

## EXAM

### JUS5851 - International Investment Law Spring 2018

Date: 8 June 2018

Time: 09:00 – 13:00

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The country of Xandia has massive state debts and its government considers that it is no longer able to service the debt. The heavy debt burden cripples the economy, as a large and increasing portion of state earnings goes to pay interest on the debt. Unemployment is skyrocketing and the country suffers from social unrest and upheavals caused by increasing poverty and distress among the general population, as the country's previously generous social welfare arrangements has been cut in order to instil financial discipline. Most of the debt is in state bonds held by international private funds, banks and financial institutions. After negotiation with the creditors, the government comes to an agreement with the majority of the creditors, reducing the debt to 50 % of its original nominate value with a new payment plan. The agreement is followed up with Xandian legislation, reducing all Xandian state debts to 50 % of its nominate value.

Some creditors from the country of Patria are unwilling to settle however, and sues the Xandian government under a bilateral investment treaty that Xandia has with Patria. The bond holders from Patria maintain that the reduction of the value of their bonds constitute a direct or indirect expropriation in accordance with the expropriation provision of the BIT, which has the following wording:

*A Party shall not directly or indirectly expropriate an investment except for a public purpose, under due process of law, in a non-discriminatory manner, and against payment of prompt, adequate and effective compensation.*

In order for a claim to be made under the bilateral investment treaty, the claim must be connected with an "investment (...) in the territory of the other Contracting Party" and the term investment is further defined in its relevant parts as follows:

*Every kind of asset owned or controlled, directly or indirectly, by an investor of a Party, including, but not limited to:*

- i. *any entity established in accordance with, and recognised as a legal person by the law of a Party, whether or not their activities are directed at profit;*
- ii. *shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;*
- iii. *bonds, debentures, loans and other forms of debt, and rights derived therefrom;*
- iv. *rights under contracts, including turnkey, construction, management, production or revenue-sharing;*
- v. *contracts;*

- vi. *claims to money and claims to performance;*
- vii. *intellectual property rights;*
- viii. *rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits;*
- ix. *any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges*

*In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.*

The treaty furthermore contains the following exception:

*Notwithstanding any other provisions of this Agreement, a Party shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, to ensure the integrity and stability of the financial system, or to enhance market competition, including ownership control and limitation.*

*Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Party's commitments or obligations under the Agreement.*

The Xandian government considers its defences against the claim and request you as their legal advisor to prepare a brief where you outline the legal background for and discuss the following potential legal defences against the claim:

1. The rights of the Patrian bond holders do not constitute an investment under the BIT.
2. The reduction of the state debt was a legitimate, general, regulatory measure, not constituting a direct or indirect expropriation.
3. The reduction of the state debt was justified by the gravity of the crisis in Xandia as a necessity measure under the general law of state responsibility.
4. In any case, the reduction of the state debt was justified under the BIT as a prudential measure.

All questions shall be answered.