GUJARAT NATIONAL LAW UNIVERSITY
GANDHINAGAR

Course: **Investment Law**

Semester- IX (Batch: 2018-23)

End Semester Examination: November 2022

Date: 10th Nov, 2022
Duration: 3 hours **Max. Marks: 50**

Instructions:

- Read the questions properly and write the answers in the given answer book.
- The respective marks for each question are indicated in-line.
- Indicate correct question numbers in front of the answer.
- No questions or clarification can be sought during the exam period, answer as it is, giving reason, if any.
- **Bare Act is not allowed.**
- Word Limit: 550-600 words

(Answer Any Five) **Marks**

Q.1 In December 2017, an agreement was entered into between a highway construction company named 'DAS', an Ultanian national, and an Amocron government owned and controlled enterprise responsible for public works called 'PWE' for constructing a national highway of 1,200 kms in the territory of Amocron. The agreement has been in force in compliance with the Bilateral Investment Treaty (BIT) entered into between two sovereign countries, Ultania and Amocron, in the year 2015. After the completion of the work at the end of 2020, 'DAS' submitted claims for compensation to 'PWE', but 'DAS' received no reply from 'PWE' even after a year. In August 2022, 'DAS' submitted a request for arbitration on the basis of an ICSID Convention arbitration clause contained in the said BIT. Accordingly, an ICSID tribunal has been constituted in consultation with the parties to the dispute. (Note: it is a hypothetical case and used only for examination purpose) (10)

What can be the approach of the ICSID tribunal in considering the investment claim brought by 'DAS', when the ICSID Convention itself does not define investment? Explicate.

Q.2 In November 2011, White Industries Australia Ltd (White Industries) obtained an arbitral award in an investment claim brought against India in connection with the enforcement of a previous arbitral award given in a contractual dispute with Coal India Ltd. One of the principal reasons for White Industries to bring the investment claim under the India – Australia BIT (1999) was the inordinate delay in Indian courts to enforce the arbitral award obtained against Coal India Ltd. White Industries argued that the said delay infringed the India – Australia BIT on the grounds of violations of fair and equitable treatment, MFN treatment, expropriation and free transfer of funds. (5x2=10)

a) Whether the investment tribunal agreed with all the grounds of violations of the India – Australia BIT as argued by White Industries? Clarify.
b) What was the implication of the White Industries investment award on the subsequent Indian Model BIT 2016? Elucidate.

Q.3 'The definition of investment in a BIT holds a key role in determining the scope of rights and obligations under the treaty and the eventual establishment of jurisdiction of an ISDS tribunal.' (6)

Explain the effects of enterprise based definition of investment in the Indian Model BIT, 2016, reflecting a deviation from the previous asset based definition of investment.

Q.4 'ICSID is the first and the only dispute resolution facility dedicated exclusively for resolution of investment disputes based on the multilateral ICSID Convention. Despite the institutional nature and the possibility of institutional control of the performance of arbitral tribunals, the impression of ICSID with member states has not been consistent and positive. Though India of late has been registering a significant share in both inbound and outbound flow of foreign investments and has recently faced many investment claims, it has not ratified the ICSID Convention.' (10)

Explicate the reasons behind India's non ratification of the ICSID Convention. Whether India will benefit from ratifying the ICSID Convention in further promotion of its foreign investments? Evaluate.

Q.5 In December 2006, Vodafone acquired Hong Kong based mobile operator Hutchison Whampoa for USD 10.9 billion. Vodafone International Holdings BV (Dutch tax resident) acquired the entire share capital of CGP Investments (Holdings) Ltd (CGP) (tax resident of Cayman Islands) from Hutchison Group, having headquarters in Hong Kong. CGP indirectly owned 67 per cent of Hutchison Essar Ltd (HEL), an Indian entity which engaged in telecommunication business in India. Subsequent to this transaction, the Indian tax authorities slapped a capital gains tax of around USD 2.2 billion on Vodafone. However, Vodafone contended that the transaction did not involve a capital asset situated in India and therefore it was not liable to pay the capital gains tax. Vodafone successfully pursued the dispute through an investment arbitration in accordance with the India – Netherlands BIT (1995). (10)

What is the impact of Vodafone arbitration award on the Indian investment regime? Elucidate in the light of the Indian Model BIT 2016.

Q.6 Write short notes on the following: (5x2= 10)

a) Risks factors in foreign investment
b) Actors in the field of foreign investment

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