under the pretext of preserving the state's economy and working to expropriate projects under the pretext of public interest without the government administration's commitment to the public interest when issuing its decisions on expropriation, which necessitates the need to establish a law that defines the procedures for expropriation and public benefit that the state has the right to expropriate to achieve it.

1.3 The Conditional Prohibition of Expropriation Without Discrimination

With the emergence of foreign investment and real estate ownership, the expropriation of the foreign investor by the state has become conditional on the fulfillment of certain conditions and with no discrimination in expropriation between the national and foreign investors alike.

1.4 Conditional Prohibition of Expropriation

This requires that the Investment Law permits the ownership of foreign investment under certain conditions that must be met for this to be possible. This trend is generally embodied in the foreign investment system in Saudi Arabia, which requires that "it is not permissible to expropriate the investments belonging to the foreign investor, except in the public interest in return for fair compensation in accordance with the regulations and instructions".⁹ (Article N° 11 of the Foreign Investment Law in Saudi Arabia, 2000).

Through extrapolation, we note that the Saudi government has worked to expropriate the properties adjacent to the Two Holy Mosques in Madinah and the city of Mecca, which amounted to about 25,707 square meters, and to compensate them with real estate in places outside Mecca and Medina, which makes the compensation lose the character of justice, so the proportion of cases of expropriation in the Court of Cassation reached In Jeddah, about 35%, according to the testimony of the Jeddah Court of Cassation for the year 2021.

Moroccan law has dealt with compensation resulting from expropriation by administrative courts, taking into account" considerations Derived from Chapter 20 of Law No. 7.81 referred to in Chapter 35 of the Constitution issued on 1 July 2011 so that the compensation includes only current and not potential damage, with the compensation being according to the value of the property on the day of the publication of the decision to abandon without considering the improvements and constructions completed without the consent of the owner of the property.

Ownership must be within the limits of need, issued by the Minister of Industry and Trade, and the ownership of the real estate in Medina and Makkah is only for citizens, otherwise, it is subject to expropriation without compensation in return.¹⁰ (Abdelqader Al Idrisi, Expropriation for the Public Benefit, 2020)

The same applies to the provision in the Jordanian Investment Law, as this law expressly states that the ownership of the investment project may not be expropriated except by expropriating it for the requirements of the public interest, and in return for fair compensation.¹¹(Article N°25 of Investment Promotion Law in Jordan Law, 1995).

⁹ Article, "N° 11", of the Foreign Investment Law in Saudi Arabia in, :2000: p: 3.

¹⁰ Abdelqader Al Idrisi, "Expropriation for the Public Benefit", Journal of Law and International Business: Hassan I University, May 23, 2020, p: 9.

¹¹ Article, "N° 25", of the Investment Promotion Law in Jordan Law, "N°. 16", in :1995: p. p: 5:7 .

1.4.1 Conditions for owning the real estate of a non-national commercial project

From the foregoing it appears that to acquire the real estate of a non-national commercial project, two conditions must be met

1.4.2 The first is the general assumption or "the requirements of the public interest"

This condition is available in countries that aim to seize a foreign commercial project if it aims primarily to achieve a public interest for the state, or even for one of its bodies. As for the procedure that aims only to achieve benefits outside the requirements of the public interest, it is not considered a factor in resorting to expropriation.¹² (Essam El-Din Mustafa, "The Legal System for Foreign Investment in Developing Countries, 1975)

It is noted that the general-purpose condition is a cornerstone for the legitimacy of the decision of the state's seizure of foreign investment project real estate, so it is stipulated by many comparative expropriation laws. Such as the Expropriation Law in Iraq, which aims to regulate real estate acquisition and in-kind rights by the socialist and mixed sectors to achieve their purposes and implement their plans and projects.¹³ (Article N°1/1 of the Iraqi Acquisition Law N° 12, 1981)

1.4.3 The second is observance of the provisions of the system without discrimination

This restriction is an important guarantee for the foreign investor from the arbitrariness that the public authority in the state may take in violation of international law, and the rules for the treatment of foreigners established in international law. Also, the seizure decision must be issued by an authoritative body with jurisdiction and in accordance with the rules of the internal law of the state.

This is confirmed by the Yemeni Investment Law, which stipulates that the real estate of the project may not be expropriated except for the public benefit and by a court ruling and in return for fair compensation without privileges.¹⁴ (Article N°13/b of the Yemeni Investment Law N°. 22, 1991). From all the foregoing, it is believed that the expropriation of foreign investment in accordance with this trend provides a degree of legal protection for this investment because expropriation is linked to a set of conditions that must be met from the outset. Observing non-discrimination in the expropriation of property, as most jurisprudence and the judiciary say that the rules of international law require the state not to interfere with the foreign investor's property in respect of the principle of equality and non-discrimination, otherwise, its international responsibility will be established.¹⁵ (Hisham Sadiq, International Protection of Foreign Money, 1981)

Discrimination may occur in the expropriation of foreign projects without national projects engaged in the same commercial or industrial activity or an activity belonging to the ownership of certain other nationalities.¹⁶ (Issam Bassim, The Legal System for Investment in Developing Countries, 1981). This requires that foreign investors enjoy the same protection that domestic laws provide to their own nationals, and this is the case in many countries legislation, for example, Italy, where the Rome Civil Court decides that laws that are discriminatory and issued by xenophobia because of sex or policy cannot be applied in Italy

¹² Essam El-Din Mustafa, "The Legal System for Foreign Investment in Developing Countries" Ph.D. thesis, Faculty of Law, Ain Shams University, 1975, p: 261.

¹³ Article, "N°1/1", of the Iraqi Acquisition Law, "N° 12 in 1981: p: 2.

¹⁴ Article, "N°13/b", of the Yemeni Investment Law, "N°. 22", in: 1991: ,as amended by Law, "N° 29" ,in :1997: p. p: 2:3.

¹⁵ Hisham Sadiq, "International Protection of Foreign Money", Beirut University House: 1981: p. p: 52:53.

¹⁶ Issam Bassim, "The Legal System for Investment in Developing Countries", Ain Shams University, p: 266.

for its conflict with the internationally recognized principle that individuals are equal before the law.¹⁷ (Decision of the Court of Rome on December 13, 1954)

As well as the Nuremberg Appeal Court confirms this concept as it requires the principle according to which no person can be deprived of his rights because of his nationality.¹⁸ (Ahmed Khairat, *Nationalization and Foreign Ownership*, 1963). The modern trend goes, but the state's discrimination is not a violation of international law if it does so to achieve or maintain economic independence if it is issued by a developing country.¹⁹ (Ahmed Abdel Hamid Ashush, *Legal System of Petroleum Agreements in the Arab Countries*, 1975)

This must be done according to specific criteria announced by the state so that the principle of equality is not tampered with under the pretext of preserving the state's economy and policy. Therefore, the courts must legalize such practices followed by the state, where nationalization is abolished if no danger to the state's economy is proven or not. achieve public benefit. The American judiciary dedicates this trend by deciding, regarding Cuba's nationalization of American projects, that there is no unanimous customary rule that prohibits Cuban insurance directed against American projects.²⁰ (Ahmed Sadiq Al-Tamim in *International Law N° 1*, 1969)

This is an implicit admission that nationalization is often used by developing countries to get rid of economic control. Without this being considered a violation of the principle of equality, on the basis that seizing the special interests of the two countries is not necessary to secure the economic requirements of the state and its national needs.²¹ (Muhammad Al-Ghunaimi, *the general provisions in the law of nations, the law of peace*, 1970). It was supposed to demand on the part of the US government that Cuba prove the danger of American projects to its economy, which would result in the nationalization of those projects or not. Also, projects owned by Cubans could pose the same danger to the state's economy, so as a matter of equality, they must be nationalized to achieve the same alleged danger in projects American.

2. The Obligation to Pay Compensation

In this topic, we will highlight just compensation in the event of confiscation and nationalization, as well as compensation in case of expropriation for the public benefit.

2.1 Compensation in the event of confiscation and nationalization

The obligation to compensate is a legal guarantee for the foreign investor against the state, even if it has the right to seize, but it is obligated under domestic and international law to redress the damage, and that reparation varies according to the legal tool used in the seizure, so we will present the seizure by confiscation and seizure by nationalization.

2.2 Compensation in the event of confiscation.

Confiscation in principle is a penalty for violating the provisions of law and public order, and the state is not obligated to compensate. Whereas, if the state took the confiscation

¹⁷ "The decision of the Court of Rome on December 13", 1954, p: 534 & p:542. published in: (revue critique de Droit international price. "N° 1" (Janvier-Mars 1958). p. p: 520:521.

¹⁸ Ahmed Khairat, "Nationalization and Foreign Ownership", *The Egyptian Journal of International Law*, 1963: p. p: 18:19.

¹⁹ Ahmed Abdel Hamid Ashush, "Legal System of Petroleum Agreements in the Arab Countries", Ph.D. Thesis, Cairo University :1975, p: 381.

²⁰ "The US Federal Supreme Court ruling in the Cuban nationalization case referred to by Dr. Ahmed Sadiq Al-Tamim in *International Law*", No 1, 1969, p. p: 296:297.

²¹ Muhammad Al-Ghunaimi, "the general provisions in the law of nations", *the law of peace*, Alexandria, the source of knowledge, 1970, p: 301.

because of the violation of some partners or shareholders in a particular company based on the idea of the collective criminal responsibility of the legal person without discrimination, then such confiscation is considered an arbitrary act that contradicts the established rules of the law.²² (Hisham Sadiq, International Protection of Foreign Money) .

From all the foregoing, the state has the right to confiscate foreigners' money when violating the provisions of the law without compensation, and that decision is productive of its legal effects unless it is arbitrary based on an illegal basis, as it is a violation of the rules of common law. Through extrapolation, I did not find an Arab law that defines the actions that are punishable by law in a precise and restrictive manner, but that is left to the discretion of the state, which makes the investor not confident in his dealings with that state due to the absence of the element of transparency.

2.2.1 Obligation to compensate in case of nationalization.

Most jurisprudence and jurisprudence hold that the state's nationalization of foreign projects cancels out the obligation to pay compensation. It went to the Supreme Court of Austria, which held that the expropriation of the rights of shareholders resulting from the nationalization of the company without compensation must be considered exactly equal to the confiscation of the assets of the company.²³ (Essam El-Din Bassim, The Legal System for Private Foreign Investments in Developing Countries, 2009). However, there was disagreement at the level of jurisprudence and the judiciary about the concept of just compensation. Some have argued that just compensation is the one that is sufficient if it matches the value of the foreign economic interests that were affected by the nationalization.²⁴ (Ashush, The Legal System of Petroleum Agreements in the Arab Countries)

This has been criticized, as it is the gain achieved by the nationalized state that is considered when determining the amount of compensation, not the investor's loss. The compensation must be represented in the free market value of the nationalized funds at the time of nationalization, as the Iraqi legislator adopted this when nationalizing the Basra Oil Limited Operations.²⁵ (Article N°. 2/(A-B) of the Iraqi Nationalization Law No 200, 1975). Part of the jurisprudence supports the nationalized state to pay partial compensation since full compensation can make nationalization impossible, as it may lead to the state's bankruptcy.²⁶ (Ashush, The Legal System of Petroleum Agreements in the Arab Countries) . We also prefer that the compensation be paid within a year from the date of agreement on its amount, or the assessment acquires its final character, otherwise, the investor shall be entitled to the benefits of delaying it starting from the day following the expiry of this period.²⁷ (Article N°. 11 of the Unified Agreements for the Investment of Arab Capitals, 1980). This method was followed in compensation for the nationalization of insurance and reinsurance companies, and the cement and spinning and weaving industries.²⁸ (Article N° 2 of Law No 99/A, the Iraqi Nationalization Law, 1924).

Nevertheless, the nationalized state's circumstances must be taken into consideration, and compensation should not be a means of pressure on it. That is, without prejudice to its economic interests. From the foregoing it is clear that the compensation must be just, and this requires that it be immediate compensation, not delayed. We did not notice any Arab law that

²² Hisham Sadiq, "International Protection of Foreign Money", Dar Al-Fikr University, p: 61.

²³Essam El-Din Bassim, "The Legal System for Private Foreign Investments in Developing Countries", 2009, p. p: 271:272.

²⁴Ashush, "The Legal System of Petroleum Agreements in the Arab Countries, *ibid*", p. p: 263:264

²⁵ Article, "N°. 2/(A - B)", of the Iraqi Nationalization Law, "N° 200" ,in: 1975 p: 1.

²⁶ Ashush, The Legal System of Petroleum Agreements in the Arab State, *ibid*, p. p: 365:266.

²⁷ Article, "N°. 11" ,of the Unified Agreements for the Investment of Arab Capitals, in :1980. p: 1

²⁸ Article, "N° 2" ,of Law "N° 99/A", the Iraqi Nationalization Law in :1924, p: 1

stipulated that it be immediate, except for the Jordanian law, in addition, but it specified the method of compensation. Partial compensation for the expropriated project harms the project owner and requires him to obtain delayed benefits. Therefore, the issue of expropriation must be an issue based on careful study. The fair compensation must be effective and of real economic value for the foreign investor, i.e., it should be in the form of money convertible into cash in the currency of the investor's country of nationality while allowing him to transfer it abroad. This was confirmed by the International Court of Justice that the compensation must be in French francs. It contains his accounts and financial equations.

From the foregoing, the investor must be allowed to transfer his money abroad without condition or restriction, which results in an exemption from customs duties and the arbitrary condition that exists in several Arab countries, which is the necessity of investing part of the transferred funds at home without exporting them, which causes harm to the foreign investor, under the pretext of preservation. to the public treasury of the host country for investment.

2.2.2 The obligation to pay compensation in the event of expropriation for the public benefit.

If the rules of law, in general, are stable on authorizing the state the right to expropriate real estate in the public interest, it is also stable on granting the expropriated persons the right to obtain fair compensation, and in this regard, the Jordanian Investment Law prevents the expropriation of any project except for the public interest provided that fair compensation is paid to the investor.²⁹ (Article N° 15 of Law N° 16 of the Jordanian Investment Promotion Law, 1995)

The compensation should be comprehensive for all damages, and the compensation should be effective and allow the investor to reinvest in the country or export his money to another country, as determined by the Yemeni investment law, as well as the Sudanese investment law.³⁰ (Article N° 13/B of Law N° 22, 1991, Yemeni Investment Law, as amended by Law N° 29, 1997 & Article N° 7/1 of the Sudanese Investment Promotion Act in 1999). On the other hand, there are some legislations and laws, such as the Egyptian law, that do not regulate the procedures of expropriation for the public benefit, so it is necessary to refer to the national expropriation laws.³¹ (Article N° 8 repealed Egyptian Law N° 23 in 1989)

The compensation is estimated based on the market value of the property in addition to the consideration for depriving its use for the period between the date of appropriation of the property and the date of paying the compensation due for expropriation.³² (Maged Ragheb Al-Helou, Administrative Law, 1973). All previous laws stipulated that compensation should be just, effective, and immediate, and did not specify the time period in which fair compensation would be achieved and in which the expropriated investor must be compensated for each day that passed after the expiry of the specified period for entitlement to compensation.

3. Conclusion

At the end of this research, it became clear to us the seriousness and size of the problems raised by the issue of expropriation of the foreign investor, although this expropriation is a right

²⁹ Article, "N° 15", of Law, "N° 16", of the Jordanian Investment Promotion Law, in ,1995: p: 2.

³⁰ Article, "N° 13/B", of Law, "N° 22", in :1991, Yemeni Investment Law, as amended by Law, "N° 29", in ,1997, p: p: 2:3. .& see Article, "N° 7/1", of the Sudanese Investment Promotion Act, in: 1999, p: 1

³¹ Article, "N° 8", repealed Egyptian Law, "N° 23", in: 1989. p: 2

³² Maged Ragheb Al-Helou, "Administrative Law", Alexandria, University Press, 1973, p: 587.

of the state, this procedure has become an obstacle to the flow of investors' money, especially after the spread of globalization and the expansion of foreign trade around the world.

Therefore, we see the necessity of presenting legal restrictions that limit this arbitrary procedure, based on the rules of international law, and not violate them.

Accordingly, we offer some suggestions as:

- Enacting a special system regulating the confiscation process, based on judicial decisions.
- The compensation required by some Arab investment laws must be immediate and sufficient compensation of economic value.
- Adoption of nationalization procedures that guarantee the protection of the foreign investor without discriminating the national investor from him.
- Adoption of procedures for compensating the foreign investor without burdening the country that has attracted the foreign investor.
- Setting a clear standard by which developing countries are distinguished from others that have the right to discriminate against foreigners for their citizens to achieve economic independence.
- Determining the maximum period for the remaining installments of the compensation so that the foreign investor is aware of his fair compensation.
- These were some of the proposals that we consider necessary to legalize the expropriation of real estate belonging to the foreign investor and pending the intervention of international law to prevent the state from quickly changing the legal restrictions on expropriation as they are internal laws.

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