

UNIVERSITY OF COLOMBO, SRI LANKA
FACULTY OF LAW
BACHELOR OF LAWS EXAMINATION (Online), YEAR III – 2021

INTERNATIONAL INVESTMENT LAW

Three (03) Hours

Total number of questions: 06

Answer only **Three (03)** questions selecting at least **one (01)** from each PART.
(Candidates will be penalised for illegible handwriting.)

PART A

Bolonia is a resource-rich developing country situated in the Limuria continent. To accelerate the country's economic development, the Bolonian government decided to attract foreign mining investments, creating a special Mining District (Velona), and inviting investors across the globe to invest in Bolonia's emerging mining sector. Being enticed by this propound, Mintex Resources Limited (Mintex), a corporation constituted under the laws of Selonia, decided to invest in a gold deposit located in Lima (Lima Project), within the Velona Mining District. In 2010, Mintex entered into an assignment agreement with Mr Smith, who had a permit entitling the holder to explore and exploit precious metals in a 300-hectare area within the Lima gold deposit. In 2011, Mintex started carrying out a surface mapping, sampling and drilling program and obtained the environmental approval required for the exploratory phase of the mining project for the permit.

In 2012, Mintex entered into a Concession Contract with the National Mining Agency (NMA) of Bolonia to explore and exploit the Lima gold deposit, and the company owned 100% of the mining project. Under the applicable Bolonian laws, Mintex was required to obtain an environmental license before moving to the exploitation phase. Accordingly, Mintex submitted the Environmental Impact Study (EIS) to the Ministry of Environment and Sustainable Development to obtain this license. However, the Minister refused to grant the environmental license, stating that the Lima Project is in a unique ecosystem known as páramo, a páramo so-called "Venus" in this particular case. This decision was made based on an atlas of páramo prepared, in 2013, by the research unit attached to the Ministry, according to which Bolonia's páramo ecosystems are required to identify. It was further stated that as per the amended Mining Law of

Bolonia, mining exploration and exploitation work and projects are not allowed to be carried out in areas declared and delimited areas, including the páramo ecosystems, subject to very few exceptions.

Meanwhile, legally delimiting páramo ecosystems became highly controversial in Bolonia, and many civil society organisations (CSOs) opposed the Lima Project due to its perceived environmental impact on the Páramo of Venus. Although the Minister of Environment refused to grant the environmental licence, NMA approved Mintex's application for the first one-year extension of the exploration phase under the Concession, declaring the project as a Strategic Development Project considering its economic and social benefits. However, amidst the unexpected circumstances encountered by Mintex in Bolonia, the company sold 49 per cent of its shares to a company incorporated in Salomon Island and requested the second one-year extension of the exploration phase under the Concession.

While granting the second extension, NMA stated that the extension was granted exclusively for the area that does not overlap with the Páramo of Venus and further informed Mintex that once the boundaries are finalised, the areas overlapping with the Venus páramo should be handed over. In 2017, the boundaries of the country's Páramos were published by way of Resolution, allowing the projects with a mining concession contract and environmental licenses to continue with the operations despite being located in a páramo, only until these concessions expire. However, this Resolution was challenged before the country's Supreme Court by CSOs, alleging the lack of public consultation in the delimitation process. The Court, in 2018, struck down the Resolution, ordering the Environmental Minister to re-delimitate the boundaries of Páramos following the due process.

However, the Minister could not complete the re-delimitation process within a reasonable time frame. Furthermore, due to the uncertainty over the legal boundaries of Páramos, Mintex could not obtain the required environmental license to commence the exploitation phase. It was also uncertain whether the company could carry out mining activities in the Concession area because, according to the existing atlas of Páramos, it considerably overlaps with the Venus Páramo. Finally, after having spent several years in Bolonia and developing the Lima Project with an investment of over USD 150 million, Mintex renounced the Concession and initiated an arbitration proceeding in the International Centre for Settlement of Investment Disputes (ICSID) under the bilateral investment treaty (BIT) between Bolonia and Selonia that came into force in 1987. This BIT provides for all the core investment disciplines and the direct recourse to the treaty-based investment arbitration.

1. As the legal consultant to the Bolonian government, prepare a legal opinion discussing the grounds on which Bolonia can challenge the jurisdiction of the arbitral tribunal under Article 25 of the ICSID Convention.
2. Mintex retains you to appear on behalf of it before the ICSID arbitration tribunal. Prepare a legal opinion as to the strongest allegation/s against the host state based on the Bolonia-Selonia BIT of 1987.
3. Assume that you are the head of the legal research unit of a CSO working on the preservation of Páramo and willing to participate in this arbitration process as *amicus curiae*. Prepare a legal memo describing the legal grounds and policy perspectives that enable host States to pursue non-investment concerns, ensuring the State right to regulate in the public interest.

PART B

4. Nagar is a fast-growing developing country that emphasises the significance of the inflow of foreign capital. Recently, the government appointed a committee on Economic Development to take measures to cancel some of the investment projects that do not comply with the terms and conditions agreed upon during the entry of foreign investments. The government of Nagar approves a scheme of ABC Ltd to reconstruct an existing garment factory with modern equipment and machinery in a more densely populated area. The project also includes a solid waste management system. The company agrees to bring an agreed sum of capital to capitalize the venue and obtain the Bank of Nagar certificate to ensure the required capital is brought into the country. However, the Committee finds that the company has not complied with the capital requirement, affecting the waste management system and anticipating public pressure in the area. Moreover, if that waste management system is ineffective, the project will not bring the expected tangible benefits to the country but would instead create an environmental disaster due to the high chemicals used. On the advice of the Committee, government authorities are now ready to terminate the project and decide to hand it over to a state-owned corporation with a government subsidy. ABC Ltd initiates arbitral proceedings against the government, alleging that Nagar fails due process and violates international rules on discrimination.

Analyse the legal issues that arise out of the above situations.

5. “The home state has the ability to ensure that its nationals who operate abroad as foreign investors act in a manner consistent with international norms through the exercise on jurisdiction on the basis of nationality.”

Critically analyse the above statement in light of home state measures on the duties and responsibilities associated with outbound foreign investments.

6. The state of Sealand is a developing nation rich in natural, human resources and higher literacy rates in the region. However, the inflow of foreign direct investment is relatively low compared to similar neighbouring countries. The government of Sealand recently established a Modern City to attract more FDI from affluent countries. The new policy on foreign investment reveals that the government is more concerned about the benefits of FDI initiatives. The government now seeks to revise its foreign investment laws to improve the favourable environment for investors to increase FDI inflows to reap more sustainable economic benefits.

Assume that you have been appointed as a researcher to study the foreign investment laws of Sealand and their impact. List the features you consider in your draft to propose a best model for Sealand.
