

UNIVERSITY OF COLOMBO
FACULTY OF LAW
BACHELOR OF LAWS DEGREE EXAMINATION, YEAR III - 2019

International Investment Law

(Three Hours)

Total Number of Questions: 07

Answer FOUR (04) questions and no more, selecting TWO (2) from each part.

(Candidates will be penalized for illegible handwriting.)

PART-A

Radiant Recourses Corporation (RRC) is duly incorporated under the laws of Lividia for the purposes of dealing in mineral properties. Happy Province in Agraria, located within 70 kilometers of its border with Nolivia, contains gold ore deposits. Article 75 of the Agrarian Constitution precludes foreigners from acquiring or possessing any natural resource, subject to the penalty that such acquired right will revert to the State. The proviso to Article 75 however allows a foreign national to gain rights to natural resources in border regions only if he/she successfully demonstrates a "public necessity", which must be specifically approved by a Cabinet Decision in accordance with the law.

In 2015, RRC entered into an agreement with its employee Mr. Valentine, an Agrarian national, that he would secure mineral rights with respect to the gold ore, while the company would make a case for a "public necessity". This agreement, known as the "Option Agreement," further stipulated the option available for RRC to acquire mining concessions if Mr. Valentine successfully obtained all requisite authorizations. Mr. Valentine registered this "Option Agreement" in the Agrarian National Public Registries on 5th September 2017.

Meanwhile, Mr. Valentine's applications to the respective mining concessions in his own individual capacity as an Agrarian citizen were successful. The competent Agrarian authority issued resolutions granting him five concessions in June 2017. In July 2017, the RRC started the procedure to have the gold ore declared as a Public Necessity, which the Agrarian Cabinet

approved on November 3, 2017. The RRC was thereby authorized to acquire, own, and operate the relevant mining concessions and to exercise any rights derived from the ownership.

Thereafter RRC exercised its option in the Option Agreement for the transfer of mining rights. RRC then commenced the Happy Gold Ore Project and carried on a great number of activities in the locality amounting to approximately USD \$ 20 million. However, neighbouring communities were unhappy and began protesting against the Happy Gold Ore Project. RRC staff were threatened, physically detained and attacked by various community groups, who demanded a share of the benefits. Some other community groups invaded RRC's compound, ransacked and set fire to the company's office. All these incidents were reported to the police by the RRC.

In January 2019, RRC, having engaged in expensive exploration and development efforts, published the results of a Preliminary Economic Assessment showing resources of 95.5 million ounces of gold. RRC was also able to secure the support of some community groups by promising them certain benefits. However, RRC's community outreach programmes were not successful. During the public hearing regarding the Environmental and Social Impact Assessment (ESIA) conducted by the Environmental Ministry, participants called for cancellation of the project in its entirety. Remonstrations against this project gradually turned into a huge public outcry against all mining projects in the Happy Province.

The Agrarian Cabinet revoked its Decree declaring Happy Gold Ore Project as a "Public Necessity" without consulting RRC. None of the other mining concessions operating in the Happy Province were affected by these measures. The Agrarian Government also charged that RRC's acquisition of mineral rights through an Agrarian national was in violation of Article 75 of the Constitution.

RRC then decided to initiate international arbitration against Agraria based on the dispute settlement clause of the 2001 Bilateral Investment Treaty (BIT) between Agraria and Lividia, which permits recourse to ICSID arbitration. Both Lividia and Agraria have ratified the ICSID Convention without any reservations. RRC further observed that the Agraria-Lividia BIT of 2001 accords all the core investment treaty protections to the covered Lividian investors and their investments and, all these core investment disciplines have been drafted as autonomous treaty standards.

Covered investments under this BIT are defined broadly as “any kind of asset, including an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory”. However, the definition of investment expressly provides for the requirement that the investment must be made in accordance with the domestic law of the host State.

1. As the legal consultant to the Agrarian government, prepare a legal opinion addressing the issue whether RRC's economic activity in the country is an 'investment' under the Agraria-Lividia BIT of 2001, as well as under the ICSID Convention.
2. RRC retains you to appear on behalf of it before the ICSID arbitration tribunal. Prepare a legal opinion as to the three strongest allegations against the host state based on the Agraria-Lividia BIT of 2001.
3. Assume that the Agrarian government has asked your advice on the possibility of defending treaty violations, if any, based on the General Exception clause in the Agraria-Lividia BIT of 2001. Prepare a legal memo assuming that this General Exception clause is a tailor-made clause based on Article XX of the General Agreement on Tariffs and Trade (GATT) allowing host state to take measures necessary to protect, *inter alia*, public order, protection of environment and exhaustible natural resources.

Part – B

4. With regard to economic development and environmental protection, comment on whether protection clauses in BITs favour investors or strike an adequate balance between the aspirations of investors and host states.
5. State sovereignty ensures that the host state has unlimited control over the entry of foreign investors. However, some pre-establishment rights agreed through the treaty provisions can affect this control. Explain how this may be done.

6. The dynamics of international trade and investment are such that the role and influence of its actors keep changing, necessitating regulation to keep up with these changes.

Do you agree? Critically discuss the above statement with reference to the actors in the field of investment in the global arena.

7. Analyse, with reference to suitable examples, how home states may influence the investment activity through various measures that they adopt, and what impacts these may have on the host state's right to regulate the investment.
