

29 APR 2025

NATIONAL LAW UNIVERSITY, JODHPUR

End Term Examination April-2025

Semester: UG VIII Semester (Trade Law Hons.)

Subject: International Investment Law

Time: Three Hours

Marks: 100

Instructions:

1. Attempt any five out of the six questions
2. All questions carry equal marks
3. Students are prohibited from using any electronic device

Q.1) Article 25 of the ICSID convention states-

"National of another Contracting State" means-

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

With the help of relevant authorities explain the double barrel test in ICSID cases. Explain the import of "foreign control" under the above provision. Differentiate between the two portions of the above provision. (Marks 20)

Q.2) Article 14.5 of USMCA state-

Each Party shall accord to investors of another party treatment no less favorable than the treatment it accords, in like circumstances, to investors of another party or of any non-party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

With the help of relevant authorities explain the import of the term "no less favorable" under the said provision. Critically analyze the import of the term "with respect to establishment" under the said provision of USMCA. (Marks 20)

Q.3) Explain the import of the term fair, prompt and adequate compensation under expropriation. Compare the same with the general standard of compensation under general international regime. Briefly explain various grounds to assert the legality of an expropriation measure.

(Marks 20)

Q.4) In light of the decision rendered in *Mobil v Argentina* explain the relation of good faith obligation with Fair and Equitable Treatment under International Investment Law. Discuss the scope of legitimate expectations under International Investment regime. (Marks 20)

Q.5) Article 1 of the United States- Argentina Republic provides for the following definition of investment-

"investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof.

Explain the relevance of tangible and intangible property under the above definition of investment. Explain the relevance of "share of stock" under the above definition with the help of relevant case laws. Can the definition be further expanded to cover matters of portfolio investment?

(Marks 20)

Q.6) Briefly explain the silent features of investment provided under *Salini v. Morocco*. In light of the tribunal's decision in *Roman v. Uzbekistan* explain the nature and scope of risks involved in international investment matters.

20)

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Q.1) Article V of Model BIT 2016 states as follows-

5.1 Neither Party may nationalize or expropriate an investment of an investor (hereinafter "expropriate") of the other Party either directly or through measures having an effect equivalent to expropriation, except for reasons of public purpose, in accordance with the due process of law and on payment of adequate compensation.

5.3 The parties confirm their shared understanding that indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

In light of the above provision explain the scope and nature of creeping expropriation. Explain the scope of "substantial or permanent deprivation of fundamental attributes of property". How is it different from the notion of economic deprivation?
(Marks 20)

Q.2) Salini test provided for certain essential requirements of investment. Explain the import of various requirements enumerated under the Salini judgment. Explain the departure taken by the tribunal in *Saba Fukes vs Republic of Turkey*. Do you agree with the criticism leveled against the Salini test?
(Marks 20)

Q.3) The investment chapter of the USMCA provides that-

"...investor of a Party means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party, provided however that: (a) a natural person who is a dual citizen is deemed to be exclusively a national of the State of his or her dominant and effective citizenship; and (b)

a natural person who is a citizen of a Party and a permanent resident of another Party is deemed to be exclusively a national of the Party of which that natural person is a citizen."

Explain the relevance of "dominant and effective citizenship" with the help of relevant authority under International Law. Compare the above definition with the requirement under ICSID Convention.
(Marks 20)

Q.4) Article 11 of Pakistan Switzerland BIT states as follows-

Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.

Explain the nature and scope of Umbrella Clauses under international investment law. In light of the tribunal's decision in *SGS v. Pakistan* explain the import of the term "observance of commitment" under the relevant paragraph of the BIT. Do you agree with the interpretation taken by the tribunal? (Marks 20)

Q.5) Explain the import of MFN clauses under modern Investment treaties. Critically analyze the concept of "likeness" under such clauses. (Marks 20)

Q.6) Country A is a developing state. It wishes to ease the electricity supply of the country. The central electricity board of the state decided to invite various private entities to invest in the development of an integrated credit facility program. A company XYZ applied for the tender and the bid was accepted by the electricity board. A separate agreement was entered into between the two entities. Under the said agreement the board agreed to identify a separate location for establishing a separate factory. In return the company promised to share its technical expertise and also undertook the responsibility to place and update various machineries. The agreement was entered in the year 2000. The company had invested a sum of 30 crore for the same. It had to take a separate loan to invest the amount. In the year 2002, the urban department refused to grant the license to establish the said factory. This severely affect the general working of the project. The company went into a certain amount of loss. As a result it also defaulted in paying the amount that it had borrowed. The company was registered in country A. Twenty five percent of the shares were acquired by Mr. D (a national of country A). Further, seventy five percent was held by a company Z (incorporated in country A). Company Z was a wholly owned company of Company M. Company M was registered in Country C. Company M decided to raise the jurisdiction of ICSID by relying upon the BIT that Country A had entered into with Country M. Decide. (Marks 20)

Relevant portion of the BIT-

Article 1- The term "investor" refers with regard to either Contracting Party to

(b) legal entities including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat together with real economic activities, in the territory of that same Contracting Party; (c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat together with real economic activities, in the territory of that Contracting Party.

Article 2- Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.