



Jindal Global Law School  
*India's First Global Law School*

## O.P. Jindal Global University Jindal Global Law School Internal Examination

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Course Name	: Comparative Public Law
Course Number	: Course 3
Programme	: Blended Learning Programme
Specializations Covered	: LL.M.s in Corporate & Financial Law (CFL), Intellectual Property & Technology Law (IPTL), and Dispute Resolution (DR)
Cohort	: Cohort 6
Duration	: July 5, 2022 to July 20, 2022
Maximum Marks	: 50

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### **General instructions to students:**

- Students undertaking the examination are requested to adhere to the University norms related to examinations.
- This is an 'Open-Book' examination.
- The main ask/questions, after the factual scenarios have been provided for each of Part 1 and Part 2 of this question-paper, are contained on **page 6 (Question 1)** and **page 10 (Question 2)**, respectively, each worth 25 marks.

**WARNING: Plagiarism in any form is prohibited. Anyone found using unfair means will be penalized severely.**

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**BLENDDED LL.M. PROGRAMME**  
**COHORT 6**

**INTERNAL ASSIGNMENT (50 marks)**

July 5, 2022 - July 20, 2022

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Assignment-specific details and instructions

- *This Internal Assignment carries 50 marks in total.*
- *The assignment comprises two (2) questions in two (2) parts, each carrying a maximum of 25 marks.*
- *Accordingly, you need to attempt BOTH questions/parts, i.e., BOTH Part 1 and Part 2.*
- *Each of the two parts in this assignment involves a hypothetical fact situation.*
- *For each hypothetical case, you first need to read the background information, based on which you are required to write a brief memorandum.*
- *In each part, after the background facts are provided, a question has been asked which needs to be responded to through your memorandum.*

**In particular, please note the following:**

- i. INTERNAL ASSIGNMENT: This is the one (and only) Internal Assignment for this course. The External (or End-Term) Assignment will be released at the end of the course.
- ii. INDIVIDUAL ASSIGNMENT: This is an *individual* assessment. Accordingly, please work on your own without discussing with others. Your submission should be your own work.
- iii. WORD/PAGE LIMIT: **For each part/question** in this assignment, please prepare a brief memorandum (or policy/advisory note) of NOT MORE THAN 1,000 words (excluding endnotes, footnotes, etc.) **or** TWO (2) A-4 sized pages in length, whichever is shorter.

Thus, your **final submission** to this Internal Assignment comprising your responses to **BOTH Part 1 and Part 2** herein, collectively, should not exceed 2,000 words (excluding endnotes, footnotes, etc.) **or** FOUR (4) A-4 sized pages in length **in aggregate**, whichever is shorter.

- iv. Your NAME, ROLL NUMBER and JGU EMAIL ID must be mentioned on the first page of your submission.
- v. Each of the memoranda (or policy/advisory notes) should be drafted in NUMBERED or BULLETED paragraph format.
- vi. You do **not** need to provide a summary or re-statement of facts, as these are already available to the examiners. Accordingly, your memoranda should primarily contain your assessment/analysis of the facts and any appropriate advice, as required.

- vii. Keep your analyses limited to the factual scenarios that have already been provided. Do not ‘invent’ new facts or change available facts.
  - viii. Use only Times New Roman font of 12-point size, with single line spacing.
  - ix. Your submissions should be contained in a single MS Word or a PDF document.
  - x. If you are quoting from, or referencing, a case, article, website, book, or other external material (or any part thereof), please ensure that you cite the same appropriately (preferably as footnotes or endnotes).
  - xi. DEADLINE: The submission deadline is 11:59 p.m. of July 20, 2022 (Wednesday).
  - xii. SUBMISSION PORTAL: All submissions must be made via the UMS Portal only. Any submissions by email or by other means WILL **NOT** BE ACCEPTED. Your submission will be complete only when you have uploaded and submitted your final document on JGU’s UMS portal.
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All the best!

PART 1  
(25 marks)

I. Background facts

1. The Islamic Republic of Roohafza, pursuant to advice from certain well-esteemed liberal thinktanks headquartered in New York, Tokyo, and London, is considering the adoption of an open economic policy punctuated by greater market deregulation. In that regard, it seems intent on introducing a slew of measures to facilitate increased trade and foreign investment into its domestic economy, much more than levels existing at present. Among the various policy issues it must now address, however, one important task is to formulate an appropriate position on dispute-settlement to better negotiate bilateral investment treaties (BITs) with major developed countries, several of which Roohafza is currently in talks with.

2. The President of Roohafza has requested your assistance in developing a reasonable stance in respect of the same, which can then be made Roohafza's official position in matters of dispute-settlement while negotiating future treaties. Specifically, the President seeks support in light of her preferred position that domestic courts be given priority in respect of disputes arising within the territory of Roohafza.

3. At present, seeking to improve its judicial system, Roohafza has introduced far-reaching reforms in that regard. Corruption, once rampant in the higher judiciary, has been significantly weeded out (or so reports in the national press suggest, although global rankings, benchmarks, and indices like the ones employed by Transparency International remain non-committal on that front). The fight against corruption has been waged, amidst much fanfare, chiefly due to efforts by the incumbent President, who remains proud of her achievement in this area of governance – especially since this was one of the main pillars of her re-election campaign. Although Roohafza has historically witnessed a pluralistic legal environment with Sharia law, canonical/ecclesiastical influences under Roman Catholicism (especially among minorities), as well as civil law traditions (on account of a brief but memorable French takeover in the mid-19th century) cohabiting ensemble and in tandem, a single unified legal system has prevailed since the late-1970s in the wake of repressive secularising trends. Now, it is influenced both by eastern and western legal traditions, as well as by residue from Soviet legal ideology (stemming from the Cold War-era). However, with US backing in the recent past, Roohafza has been able to introduce a Presidential-type democracy that increasingly leans towards commonwealth legal traditions, although Islam remains its state religion, in deference to populist demands.

4. Not very long ago, Roohafza had turned into a Communist state when it came under Soviet influence during the height of the Cold War. Immediately prior, during a brief lull in tensions between the Soviet Union and countries of the 'West' – driven by global efforts towards nuclear de-escalation (between 1969 and 1972), Roohafza had sought to embrace a policy of non-alignment under the able leadership of the current President's father, who, in the 1950s and 60s, had maintained cordial relations with, and was influenced by, some of the key actors in the Non-Aligned Movement (NAM), including Indian Prime Minister Jawaharlal Nehru, Indonesian President Sukarno, and Egyptian President Gamal Abdel Nasser. However, with the influence of US President Richard Nixon and Secretary of State Henry Kissinger waning over time on account of, inter alia, the infamous Watergate scandal that rocked the

credibility of the White House, the General Secretary of the Communist Party, Leonid Brezhnev, found a perfect opportunity to expand Soviet influence further. Eventually, the Soviet invasion of Roohafza in 1975, while establishing its current unified legal regime, redefined the country's economic policies in deliberate ways.

5. Thus, although Roohafza did declare independence after the end of World War II itself (circa 1946, once local nationalists had managed to secure a formal recognition of sovereignty from the Dutch – Roohafza's colonizing power), it democratized only recently. Nevertheless, Roohafza now aims to become a fully-developed nation by 2030. It had first sought to become a democracy back in 1985, when the Soviet-backed local Communist Party was briefly supplanted with external American support. This transition, of course, was followed by three decades of civil war and ethnic strife, in which Leftist armed forces first fought against Roohafza's main colonial power – the Netherlands; then a US-led coalition involving several European and Gulf countries; and subsequently against pro-democracy forces within Roohafza itself. Having finally inherited the Dutch political, bureaucratic, and legal apparatus, duly coached by its former colonizer (with ample support from the United States, although tensions do emerge from time to time between American and Dutch best-practice prescriptions), Roohafza remains ambitious about its future plans and economic growth strategies.

6. The US maintains that investor-state dispute settlement (ISDS) ought to be the preferred template for Roohafza's policy towards increased participation in the international investment regime. Nevertheless, the current Roohafzan President feels otherwise, consistent with the historical views of her father (widely-regarded as a founder of the modern democratic nation), whose dream was to establish Roohafza's legal system as one of the best in the world. On account of her charismatic father's historical alliance with the Dutch, the President receives tacit support from the Netherlands, as well as from the European Union (EU) more generally – not only towards re-building its local judicial infrastructure, but also in terms of her principal argument that recourse to national high courts should be the only legal option amenable to Roohafza – including in terms of claims brought forth by foreign investors. Since the President did manage to institute Islam as the state religion – a strategic move seen favourably by oil-rich countries of the Middle East, she receives a fair amount of support from the Organization of the Petroleum Exporting Countries (OPEC) as well, including in terms of foreign aid – which makes her confident about influencing future treaty negotiations, even with major capital-exporting countries, all of whom ultimately remain reliant upon oil supplies from Roohafza's OPEC allies.

7. Roohafza is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, 1958). However, it has not yet ratified (although it has signed) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention, 1965) despite the US insisting, on several occasions, that it do so at the earliest.

II. Question 1:

In light of the above, please advise the President of the Islamic Republic of Roohafza in the following manner:

- Please prepare a very brief memorandum/note of not more than 1,000 words or two (2) A-4 sized pages, whichever is shorter, containing your advice ONLY IN BULLET POINTS or in NUMBERED paragraph format – after all, the President has a very busy schedule and has time only to review the big picture
- Use Times New Roman font of 12-point size, with single line spacing, as preferred by Madam President

Please free to dispense with formalities/salutations in either case and get straight to the point.

Essentially, what you need to do is to EITHER support the President's stance on local dispute resolution (*i.e.*, recourse to national courts only) with appropriate justifications for the same, OR suggest alternatives in lieu thereof with adequate reasons explaining why (according to you) her present stance is untenable (and/or impractical). Such advice must be provided given the present context of Roohafza. In particular, the President has provided you with some of the epistemic reasons in reliance of which she wishes to articulate her stance further, most of which have been summarized in the following article, as available in the public domain (citation provided below) and also provided to you separately along with this assignment. Please make sure that you read the article before you start preparing your memorandum.

*Yackee, J. (2009). Toward minimalist system of international investment law. Suffolk Transnational Law Review, 32(2), 303-340*

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PART 2  
(25 marks)

*I. Background facts*

1. Olacious Corporation (hereinafter “**Olacious**”) was established and incorporated (in the year 1985) in Kafistan for the purpose of mining rare metals and the manufacture of high-end electronic components from these metals, including various types of semiconductors. It grew quickly to become one of the top semiconductor manufacturers in the world (by sales), as well as a mining giant, with total consolidated revenue of over 8 billion USD in 2020. Olacious has acquired tremendous reputation on account of the quality of its manufactured products as well as the mined metals which it sells to other manufacturers of high-end chipsets. Its performance and reputation for quality over the past two decades has attracted not only some of the leading investors in the sector but has also led to successful foreign investment ventures in over 15 countries. Consequently, governments of several countries which have significant metal deposits but lack the capacity to extract them profitably have approached Olacious to invest in their respective territories.

2. Tukostan is a landlocked nation with a culturally and ethnically rich and diverse population of over 25 million as per the latest estimates. Over 4 million Tukostanis belong to various indigenous communities that continue to live by traditional customs and laws in their ancestral lands. While Tukostan’s turn towards a market-based economy in the mid-1990s led to economic growth and rising prosperity levels, the per capita income continues to be low (approximately 2400 USD). Low-level income and underdevelopment are particularly prevalent within the indigenous groups that continue to subsist on agriculture and traditional craftsmanship. Despite several policies instituted by successive governments in the past two decades, the indigenous communities have been largely left out of the rising tide of prosperity at the national level. Moreover, this is despite the thriving petroleum and metallic ore industries of Tukostan that have driven its growth in recent years, along with many such enterprises based close to or within indigenous territories. Tukostan in general is blessed with towering mountains, tropical jungles, broad rivers and banks, as well as arid coastal plains, all of which provide diversity of natural habitat. This varied physical and geographical richness is also home to untapped reserves ranging from mineral ores to precious and semi-precious stones spread across the terrain of Tukostan. In 2015, Olacious began a pilot project in Tukostan based on a Memorandum of Understanding (MoU) with the national government to find metallic ore deposits in the country, following which both parties intend to sign an exclusive profit-sharing agreement. After extensive research and evaluation where over 60 million USD was spent by Olacious, it discovered a number of sites in the Ras Khamum territory in 2018 that was believed to contain significant metallic ores and deposits. Based on its initial findings, Olacious believed that it could profitably extract and sell the ore in international markets as well as use some of the output in its own production process for semiconductors and microprocessors. As part of its MoU with the Tukostan government, it has decided to establish a manufacturing facility in Tukostan’s capital Terrania, which is 600km away from the sites in the Ras Khamum territory.

3. Since foreign enterprises were prohibited from initiating any greenfield operations within indigenous territories under Tukostan’s domestic law, Olacious had earlier acquired a 49% stake in Tukostan Exploration and Mining Limited (hereinafter “**TEM**”), a formerly state-owned company that had been engaged in small-scale mining operations since the 1980s. Therefore, TEM would be the primary investment vehicle by which Olacious intended to

conduct its activities in Tukostan. After the discovery of the Ras Khamum sites, Olacious decided to acquire majority shareholding in TEM as soon as it received the necessary mining permits from the Tukostani government.

4. In March 2019, TEM initiated proceedings to obtain mining rights relating to the Ras Khamum sites which is located within the self-governed territories of four indigenous communities. Based on an agreement between the government and Olacious (through TEM) for a profit-sharing agreement for an initial 10-year period, the Tukostani government granted exclusive mining rights to TEM that would be limited to the identified sites in Ras Khamum for 10 years starting from July 2019, subject to further renewal. By September 2019, Olacious had converted its 49% ownership in TEM to a majority stake of 75%, with the National Bank of Tukostan remaining as the only other shareholder in the company. These agreements were formed and executed amidst waves of protests by indigenous communities, who felt that they were being completely cut off from the economic benefits of the project. The only clause in the MoU between Olacious and the Tukostan government addressing the interests of the indigenous communities relates to a provision that Olacious will “strive to invest” up to 5% of the profits generated from the mining activities in Tukostan for the economic development of the communities in whose lands the mining projects would be based. A second cause of concern for the communities are the large risks of environmental harm that may arise from the Ras Khamum mining project, which is compounded by the fact that Tukostan has a poor record of environmental protection, with poorly drafted laws and lack of an effective enforcement mechanism. Consequently, thousands of members belonging to the indigenous communities began to hold strikes and protests in Terrania as well as in the proposed mining sites, demanding that the project be suspended until better terms for the benefit of the communities concerned could be agreed upon, and strict regulations governing the operation of the mines could be instituted.

5. It is noteworthy that the sites which Olacious wanted to acquire for mining were so rich in natural resources that they were considered as an all-in-one supermarket, farm, and pharmacy for the indigenous communities. The root of one plant cured several ailments, while the leaf of another kept many diseases like malaria and dengue at bay. There were a variety of produce which contributed to the quotidian and existential nutrition needs of the communities as well, including plants that were essential to their rituals and festivities. The indigenous community’s closeness to the land has enabled them to live sustainably and provide livelihood to many people. According to traditional beliefs, the whole community has the right to possess land, forest, and water bodies with a set of common rules. They also pointed to several international studies which confirmed that the rich biodiversity of the Ras Khamum territories was due to the indigenous land management practices.

6. Due to these varied considerations, there is a growing movement against the exploitation of the Ras Khamum sites for the purpose of the proposed mining activities by TEM. The project is in a state of impasse two years after the necessary permits have been granted. This is primarily because of various protests and blockading activities by Tukostani citizens, preventing TEM from carrying out its operations at the mining sites. Due to the dissatisfaction and increasingly grave situation caused due to the unrest amongst the citizens, the government of Tukostan is planning to announce an indefinite suspension of mining activities by TEM in the Ras Khamum sites on the ground of public safety. While this decision is yet to be notified, Olacious is aware that this would effectively derail its planned operations in Tukostan, besides threatening the future of the Ras Khamum project. If such a decision is made, Olacious intends to file an international arbitration claim against the state of Tukostan



for breach by Tukostan of its investment protection obligations under the Kafistan-Tukostan Bilateral Investment Treaty. If its claim is successful, Olacious will seek to obtain compensation for its lost investment in Tukostan, including a claim for lost profits from the mining project, estimated at over 2 billion USD in total over a period of 10 years of the mining permit.

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II. Question 2:

You are a policy researcher from the University of Tukostan, regularly involved in advising the government of Tukostan on law and policy issues. State officials have approached you to draft a policy memo of **not more than 1,000 words or two (2) pages in length**, whichever is shorter, to help the government better understand and appreciate the issues at hand, particularly in terms of the competing interests between the foreign investor (Olacious), the government of Tukostan and the indigenous communities leading the protests. Based on your assessment of the factual scenario, you have been asked to suggest possible measures that the government can take to resolve the current situation.

A recent investment arbitral award was issued in *Bear Creek Mining v. Peru* involving a similar situation. A case comment to the Bear Creek award is provided to you along with this question (citation provided below), which you may use to draw ideas and inspiration from, for the purpose of providing any advice that you may provide in your memorandum.

*Jean-Michel Marcoux and Andrew Newcombe, Bear Creek Mining Corporation v Republic of Peru: Two Sides of a 'Social License' to Operate, ICSID Review, Vol. 33, No. 3 (2018), pp. 653–659*

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