

30 APR 2024

NATIONAL LAW UNIVERSITY JODHPUR

End Term Examination May – 2024
Semester – UG VIII Semester (Trade Law Hons.)
Subject: International Investment Law

Time: 3 hours

Marks: 100 marks

Instructions:

- i. All the questions carry equal marks.
- ii. The students are required to attempt Five questions only.
- iii. Please substantiate your statement(s)/argument(s) with relevant case laws, whenever necessary.

Q.1). Write Short Notes on:

(Marks 10+10 = 20)

- a. Principle of 'Legitimate Expectations'.
- b. Principle of Fair and Equitable Treatment as a Standard of Protection in the International Investment regime.

Q.2). Discuss the significance of Nationality of Investor for the purposes of Article 25 of the ICSID Convention. When does nationality be determined? Is it the time at which the claim arises or the time of lodging the claim? After the commencement of the proceedings, must nationality be maintained continuously through to the date of the tribunal's award?
(Marks 20)

Q.3). Republic of Metropolis is a developing economy and is known as the 'Global Oil Depot', due to its rich natural oil reserves and flourishing oil business. Alexandria is the capital city of Metropolis. In mid-1990s, the Government of Metropolis felt the need to revamp its regulatory regime concerning foreign investments and make it more consistent with the global best practices. The efforts resulted in the drafting of the Foreign Exchange Management Bill, 1997, which was later passed by the legislature as the Foreign Exchange Management Act in the year 1999. The Act intended to simplify the process of investment by foreign enterprises in Metropolis. Further, the Government of Metropolis have passed various rules and regulation under the FEMA Act, one of which is the Non-Debt Instrument Rules, 2009.

Equatoriana is a developed country and because of its focus on green energy has gained significant expertise of using green technology in oil industry. However, it has historically been a rather closed economy. However, under its new President Mr. Albert Carlos, it has revamped its policy recently and has relaxed its laws to allow its domestic producers to invest in foreign countries.

Both Metropolis and Equatoriana have been party to ICSID convention since 2006. Additionally, Metropolis and Equatoriana have entered into a Strategic and Economic Cooperation Agreement (BIT Agreement) in 2008. Clause 10 of the Agreement states that,

"In the event of any dispute arising out of the investment, the parties shall resolve the dispute through ICSID arbitration".

Astapor Ltd. (Astapor) is one of the major players in the oil market of Metropolis having a market share of 35%, however it is owned by Wayne Enterprises Ltd. (Wayne Enterprises) a global conglomerate having its head quarter in Viudobona.

In 2009 Fantasia Oxy Ltd. (Fantasia), a company incorporated in Equatoriana indulged in the business of Oil Tankers, sought to invest in the growing oil industry of Metropolis, in doing so, it acquired controlling stake in Atlantic Corporation Pvt. Ltd. (Atlantic), a domestic producer of oil tankers. With the support of Fantasia, the market power Atlantic grew considerably and so did its business capabilities.

In 2014, with an intention of further grow its hold over the market, Atlantic acquired controlling stake in Grand Trunk Ltd. (Grand Trunk), a competitor of Atlantic in the oil tanker manufacturing market. Grand thereby gained access to Mark Owens Co. Ltd. (Owens), a boutique firm dealing with cutting edge technology for creating laser oil drills. If the reports of Daily Herald, a national daily of Metropolis are to be believed Fantasia always to have access to the technology possessed by Owens and have bypassed laws to enter into such transactions. However, the same was dismissed by the top executives of both Fantasia and Atlantic. Mr. Saunder Williams (Mr. Williams) was a Belgian citizen, however was one of the shareholders of Fantasia owning 10.5% shares in the company.

In 2018, the General Elections took place in Metropolis in which the present government (formed by the Democrats Party) fell and a new government was by the Republican party, which was known for hawkish views on the idea of Nationalism. In later half of 2019, the Parliament of Metropolis passed a new legislation which aimed at nationalising the oil businesses operating in the Country. Consequently, Fantasia's assets were nationalised and adequate compensation was given, but they were not reimbursed for the laser technology of Owens on the ground that the investment was an invalid investment. Fantasia suffered huge economic backlash because of the same and thereby filed a writ petition in the High Court of Alexandria challenging the decisions of the Government.

Further, Mr Williams, took the matters into his own hands and initiated ICSID arbitration proceedings against Republic of Metropolis under Clause 10 of the BIT Agreement. The Republic of Metropolis have challenged the jurisdiction of the Arbitral Tribunal to hear the matter and has argued that Mr. Williams would not be governed within the scope of the BIT Agreement

Based on the above factual matrix the students are required to answer the following issues separately. (Marks 5+15 =20)

- a. Whether the investment made by Fantasia in Owens would qualify as a valid investment? Give reasons for the stance taken.
- b. Whether Mr. Williams will have a *locus standi* to raise a dispute under Clause 10, Strategic and Economic Cooperation Agreement?

Q.4). Write Short Notes on the following:

(Marks 10+10 = 20)

- a. Discuss the scope of the term 'relative' under the 'relative standards of investor protection' in IIAs
- b. Discuss the position of '*legal harm*' under the Full Protection and Security standard?

Q.5). Between 2010 and 2015 company 'A' invested USD 650 million into the renewable infrastructure of country 'X'. It did so on the basis of a legal framework existing at the time of its investments in 2010. The legal framework included a system of favourable

electricity tariffs so as to encourage and entice foreign investments into country 'X'. Without these tariffs no foreign investor would have made the high cost, up-front investments required in the renewable sector, since the tariffs were the only way for the investor to make a profitable return on the investment.

In 2016 the Government of 'X' radically changed the legal framework for investments in the renewable energy sector, affecting not only future; investments, but also existing investments in the sector. The tariffs under the new system were calculated in a completely different manner than under the old system, resulting in considerably lower income for company A.

The Government of X, explains that the changes are necessary because the favourable treatment of renewable energy is becoming too costly for the country. Government funds are needed for other socially important areas, such as education and health care. Also, the government states that it is not reasonable to treat renewable energy more favourably than other forms of energy.

Do the measures taken by the Government of 'X' violate FET, in particular with respect to the legitimate expectations of Company A? (Marks 20)

Q.6). In order to put an end to its economic crisis of the early 1990s, in 1999 Arendale 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 Arendale currency to the Harrenhal 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. Furthermore, Arendale started entering into several BITs with foreign countries, in an attempt to open its market as a possible avenue of inviting foreign investment. In furtherance of the same, in 2007, it entered into a Bilateral Investment Promotion Agreement (*hereinafter* referred to as 'BIPA').

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 Travis & Gecko Oil & Natural Gas Co. Ltd. (TGN). In December 2002, TGN was granted a licence to transport gas in Arendale. Dinoco Natural Gas & Crude Oil Transmission Co. Ltd. (**Dinoco**), is a company incorporated under the Harrenhal Corporations Law, 1956. Dinoco's participation in TGN began in 2005 vide a 2005 Offering Memorandum, wherein, Dinoco floated Dinoco Hydrocarbons (Arendale) Pvt. Ltd. (a wholly owned subsidiary hereinafter referred as 'Dinoco Arendale') leading to the purchase of the shares still held by the government. Dinoco's acquisition represented 25% of the company, later supplemented by the purchase of an additional 4.42% shares, which was concluded in 2009.

According to Dinoco, 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 Arendalen Rupec at the time of billing and adjusted every six months in accordance with the Harrenhal Producer Price Index (Harrenhal-PPI).

In the late 2000s, on account of the Global Financial crisis arising out of the Lehmann Brothers scandal, a serious economic crisis began in Arendale. In January 2010 and again in July 2010, the representatives of the gas companies agreed, on conditional deferment of the adjustment of the gas tariffs in accordance with the Harrenhal-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 Ministry of Petroleum and Natural Gas (*hereinafter* the 'Ministry'), vide Resolution No. 1471 on September 10, 2010 (*hereinafter* referred to as 'Resolution No. 1471').

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 revised terms of License (in furtherance of Resolution No. 1471) were not acted upon; in fact, the Ministry 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 Harrenhal-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 Harrenhal-PPI adjustments were to be reintroduced as from December 30, 2012. The above decision was enacted as a law vide Decree No. 669/2010 embodied the new arrangements while recognizing that Harrenhal-PPI adjustment constituted "legitimately acquired right" and was a basic premise of the contractual agreements.

In late 2011 the crisis deepened even further as the corrective measures undertaken by the Ministry of Finance and the Central Bank of Arendale failed and a new emergency law was passed in 2012. Under the new regime, Arendalen Rupee was devalued. This had devastating effect on the value of the Dinoco's investments in Arendale. According to Dinoco, as no adjustment of tariffs had taken place since January 1, 2000 and because tariffs were no longer be calculated in Harrenhal dollars, the TGN's domestic revenues have decreased by 75%. Only the export revenues were calculated in accordance with the Harrenhal currency, which according to Dinoco 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 Arendalen Rupee from 5:1, from the previous rate of 1:1 has also resulted in significant loss of profits.

Citing the above grounds, Dinoco has invoked Article VII of the Arendale-Harrenhal Bilateral Agreement for Promotion of International Investment and Trade, 2007 (*hereinafter* referred as 'BIPA') r/w Article 25 of ICSID, to which both Arendale and Harrenhal are signatories. The primary claim of Dinoco is that, the actions of Arendale was in violation of the provisions of Arendale-Harrenhal BIPA as well as the good faith principle enshrined under Article 31 of VCLT, 1969 (which has been ratified by Arendale). Further, they claimed that the conduct of Arendale has resulted in substantial

deprivation of its rights with respect to its investments and hence are expropriatory in nature.

Being the President of the international tribunal, please provide a reasoned order with respect to the claims being raised by Dinoco in the above stated facts. You may rely on the above-mentioned facts, the provisions of BIPA (as provided in *Annexure I*) as well as the earlier pronounced orders to determine the validity of the above claims.

(Marks 20)

Annexure I

ARENDALE-HARRENHAL BILATERAL AGREEMENT FOR PROMOTION OF INTERNATIONAL INVESTMENT AND TRADE, 2007

ARTICLE I

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favourable 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 Agreement.
3. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favourable 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.
3. Each Party shall observe any obligation it may have entered into with regard to investments.
4. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.

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. 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 favourable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favourable treatment, as regards any measures it adopts in relation to such losses.