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**SHRI. G.A. THAKKAR NATIONAL ONLINE
MOOT COURT COMPETITION, 2022**

ON COMMERCIAL LAW

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MOOT PREPOSITION

1. The Republic of Youngistan (“YOUNGISTAN”) is a developing country located in South Asia. It is the second most populous country in the world and the seventh-largest in terms of land area. While it is a developing country, it is now the fifth largest economy in the world. The Kingdom of the Tudors (“KINGDOM”) is a country located in north-western Europe. It is a developed country and is the fourth largest economy in the world. It has historically been a colonial power and has held great importance in global affairs.
2. Youngistan was a colony of the Kingdom for nearly 200 years, between 1757-1947. In 1947, Youngistan became an independent country among the comity of nations. The people of Youngistan gave to themselves an elaborate written constitution on 26 January 1950, pursuant to which Youngistan was declared a democratic republic. The country’s first elected government was primarily tasked with rebuilding an economy that was severely crippled because of the colonial exploitation it had suffered for over two centuries. Coming fresh out of the suffering caused by capitalist greed of the imperialist Kingdom, the founding leaders of Youngistan adopted the “mixed economy” model. It was a model that tried to combine the best features of socialist and free market economies in theory but tended heavily towards a socialist economy in practice. While this proved to be beneficial with respect to certain protecting domestic industries, it also meant that Youngistan’s economy grew much slower than the economies of similarly-placed developing nations who had adopted the free market model. By 1985, Youngistan started having a balance of payments problems and by the end of 1990, the economy was in a serious economic crisis. The Government of Youngistan (“GoY”) was close to default, its central bank had refused new credit, and foreign exchange reserves had reduced to the point that it could barely finance two weeks' worth of imports. This crisis prompted the then Prime Minister of Youngistan, in consultation with his Finance Minister, to come up with radical reforms in terms of opening up Youngistan’s economy to private enterprise and foreign capital. This policy was termed “Liberalisation, Privatisation and Globalisation Policy” or “LPG Policy”. The LPG policy served as a catalyst for

unprecedented economic growth and within a decade of the introduction of these reforms, Youngistan's economy was growing at over 8% per annum. There was a considerable increase in the economic prosperity of the people of Youngistan as a result of creation of millions of new jobs.

3. In furtherance of the LPG Policy, Youngistan signed bilateral investment treaties ("BITs") with a number of countries, the first among them being the Kingdom. These agreements essentially captured the terms agreed between the two countries in terms of the substantive regulatory protections that each of them would mutually offer to individuals and corporations having the nationality of the other country that made an investment within their territory. Besides substantive regulatory protections such as 'National Treatment', 'Most Favoured Nation Treatment', 'Fair and Equitable Treatment' and so on, these treaties typically provide for a unique dispute resolution mechanism through which an individual investor has the right to initiate arbitration proceedings directly against the host State, without their home State having to espouse their claim in a state v. state dispute resolution forum. The provisions of the BIT signed between Youngistan and the Kingdom ("TREATY") are *pari materia* with those of the 'Agreement between the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments' ("UK-INDIA BIT").
4. As a result of the LPG policy, the mobile telecommunications sector in Youngistan saw unprecedented growth and by the mid-2000s, Youngistan was the fastest growing market of mobile phone users. With a view to capitalise on the 'mobile phone boom' (as it had been described by the media) and attract more global telecom players to Youngistan, the GoY in 2007 decided to further liberalise investment norms and offer certain relaxations from paying taxes to foreign companies who wished to enter the Youngistan mobile telecom market. Violet Telecom Limited ("VTL"), a major international telecommunications corporation incorporated in and having its headquarters in the Kingdom, was among those who took note of these policy changes and was eager to enter the Youngistan market. With this in mind, they entered into negotiations with various telecom companies already operating to Youngistan to explore the possibility of forming a joint venture. After several months of negotiations, they decided to partner with Bharat

Telecom Limited (“BTL”), which was then among the top three mobile telecom services providers in Youngistan. VTL and BTL jointly applied to the relevant governmental authorities in Youngistan to seek approval for this joint venture and the GoY willingly approved the joint venture. In its letter of approval, the GoY confirmed that the proposed joint venture company would be eligible for specific relaxations in payment of taxes payable by it under the Income Tax Act of Youngistan, 1961 (“INCOME TAX ACT”). After having received all necessary regulatory and corporate approvals, a new joint venture company called Violet Bharat Telecommunications Limited (“VBTL”) was incorporated on 1 January 2009 with VTL holding 51% of its shares and BTL holding 49%. VBTL began its operations in May 2009 and within a year of launching its operations, it had already emerged as the largest mobile telecom company in Youngistan in terms of number of subscribers. By 31 December 2011, it had captured a market share of about 35%.

5. While VBTL was being hailed as a success story, the opposition parties in Youngistan expressed their displeasure over the tax relaxations offered by the Government to VBTL (and other such foreign corporations) and accused the Coalition for Youngistan (“Coalition”), the political formation running the central government of Youngistan, of helping big foreign corporations benefit at the expense of ordinary taxpayers of Youngistan. This narrative became a major political issue during the run up to elections to state legislative assemblies in 2011 of two large states of Youngistan where the Coalition was the incumbent political formation. While the Coalition was able to retain a majority and form the government in both these states, its margin of victory was narrower than expected. A *post facto* assessment of the election results by the central leadership suggested that the issue of tax relief to foreign corporations was among the major issues that caused it to lose votes in these elections. With the general elections scheduled to be held in less than two years, senior leaders of the Coalition were concerned about this issue being exploited by the opposition parties to score political points, especially among the socially and economically weaker poorer sections of Youngistan society. Accordingly, a decision was taken to do away with the policy on offering special tax relief to foreign corporations. In his annual budget speech in March 2012, the erstwhile Finance Minister of Youngistan announced that the Government had decided to bring about an amendment in the Income Tax Act (“2012 AMENDMENT”) that would render null and void any

relaxations and/or exemptions provided to companies in which non-resident shareholders held more than 50% shares and/or exercised control through other means (such as through the power to appoint a majority of directors on the board, restrictions agreed upon in shareholders agreements, affirmative voting rights and so on). In a bizarre move, he announced that not only would this amendment apply to future tax assessments of such corporations, but also retrospectively.

6. As expected, the Finance Minister's budget speech caused a furore among those corporations operating in Youngistan who were majority-owned and/or controlled by non-resident shareholders and would thereby fall within the ambit of the proposed amendment. Several representations were made to the Government by such corporations, both at an individual and industry level, to take back its decision. Being among the corporations that were likely to be directly and significantly impacted by this decision, members of the senior management of VBTL held several meetings with various government representatives to work out a possible solution. However, the Government did not pay any heed to such requests by VBTL or other similarly placed corporations and was able to get the 2012 Amendment passed during the Winter Session of the Youngistan Parliament in December 2012. In April 2013, the Central Taxation Authority of Youngistan ("CTA") served a notice on VBTL, requiring it to pay past dues in lieu on its renewed liability under the 2012 Amendment.

7. Aggrieved by what it believed was an arbitrary and illegal action on the part of the Government of Youngistan, VTL sent a 'Notice of Dispute' to the GoY on 31 July 2013 invoking Article 9 of the Treaty. In the said Notice of Dispute, VTL essentially argued that by enacting the 2012 Amendment, the GoY had violated its obligation to afford 'fair and equitable treatment' ("FET") to VTL's investment as per Article 3(2) of the Treaty and that it should reconsider its decision. After having received no reply from the GoY to the said notice by 30 January 2014, VTL sent a 'Notice of Arbitration' to the GoY on 1 March 2014, also stating their choice of arbitrator, being Mr. A. The GoY replied to the Notice of Arbitration on 15 April 2014. In its reply, it contested the jurisdiction of the tribunal on several grounds, foremost among them being that 'tax-related measures' such as the 2012 Amendment are carried out in furtherance of its sovereign "right to regulate" and are

accordingly exempted from the substantive protections offered under the Treaty. However, it did nominate an arbitrator of its choice, being Mr. B. It was decided amongst the parties that the arbitration would be governed by UNCITRAL ARBITRATION RULES, 1976 and be administered by the Permanent Court of Arbitration (“PCA”), with the seat of arbitration being The Hague, Netherlands. Subsequently, the two arbitrators Mr. A and Mr B. mutually agreed upon the appointment of Ms. C as the presiding arbitrator and the tribunal (“Tribunal”) was deemed to be properly constituted on 1 July 2014. At the conclusion of written and oral proceedings before the Tribunal, which took place between September 2014 and July 2016, the Tribunal rendered its award (“Award”) on 1 November 2016. The Award dealt with multiple issues on jurisdiction and merits and essentially ruled that the GoY did indeed violate Article 3(2) of the Treaty by enacting the 2012 Amendment retrospectively. Since VBTL had voluntarily paid all its dues to the CTA under protest, including for the assessment years 2009-10, 2010-11 and 2011-12, the Tribunal order the GoY to refund these payments with applicable interest. The GoY initiated annulment proceedings before The Hague District Court on 15 February 2017, wherein it *inter alia* argued that the tribunal exceeded its mandate by ruling on an issue on a tax-related measure that was beyond the contemplation of the disputing parties in terms of the scope of submission to arbitration. In its decision of 30 January 2018, The Hague District Court rejected the GoY’s arguments and refused to annul the Award or any part of it. The GoY chose to appeal the judgement and The Hague Court of Appeal, in its judgement delivered on 10 September 2019, upheld the judgement of The Hague District Court. Eventually, the Supreme Court of the Netherlands also denied GoY’s appeal in its judgement of 31 May 2020 and confirmed the judgment of The Hague District Court that refused to annul the Award.

8. In the interim, VTL began seeking enforcement of the Award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“NEW YORK CONVENTION”) in multiple jurisdictions which were signatories to the New York Convention and where the GoY had potentially attachable assets. As part of its global enforcement efforts, it also initiated enforcement proceedings before the High Court of Indraprastha (“INDRAPRASTHA HC”) in Youngistan’s capital city of Indraprastha, being the relevant court in this case to which an enforcement application could have been made

under relevant provisions of the Arbitration and Conciliation Act, 1996 (“ACT”). The GoY, while praying that the enforcement of the Award be refused, put forth the following arguments in support of its prayer:

- I. The subject-matter of an arbitral award passed in an investor-state arbitration cannot be considered “commercial under the law in force in Youngistan” and hence cannot be enforced under the relevant provisions of Part II of the Act;
 - II. Even if the subject-matter of the Award were to be considered as “commercial under the law in force in Youngistan”, the Award should not be enforced on the following grounds:
 - a. the Award has ruled conclusively on a ‘tax-related’ measure which relates to exercise Youngistan’s sovereign rights and hence impliedly exempted from the substantive protections set out in the Treaty, and accordingly deals with a difference not contemplated by or not falling within the terms of the submission to arbitration by Youngistan and the Kingdom under the Treaty;
 - b. enforcing the Award would be contrary to Youngistan’s sovereign right to impose taxes as well as its taxation laws, both of which are a fundamental part of the public policy of Youngistan.
9. VTL, on its part, made the following counter-arguments:
- I. the subject-matter of an arbitral award passed in an investor-state arbitration can be considered “commercial under the law in force in Youngistan” and hence can be enforced under the relevant provisions of Part II of the Act;
 - II. There is no basis to refusing the enforcement of the Award because:
 - a. there is neither an express nor an implied exemption of tax-related measures from the substantive protections set out in the Treaty and hence the Award does not deal

with any difference not contemplated by or not falling within the terms of the submission to arbitration by Youngistan and the Kingdom under the Treaty;

- b. the Award does not violate the public policy of Youngistan as it has been passed pursuant to the provisions of the Treaty, a binding legal instrument containing Youngistan’s international obligations that are very much a fundamental part of its public policy and override any contrary municipal laws and policies.

10. The Indraprastha HC, in its judgement of 5 October 2020, accepted the arguments of the GoY and refused to enforce the Award. On 1 December 2020, VTL has filed an appeal before the Supreme Court of Youngistan (“SUPREME COURT”). The Supreme Court has listed this case for a final hearing on [*dates of the moot court*] 2021.

11. Both Youngistan and the Kingdom are parties to the New York Convention (as defined above). While the Kingdom is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID CONVENTION”), Youngistan has neither signed nor ratified the same.

IMPORTANT CLARIFICATIONS AND INSTRUCTIONS:

1. The issues before the Supreme Court shall remain the same as the ones framed before the Indraprastha HC. The Parties will accordingly re-iterate the arguments they made before the Indraprastha HC.
2. The laws of Republic of Youngistan are *pari materia* with the laws of India.
3. For the avoidance of doubt, a copy of the UK-India BIT is enclosed herewith. Participants should only rely on this text only and not on any other text of this treaty.