

NATIONAL LAW UNIVERSITY JODHPUR

End Term Examination November– 2023

Semester – LL.M. (Corporate Laws) Semester - I

Subject: Investment Law

Time: 3 hours

Mark: 100 marks

Instructions:

- i. All the questions carry equal marks.
- ii. The students are required to attempt four questions.
- iii. Question No. 3 and 6 are mandatory to attempt.
- iv. The Students may choose to attempt any two question from the remaining four questions
- v. Please substantiate your statement(s)/argument(s) with relevant case laws, whenever necessary.
- vi. Considering the Factual Matrix involved in the Students may be kindly permitted to 'Strikeout / Underline' only for Question Nos. 3 & 6.

Q.1) Write Short Notes on: (Maximum Word Limit: 1000 Words each) (Marks 12.5*2)

- i. Notion of 'Legal Protection' vis-à-vis the Standard of Full Protection and Security.
- ii. Principle of Denial of Justice as a ground for violation of the Standard of Protection clause in the International Investment regime.

Q.2) *Atlantis Enterprises Ltd (hereinafter referred to as 'AEL') is a Core Investment Company incorporated in the Republic of Tatoonie dealing in the business of providing financial support to other companies. Mr. Hermit Brookes of Atlantis, has set its sight on the Din Djarin Financial Corporation Pvt. Ltd. (hereinafter referred to as 'DDFC'), a banking company incorporated in Republic of Mandalore, primarily dealing in financing Housing Sector projects.*

Mr. Jar Jar Binks, a resident of Islamic Republic of Naboo (a country sharing its land and maritime borders with Republic of Mandalore), is a beneficial owner in AEL. Given the significantly positive forecasts regarding the performance of DDFC, Mr. Brookes intends to make a significant investment of 48% in DDFC's equities amounting to MNR 5000.10 crores. This idea is pitched in by AEL representatives before the BOD of DDFC and was welcomed with open arms. In furtherance of the same, a resolution was passed by the shareholders of DDFC in an AGM convened on 29th November, 2020.

Pursuant to the same both AEL and DDFC have employed DuoLegal LLP (DuoLegal), a top legal firm in Mandalore as their legal adviser to handle the legal procedures arising with the investment.

Based on the above factual matrix answer the following: [Marks 12.5*2]

- i. As the designated Legal Adviser, please advise the Companies on the route that would be followed for the above investment? Substantiate your answers with legal provisions and sound legal argument.
- ii. In context of the above factual matrix, it was decided that the government route needs to be followed and consequently an online application (not digitally signed) was made on 04/12/2020. However, the online application was not accompanying the Shareholders' Resolution allowing the investment. The resolution was submitted along with the hardcopy of the application on 11/12/2020.

Please discuss the entire procedure for the above stated proposed investment and the tentative date on which a decision regarding the above application could be expected.

Note: Please note that for the above factual matrix, the laws, guidelines, master circulars, notifications and any other ancillary legal documents of Republic of Mandalore are *pari materia* with that of the Republic India, and have the equivalent legal effect for all the relevant purposes.

Q.3) In order to put an end to its economic crisis of the early 2000s, in 2009 Konoha adopted an economic recovery plan that included a program to privatize certain government-owned industries and public utilities. It also enacted various new laws, including a 2001 Currency Convertibility Law, a 2001 Decree pegging the Konohan currency to the Mordor Dollar and a 2002 Gas Law establishing the legal framework for the privatization of the gas industry and regulation of the transport and distribution of natural gas.

Under the new Gas Law regime, the national state-owned gas monopoly was divided into a number of companies to be privatized, one of which was Transportadora de Gas del Norte (TGN). In December 2002, TGN was granted a licence to transport gas in Konoha. Nomaj's participation in TGN began in 2005 vide a 2005 Offering Memorandum leading to the purchase of the shares still held by the government. Nomaj's acquisition represented 25% of the company, later supplemented by the purchase of an additional 4.42% shares.

By 2009, Nomaj Gas Konoha Ltd., a wholly owned subsidiary of claimant Nomaj Gas Transmission Company (NGT), a company incorporated in Mordor, had purchased close to 30 per cent of TGN's shares. According to NGT, under the regime established by the above laws and decrees and by the licence granted to TGN to transport gas, its tariffs were to be calculated in dollars, converted to Konohan Rupee at the time of billing and adjusted every six months in accordance with the Mordor Producer Price Index (Mordor-PPI).

In the late 2000s, a serious economic crisis began in Konoha. In January 2010 and again in July 2010, the representatives of the gas companies agreed, subject to certain conditions, to defer the adjustment of the gas tariffs in accordance with the Mordor-PPI. The resulting agreement provided that costs of the deferral would be recouped in the period July 1, 2010 – April 30, 2011, that resulting income losses would be indemnified and it was understood that this arrangement would not set a precedent or amend the legal framework governing the licenses. This agreement was approved by ENARGAS, the public regulatory agency of the gas industry, by Resolution No. 1471 on January 10, 2010.

Soon thereafter it became apparent that the agreement would not be implemented and requests by TGN for an adjustment of tariffs in accordance with the License were not acted upon; in fact, ENARGAS directed the company to refrain from introducing any such adjustment. On December 17, 2010, a further meeting was held with representatives of the gas companies, at which the companies were asked to agree on a new deferral of the tariff adjustment. Another agreement to this effect was entered into on that date, freezing US PPI adjustments of tariffs for a two year period while allowing for some increases relating to the earlier deferral and lost income. Income lost as a result of the new deferral was to be gradually recovered and US PPI adjustments were to be reintroduced as from June 30, 2012. Decree No. 669/2010 embodied the new arrangements while recognizing that Mordor-PPI adjustment constituted "legitimately acquired right" and was a basic premise of the contractual agreements.

In late 2011 the crisis deepened as the corrective measures by Minister Domingo Cavallo failed and a new emergency law was passed in 2012. Under the new regime, Konohan Rupee was devalued. This had devastating effect on the value of the Nomaj's investments in Konoha. According to Nomaj, as no adjustment of tariffs had taken place since January 1, 2000 and because tariffs were no longer be calculated in US dollars, the TGN's domestic revenues have

decreased by 75%. Only the export revenues been kept in US the Claimant's view the situation has been aggravated by the assertion by some provincial governments of right to pay gas and other invoices through bonds. Further, the devaluation of the Konohan Rupee from 3.6:1, from the previous rate of 1:1 has also resulted in significant loss of profits.

Citing the above grounds, Nomaj has invoked Article VII of the Nomaj-Mordor Bilateral Agreement for Promotion of International Investment and Trade, 2007 (hereinafter referred as 'BIPA') r/w Article 25 of ICSID, to which both Konoha and Mordor are signatories. The primary claim of Nomaj is that, the actions of Mordor was in violation of the provisions of Konoha-Mordor BIPA as well as the good faith principle enshrined under Article 31 of VCLT, 1969.

Being the President of the international tribunal, please provide a reasoned order with respect to the claims being raised by Nomaj in the above stated facts. You may rely on the above mentioned facts as well as the earlier pronounced orders to determine the validity of the above claims. (Marks 25)

Note: The Students may refer to 'Annexure – I' provided herewith for the relevant portions of the Nomaj-Mordor Bilateral Agreement for Promotion of International Investment and Trade, 2007 (a.k.a BIPA)]

- Q.4) Discuss the following: (Marks 10+15)
- Provide a brief discussion on the Position of Investors under the International Investment regime. (Maximum Word Limit: 800 Words)
 - Understanding of Public Policy under International Investment Law (Maximum Word Limit: 1500 words)
- Q.5) Discuss India's stance on Standard of Protection Clauses under the BIT regime. In context of the same, please trace the development of the standard of protection clauses under Indian BIT regime under Model BIT, 2003 and Model BIT, 2015. (Maximum Word Limit 1000) (Marks 25)
- Q.6) Republic of Magnolia is a developed country situated in the continent of Fiore. Since gaining its independence in 1947 from its colonial rulers, it intended to become a self-sufficient economy. Since, early 2000s the Government of Magnolia has been constantly attempting to promote entrepreneurship amongst the youth and have thereby made a scheme for Start-up companies, which allowed various concessions for the start-ups carrying out business of strategic and economic relevance to the Country.
- In accordance to the scheme, Ms. Lucy Heartfilia, an aerospace engineering graduate from the Magnolia Institute of Technology along with Mr. Gray O'Neal and Mr. Natsu Dragneel, incorporated the Edolas Star Services LLP ('Edolas') in 2008. Edolas was dealing with the development of uplink technologies and missile technologies for the fighter aircrafts which has strategic military importance. With their expertise in coding capabilities, aerospace technologies and military designs of its founders, Edolas was soon a go-to company for developing of uplink technologies having military applications. As a result, in 2014, Magnolia Defence Research and Development Organisation (MDRO) contracted with Edolas as a permanent vendor for developing uplink devices and technologies as well as a long term evolution plan of.
- Given its growth, soon the people involved in Edolas started to increase, and the LLP got converted into a Pvt. Co. in 2016. As per the annual reports filed by the Company in March, 2020, the total issued Share capital of the Company was MNR 3700 crores and following was the shareholding pattern of the company:

Shares being held by Resident Persons :-

Angola Co Pvt Ltd - 555 cr (Angola)

Bradford Defence Ltd - 481 cr (Bradford)

Crayden Aero Engineering Pvt Ltd - 183 cr (Crayden)

Evergarden SpaceEx Ltd - 302 cr (Evergarden)

Shares being held by Non-Resident Entities

Xperia Ltd - 629 cr (Xperia)

Zaniola Pvt Ltd - 592 cr (Zaniola)

Yippin Aerospace Engineering Plc - 333 cr (Yippin)

Walter O'Brien & Sons Ltd - 333 cr (Walter & Sons)

Rodeo Pvt Ltd (Rodeo) is a venture capital fund, which is incorporated as a private limited company incorporated in Naath. It is led by Mr. Elon Musk. Rodeo specialises in investing in mid-tier companies which focuses on innovation and developing new technologies. In 2006, Rodeo invested in Sky Rockets Ltd (SRL), a company incorporated under the Magnolia Companies Act, 1956, a public limited company engaged in the development and manufacturing of reusable booster rockets jet engines amounting to 24%. SRL is regarded as a pioneer of reusable booster rockets and is one of the three manufacturers of the same in the entire world.

Dr. Erza Scarlett (Dr. Scarlett), the CEO of SRL, is a visionary and has realised the potential importance of uplink technologies in civil and military applications and had discussed the possibility and feasibility of expanding the portfolio of the Company into the avenue of swarm drones in SRL's Annual General Meeting on 27th December, 2014, a motion which was vehemently supported by Mr. Musk and other shareholders. Consequently, in November, 2015, SRL's management signed Shareholder Agreement with Bradford, for a total of 35% shareholding in the company. Additionally, the SHA allowed SRL to appoint the Managing Director to the Bradford's BOD, having the final say in the board decisions. In December 2015, Mr. Musk signed a shareholder agreement with SRL for a purchase of 26.1% shares. Post the meeting, SRL floated Texaco Arms Pvt. Ltd (Texaco), a company incorporated under Magnolian Companies Act, 2013. The MOA of Texaco suggested that research and development of swarm drone technology was the primary objective of the company. While, the Texaco's website showed SRL to be the sole shareholder of Texaco. In the summer of 2020, Mr. Aviral Sharma, the Managing Director of Texaco, initiated discussions with Ms. Heartfilia concerning a possible investment of MNR 2500 crores to focus on the further development of Edolas's swarm drone technology for MDRO. The same was approved by the shareholders of both the companies and resultantly a SHA was signed between Texaco and Edolas in December, 2021.

Based on the abovementioned factual matrix, answer the following:

- (Marks 15+10)
- Discuss the amount of downstream investment in Edolas accordance with the applicable relevant laws [the laws of Magnolia being *pari materia* with India].
 - Also, discuss the validity of the transaction carried out between Edolas and Texaco as per the relevant legal regime.

ANNEXURE – I: NOMAJ-MORDOR BILATERAL AGREEMENT FOR PROMOTION OF INTERNATIONAL INVESTMENT AND TRADE, 2007 (Relevant Portions Only)

ARTICLE I

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favourable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in this Treaty.
2. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective.
3. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

ARTICLE II

1. Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.
2. Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party.
3. Each Party shall observe any obligation it may have entered into with regard to investments.
4. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.
5. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.
6. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

Article III

1. This Treaty shall not preclude either Party from prescribing laws and regulations in connection with the admission of investments made in its territory by nationals or companies of the other Party or with the conduct of associated activities, provided, however, that such laws and regulations shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE IV

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.
2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the provisions of this Treaty and the principles of international law.
3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.

Article V

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.
2. Except as provided in Article IV paragraph 1, transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. The free transfer shall take place in accordance with the procedures established by each Party; such procedures shall not impair the rights set forth in this Treaty.
3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.