

PCA Case No. 2014-10

13 December 2017

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IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF ARBITRATION OF  
THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW  
(UNCITRAL)

between

**DEUTSCHE TELEKOM AG**

Claimant

and

**THE REPUBLIC OF INDIA**

Respondent

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**Interim Award**

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**ARBITRAL TRIBUNAL**

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Mr. Daniel M. Price, *Co-Arbitrator*

Prof. Brigitte Stern, *Co-Arbitrator*

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**FREQUENTLY USED ABBREVIATIONS AND DEFINITIONS**

<b>2G</b>	Second Generation
<b>3G</b>	Third Generation
<b>4G</b>	Fourth Generation
<b>Agreement (or Devas Agreement)</b>	Agreement between Devas and Antrix for the lease of S-band electromagnetic spectrum on two satellites, 28 January 2005
<b>Antrix</b>	Antrix Corporation Limited, an Indian state-owned company
<b>ASG</b>	Additional Solicitor General of India, Mr. Parasan
<b>BIT</b>	1995 Agreement between Germany and India for the Promotion and Protection of Investments
<b>BSS</b>	Broadcast Satellite Services
<b>BWA</b>	Broadband Wireless Access
<b>CAFTA</b>	The Dominican Republic - Central American – United States Free Trade Agreement
<b>CBI Charge Sheet</b>	Charge Sheet No. 01/2016 in the Honorable Court of the Principal Special Judge for CBI Cases, dispatched on 11 August 2016
<b>CCS</b>	Indian Cabinet Committee on Security
<b>CLA-[#]</b>	Claimant's Legal Authority
<b>Counter-Memorial</b>	Respondent's Counter-Memorial on Jurisdiction and Liability, dated 13 February 2015
<b>C-PHB</b>	Claimant's Post Hearing Brief, dated 10 June 2016
<b>Devas</b>	Devas Multimedia Private Limited, Deutsche Telecom AG's Indian minority-owned indirect subsidiary
<b>Devas Spectrum</b>	Total amount of S-band capacity leased to Devas
<b>DOS</b>	Department of Space of India
<b>DOT</b>	Department of Telecommunications of India
<b>DT</b>	Deutsche Telecom AG

<b>DT Asia</b>	Deutsche Telekom Asia Pte. Ltd.
<b>ER</b>	Expert Report
<b>Exh. C-[#]</b>	Claimant's Exhibit
<b>Exh. R-[#]</b>	Respondent's Exhibit
<b>FET</b>	Fair and Equitable Treatment
<b>FIPB</b>	Foreign Investment and Promotion Board of India
<b>FPS</b>	Full Protection and Security
<b>GHz</b>	Gigahertz
<b>GSAT6</b>	Primary Satellite 1, also referred to as PS1
<b>GSAT6A</b>	Primary Satellite 2, also referred to as PS2
<b>Hearing</b>	Hearing on jurisdiction and liability held from 6 to 11 April 2016 (excluding Sunday 10 April 2016) at the ICC Hearing Centre in Paris
<b>ICC Award</b>	Final Award issued on 14 September 2015 in the ICC arbitration commenced on 19 June 2011 by Devas against Antrix
<b>IDS</b>	Integrated Defence Staff
<b>ILC Articles</b>	The International Law Commission Articles on State Responsibility
<b>Indian Space Authorities</b>	The Space Research Organization, the Department of Space and the Space Commission, collectively
<b>INR</b>	The Indian Rupee
<b>INSAT</b>	Indian National Satellite System
<b>ISRO</b>	Indian Space Research Organization
<b>ITU</b>	International Telecommunications Union
<b>LLC</b>	Limited liability company
<b>LLP</b>	Limited liability partnership
<b>Mauritius BIT Arbitration</b>	CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited., and Telcom Devas Mauritius Limited. v. Republic of India, PCA Case No. 2013-09

<b>Mauritius BIT Award</b>	Award on Jurisdiction and Merits and the dissenting opinion of one of the arbitrators in the Mauritius BIT Arbitration
<b>Memorial</b>	Claimant's Memorial on Jurisdiction and Liability, dated 2 October 2014
<b>MHz</b>	Megahertz
<b>MOD</b>	Ministry of Defense of India
<b>MOJ</b>	Ministry of Law and Justice
<b>MSS</b>	Mobile Satellite Services
<b>NAFTA</b>	The North American Free Trade Agreement
<b>NSC</b>	National Security Council
<b>PCA</b>	Permanent Court of Arbitration
<b>PO</b>	Procedural Order
<b>PS1</b>	Primary Satellite 1, also referred to as GSAT6
<b>PS2</b>	Primary Satellite 2, also referred to as GSAT6A
<b>Rejoinder</b>	The Respondent's Rejoinder on Jurisdiction and Liability, dated 9 October 2015
<b>Reply</b>	Claimant's Reply on Jurisdiction and Liability, dated 26 June 2015
<b>Respondent's Submission on ICC Award</b>	Respondent's Submission on the ICC Award in <i>Devas Multimedia Private Limited v. Antrix Corporation Limited</i> , ICC Case No. 18051/Cyk, 7 December 2015
<b>RLA-[#]</b>	The Respondent's Legal Authority
<b>R-PHB</b>	The Respondent's Post Hearing Brief, dated 10 June 2016
<b>SatCom</b>	Satellite Communications
<b>SatCom Policy</b>	Satellite communications policy framework approved by Indian Cabinet Ministers in 1997
<b>Suresh Committee</b>	Committee consisting solely of the former Director of the Indian Institute of Space and Technology, Dr. Suresh
<b>Suresh Report</b>	The Suresh Committee report of 6 June 2010

<b>The Devas System</b>	Mobile multimedia and broadband data services offered to the Indian market via a hybrid satellite-terrestrial communications platform
<b>TRAI</b>	Telecom Regulatory Authority of India
<b>VCLT</b>	The Vienna Convention on the Law of Treaties
<b>WPC</b>	Wireless Planning and Coordination Wing of the DOT
<b>WS</b>	Witness Statement

## I. INTRODUCTION

### A. THE PARTIES

#### 1. The Claimant

1. The Claimant is Deutsche Telekom AG (the "Claimant" or "DT"), a company incorporated under the laws of the Federal Republic of Germany.
2. The Claimant is represented in this arbitration by Mr. Karam Daulet-Singh of Platinum Partners, Mr. Samuel Wordsworth QC of Essex Court Chambers, Ms. Sylvia Noury, Mr. William Thomas, Mr. Michael Kotrly, Ms. Ella Davies, Ms. Annie Pan and Ms. Leonie Beyrle of of Freshfields Bruckhaus Deringer LLP, and Mr. Aman Ahluwalia.

#### 2. The Respondent

3. The Respondent is the Republic of India (the "Respondent" or "India").
4. The Respondent is represented in this arbitration by Messrs. George Kahale III, Benard V. Preziosi, Fernando Tupa and Fuad Zarbiyev of Curtis Mallet-Prevost Colt & Mosle LLP.

### B. OVERVIEW OF THE DISPUTE AND THE PARTIES' PRAYERS FOR RELIEF

5. The present dispute arises out of India's purported annulment of the agreement for the lease of S-band electromagnetic spectrum on two satellites concluded on 28 January 2005 (the "Agreement" or "Devas Agreement")<sup>1</sup> between DT's Indian minority-owned indirect subsidiary Devas Multimedia Private Limited ("Devas")<sup>2</sup> and the Indian state-owned company Antrix Corporation Limited ("Antrix"). The Agreement *inter alia* contemplated offering mobile multimedia and broadband data services to the Indian market via a hybrid satellite-terrestrial communications platform (the "Devas System").
6. In sum, the Claimant maintains that, based on political considerations linked to the public scrutiny over the allocation of the terrestrial 2G spectrum, India

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<sup>1</sup> Agreement for the Lease of Space Segment Capacity on ISRO/Antrix SBand Spacecraft by Devas Multimedia Pvt Ltd, 28 January 2005, **Exh. C-006**.

<sup>2</sup> DT's wholly-owned subsidiary, DT Asia (Singaporean company) owns 19.65% of Devas's paid up share capital, Memorial, para. 119.

arbitrarily annulled the Agreement contrary to prior assurances by the Indian Space Research Organization (the "ISRO"), the Department of Space (the "DOS") and the Space Commission (collectively the "Indian Space Authorities") that they would allow and support the realization of the Devas System, including by launching two satellites necessary to exploit the S-band electromagnetic spectrum. According to the Claimant, the conduct of India constituted multiple breaches of the 1995 Agreement between Germany and India for the Promotion and Protection of Investments (the "Treaty" or "BIT"),<sup>3</sup> including unlawful expropriation and unfair and inequitable treatment.

7. In its Reply, the Claimant has formulated its prayers for relief as follows:

"341. On the basis of the foregoing, without limitation and expressly reserving its right to supplement this request for relief in light of additional facts or further action that may be taken by India in relation to Devas, its directors and / or its shareholders, DT respectfully requests that the Tribunal:

(a) DECLARE that India is in breach of its obligations under Article 3 and 5 of the Treaty;

(b) ORDER India to compensate DT fully for its losses resulting from India's breaches of the Treaty and international law, in an amount to be determined in the second phase of these proceedings; such compensation to be paid without undue delay, be freely convertible and transferable, and bear (pre- and post-award) interest at a compound rate sufficient fully to compensate DT for the loss of the use of this capital as from the date of India's breaches of the Treaty;

(c) DECLARE that:

(i) the award of damages and interest in (b) be made net of all Indian taxes; and

(ii) India may not deduct taxes in respect of the payment of the award of damages and interest in (b);

(d) ORDER India to indemnify DT:

(i) for any taxes India assesses on the award of damages and interest in (b); and

(ii) in respect of any double taxation liability that would arise in Germany or elsewhere that would not have arisen but for India's adverse measures;

(e) AWARD such further or other relief as the Tribunal considers appropriate; and

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<sup>3</sup> Agreement between Germany and India for the Promotion and Protection of Investments, 10 July 1995, **Exh. C-001**.

(f) ORDER India to pay all of the costs and expenses of this arbitration, including DT's legal and expert fees, the fees and expenses of the Tribunal,

the fees and expenses of any appointing or administering authority, the fees and expenses of any experts appointed by the Tribunal, plus interest, pursuant to the discretion granted under Article 9(2)(b)(vii) of the Treaty and Article 40 of the UNCITRAL Rules."<sup>4</sup>

8. The Respondent denies the claims. It primarily contends that three "threshold issues" preclude the Claimant from asserting its claims in this arbitration. In particular, the BIT (i) contains an essential security interests clause; (ii) does not protect pre-investments; and (iii) does not cover indirect investments and indirect investors. In any event, the Respondent submits that India annulled the Agreement based on the policy decision to reserve a segment of the S-band electromagnetic spectrum for non-commercial use by military and other security agencies.
9. In its Rejoinder, the Respondent has formulated its prayers for relief as follows:

"274. For the reasons stated above, all claims asserted herein should be dismissed and all costs of this proceeding should be assessed against Claimant."<sup>5</sup>

## II. PROCEDURAL HISTORY

10. On 2 September 2013, the Claimant filed a Notice of Arbitration against the Respondent under the BIT and the UNCITRAL Rules.
11. The Tribunal was constituted on 11 April 2014. It is composed of Mr. Daniel M. Price, appointed by the Claimant; Professor Brigitte Stern, appointed by the Respondent; and Professor Gabrielle Kaufmann-Kohler as Presiding Arbitrator, appointed by the Parties upon proposal of the ICSID Secretary General.
12. With the consent of the Parties, the Tribunal appointed Dr. Michele Potestà as Secretary to the Tribunal. Dr. Potestà's CV was circulated to the Parties and his tasks were set out in the Tribunal's letter to the Parties of 5 May 2014.
13. On 31 April 2014, the Respondent filed an Answer to the Claimant's Notice of Arbitration.

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<sup>4</sup> Reply, para. 341.

<sup>5</sup> Rejoinder, para. 274.

14. On 21 May 2014, in compliance with the agenda set out in the Presiding Arbitrator's letter of 5 May 2014, the Tribunal and the Parties held an initial procedural hearing via telephone conference to discuss various procedural matters, in particular the Terms of Appointment and the procedural rules of the arbitration (contained in a draft Procedural Order No. 1 circulated by the Tribunal). The Parties and the Tribunal agreed that the Permanent Court of Arbitration ("PCA") would act as Registry in these proceedings.
15. On 22 May 2014, the Tribunal issued Procedural Order No. 1 ("PO1") containing the procedural rules and the procedural calendar.<sup>6</sup>
16. On 10 June 2014, the Presiding Arbitrator dispatched copies of the Terms of Appointment, signed by the Parties and the Tribunal, to the Parties and her co-arbitrators.
17. On 2 October 2014, in accordance with the procedural calendar, the Claimant filed its Memorial on Jurisdiction and Liability ("Memorial").
18. On 13 February 2015, the Respondent filed its Counter-Memorial on Jurisdiction and Liability ("Counter-Memorial").
19. On 9 April 2015, the Tribunal resolved certain disputed issues concerning the admissibility in this arbitration of the use of the transcript and of other information from the PCA arbitration in *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited., and Telcom Devas Mauritius Limited. v. Republic of India* ("Mauritius BIT Arbitration").
20. On 1 May 2015, the Tribunal issued Procedural Order No. 2 ("PO2"), with Annexes A and B, dealing with the Parties' document production requests.
21. On 8 May 2015, the Tribunal issued Procedural Order No. 3 ("PO3") containing rules on confidentiality. A draft version of PO3 had been circulated to the Parties on 1 May 2015, to which the Parties had provided their comments.
22. On 26 June 2015, the Claimant filed its Reply on Jurisdiction and Liability ("Reply").
23. On 19 August 2015, the Tribunal resolved certain disputed issues concerning disclosures and redactions.

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<sup>6</sup> A corrected version of PO1 was dispatched to the Parties on 5 June 2014.

24. On 9 October 2015, the Respondent filed its Rejoinder on Jurisdiction and Liability ("Rejoinder").
25. On 20 October 2015, the Tribunal gave directions on the further steps in the procedural calendar and confirmed the Parties' agreement on the amendment of the procedural calendar to allow each Party to file one short written submission in order to address the award issued on 14 September 2015 by the ICC tribunal in the arbitration between Devas Multimedia Private Limited and Antrix Corporation Limited. Accordingly, the Claimant filed its submission on 20 November 2015 and the Respondent its response on 7 December 2015.
26. On 15 February 2016, the Tribunal and the Parties held a telephone conference to discuss the outstanding issues pertaining to the organization of the hearing.
27. On 16 February 2016, the Tribunal issued Procedural Order No. 4 ("PO4") concerning the organization of the hearing.
28. In accordance with Article 13(b) of PO4, on 29 March 2016, the Claimant filed additional factual exhibits and legal authorities and the Respondent filed additional legal authorities.
29. A hearing on jurisdiction and liability took place from 6 to 11 April 2016 (excluding Sunday 10 April 2016) at the ICC Hearing Centre in Paris ("Hearing").
30. On 12 April 2016, the Tribunal issued Procedural Order No. 5 ("PO5") dealing with post-hearing matters.
31. On 18 April 2016, the Tribunal asked the Parties to address a specific question in their post-hearing memorials.
32. On 11 May 2016, the Parties submitted their joint proposed corrections to the transcript of the Hearing.
33. On 10 June 2016, the Claimant and the Respondent submitted their post-hearing briefs (respectively "C-PHB" and "R-PHB").
34. On 8 July 2016, the Parties filed their submissions on costs.
35. On 26 July 2016, in accordance with para. 7 of PO5, the Respondent filed the Award on Jurisdiction and Merits and the Dissenting Opinion of one of the arbitrators in the Mauritius BIT Arbitration ("Mauritius BIT Award").

36. On 8 August 2016, in accordance with PO5, each Party filed a submission on the Mauritius BIT Award.
37. On 24 October 2016, the Respondent sent a letter bringing to the Tribunal's attention "certain recent developments in the Devas matter" and requested that the Tribunal suspend the present arbitration.
38. On 14 November 2016, the Claimant provided its comments on the Respondent's letter of 24 October 2016 and requested leave to submit additional factual evidence.
39. On 21 November 2016, the Respondent informed the Tribunal that it did not object to the Claimant's request to submit the additional factual documents.
40. On 23 November 2016, the Tribunal invited the Claimant to file the additional factual evidence.
41. On 29 November 2016, in accordance with the Tribunal's instructions, the Claimant filed the additional factual evidence with brief comments.
42. On 15 December 2016, the Respondent informed the Tribunal that it had no comments on the Claimant's letter of 29 November 2016.
43. On 23 December 2016, the Claimant requested leave to submit a copy of a decision issued on 21 December 2016 by the arbitral tribunal in the Mauritius BIT Arbitration, in which that tribunal denied a request made by the Republic of India to stay that arbitration.
44. On 13 January 2017, the Respondent informed the Tribunal that it did not object to the submission by the Claimant of the decision issued by the tribunal in the Mauritius BIT Arbitration and requested leave to submit (i) the letter which the Respondent had sent to the tribunal in the Mauritius BIT Arbitration following receipt of the decision and (ii) the writ of summons which the Respondent submitted to the Dutch court in seeking to set aside the Mauritius BIT Award.
45. On 26 January 2017, following further observations filed by the Parties, the Tribunal decided to (i) grant leave to the Claimant to submit a copy of the decision issued on 21 December 2016 by the tribunal in the Mauritius BIT Arbitration; (ii) grant leave to the Respondent to submit the letter which it had sent to the tribunal in the Mauritius BIT Arbitration following receipt of the 21 December 2016 decision; (iii) set a schedule for the Parties' comments on those additional

documents; and (iv) denied the Respondent's request to file the writ of summons submitted to the court in The Hague requesting the annulment of the Partial Award in the Mauritius BIT Arbitration.

46. On 2 February 2017, the Parties filed their comments and additional documents in accordance with the Tribunal's directions.
47. On 20 February 2017, the Tribunal resolved the Parties' outstanding requests. In particular, it (i) denied the Respondent's request to suspend these proceedings; and (ii) deferred its determination of the Parties' other requests and submissions in relation to the so-called "CBI charges" to its forthcoming Award (see *infra* section IV.4).
48. On 14 March 2017, the Respondent requested leave to file the *travaux préparatoires* of the Netherlands-India BIT. The Claimant provided its comments on 17 March 2017.
49. On 20 March 2017, the Tribunal denied the Respondent's request to file the *travaux* of the Netherlands-India BIT.

### III. FACTUAL BACKGROUND

50. In this section, the Tribunal sets forth the main facts underlying the present dispute in chronological order as they arise from the record. It will refer to additional facts when needed in the context of its analysis. This section does not reflect any finding of fact.

#### A. INDIA'S SATELLITE FREQUENCY SPECTRUM AND ITS ALLOCATION

51. Pursuant to the regulations of the International Telecommunications Union ("ITU"), India is entitled to various bands of electromagnetic spectrum, including 190 MHz of the S-band spectrum, which is the portion of the electromagnetic spectrum in the frequency range of 2.5 to 2.69 GHz (S-band). Since 1983 India's entire S-band spectrum has been at the disposal of the DOS.<sup>7</sup>
52. In 1997, the Cabinet of Ministers of the Republic of India approved a new policy framework for satellite communications ("SatCom Policy"). Among other things,

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<sup>7</sup> ISRO Background Note, **Exh. C-047**, p. 1.

the SatCom Policy contemplated “[e]ncouraging the private sector investment in the space industry in India and attracting foreign investments”.<sup>8</sup> In 2000, the Government then approved the Guidelines and Procedures for the Implementation of the SatCom Policy. The guidelines allowed the DOS to allocate the spectrum capacity for commercial use on the basis of “suitable transparent procedures”, such as “auction, good faith negotiations, first come first served, or any other equitable method”.<sup>9</sup>

53. In 2003, the DOS transferred 40 MHz of S-band spectrum to the Department of Telecommunications (“DOT”) for use for commercial terrestrial services.<sup>10</sup> The DOS retained the remaining 150 MHz, out of which 80 MHz were approved for use by Broadcast Satellite Services (“BSS”) and the other 70 MHz were allotted to Mobile Satellite Services (“MSS”).<sup>11</sup> The following chart, which is excerpted from the Memorial (para. 37), describes the resulting allocation of S-band:

#### S-band Allocation in India



#### B. THE DEVAS PROJECT

54. In mid-2003, a US consultancy firm named Forge Advisors, which would later found Devas, began negotiations with the Indian Space Authorities on a potential collaboration for commercializing some of the DOS’s S-band spectrum. In particular, Forge Advisors proposed establishing a hybrid (satellite-terrestrial) communications platform, which would offer two principal services: (i) an

<sup>8</sup> Policy framework for satellite communications in India, 1997, **Exh. C-004**, p. 1.

<sup>9</sup> Guidelines and Procedures for Implementation of the SatCom Policy, **Exh. C-054**, Art. 2.6.2.

<sup>10</sup> Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**, pp. 92, 97.

<sup>11</sup> BSS allows one-way transmission of information, while MSS contemplates two-way transmission; Extracts from India’s National Frequency Allocation Plan, 2002, **Exh. C-055**, pp. 28-29.

interactive audio visual service that would deliver television and cable programming to hand-held and mobile terminals, and (ii) a broadband wireless access ("BWA") service that would provide internet access to fixed (homes) and nomadic users (PCs, laptops, tablets and mobile devices) in urban areas (the Devas Services).<sup>12</sup> In addition, the proposal contemplated a "rural information kiosk receiver" to offer informational services to India's rural population.<sup>13</sup>

55. India instructed a committee comprised of public officials led by Dr. K. N. Shankara, the Director of ISRO's Space Applications Centre, to review the feasibility of the Devas project. In May 2004, the committee issued a report (the "Shankara Report"), which concluded that the concept was "attractive" and provided for a "significant opportunity to ISRO and Antrix in the development of a new, state-of-the-art satellite application and technology as well as in the broader participation in the international commercial satellite market".<sup>14</sup>

## C. THE LEASE AGREEMENT

### 1. Negotiating history

56. In July 2004, based on the Shankara Report, the Board of Directors of Antrix approved that the company enter into a partnership with Forge Advisors.<sup>15</sup> At the time, Antrix's Board was composed of, *inter alia*, Dr. Nair, the Secretary of the DOS and Chairman of the Space Commission, ISRO and Antrix, and Mr. Das, Financial Advisor to the Government and a Member of the Space Commission and the Atomic Commission.
57. In the course of the negotiations of the Agreement throughout the fall of 2004, ISRO and Antrix, on the one hand, and Forge Advisors, on the other, exchanged a number of communications, in particular:
- In mid-September 2004, Forge Advisors sent ISRO and Antrix a draft term sheet which contemplated that ISRO would be a party to the Agreement

<sup>12</sup> Letter of 15 April 2004 from Forge Advisors to ISRO and Antrix, enclosing a proposal to launch Devas System through an Indian joint venture, **Exh. C-057**.

<sup>13</sup> *Id.*, p. 7.

<sup>14</sup> Shankara Report, **Exh. C-059**, p. 1 "Introduction", p. 11 "Risk Reduction".

<sup>15</sup> Suresh Report, **Exh. C-130**, pp. 6-7.

and would have the burden of obtaining an operating license from the Wireless Planning and Coordination Wing of the DOT (“WPC License”).<sup>16</sup> Both of these proposals were rejected by ISRO and Antrix.<sup>17</sup>

- The term sheet proposed by Forge Advisors precluded ISRO from terminating the Agreement except for non-payment of fees by Devas.<sup>18</sup> If ISRO terminated the Agreement for any reason other than Devas’s non-payment, the term sheet provided that ISRO would refund to Devas all of the amounts paid and would in addition pay liquidated damages of INR 460 million or INR 6.9 billion depending on the stage at which the Agreement would be terminated.<sup>19</sup> This proposal was also rejected by ISRO and Antrix.<sup>20</sup>
- A draft of the Agreement submitted by Forge Advisors on 6 December 2004 provided that “[i]n the case of material breach, in addition to termination and refund of fees, the terminating party reserves the customary rights and remedies provided by Indian law against the defaulting party”.<sup>21</sup> Antrix deleted this clause from the draft agreement on 13 December 2004.<sup>22</sup>

58. Following the negotiations, the Board of Directors of Antrix approved the final version of the Agreement. On 17 December 2004, Devas was incorporated in the State of Karnataka for the purpose of entering into the Agreement with Antrix.<sup>23</sup>

## 2. Overview of the Agreement

59. On 28 January 2005, Antrix and Devas entered into the Agreement. The Agreement provided for the lease of S-band capacity on two satellites, PS-1 (also known as GSAT-6) and PS-2 (also known as GSAT-6A) to be manufactured and

<sup>16</sup> Draft Binding Term Sheet, 12 September 2004, **Exh. R-011**, Sections 1.1, 1.5.1(c).

<sup>17</sup> Email of 20 September 2004 from ISRO to Forge Advisors, **Exh. R-014**.

<sup>18</sup> Counter-Memorial, para. 25.

<sup>19</sup> Draft Binding Term Sheet, 12 September 2004, **Exh. R-011**, p. 10.

<sup>20</sup> Email of 20 September 2004 from ISRO to Forge Advisors, **Exh. R-014**.

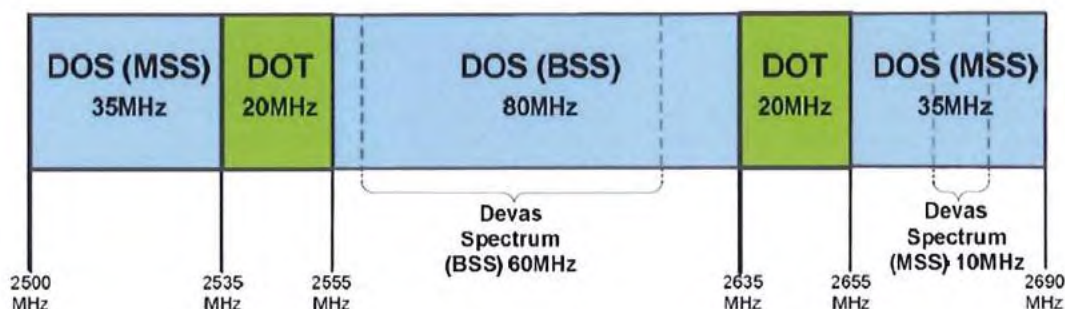
<sup>21</sup> Email of 6 December 2004 from Devas to Antrix, attaching draft agreement, **Exh. R-15**, p. 7.

<sup>22</sup> Email of 13 December 2004 from Antrix to Forge Advisors, attaching the draft agreement, **Exh. R-016**, p. 9.

<sup>23</sup> Devas Certificate of Incorporation, 17 December 2004, **Exh. C-005**.

launched by ISRO. The total amount of S-band capacity leased to Devas was 70 MHz, out of which 60 MHz were of BSS spectrum and the remaining 10 MHz were of MSS spectrum (the “Devas Spectrum”). The following chart, excerpted from the Memorial (para. 56), indicates the location of the Devas Spectrum:

### DOS Spectrum leased to Devas



60. Devas undertook to pay (i) an upfront capacity reservation fee of USD 20 million per satellite to be paid in installments;<sup>24</sup> (ii) lease fees in the amount of USD 9 million per year to be increased to USD 11.25 million once Devas became cash positive;<sup>25</sup> and (iii) critical component acquisition fees.<sup>26</sup>
61. The initial period of the lease was 12 years. The Parties later agreed to an amendment providing for 12 further years upon the payment of a “reasonable Lease Fee”.<sup>27</sup>
62. Pursuant to its Article 27, the Agreement would take effect “on the date that Antrix is in receipt of all required approvals and communicates to Devas in writing regarding the same”. On 2 February 2006, Antrix sent a letter to Devas informing that it had received “necessary approval for building, launching, and leasing the capacity of S-band satellite”,<sup>28</sup> which brought the Agreement into effect.<sup>29</sup>

<sup>24</sup> Agreement for the Lease of Space Segment Capacity on ISRO/Antrix SBand Spacecraft by Devas Multimedia Pvt Ltd, 28 January 2005, **Exh. C-006**, Article 4(a) and Exhibit B, Sections 1.2, 2.1.1.

<sup>25</sup> *Id.*, Article 4 and Exhibit B, Sections 2.1.2.B, 2.1.2.1.

<sup>26</sup> *Id.*, Article 4 and Exhibit B, Section 1.2.3.

<sup>27</sup> Amendment No. 1 to the Agreement, 27 July 2006, **Exh. C-063**.

<sup>28</sup> Letter from Antrix (Mr. Murthi) to Devas (Mr. Viswanathan), 2 February 2006, **Exh. C-008**.

<sup>29</sup> Memorial, para. 64.

### 3. **Terms governing the regulatory approvals**

63. The Agreement included the following provisions allocating the burden of obtaining regulatory approvals:

- Pursuant to Article 3(c), Antrix would be “responsible for obtaining all necessary Governmental and Regulatory Approvals relating to orbital slot and frequency clearances, and funding for the satellite to facilitate Devas services. Further, Antrix shall provide appropriate technical assistance to Devas on a best effort basis for obtaining required operating licenses and Regulatory Approvals from various ministries so as to deliver Devas services via satellite and terrestrial networks. However the cost of obtaining such approvals shall be borne by Devas”.
- Further, under Article 12(a)(ii), Antrix, through ISRO/DOS, would be “responsible for obtaining clearances from National and International agencies (WPC, ITU, etc.) for use of the orbital slot and frequency resources so as to ensure that the spacecraft is operated meeting its technical characteristics and provide the Leased Capacity as specified”.
- Finally, according to Article 12(b)(vii), Devas would be “solely responsible for securing and obtaining all licenses and approval (Statutory or otherwise) for the delivery of Devas Services via satellite and terrestrial network”.

### 4. **Terms governing termination and exclusion of liability**

64. With respect to contract termination and exclusion of liability, the Parties refer particularly to Article 7(c), according to which Antrix “may terminate this Agreement in the event Antrix is unable to obtain the necessary frequency and orbital slot coordination required for operating PS1 on or before the completion of the Pre Shipment Review of the PS1. In the event of such termination, Antrix shall immediately reimburse to Devas all the Upfront Capacity Reservation Fees and corresponding service taxes received by Antrix until that date. Upon such termination, neither Party shall have any further obligation to the other Party under this Agreement nor be liable to pay any sum as compensation or damages (by whatever name called)”.

65. The Parties further cite to Article 11 providing that "(a) [n]either of the Parties hereto shall be liable for any failure or delay in performance of its obligations hereunder if such failure or delay is due to Force Majeure as defined in this Article, provided that notice thereof is given to the other Party within seven (7) calendar days after such event has occurred"; "(b) For the purposes of this Agreement, Force Majeure Event shall include any event, condition or circumstance that is beyond the reasonable control of the party affected (the "Affected Party") and that, despite all efforts of the Affected Party to prevent it or mitigate its effects (including the implementation of a business continuation plan), such event, condition or circumstance prevents the performance by such Affected Party of its obligations hereunder. The following events may be considered Force Majeure Events under the Agreement: (i) explosion and fire; (ii) flood, earthquake, storm, or other natural calamity or act of God; (iii) strike or other labor dispute; (iv) war, insurrection, civil commotion or riot; (v) acts of or failure to act by any governmental authority acting in its sovereign capacity; (vi) changes in law and regulation, (vii) National emergencies, (ix) Launch Failure".

**A. DT'S INVOLVEMENT IN DEVAS**

66. In October 2007, Devas's representative, Dr. Rajendra Singh, first approached Mr. Hamid Akhavan, then CEO of T-Mobile International AG, a DT subsidiary, to discuss a possible partnership.<sup>30</sup> By that time, Devas had already secured equity investment from Columbia Capital LLC and Telecom Ventures LLC, who had both invested in Devas through their Mauritian subsidiaries.

67. The Claimant submits that the Devas project matched DT's strategy to invest in early-stage players in emerging markets to which it could add value through its expertise in planning and designing terrestrial networks.<sup>31</sup> DT thus undertook a review of Devas's business plan and financial model.<sup>32</sup> From late 2007 to early 2008, DT's representative, Dr. Kim Larsen (one of the Claimant's witnesses in this arbitration), worked with Devas to review Devas's business plan and financial model.<sup>33</sup> Additionally, in December 2007, Devas organized several meetings

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<sup>30</sup> Axmann WS1, para. 9; Viswanathan WS, para. 49.

<sup>31</sup> Memorial, paras. 67-68; Axmann WS1, paras. 13-15.

<sup>32</sup> Axmann WS1, paras. 22-23.

<sup>33</sup> Axmann WS1, para. 24.

- between DT and the representatives of the Indian Space Authorities on ISRO's premises in Bangalore.
68. On 19 February 2008, DT's Management Board discussed the prospects of investing in Devas. The Board considered such investment to be in line with DT's business strategy, but identified risks, such as the start-up nature of the business, the unclear status of the WPC License and the limited nature of DT's corporate governance rights.<sup>34</sup> To minimize the risks, the Management Board approved an initial equity investment of USD 75 million instead of USD 150 million as previously contemplated.<sup>35</sup>
69. On 19 March 2008, DT's wholly-owned Singaporean subsidiary Deutsche Telekom Asia Pte Ltd ("DT Asia") signed a share subscription agreement with Devas.<sup>36</sup> The agreement contemplated that DT Asia would acquire Class C Shares in Devas in exchange of a USD 75 million equity contribution. On 18 August 2008, DT Asia closed the share purchase by paying the agreed USD 75 million and acquiring 28,349 Class C shares in Devas, i.e. 17.2% of Devas's paid up share capital.<sup>37</sup>
70. On 29 September 2009, following approval by DT's supervisory board,<sup>38</sup> DT Asia agreed to make a further equity contribution in Devas in the amount of USD 22.2 million.<sup>39</sup> Consequently, DT Asia acquired further 8,400 Class C shares in Devas and increased its shareholding to 20.73% of Devas's paid up share capital.<sup>40</sup> Following subsequent minor changes in Devas's shareholding, DT Asia's shareholding decreased to 19.62%.<sup>41</sup>

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<sup>34</sup> Memorial, para. 90; DT briefing, "Meeting with Devas-Shareholders on 19 Feb. 2008" and "Board meeting on 19 Feb. 2008" (redacted), 15 February 2008, **Exh. C-076**.

<sup>35</sup> Memorial, para. 92.

<sup>36</sup> Share Subscription Agreement between Devas and DT Asia, 19 March 2008, **Exh. C-078**.

<sup>37</sup> Devas Share Certificate for 28,349 Class C equity shares, 18 August 2008, **Exh. C-016**.

<sup>38</sup> Extract from the minutes of the DT's Supervisory Board Meeting of 28 August 2009, **Exh. C-109**.

<sup>39</sup> Share Subscription Agreement between Devas, DT Asia, CC/Devas, Telecom Devas, 29 September 2009, **Exh. C-020**.

<sup>40</sup> Memorial, para. 119.

<sup>41</sup> *Ibid.*

**B. THE PURPORTED TERMINATION OF THE AGREEMENT**

71. The Parties diverge on India's motives for the cancellation of the Agreement. The Claimant contends that India illegally repudiated the Agreement for commercial reasons, as well as political considerations arising out of corruption allegations (not involving Devas) against the Indian Space Authorities. The Respondent, on the other hand, submits that it instructed Antrix to terminate the Agreement for reasons linked to the country's essential security interests. In this regard, the following facts emerge from the record.
72. In April 2004, the Indian naval forces requested a satellite for naval use because of a need for "reliable, secure, real time and uninterrupted tactical as well as strategic communications".<sup>42</sup> Similarly, throughout the period between 2005 and 2007, several public officials, including senior military officers, stressed the importance of a reliable space-based communication network and recommended reserving S-band for military and strategic purposes.<sup>43</sup>
73. In September 2007, the Expert Committee on Spectrum and Satellite Uses of S-band by Defense Services, composed of officials of the Ministry of Defense ("MOD"), issued a report concluding that if S-band were "lost to commercial operators, it would severely jeopardize the future Defence services plans of providing mobile SATCOM connectivity". The report "strongly recommended that the S-band spectrum be safeguarded from being poached by the commercial operators for meeting the future requirements of Defence Services".<sup>44</sup> At that time, Antrix had already leased 70 MHz of S-band to Devas.
74. In December 2009, representatives of the MOD, Integrated Defense Staff ("IDS"), Integrated Space Cell and ISRO held a meeting, at which the armed forces requested 17.5 MHz of S-Band until 2010, 40 additional MHz for the upcoming 5-year term, and further 50 MHz for the subsequent 5-years.<sup>45</sup>

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<sup>42</sup> Anand WS, Annex 1, paras. 5-6, **App. VA-1**, para. 1.

<sup>43</sup> Counter-Memorial, para. 36; Anand WS, Annex 1, **App. VA-2**: HQ Integrated Defense Staff, Note, 14 October 2005; Annex 3, **App. VA-3**: Minutes of the Third Task Force Meeting with DOS, 21 February 2006.

<sup>44</sup> Anand WS, Annex 1, **App. VA-7**, Report of the Expert Committee on Spectrum and Satellite Uses of Frequency Band 2.5 to 2.69 (S-band) by Defence Services, September 2007, paras. 10-12.

<sup>45</sup> Anand WS, Annex 1, **App. VA-10**, Minutes of the Meeting, 15 December 2009, p. 3.

75. In parallel during 2009, allegations surfaced in Indian media that the DOS and in particular Minister Raja had engaged in corrupt dealings in the context of the allocations of 2G spectrum to terrestrial mobile operators (the "2G Scandal"). On 22 October 2009, the Indian Central Bureau of Investigations raided the offices of the DOS.<sup>46</sup> The 2G Scandal is unrelated to the allocation of S-band leased to Devas. However, the Parties diverge on whether the bad publicity resulting from the 2G Scandal and ensuing press allegations against the Government and Devas played a role in the Government's eventual decision to annul the Agreement.
76. On 8 November 2009, the Joint Secretary of the DOS, Mr. Vijay Anand (one of the Respondent's witnesses in this arbitration), allegedly received a complaint that the S-band spectrum had also been leased to Devas on the basis of corrupt practices.<sup>47</sup> The complaint was anonymous, apparently not in writing and not submitted in evidence. On 8 December 2009, representatives of the Indian Space Authorities met to discuss the complaint, as a result of which a single-man committee consisting of the Director of the Indian Institute of Space and Technology, Dr. Suresh (the "Suresh Committee") was constituted.<sup>48</sup>
77. The Suresh Committee issued its report on 6 June 2010 (the "Suresh Report"). The report stressed that there was "absolutely no doubt on the technical soundness" of the Devas System. It also highlighted that, as a result of the Agreement, only 10% of the capacity was available to ISRO, which would bring "limitations on the availability of the spectrum for any essential demands in the future".<sup>49</sup> The Suresh Report recommended that the Agreement be "re-visited".<sup>50</sup>
78. In mid-May 2010, the DOT licensed 20 MHz of S-Band spectrum to commercial Government-owned BWA operators as a result of an auction, which raised USD 15 billion.<sup>51</sup> This sparked increased interest from the media for the fact that

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<sup>46</sup> Memorial, para. 128.

<sup>47</sup> See DOS memorandum, "Source Information", **Exh. C-193**.

<sup>48</sup> Memorial, paras. 135-136; Suresh Report, **Exh. C-130**, page marked "enclosure 1" following page 17 of the report.

<sup>49</sup> Suresh Report, **Exh. R-019**, para. 11.

<sup>50</sup> *Id.*, para. 15(iv).

<sup>51</sup> BBC News, **Exh. C-133**.

- about 5 years earlier, 70 MHz of S-band had been leased to Devas at what the media considered a low price.<sup>52</sup> The media thus called upon the Government to annul the Agreement in order to "raise some more much-needed money".<sup>53</sup>
79. On 14 June 2010, the DOT forwarded the press articles concerning the Devas Agreement to the DOS Secretary Radhakrishnan for comments.<sup>54</sup> Two days later, Secretary Radhakrishnan reacted by sending two memoranda, one to the DOT<sup>55</sup> and another one to the Ministry of Law and Justice ("MOJ"),<sup>56</sup> in which he sought advice as to whether the Agreement needed to "be annulled [...] in order to (i) preserve the precious S band spectrum for the strategic requirements of the nation and (ii) to ensure a level playing field for the other services providers using terrestrial spectrum".<sup>57</sup>
80. The MOJ replied on 18 June 2010 that the Government's duty was to take care of strategic needs and not "to provide orbit slot to ANTRIX for commercial activities, especially when there is [*sic*] strategic requirements".<sup>58</sup> It added that the Government "may take a policy decision to the effect that due to the needs of strategic requirements, the [Government] would not be able to provide orbit slot in S band for operating PS1".<sup>59</sup>
81. Having received such advice, Secretary Radhakrishnan instructed the DOS Additional Secretary Balachandran to prepare a note on the annulment of the Agreement for the upcoming meeting of the Space Commission.<sup>60</sup> On 30 June

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<sup>52</sup> Memorial, paras. 145-147 citing to "Devas gets preferential allocation of ISRO's spectrum" and "Another spectrum sold on the quiet", The Hindu Business Line, 31 May and 1 June 2010, **Exh. C-024**.

<sup>53</sup> "Devas gets preferential allocation of ISRO's spectrum" and "Another spectrum sold on the quiet", The Hindu Business Line, 31 May and 1 June 2010, **Exh. C-024**.

<sup>54</sup> Letter from DOT (Mr. Thomas) to DOS / ISRO (Secretary Radhakrishnan) enclosing press articles, 14 June 2010, **Exh. C-138**.

<sup>55</sup> Memorandum from DOS to DOT, 16 June 2010, **Exh. C-140, Exh. R-022**.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Anand WS, Annex 1, **App. VA-18**, MOJ to DOS, 18 June 2010, para. 11.

<sup>59</sup> *Id.*, para. 12.

<sup>60</sup> Memorial, para. 169.

2010, Mr. Balachandran issued a note attaching the Suresh Report<sup>61</sup> and recommended the annulment of the Devas Agreement in the following terms:

“Considering the need (i) to preserve S-band spectrum for national requirements in strategic sector and for societal applications, (ii) certain concerns on technical, managerial, financial and contractual aspects of ANTRIX-Devas Agreement, and (iii) issues involved in DEVAS obtaining the Spectrum License for the proposed services [...] it would be inevitable to annul the ANTRIX/Devas Agreement”.<sup>62</sup>

82. At its 117<sup>th</sup> meeting, on 2 July 2010, the Space Commission considered that note and found, *inter alia*, that “[g]iven the limited availability of S band spectrum, meeting the strategic and societal needs is of higher priority than commercial/entertainment sectors”. Apart from the strategic and societal needs, the Space Commission also referred to the concerns about “technical, managerial and financial aspects” of the Agreement, including “severe penalty clauses for delayed delivery” and observed that the estimated revenue from the Devas Project did not justify the costs of the DOS investment in the satellites and the cost of capital. In conclusion, the Space Commission decided that the DOS “may take actions necessary and instruct Antrix to annul the Antrix-Devas Agreement”.<sup>63</sup> It is undisputed that this decision was not communicated to Devas at this juncture.
83. After the meeting, Secretary Radhakrishnan sought advice from the Additional Solicitor General (“ASG”) on how to annul the Agreement with the least legal risks.<sup>64</sup> On 12 July 2010, the ASG advised that Article 7(c) of the Agreement allowed Antrix to terminate the Agreement if it were “unable to obtain the necessary frequency and orbital slot coordination required for operating PS1 on or before the completion of the Pre-Shipment Review of PS1”. According to the ASG, “the conditions stipulated in this clause cannot be invoked at this stage for the purpose of terminating the contract”. The ASG further advised that Article 11(a) of the Agreement allowed Antrix to terminate the Agreement in the event of *force majeure*, which included “acts of or failure to act by any governmental

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<sup>61</sup> Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**.

<sup>62</sup> *Id.*, para. 15.1.

<sup>63</sup> Minutes of 117<sup>th</sup> Meeting of the Space Commission, 2 July 2010, **Exh. C-145**, para. 117.6.12.

<sup>64</sup> Letter from DOS (Secretary Radhakrishnan) to the ASG (Mr. Parasaran) with enclosures, 8 July 2010, **Exh. C-146**.

- authority acting in its sovereign capacity". The ASG thus recommended that the Government take a decision to terminate the Agreement "as a matter of policy, in exercise of its executive power".<sup>65</sup>
84. On 9 January 2011, the Additional Secretary of the DOS, Mr. Balachandran, prepared a further report based on the Suresh Report. That report noted that the Government did not have complete information about the Devas Agreement at the time of its conclusion and that the Agreement did "not leave enough spectrum for ISRO/DOS use if required".<sup>66</sup>
85. A few weeks later on 2 February 2011, former Minister of Telecommunications Raja and two other officials were arrested in connection with the 2G Scandal.<sup>67</sup> This triggered criticism from the opposition, including in connection with the Government's allocation of the S-Band spectrum to Devas at an allegedly low price.<sup>68</sup>
86. A few days after the arrest, on 8 February 2011, Secretary Radhakrishnan and Dr. Kasturirangan, a former ISRO Chairman and the DOS Secretary, announced at a press conference the decision to terminate the Devas Agreement. They also stated that there was no "finality" as to how the termination would be effected. On this occasion, Devas learned for the first time about the purported termination of the Agreement.
87. To proceed to the termination, Secretary Radhakrishnan instructed the DOS to prepare a note for the Cabinet Committee on Security ("CCS"), which would take the final decision,<sup>69</sup> being the highest authority in such matters.

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<sup>65</sup> Opinion of the ASG (Mr. Parasan), **Exh. C-147**, pp. 2-4.

<sup>66</sup> Report on Dr. Suresh Committee Report on ANTRIX-DEVAS Agreement & Issues, Arising from Therein, submitted by G. Balachandran, Additional Secretary, Department of Space, 9 January 2011, **Exh. R-029**, p. 18, para. 5.3.2.

<sup>67</sup> "2G spectrum scam: Former telecom minister A Raja arrested", The Times of India, 2 February 2011, **Exh. C-175**.

<sup>68</sup> Memorial, paras. 195-197; The Press Trust of India, 7 February 2011, **Exh. C-179**; Tehelka, 7 February 2011, **Exh. C-178**.

<sup>69</sup> Anand WS, Annex 1, para. 22.

88. In the meantime, on 10 February 2011, the Prime Minister constituted a High Power Review Committee to revise the decision to enter into the Agreement (the “Chaturvedi Committee”).<sup>70</sup>
89. On 16 February 2011, Secretary Radhakrishnan finalized the note for the CCS, which suggested that there was “an imminent need to preserve the S band spectrum for vital strategic and societal applications”.<sup>71</sup> The MOD commented on the note that “[t]he Defence Services have extensive existing as well as planned usages in [S-Band]”.<sup>72</sup>
90. On the same day of 16 February 2011, the Prime Minister announced at a press conference that the Government “should take a sovereign policy decision regarding the utilization of [S-band] spectrum having regard to the country’s strategic requirements” and that his office had sought not to “dilute, in any way the decision taken by the Space Commission in July 2010”. According to the Prime Minister, the matter was “expected to be put before Cabinet Committee on Security for its final decision”.<sup>73</sup>
91. One day later, based on Secretary Radhakrishnan’s note, the CCS made a final decision that “[i]n light of the policy of not providing orbit slot in S Band to Antrix for commercial activities, the Agreement [...] shall be annulled forthwith”.<sup>74</sup>
92. Consequently, on 25 February 2011, Antrix notified Devas of the termination of the Agreement due to a *force majeure* event, by reference to the decision of the CCS.<sup>75</sup> In addition to *force majeure* under Article 11(a) of the Agreement, the letter relied on Antrix’s inability to obtain the necessary frequency and orbital slot

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<sup>70</sup> Charurvedi Report, **Exh. C-190**.

<sup>71</sup> DOS Note to the CCS, Annulling the “Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft by Devas Multimedia Pvt Ltd.”, with attachments, 16 February 2011, **Exh. R-028**, para. 34.

<sup>72</sup> Letter from the MOD to the DOS with attachments (Redacted), 15 February 2011, **Exh. R-030**.

<sup>73</sup> “Prime Minister Manmohan Singh’s interactions with Editors of the Electronic Media on Feb 16, 2011”, The Hindu, 16 February 2011, **Exh. C-185**, pp. 6-7.

<sup>74</sup> Press Information Bureau, “CCS Decides to Annul Devas-Antrix Deal”, 17 February 2011, **Exh. C-031**.

<sup>75</sup> Letter of 25 February 2011 from Antrix to Devas, **Exh. C-032**.

- clearance as a ground for the termination pursuant to Article 7(c) of the Agreement.
93. Devas responded three days later that (i) the purported termination of the Agreement was not in good faith and that Antrix could not rely on a self-induced *force majeure*; (ii) Antrix had already confirmed on 26 February 2006 that it had obtained the necessary orbital slot clearances and, hence, Article 7(c) could not serve as a valid ground for termination.<sup>76</sup>
94. On 15 April 2011, Antrix offered to reimburse Devas for capacity reservation fees paid,<sup>77</sup> which Devas refused.
95. On 15 May 2012, DT then notified the Prime Minister of the existence of a dispute arising out of alleged breaches of the BIT.<sup>78</sup> More than six months later, on 19 December 2012, the DOS responded that the notice of dispute was premature since the contractual dispute between Devas and Antrix was ongoing.<sup>79</sup>
96. On 15 February 2013, DT wrote again to the Prime Minister, repeating its desire to engage in amicable negotiations.<sup>80</sup> On 21 March 2013, the DOS responded that there was no investment dispute between the Parties.<sup>81</sup>

### C. POST-ANNULMENT EXCHANGES AND ATTEMPTS TO SETTLE

97. The Parties diverge on the significance of their respective conduct and communications after the purported termination of the Devas Agreement. For the Claimant, the Respondent's subsequent conduct demonstrates that India did not annul the Agreement on the basis of security needs, but rather for commercial and political reasons. The Respondent, for its part, denies this allegation and points to the fact that it attempted to compensate Devas pursuant to the terms of the Agreement. The record establishes the following facts.

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<sup>76</sup> Letter of 28 February 2011 from Devas (Mr. Viswanathan) to Antrix (Secretary Radhakrishnan & Mr. Madusudhan), **Exh. C-033**.

<sup>77</sup> Letter of 15 April 2011 from Antrix to Devas, **Exh. C-034**.

<sup>78</sup> Letter of 15 May 2012 from DT to Prime Minister, **Exh. C-038**.

<sup>79</sup> Letter of 19 December 2012 from DOS to DT, **Exh. C-039**.

<sup>80</sup> Letter of 15 February 2013 from DT to Prime Minister, **Exh. C-040**.

<sup>81</sup> Letter of 21 March 2013 from DOS (Mr. Srinivasan) to DT (Dr. Kremer & Mr. Cazzonelli), **Exh. C-042**.

98. The Chaturvedi Committee issued its report on 12 March 2011. The report concluded that the satellite services would be “especially useful for societal applications, in natural disasters and communications in far-flung areas of the country where building towers for terrestrial communications may be difficult”. For the Chaturvedi Committee “[i]ts usage for strategic purposes by Defence forces could also be developed”.<sup>82</sup> Although the report criticized certain commercial terms of the Devas Agreement, it concluded that “concerns regarding spectrum having been sold [leased] cheap under the agreement have no basis whatsoever”.<sup>83</sup>
99. On 12 April 2011, Cabinet Secretary Chadrsekhar submitted his recommendations to the Prime Minister. He stated that the policy to reserve S-band “for national and strategic purposes [...] may not realize the full commercial potential of the S-band”. The recommendation warned that “ISRO/DOS are left with a satellite [...] which has no immediate commercial application”.<sup>84</sup>
100. Subsequently, on 17 May 2013, the Prime Minister’s advisor proposed to free 80MHz of S-band for commercial use by terrestrial 4G services.<sup>85</sup> Finally, on 1 April 2015, the Cabinet of Ministers denominated S-band as “Defence Band and Defence Interest Zone”.<sup>86</sup>

#### D. THE ICC ARBITRATION

101. Meanwhile, on 19 June 2011, Devas had commenced an ICC arbitration against Antrix pursuant to Article 20 of the Agreement, requesting specific performance or, in the alternative, damages of approximately USD 1.6 billion. The seat of the arbitration was Delhi. Antrix initially refused to participate in the arbitration. In August 2012, it initiated litigation in India to enjoin the arbitral proceedings. The

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<sup>82</sup> Charurvedi Report, **Exh. C-190**, p. 41 (para. 3.7.2).

<sup>83</sup> *Id.*, p. 38 (para. 3.5.8).

<sup>84</sup> Note by Cabinet Secretary (Mr. Chandrasekhar) on the Charturvedi Report, 12 April 2011, **Exh. C-191**, p. 16, para. v.iii.

<sup>85</sup> The Economic Times, 17 May 2013, **Exh. C-194**.

<sup>86</sup> Memo from V.K. Pant, DOT, to Member (Finance), DOS, 1 April 2015, with enclosure, **Exh. R-043** (referring to a Cabinet meeting of 21 January 2015).

Supreme Court of India dismissed Antrix's plea on 29 August 2013, after which Antrix announced its intention to take part in the arbitration.

102. The ICC tribunal, composed of Dr. Adrsh Sein Anand, Dr. Michael Pryles and Mr. V. V. Veeder QC, issued a final award on 14 September 2015 (the "ICC Award"). The operative part of the ICC Award reads as follows:

"401 . For the foregoing reasons the tribunal unanimously finds and awards as follows:

- a. the tribunal has jurisdiction to hear and decide the claims in this arbitration;
- b. Antrix is to pay USD 562.5 million to Devas for damages caused by Antrix's wrongful repudiation of the Devas Agreement;
- c. Antrix is to pay simple interest on USD 562.5 million from 25 February 2011 to the date of this award at the rate of three month USD LIBOR + 4%;
- d. Antrix is to pay simple interest at the rate of 18% per annum of the amounts in paragraphs 401(b) and (c) from the date of this award to the date of full payment; and
- e. each party is to bear its own legal costs of this arbitration, and the parties are to pay, in equal shares, the fees and expenses of the arbitrators and the ICC administrative expenses.

402. All other claims and requests made by the parties in this arbitration have been rejected".<sup>87</sup>

103. The ICC tribunal concluded that neither Article 7(c) nor Article 11(a) authorized Antrix to terminate the Devas Agreement in the circumstances. Antrix filed an action for annulment of the ICC Award before the Indian courts.<sup>88</sup>

#### IV. PRELIMINARY MATTERS

104. Prior to considering the merits of the Parties' positions, the Tribunal will address (1) the scope of this Award; (2) the applicable laws; (3) the relevance of the ICC Award; and (4) a number of outstanding requests from the Parties.

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<sup>87</sup> *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Final Award, 14 September 2015, **Exh. R-042**, paras. 401-402.

<sup>88</sup> Respondent's Submission on the ICC Award in *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/Cyk, 7 December 2015, para. 8.

## 1. Scope of the Award

105. In PO1, the Tribunal decided “to bifurcate the proceedings into a first phase addressing jurisdiction and liability and a second phase addressing damages”.<sup>89</sup> Therefore, the present award finally resolves all matters of jurisdiction and liability without addressing quantum.

## 2. Applicable laws

### a. *Law governing the arbitration proceedings*

106. In the Terms of Appointment signed on 3 June 2014, the Parties agreed on the law governing the procedure of this arbitration as follows:

“40. In order of priority, the procedure in this arbitration shall be governed by the mandatory provisions of the law of the seat on international arbitration, these Terms of Appointment, the rules on procedure contained in Article 9 of the BIT and the 1976 UNCITRAL Arbitration Rules.

41. If the provisions therein do not address a specific procedural issue, the applicable procedural issue shall be determined by agreement between the Parties or, in the absence of such agreement, by the Arbitral Tribunal”.<sup>90</sup>

107. Under Article 6(1) of the Terms of Appointment, the Parties agreed to set the seat of this arbitration in Geneva, Switzerland, with the result that this arbitration is subject to Chapter 12 of the Swiss Private International Law Act.

### b. *Law governing jurisdiction*

108. It is common ground between the Parties that jurisdiction must be established under the BIT. Specifically, the BIT’s dispute resolution clause contained in Article 9 reads as follows:

“(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute. The party intending to resolve such dispute through negotiations shall give notice to the other of its intentions.

(2) If the dispute cannot be thus resolved as provided in paragraph 1 of this Article within six months from the date of notice given thereunder, then the dispute may be referred to conciliation in accordance with the United Nations Commission on International Trade Law Rules on Conciliation, 1980, if both parties agree. If either party does not agree to conciliation or if conciliation

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<sup>89</sup> Article 1.1 of PO1.

<sup>90</sup> Article 8 of the Terms of Appointment.

fails, either party may refer such dispute to arbitration in accordance with the United Nations Commission on International Trade Law Rules on Arbitration, 1976, subject to the following provisions:

- (a) in respect of conciliation proceedings, there shall be two conciliators, one each appointed by the respective parties;
- (b) in respect of arbitration proceedings, the following shall apply:
  - (i) The arbitral tribunal shall consist of three arbitrators. Each party shall select an arbitrator. These two arbitrators shall appoint by mutual agreement a Chairman who shall be a national of a third State which has diplomatic relations with the Governments of the parties to the dispute. The arbitrators shall be appointed within two months from the date on which one of the parties to the dispute informs the other of its intention to submit the dispute to arbitration;
  - (ii) The arbitral award shall be made in accordance with the provisions of this Agreement, the relevant national laws including the rules on the conflict of laws of the Contracting Party where the investment dispute arises as well as the generally recognised principles of international law;
  - (iii) If the necessary appointments are not made within the period specified in paragraph (2) (b) (i), either party may, in the absence of any other agreement, request the Secretary General of the International Centre for the Settlement of Investment Disputes to make the necessary appointments;
  - (iv) The tribunal shall reach its decision by a majority of votes;
  - (v) The decision of the arbitral tribunal shall be final and binding and the parties shall abide by and comply with the terms of its award. The award shall be enforced in accordance with national laws of the Contracting Party where the investment has been made;
  - (vi) The arbitral tribunal shall state the basis of its decision and state reasons upon the request of either party;
  - (vii) Each party concerned shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairman in discharging his arbitral function and the remaining costs of the tribunal shall be borne equally by the parties concerned. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two parties, and this award shall be binding on both parties;
  - (viii) During conciliation or arbitration proceedings or the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage. In this case the other Contracting Party will respect the award made in the arbitration or conciliation proceedings and shall not initiate fresh proceedings for the same matter as covered in the award".<sup>91</sup>

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<sup>91</sup> Agreement between Germany and India for the Promotion and Protection of Investments, 10 July 1995, **Exh. C-001**.

109. It is uncontroversial that the interpretation of the BIT is governed by customary international law as codified in the Vienna Convention on the Law of Treaties of 23 May 1969 (“VCLT”). It is also common ground that the Tribunal has the power to rule on its own jurisdiction.<sup>92</sup>

**c. Law governing the merits of the dispute**

110. Finally, in respect of the law applicable to the merits, the BIT contains the following provision (Article 9.2(b)(ii):

“The arbitral award shall be made in accordance with the provisions of this Agreement, the relevant national laws including the rules on the conflict of laws of the Contracting Party where the investment dispute arises as well as the generally recognised principles of international law”.<sup>93</sup>

111. Therefore, in addition to the BIT, the Tribunal will apply Indian national law and generally recognized principles of international law whenever appropriate. Where necessary, it will determine whether an issue is subject to national or international law depending on the nature of the issue.<sup>94</sup>

**d. Jura novit arbiter**

112. When applying the governing law, be it international or national, the Tribunal is not bound by the arguments and sources invoked by the Parties. Under the maxim *jura novit curia* – or, better, *jura novit arbiter* – the Tribunal is required to apply the law of its own motion, provided it seeks the Parties’ views if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.<sup>95</sup>

<sup>92</sup> Article 21(1) UNCITRAL Arbitration Rules 1976.

<sup>93</sup> Agreement between Germany and India for the Promotion and Protection of Investments, 10 July 1995, **Exh. C-001**; Article 11 of the BIT further provides as follows: “All investments shall, subject to this Agreement, be governed by the laws in force in the territory of the Contracting Party in which such investments are made”. The Parties have not referred to this provision in the relevant section of the Terms of Appointment.

<sup>94</sup> See, e.g., *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 179.

<sup>95</sup> Swiss Supreme Court decisions 4P.114/2001 of 19 December 2001, paras. 3a, 20 *ASA Bulletin* (2002), pp. 493, 511 and 4A\_214/2013 of 5 August 2013, para. 4. See also, *inter alia*, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 118; *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 295.

### 3. Relevance of the ICC Award

113. The Parties rely on different factual and legal findings of the ICC Award. The Claimant submits that “whilst the ICC Award does not constitute *res judicata* as regards the legal issues before this Tribunal [...], it should be considered as authoritative on issues of contractual interpretation (it is the forum agreed by the contracting parties to resolve disputes as to the meaning of the Agreement) and highly persuasive on the issues of fact”.<sup>96</sup> The Respondent does not specifically oppose the invocation of the ICC Award, but notes that “Antrix has announced that it is in the process of preparing an application in appropriate court to set aside the award”.<sup>97</sup>
114. The Tribunal notes that none of the Parties contends that the ICC Award has *res judicata* effect for purposes of this arbitration and rightly so. Indeed, the Tribunal’s mandate is to resolve a treaty dispute involving the State as a respondent, which dispute is distinct from the contractual dispute brought before the ICC tribunal. That being said, the Parties also agree that the ICC arbitration was the forum chosen by Devas and Antrix to decide “any dispute or difference between the Parties [Devas and Antrix] as to any clause or provision of this Agreement or as to the Interpretation thereof [...]”.<sup>98</sup> Hence, if issues in connection with the interpretation, performance, or termination of the Devas Agreement arise in the context of the resolution of the treaty dispute, the Tribunal considers that subject to a compelling reason to the contrary, it should accord deference to the findings of the ICC tribunal, being the forum entrusted with the settlement of contract disputes.

### 4. Outstanding matters

115. In a letter dated 24 October 2016, the Respondent brought to the Tribunal’s attention “certain recent developments in the Devas matter”, including the filing by India’s Central Bureau of Investigation (CBI) of criminal charges against a number of Government officials, Devas and certain of Devas’ officers and directors. According to the Respondent, these criminal charges “if upheld, would

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<sup>96</sup> Claimant’s Submission on ICC Award, 20 November 2015, para. 14.

<sup>97</sup> Respondent’s Submission on ICC Award, 7 December 2015, para. 2.

<sup>98</sup> Agreement for the Lease of Space Segment Capacity on ISRO/Antrix SBand Spacecraft by Devas Multimedia Pvt Ltd, 28 January 2005, **Exh. C-006**, Article 20.

constitute additional grounds for dismissal [of the claims], as the alleged investment will not have been made in accordance with Indian law". The Respondent further "note[d] that the filing of such charges would warrant suspension of these proceedings pending resolution of the charges, as important issues of public policy are implicated". Together with its letter, the Respondent submitted an additional legal authority (App. 3) and two factual exhibits, one of which is described as "Charge Sheet No. 01/2016 [...] in the Honorable Court of the Principal Special Judge for CBI Cases, dispatched on 11 August 2016" (App. 1) (the "CBI Charge Sheet").

116. In its reply of 14 November 2016, the Claimant argued that it was too late and improper for the Respondent to (i) advance a new jurisdictional objection of alleged "illegality" based on the CBI Charge Sheet; (ii) seek a suspension of the arbitration pending resolution of the CBI charges; and (iii) unilaterally file new factual evidence without seeking leave from the Tribunal. In this latter respect, the Claimant asked the Tribunal to reject the Respondent's submissions and requests and decline the admission of the documents submitted by the Respondent.
117. In its letter of 20 February 2017, the Tribunal denied the Respondent's request to stay these proceedings and deferred its determination on the Parties' other requests in relation to the CBI charges to its forthcoming Award.
118. The Tribunal first notes that it is not clear whether, in its letter of 24 October 2016, the Respondent sought to raise a new jurisdictional or admissibility objection based on an alleged illegality in the making of the investment. To the extent that this was the case, the Tribunal finds that such objection is untimely and contrary to the procedural calendar established in this arbitration. Indeed, such purported objection was raised well after the Parties' written submissions and the Hearing. The Tribunal likewise denies the introduction of new evidence into the record, as untimely and not in accordance with the procedural rules, which require prior leave.<sup>99</sup>
119. In any event, even if the illegality objection were deemed timely, the Tribunal would deny it on its merits. Indeed, the Respondent has not sufficiently substantiated its objection, if it was one. It only devoted a few sentences in its

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<sup>99</sup> See in particular PO1, para. 3.5; PO4, para.13.b.ii; PO5, para. 6.

letter of 24 October 2016 arguing that, if upheld, the criminal charges in question would be grounds for dismissal of the claims, as the investment would not have been made in conformity with Indian law. Second, and more importantly, the CBI Charge Sheet on which the Respondent relies was issued in the context of an investigation commenced by the CBI in March 2015 and contains mere allegations that have not yet been tried, let alone upheld, in court. Third, none of the allegations contained in the CBI Charge Sheet relate to actions or conduct of DT. The Respondent has not explained how, as a result of the CBI Charge Sheet, DT's investment (made through the acquisition of shares in Devas) would have been contrary to Indian law. For all of these reasons, the Tribunal cannot follow the Respondent's argument that the claims should be dismissed for reasons of illegality.

## V. PRELIMINARY OBJECTIONS

120. The Respondent has raised three preliminary objections or "threshold issues", which in its view preclude the Claimant from bringing this arbitration. First, it argues that the BIT does not cover indirect investment and indirect investors (A). Second, it asserts that the Treaty does not protect pre-investments (B). Third, India puts forward that the Treaty does not apply as a consequence of the invocation of the "essential security interest" clause contained in Article 12 (C).

### A. INDIRECT INVESTMENT AND INDIRECT INVESTOR

121. The Parties diverge on whether the BIT covers indirect investments by indirect investors, such as shares in the local company held through an interposed subsidiary.

#### 1. The Respondent's position

122. The Respondent contends that the Tribunal lacks jurisdiction *ratione personae* "because indirect investors are not protected under the [BIT]".<sup>100</sup> It is undisputed that DT does not directly own the shares in Devas. Rather, the shares are owned by DT Asia, DT's wholly-owned Singaporean subsidiary. According to the Respondent, even if Devas's activities were considered to be an investment within the meaning of the BIT, DT does not qualify as an investor and, hence, its

<sup>100</sup> Counter-Memorial, para. 96.

claims fall outside the Tribunal's jurisdiction. In support, the Respondent relies on four main arguments.

123. First, the text of the BIT is unequivocal in requiring the investment to be directly made by the investor. Article 1(b) of the BIT defines "investment" as "every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made", while Article 2 limits the scope of the BIT to "investments made by investors of either Contracting Party in the territory of the other Contracting Party".<sup>101</sup> Yet, DT has made no investment in the territory of India, since DT owns no assets in India. It is DT Asia which owns the shares in Devas.
124. The Respondent refutes the Claimant's argument that the definition of investment is broad enough to extend to indirect investments. It asserts that the breadth of the definition of investment "goes to the type of rights or assets that are afforded protection, not to the manner in which such rights or assets are held".<sup>102</sup>
125. Second, for the Respondent, Articles 1 and 2 seen in conjunction with Article 5(3) of the BIT reinforce the conclusion that indirect investments are not covered by the Treaty. In particular, Article 5(3) is designed to give standing to the shareholders of an expropriated company to bring an expropriation claim in the following terms:
- "Where a Contracting Party expropriates the assets of a company in its own territory, in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraphs 1 and 2 of this Article are applied in the same manner to provide compensation in respect of the Investment of such investors of the other Contracting Party who are owners of those shares".<sup>103</sup>
126. According to the Respondent, such provision, which grants standing only to the investors who own shares, "would not have been necessary if, as the Claimant argues, indirect investors are covered by the [Treaty]".<sup>104</sup>

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<sup>101</sup> Counter-Memorial, para. 98; Agreement between Germany and India for the Promotion and Protection of Investments, Arts. 1(b) and 2, **Exh. C-001**.

<sup>102</sup> Rejoinder, para. 203.

<sup>103</sup> Agreement between Germany and India for the Promotion and Protection of Investments, Art. 5(3), **Exh. C-001**.

<sup>104</sup> Counter-Memorial, para. 109.

127. Third, the analysis of German and Indian “comparative treaty practice [...] leads to the conclusion in this case that indirect investments are beyond the scope of the [BIT]”.<sup>105</sup> The Respondent invokes the treaty practice of the contracting states as a recognized supplementary method of treaty interpretation under the VCLT.<sup>106</sup> It relies, *inter alia*, on the following treaties concluded by India and Germany:

- India-UK: “This Agreement shall apply to any investment made by investors of either Contracting Party in the territory of the other Contracting Party including an indirect investment made through another company, wherever located, which is fully owned by such investors, whether made before or after the coming into force of this Agreement”.<sup>107</sup>
- India-France: “This Agreement shall apply to any investment made by investors of either Contracting Party in the area of the other Contracting Party, including an indirect investment made through another company, wherever located, which is owned to an extent of at least 51 per cent by such investors, whether made before or after the coming into force of this Agreement”.<sup>108</sup>
- India-Spain: “This Agreement shall apply to any investments made by investors of either Contracting Party in the territory of the other Contracting Party, in accordance with its laws and regulations, including an indirect investment made through another company, whenever [sic] located, which is fully owned by such investors, whether made before or after the coming into force of this Agreement”.<sup>109</sup>
- Germany-Mexico: “The term ‘investments’ means every kind of asset acquired or used directly or indirectly in order to achieve an economic objective or other management objectives”.<sup>110</sup>

<sup>105</sup> Rejoinder, para. 207.

<sup>106</sup> Anthony Aust, *Modern Treaty Law and Practice*, (Cambridge University Press, 3<sup>rd</sup> Ed. 2013), **Exh. RLA-145**, p. 220.

<sup>107</sup> Art. 2 of the 1996 India-UK BIT, **Exh. RLA-042**.

<sup>108</sup> Art. 2(1) of the 2000 India-France BIT, **Exh. RLA-043**.

<sup>109</sup> Art. 2 of the 1998 India-Spain BIT, **Exh. RLA-044**.

<sup>110</sup> Art. 1(1) of the 2001 Germany-Mexico BIT, **Exh. RLA-047**.

- Germany-China: “[T]he term ‘investment’ means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party”.<sup>111</sup>
  - Germany-Iran: “The term ‘investment’ refers to every kind of asset, invested directly and/or indirectly by the investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party”.<sup>112</sup>
128. In support of its position, the Respondent cites to Zachary Douglas, according to whom the absence of the words “directly or indirectly” implies “directly”:
- “The principle *verba aliquid operari debent* as a canon of treaty interpretation requires that effect be given to the expansive terms ‘directly or indirectly’ so that treaties with this stipulation can be meaningfully distinguished from treaties without it. [...] [A] great number of investment treaties do not contain a provision of the type under consideration and hence there must be a concomitant limitation upon the tribunal’s jurisdiction *ratione personae*: the claimant must exercise effective control directly over the investment”.<sup>113</sup>
129. In this regard, the Respondent also relies on *Berschader v. Russia*. In interpreting the Belgium-USSR BIT, that tribunal noted that the definitions in certain other treaties “expressly provide for protection of investments ‘owned or controlled directly or indirectly’ by the party concerned”. From the absence of such wording in the Belgium-USSR BIT, it concluded as follows:
- “[S]uch contrasting approaches do render it unlikely that, in the absence of specific evidence to the contrary, both Contracting Parties intended that the Treaty would encompass the kind of indirect investments relied upon [by] the Claimants. It would seem likely that if the Contracting Parties had so intended, they would have expressly provided protection for such indirect investments in the terms of the Treaty...”<sup>114</sup>
130. Thus, given that the Germany-India BIT does not extend to indirect investments and indirect investors, the Respondent requests that the Tribunal decline jurisdiction.

<sup>111</sup> Art. 1(1) of the 2005 Germany-China BIT, **Exh. RLA-048**.

<sup>112</sup> Art. 1(1) of the 2005 Germany-Iran BIT, **Exh. RLA-049**.

<sup>113</sup> Zachary Douglas, *The International Law of Investment Claims*, (Cambridge University Press 2009), **Exh. RLA-052**, paras. 578, 580.

<sup>114</sup> *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, **Exh. RLA-051**, paras. 137, 147.

## 2. The Claimant's position

131. The Claimant refutes the Respondent's objection concerning the indirect nature of the investment with the following main arguments.
132. First, according to the Claimant, nothing in the BIT's definition of investment supports India's argument that only investments made directly were intended to qualify for Treaty protection. Article 1(b) of the BIT "contains a characteristically broad definition of investment encompassing 'every kind of asset invested'".<sup>115</sup> The absence of the explicit reference to "indirect" investments cannot be interpreted as a requirement that there be no interposed companies between the investment and the ultimate owner of the company.
133. In support, the Claimant makes reference to numerous arbitral decisions.<sup>116</sup> For instance, it points to *Siemens v. Argentina*. There, the tribunal construing the Germany-Argentina BIT, which contains language similar to the BIT at hand, accepted jurisdiction based on the indirect nature of the investment.<sup>117</sup> As to *Berschader v. Russia* relied upon by the Respondent, the Claimant notes that the decision to decline jurisdiction was based on language of the Belgium-USSR BIT, which extended its scope of application to "indirect investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party by the intermediary of an investor of a third state". The tribunal considered this language to exclude indirect investments made through a subsidiary established in the same state as the claimant. The reasoning of the *Berschader* tribunal cannot thus be transposed to the present case.

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<sup>115</sup> Reply, para. 147.

<sup>116</sup> *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, **Exh. CLA-043**, para. 165 ("The BIT does not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment. Therefore, a literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments"); *CEMEX Caracas Investments B.V and CEMEX Caracas II Investments B.V v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, **Exh. CLA-015**, para. 152; *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/06, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, **Exh. CLA-075**, paras. 106-111.

<sup>117</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction, 3 August 2004, **Exh. CLA-063**, para. 137.

134. Second, the Claimant refutes the Respondent's argument that Article 2 of the BIT rules out indirect investments, because it requires the investments to be made "in the territory" of the host state. For DT, its investments "such as direct contribution of substantial manpower, know-how and expertise, as well as shares and interests in Devas and its assets, were ultimately made 'in the territory of India". The only relevant question "is whether these investments must be made directly 'in the territory of India in order to qualify for protection".<sup>118</sup> Article 2 of the BIT does not require that no companies be interposed between the investor and the investments, which are located in the territory of the host state. According to the Claimant, investment tribunals have consistently refused to consider references to investments made "in the territory" as a requirement that such investments be made directly.<sup>119</sup>
135. Third, the Claimant submits that Article 5(3) of the BIT, which provides for compensation of the shareholders of an expropriated company does not require that the shares be owned directly. In *EURAM v. Slovak Republic*, the tribunal held that Article 4(3) of the Austria-Slovak Republic BIT, which contains language similar to Article 5(3) of the Germany-India BIT, did not warrant "a narrower interpretation" of the definition of investment.<sup>120</sup> Moreover, as explained by the *Siemens* tribunal, a provision such as Article 5(3) defines the damage that can be recovered and "who may base the claim" on such damage.<sup>121</sup> Therefore, Article 5(3) may not serve to restrict the broad definition of investment found in Article 1(b) of the BIT.
136. Finally, the Claimant opposes the Respondent's reliance on the treaty practices of India and Germany. According to the Claimant, investment tribunals have been unpersuaded by the invocation of this supplemental method of treaty interpretation. In *ConocoPhillips v. Venezuela*, for instance, the tribunal

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<sup>118</sup> Reply, para. 155.

<sup>119</sup> *Guaracachi America, Inc and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, **Exh. CLA-108**, para. 358; *CEMEX Caracas Investments B.V and CEMEX Caracas II Investments B.V v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, **Exh. CLA-015**, para. 157.

<sup>120</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, UNCITRAL, Award on Jurisdiction, 22 October 2012, **Exh. CLA-103**, para. 325.

<sup>121</sup> *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Decision on Jurisdiction, 3 August 2004, **Exh. CLA-063**, para. 137.

dismissed the argument that indirect investments were excluded from treaty protections because the definition of investment in the applicable treaty contained no specification in this respect when other treaties had express wording. It noted that “different formulations may have precisely the same effect”.<sup>122</sup> Similarly, the silence of the BIT about the direct or indirect nature of the investment should not be understood as a limitation to direct investments.

### 3. Analysis

137. The Respondent’s objection concerning the indirect nature of the Claimant’s investment essentially raises the following questions: (a) whether the BIT requires the national of the home state to hold the relevant assets directly, i.e. without interposed companies, as a consequence of the BIT’s definitions of “investment” or “investor”; and (b) whether the home state national who does not directly own the assets affected by the contested measures can claim for Treaty breaches as a result of those measures. The Tribunal will address each of these questions in turn.

#### a. *Does the BIT require the home state national to hold the assets directly?*

138. Article 1(b) of the BIT contains a broad definition of investment, which starts as follows:

“Investment’ means every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made [...].”

139. The provision then continues with a non-exhaustive list of assets that may qualify as investments. This includes “shares in, and stock and debentures of, a company, and any other forms of such interests in a company”.

140. The Respondent does not dispute that under Article 1(b) of the BIT broad categories of assets can qualify as investments. It contends, however, that “the breadth of the definition of ‘investment’ goes to the type of rights or assets that are afforded protection by a treaty, not to the manner in which such rights or assets are held”.<sup>123</sup> The Tribunal agrees. For an asset to qualify as an investment

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<sup>122</sup> *ConocoPhillips Petrozuata B.V and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, **Exh. CLA-021**, para. 284.

<sup>123</sup> Rejoinder, para. 203.

under Article 1(b), it does not suffice that it falls within one of the categories of the non-exhaustive list. Article 1(b) also requires that the relevant assets be “invested in accordance with the national laws of the Contracting Party”. In other words, the BIT specifies how the investment must be made. Thus, even if an asset pertains to one of the listed categories (e.g. stock in a company), it will not qualify as an investment unless it is “invested in accordance with the national laws of the [host state]”.

141. That being said, the Tribunal fails to discern a requirement of direct ownership in the language of Article 1(b) of the BIT. The provision requires that the relevant asset be “invested”. It does not specify, however, that it must be invested directly, that is without one or more intermediate companies. In the absence of any qualifying language in the BIT as to the indirect or direct nature of investments, the Tribunal will interpret the terms “investment” and “invested” according to Article 31(1) of the VCLT, taking into account ordinary meaning, context and object and purpose of the Treaty.
142. Investments are often made indirectly. It is indeed not unusual for investors to structure their foreign investments through several corporations for a variety of legal and regulatory reasons. India itself notes as much, when it suggests that DT may have made its investment through the Singaporean subsidiary due to the favorable double taxation regime between India and Singapore.<sup>124</sup> Therefore, the ordinary meaning of the terms “investment” or “invested” is not restricted to assets which an investor owns directly.
143. The object and the purpose of the Treaty do not justify a limitation to directly invested assets. The preamble of the BIT provides that the Contracting Parties aim at “creating conditions favourable for fostering greater investment” and “stimulation of individual business initiative” that “will increase prosperity in both States”. Such objectives can be achieved irrespective of whether an investor carries out its economic activities directly, by holding title to each and every relevant asset, or indirectly, through subsidiaries.
144. The interpretation reached through Article 31(1) of the VCLT, according to which the term “investment” does not rule out indirect investment absent an express

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<sup>124</sup> R-PHB, para. 106.

limitation, is corroborated by consistent decisions of a number of investment tribunals.<sup>125</sup> In *Guaracachi v. Bolivia*, for instance, the tribunal construed an unqualified definition of “investment” contained in the UK-Bolivia BIT to “naturally include ‘indirect investments’ through the acquisition of shares in a company”. Similarly, in *Siemens v. Argentina*, the tribunal held that “a literal reading” of the unqualified definition of “investment” in the Argentina-Germany BIT “does not support the allegation that the definition of investment excludes indirect investments”.<sup>126</sup>

145. It is true that *Berschader v. Russia* held that an indirect investment was outside the scope of the Belgium-USSR BIT. However, it did so on the basis of treaty language providing that “[t]he term ‘investment’ also means indirect investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party by the intermediary of an investor of a third state”.<sup>127</sup> The tribunal accordingly held that indirect investments made through companies in the home state itself, as opposed to a third state, were not protected.
146. The Respondent further invokes differences in language used by the investment treaties concluded by Germany and India. It suggests that the lack of an express specification in the Treaty means that the BIT only covers direct investments. The Tribunal cannot follow this argumentation. As it is clear from the authorities cited by India, comparative treaty practice can only serve as supplementary means of treaty interpretation.<sup>128</sup> In application of the primary means, the Tribunal has concluded that indirect investments qualify for treaty protection. It is thus unnecessary to resort to the comparative treaty practice.
147. In any event, the fact that India and Germany chose not to elaborate on the directness of investments in the BIT does not mean that they intended to exclude

<sup>125</sup> *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, **Exh. CLA-030**, paras. 34-35; *ConocoPhillips Petrozuata B.V. and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, **Exh. CLA-021**, paras. 282-285.

<sup>126</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction, 3 August 2004, **Exh. CLA-063**, para. 137.

<sup>127</sup> *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, **Exh. RLA-051**, para. 138.

<sup>128</sup> Aust, *Modern Treaty Law And Practice* (3rd ed., Cambridge University Press 2013), **Exh. RLA-145**, p. 220.

indirect investments. As noted in *ConocoPhillips v. Venezuela* in relation to comparative treaty practice, “there is no single way of drafting definitions”.<sup>129</sup> Some treaties are more detailed than others. Some may for instance specify the components of fair and equitable treatment and others may not do so. This does not imply that the latter exclude those components from the notion of fair and equitable treatment. The Respondent has not advanced the *travaux* of this particular Treaty, showing that the Treaty’s silence should be interpreted as an exclusion.

148. The Tribunal therefore concludes that the Treaty definition of “investment” does not require that assets be held directly by the national of the home state in order for them to qualify as protected investments.
149. Should any different conclusion be drawn from the Treaty definition of “investor”? Article 1(c) of the BIT defines the term “investor” as “nationals or companies of a Contracting Party who have effected or are effecting an investment in the territory of the other Contracting Party”. Thus, in order for a national or company of the home state to be considered an investor, first, it must have “effected” or be “effecting” an investment and, second, such investment must be “in the territory of the [host state]”.
150. The first part of the definition does not require that the investment be “effected” directly. India has not argued that the ordinary meaning of the word “effected” implies that the investment be structured without intermediate companies. As noted above, in practice investments are often “effected” indirectly.
151. The second part of Article 1(c) of the BIT requires the investment to be “in the territory” of the host state. It is common ground that Devas is a company incorporated and existing in India. In the Tribunal’s view, the requirement that the investment be in the territory of the host state does not restrict the way in which such investment can be made. It suffices that the result of the investment activity, *i.e.* relevant assets, be in the territory of the host state.
152. Investment tribunals have consistently refused to read into the reference to the territory of the host state a requirement for direct ownership of the assets

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<sup>129</sup> *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07, Decision on Jurisdiction and Merits, 3 September 2013, Exh. CLA-021, para. 284.

constituting the investment. For instance, the *CEMEX v. Venezuela* tribunal stated:

"[W]hen the BIT mentions investments made 'in' the territory of a Contracting Party, all it requires is that the investment itself be situated in that territory. It does not imply that those investments must be 'directly' made in such territory."<sup>130</sup>

153. It therefore suffices that the assets invested be situated in India. It is not necessary that the assets be owned directly by DT in order for the latter to qualify as an investor.

**b. *Can an investor claim for the measures affecting indirectly held assets?***

154. The present question - whether a protected investor can claim for measures affecting its indirectly held investment - is distinct from the definition of "investment" and "investor". The fact that certain assets qualify as investments and that a given national who indirectly holds these assets qualifies as investor does not necessarily mean that such national can assert the direct owner's rights over the investment. The Respondent is correct in underscoring that Article 5(3) of the BIT contains a specific rule in this regard. The provision reads as follows:

"Where a Contracting Party expropriates the assets of a company in its own territory, in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraphs 1 and 2 of this Article are applied in the same manner to provide compensation in respect of the Investment of such investors of the other Contracting Party who are owners of those shares."

155. The Respondent submits that this rule grants direct shareholders "standing to bring an expropriation claim" with the result that indirect shareholders would lack such standing.<sup>131</sup> In the Tribunal's view, this submission is unsupported by the language of Article 5(3) of the BIT. The provision is clear in that it obliges the host state to fulfill one of the substantive obligations under the BIT *vis-à-vis* the direct shareholders, namely the obligation to compensate for a taking of the assets of the subsidiary. The rule does not address standing or whether a shareholder can present claims for violation of substantive provisions of the Treaty with respect to its indirect investment. The Respondent itself acknowledges this when, in respect

<sup>130</sup> *CEMEX Caracas Investments B.V and CEMEX Caracas II Investments B.V v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, **Exh. CLA-015**, para. 157.

<sup>131</sup> Counter-Memorial, para. 109.

of its pre-investment defense (addressed below), it argues that Article 5(3) does not “purport to address non-expropriation claims”. Indeed, Article 5(3) does not provide who has standing to claim for breaches other than expropriation. It merely establishes that a shareholder can benefit from the expropriation prohibition otherwise owed to the subsidiary.

156. Here, the Claimant does not present itself as the beneficiary of the protections owed to its subsidiaries. It does not purport to step into the shoes of its subsidiaries in order to assert any of their rights deriving from the primary norms of the Treaty. Instead, it claims for the reflective loss that it itself suffered due to India’s alleged breaches of Treaty obligations protecting DT’s investments. India does not dispute that, under international investment law, shareholders are entitled to recover the reflective loss that they suffer from the violation of the applicable treaty standards with respect to their investments. This is not the issue dealt with in Article 5(3); that provision covers a different situation and allows a shareholder to benefit from the BIT’s protection towards the subsidiary. Therefore, it cannot be read to restrict the shareholder’s distinct right to claim on its own behalf for the reflective loss that it suffered.
157. For the above reasons, the Tribunal denies the Respondent’s preliminary objection based on the indirect nature of the Claimant’s investment.

## **B. PRE-INVESTMENT**

### **1. The Respondent’s position**

158. The Respondent submits that the Germany-India BIT is a typical “admission clause model treaty”. It protects investments only once established and thus pre-investment activities fall outside its ambit. India cites a number of authors to argue that the rationale behind excluding pre-investment activities from the scope of an investment treaty is to “allow the host state to retain control over the entry of foreign capital, to screen investments to ensure their compatibility with the state’s national security, economic development, and public policy goals, and to determine the conditions under which foreign investments will be permitted, if at all”.<sup>132</sup>

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<sup>132</sup> Jeswald W. Salacuse, *The Law Of Investment Treaties* (Oxford University Press 2010), **Exh. RLA-025**, p. 197. See also Andrew Newcombe and Lluís Paradell, *Law And Practice*

159. According to the Respondent, the Claimant's argument that Article 3(1) of the BIT provides for the obligation to admit investments "is refuted by the unanimous precedents and writings on the subject that such language is the hallmark of an 'admission clause' model treaty".<sup>133</sup> To oppose the Claimant's argument that Article 3(1) of the BIT only requires the investment to be made legally in order to be admitted for protection, the Respondent contends that (i) the "in accordance with" provisions similar to Article 3(1) of the BIT are normally interpreted to create an admission requirement and (ii) in any event, even if the language "only incorporated the concept of legality", the record shows that "Devas lacked the intellectual property rights that it represented it had in the Devas Agreement, and [...] DT was fully aware of that fact".<sup>134</sup>
160. The Respondent draws attention to various decisions which declined jurisdiction on the ground of the pre-investment nature of the claimants' activities. In particular, the Respondent relies on the following cases:
- In *Mihaly v. Sri Lanka*, the claimant incurred significant expenses in obtaining financing, negotiating project documents, conducting feasibility studies, but the Government eventually refused the construction project. The tribunal declined jurisdiction highlighting "the absence of the consent of the host state to the implementation of the project".<sup>135</sup>
  - In *Nagel v. Czech Republic*, although the claimant entered into a legally binding cooperation agreement with a state-owned company and a private operator to jointly seek licenses to operate a global system of mobile communications (GSM), and although the claimant "might have been encouraged by various remarks from Ministers or Government officials or by general interests they demonstrated in his plans", the tribunal considered that the claimant had carried out pre-investment

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*Of Investment Treaties: Standards Of Treatment* (Kluwer Law International 2009), **Exh. RLA-035**, p. 133; Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995), **Exh. RLA-032**, p. 51.

<sup>133</sup> Rejoinder, para. 171, citing to Jeswald W. Salacuse, *The Law Of Investment Treaties* (Oxford University Press 2010), **Exh. RLA-025**.

<sup>134</sup> Rejoinder, para. 178.

<sup>135</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, **Exh. RLA-038**, paras. 60-61.

activities because “[t]here was not, and could not be, a guarantee that a license would in fact be obtained”.<sup>136</sup>

- In *Zhinvali v. Georgia*, the claimant entered into a memorandum of understanding, later supplemented by heads of agreement, with a private company, which held the lease for a power plant. The project contemplated the rehabilitation of the power plant. Upon the request of the claimant, the Government provided a letter pledging that the claimant could “expect support from the Government” in a number of areas, including regulatory permitting. During a nine-month period, in which the Government undertook not to contract with a third party, the claimant incurred substantial expenses in the preparation for the project. Georgia ultimately did not proceed, because the World Bank insisted on the organization of a transparent and competitive bidding process. The tribunal considered that the claimant’s activities had not gone beyond the pre-investment stage and declined jurisdiction.<sup>137</sup>

161. Like in these cases, the Claimant’s activities in India remained at a pre-investment stage, says India, since the Claimant never obtained the necessary governmental approvals. Indeed, Devas never applied for, let alone obtained, the WPC License, which was indispensable for the terrestrial re-use of the leased spectrum. Without this license, “Devas could not engage in any business, even a satellite only business”.<sup>138</sup>
162. In the Respondent’s further submission, the fact that DT Asia had established a local subsidiary for the implementation of the project is irrelevant for purposes of the pre-investment analysis.<sup>139</sup> The shares in Devas are not a relevant investment, since “[t]he Government has not expropriated Devas shares or otherwise prevented the Devas shareholders from managing the company”.<sup>140</sup> The fact that the purported project was planned to be implemented through a

<sup>136</sup> *Mr. William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Award, 9 September 2003, **Exh. RLA-039**, para. 326.

<sup>137</sup> *Zhinvali Development Limited v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, **Exh. RLA-041**.

<sup>138</sup> Rejoinder, para. 197 (emphasis in the original).

<sup>139</sup> Counter-Memorial, para. 92; Rejoinder, para. 193.

<sup>140</sup> Counter-Memorial, para. 90.

local subsidiary does not alter the fact that “Devas could not roll out the Devas Services after the decision of the Cabinet Committee on Security”.<sup>141</sup> In this sense, the formation of the local company “is only another step in the pre-investment activity”.<sup>142</sup>

163. The Respondent opposes the argument that Article 5(3) of the BIT permits the shareholders to claim compensation for the expropriation of the assets of the company. According to India, (i) the Claimant cannot resort to Article 5(3) since it owns shares in a Singaporean company not an Indian company; (ii) Article 5(3) does not “purport to address non-expropriation claims”; and (iii) in any event, the Claimant “confuses the concept of who is entitled to claim compensation for an alleged expropriation with the concept of whether there is an ‘investment’ affected by measures of the host state in the first instance”.<sup>143</sup>
164. Equally irrelevant, so says India, is DT’s reference to the funds and resources it contributed to Devas. Those investments are paradigmatic development or “getting ready” activities, which are outside the protection of the BIT. In any event, the Government has not expropriated these contributions. In fact, upon the termination of the Devas Agreement, Antrix offered to refund the upfront capacity reservation fees paid by Devas.<sup>144</sup>
165. In sum, what matters for India in the context of the pre-investment objection is that “the approvals indispensable for the project were not obtained, that without them the project could not proceed, and that neither Devas nor Claimant had a ‘contractual right’ or ‘concrete assurance’ to obtain those approvals”.<sup>145</sup> The present dispute thus arises out of pre-investment activities over which the Tribunal has no jurisdiction.

## **2. The Claimant’s position**

166. The Claimant opposes the Respondent’s argument that the BIT is an “admission clause” treaty. The text of the Treaty does not condition the protection of an investment on its admission by the host state. Instead, Article 3(1) of the BIT

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<sup>141</sup> Counter-Memorial, para. 91.

<sup>142</sup> Rejoinder, para. 194.

<sup>143</sup> Rejoinder, para. 196.

<sup>144</sup> Rejoinder, para. 193.

<sup>145</sup> Rejoinder, para. 194.

- imposes an obligation on each contracting party to “admit investments in its territory in accordance with its laws and policy”. Furthermore, Article 1(c) of the BIT defines “investors” as “nationals or companies of a Contracting Party who have effected *or are effecting* investments” (emphasis added).
167. In any event, so contends DT, even if the BIT only applied to admitted investments, the Indian authorities, including the Foreign Investment Protection Board (“FIPB”) and the DOT expressly admitted DT’s investments.<sup>146</sup> This fact distinguishes the present case from the ones cited by the Respondent. For instance, in *Mihaly v. Sri Lanka*, the tribunal emphasized the absence of an “acceptance by the host State ... of such expenditures as constituting an investment”.<sup>147</sup> Similarly, in *Zhinvali v. Georgia*, the tribunal underscored the lack of any express or implied consent to receive or admit the investment.<sup>148</sup>
168. Furthermore, according to the Claimant, in none of the cases to which India refers in support of its pre-investment defense did the claimants have any other investments on which the tribunal’s jurisdiction could have been founded.<sup>149</sup> By contrast, DT has made multiple investments in India, including the shareholding in Devas, the rights under the Agreement, and investments in kind reflected in the contributions of capital, know-how and other resources. DT addresses these assets in turn.
169. First, the Claimant opposes India’s submission that the shares in Devas are not a relevant investment because the contested measures did not affect the shares or the rights of the shareholders. No such “relevance” requirement exists. Moreover, “DT does claim indirect expropriation of its shareholding and other

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<sup>146</sup> Letter of 7 August 2008 from FIPB (Mr. Prasad) to Devas, **Exh. C-013**; Letter of 13 August 2008 from DOT (Mr. Saxena) to Devas, **Exh. C-086**; Letter of 17 September 2009 from FIPB (Mr. Saxena) to Devas, **Exh. C-112**, Letter of 29 September 2009 from FIPB (Mr. Saxena) to Devas, **Exh. C-022**; Letter of 21 January 2010 from DOT (Mr. Kumar) to Devas, with enclosures, **Exh. C-124**.

<sup>147</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, **Exh. CLA-042**, para. 48.

<sup>148</sup> *Zhinvali Development Limited v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, **Exh. CLA-081**, paras. 348-49.

<sup>149</sup> Reply, para. 173.

- investments and, for purposes of assessing jurisdiction, the Tribunal may not assess the merits of that claim”.<sup>150</sup>
170. In any event, according to DT, the measures impugned do not need to directly impact the shares for jurisdiction to be established. Numerous investment tribunals have recognized the “direct right of action of shareholders”, which entitles shareholders to bring claims arising out of measures affecting the company.<sup>151</sup> This right is confirmed by Article 5(3) of the BIT, which gives the shareholders of a local company the right to claim compensation for the expropriation of the assets of the company.<sup>152</sup>
171. Second, the Claimant asserts that Devas’s rights under the Agreement also constitute an investment being “right[s] to money or to any performance under contract having a financial value” under Article 1(b)(iii) of the BIT. Those rights became binding and enforceable upon Antrix’s notification of February 2006, which brought the Agreement into effect. The rights to lease satellite spectrum unquestionably had financial value, as evidenced by DT’s valuation of the investment opportunity in Devas,<sup>153</sup> by criticism in the Indian media that Antrix had “leased valuable spectrum at an undervalue”,<sup>154</sup> and by India’s internal discussions.
172. For the Claimant, the fact that Devas has not obtained the WPC License does not change the qualification of the contract rights as investments. DT is not claiming that the Agreement gave it an acquired right to implement the Devas Services or to obtain the necessary licenses. All DT needs to show is that it

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<sup>150</sup> Reply, para. 176.

<sup>151</sup> *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, **Exh. CLA-097**, paras. 53-55; *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, **Exh. CLA-092**; *American Manufacture & Trading, Inc v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, **Exh. CLA-090**, para. 5.15; *Alex Genin, Eastern Credit Limited, Inc and A. S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, **Exh. RLA-093**, paras. 324, 328.

<sup>152</sup> Reply, para. 182.

<sup>153</sup> DT briefing, “Meeting with Devas-Shareholders on 19 Feb. 2008” and “Board meeting on 19 Feb. 2008” (redacted), 15 February 2008, **Exh. C-076**, p. 1.

<sup>154</sup> “Devas gets preferential allocation of ISRO’s spectrum” and “Another spectrum sold on the quiet”, *The Hindu Business Line*, 31 May and 1 June 2010, **Exh. C-024**.

acquired rights under the Agreement with financial value.<sup>155</sup> The Agreement had value irrespective of the licenses. The absence of licenses goes to the valuation of Devas' rights and is a matter for the damages phase.

173. Finally, the Claimant counters India's argument that the activities which Devas carried out before receiving the WPC License are pre-investment and argues that such a view is belied by investment jurisprudence. If such argument were valid, it would have barred jurisdiction in a number of cases, including for instance in *Gold Reserve v. Venezuela*, where the termination of a mining concession gave rise to a treaty claim although the investor had not obtained the final approval to start mining.<sup>156</sup> Thus, accepting the Respondent's pre-investment defense would have "far-reaching consequences" as it would "unduly limit treaty protection for investments that are effected in stages or are subject to multiple stages of governmental approval".<sup>157</sup> For all these reasons, the Claimant submits that this jurisdictional objection must be denied.

### 3. Analysis

174. Article 3(1) of the BIT reads as follows:

"Each Contracting Party shall encourage and create favorable conditions for Investors of the other Contracting Party and also admit investments in its territory in accordance with its law and policy".

175. The Respondent submits that this provision subjects the application of the Treaty to the host state's admission of an investment. The Tribunal does not share this view. The wording of Article 3(1) is unequivocal: it establishes an obligation pursuant to which "[e]ach Contracting Party shall [...] admit investments in its territory in accordance with its law and policy". Article 3(1) is not a permissive clause authorizing the Contracting States not to admit investments; it stipulates an obligation of admission subject to the law and policy of the host state. That provision says nothing about the consequences of a lack of admission; it certainly does not imply that Treaty protection depends on admission.

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<sup>155</sup> Reply, para. 186.

<sup>156</sup> *Gold Reserve v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **Exh. CLA-107**.

<sup>157</sup> Reply, para. 190.

176. The authorities invoked by India do not suggest otherwise. Jeswald Salacuse writes that “if a treaty protects only investments made in accordance with host country law and an investment in an arbitration case is shown not to have been made in accordance with such law, a tribunal may conclude that it has no jurisdiction to hear the dispute”.<sup>158</sup> This, however, relates to the requirement of legality of an investment and must be distinguished from an admission prerequisite. The Respondent does not raise illegality as a separate defense.<sup>159</sup> It states, however, that “Devas lacked the intellectual property rights that it represented it had in the Devas Agreement, and [...] DT was fully aware of that fact”.<sup>160</sup> India relies on the response of the Devas group to the due diligence questionnaire from 29 December 2007, which shows that the group answered “N/A” (not applicable) to the questions on intellectual property. The Tribunal cannot infer from this evidence that Devas did not hold the intellectual property rights at stake. The Respondent did not further elaborate its allegation made for the first time in the Rejoinder and chose not to address this issue at the Hearing.
177. Even if it were established that Devas misinformed Antrix with respect to one of the contractual conditions (*quod non*), it is doubtful that this would make DT’s investment illegal or could be a ground for invalidity of the Devas Agreement. In any event, it is telling that Antrix did not raise the invalidity of the Agreement in the ICC Arbitration on this basis. In these circumstances, the Tribunal cannot but dismiss India’s argument that DT’s investment was illegal.
178. Moreover, even if the Tribunal were to accept that Article 3(1) of the BIT is a permissive clause authorizing the host state not to admit investments (*quod non*), the record shows that India’s Foreign Investment Protection Board and the DOT approved DT’s indirect equity participation in Devas.<sup>161</sup> The Tribunal agrees with the Respondent that the shares in Devas should not necessarily be viewed as an investment in isolation of the activities carried out by the company. This is not the

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<sup>158</sup> Jeswald W. Salacuse, *The Law Of Investment Treaties* (Oxford University Press 2010), **Exh. RLA-025**, p. 197.

<sup>159</sup> For the untimely purported objection based on illegality, see *supra* section IV.4.

<sup>160</sup> Rejoinder, para. 178.

<sup>161</sup> Letter of 13 August 2008 from DOT (Mr. Saxena) to Devas, **Exh. C-086**; Letter of 17 September 2009 from FIPB (Mr. Saxena) to Devas, **Exh. C-112**; Letter of 29 September 2009 from FIPB (Mr. Saxena) to Devas, **Exh. C-022**; Letter of 7 August 2008 from FIPB (Mr. Prasad) to Devas, **Exh. C-013**; Letter of 21 January 2010 from DOT (Mr. Kumar) to Devas, with enclosures, **Exh. C-124**.

case here. It is undisputed that DT contributed substantial financial resources, i.e. over USD 97 million, to obtain its indirect shareholding in Devas. Those equity contributions are protected investments under Article 1(b)(ii) of the BIT. Furthermore, by endorsing DT's participation in Devas, India admitted the Claimant's investment.

179. The Respondent insists that Devas has not obtained the WPC License, which was crucial to roll out the Devas System. While this is factually correct, the Treaty's definition of "investment" is not restricted to going concerns holding all the relevant authorizations to carry out their business. If the Treaty applied only to businesses with all necessary permits and licenses, it would for instance leave out a valid concession contract until the concessionaire obtained the last authorization to commence its activity. Such restrictive interpretation would not be warranted in light of the text and the object and purpose of the Treaty.
180. The absence of the WPC License may have made DT's investment less valuable and may thus have an impact on quantum. It does not, however, affect jurisdiction.
181. In this context, the Tribunal stresses that the situation before it differs from the cases relied upon by India. In *Mihaly*, the agreements entered into by the claimant were non-binding;<sup>162</sup> in *Petrobart*, the negotiations "did not result in any binding undertakings in the Contract";<sup>163</sup> in *Zhinvali*, the "[n]egotiations... to conclude a definitive set of agreements... never came to fruition";<sup>164</sup> in *Nagel*, the claimant entered into a cooperation agreement "only of a preparatory nature".<sup>165</sup> By contrast, in the present case, Devas had a binding agreement contemplating the lease of valuable satellite spectrum, which agreement became effective after Antrix informed Devas that it had obtained full clearance from the Government to proceed with the lease.

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<sup>162</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, **Exh. CLA-042**, para. 48.

<sup>163</sup> *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Final Award, 29 March 2005, **Exh. CLA-053**, p. 69.

<sup>164</sup> *Zhinvali Development Limited v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, **Exh. RLA-041**, para. 2.

<sup>165</sup> *Mr. William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Award, 9 September 2003, **Exh. CLA-080**, para. 328.

182. For these reasons, the Tribunal rejects the Respondent's pre-investment objection.

**C. ESSENTIAL SECURITY INTERESTS**

**1. The Respondent's position**

183. In sum, the Respondent invokes Article 12 of the BIT which excludes the application of the BIT standards to measures in furtherance of the host state's essential security interests. India's decision to reserve S-Band spectrum for military and other strategic use is a quintessential policy decision. Therefore, by virtue of Article 12 of the BIT, the Claimant is precluded from challenging this measure under the BIT.

**a. *The deference owed by the Tribunal***

184. The Respondent submits that, irrespective of whether Article 12 is "self-judging" or not, the Tribunal must accord substantial deference to India's national security determinations and in particular to its decision to reserve S-band for military and strategic use.<sup>166</sup> It relies on the UNCTAD Report on the Protection of National Security in International Investment Agreements ("UNCTAD Report") to suggest that "the distinction between self-judging and non-self-judging exceptions is more subtle than it may appear at first sight" and that the essential security defense "would lose its meaning and purpose if a third party had the power to impose on a State that felt threatened its own view about whether such a threat actually exists and what measures, if any, that State is allowed to take in response".<sup>167</sup> It is "neither the expertise nor the responsibility of an international tribunal ... [to] second-guess the appropriate national authorities in matters of national security".<sup>168</sup>

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<sup>166</sup> See Counter-Memorial, paras. 50-56 (arguing that "substantial deference" or "a wide measure of deference" must be granted to security determinations made by national authorities).

<sup>167</sup> Rejoinder, paras. 125-127, citing UNCTAD, *The Protection Of National Security In IIAS: UNCTAD Series On International Investment Policies For Development* (United Nations 2009) (Excerpt), **Exh. RLA-008**, p. 41.

<sup>168</sup> Rejoinder, para. 155.

185. According to India, the record shows that the decision to reserve S-band spectrum for military and strategic use was taken following extensive consultations with the entire national security hierarchy of India; more specifically:
- In October 2005, the IDS requested that the DOT block bandwidth in S-band.<sup>169</sup>
  - In September 2007, the Expert Committee on Spectrum and Satellite Uses of S-band warned that if the spectrum “is lost to commercial operators, it would severely jeopardize the future Defense services plans of providing mobile SATCOM connectivity”.<sup>170</sup>
  - On 2 July 2010, India’s National Security Advisor warned that S-band was “crucial for several strategic and societal services”.<sup>171</sup>
  - On 15 February 2011, the MOD addressed the DOS stating that “the barest minimum requirement” of S-band spectrum for the defense services was 120MHz.<sup>172</sup>
  - On 17 February 2011, the Cabinet Committee on Security, India’s highest authority on security matters, decided to reserve S-band for non-commercial use, “having regard to the needs of the country’s strategic requirements”.<sup>173</sup>
  - On 1 April 2015, the full Cabinet of Ministers placed the S-band within India’s “Defence Band and Defence Interest Zone”.<sup>174</sup>
186. The Respondent refutes the Claimant’s argument that the contested measure was taken because of publicity-related political or commercial considerations. This argument can only be accepted, so says the Respondent, if one concludes that the Cabinet Committee on Security did not mean what it said and the entire

<sup>169</sup> Anand WS, Annex 1, **App. VA-2**.

<sup>170</sup> Anand WS, Annex 1, **App. VA-7**, para. 11.

<sup>171</sup> Minutes of 117<sup>th</sup> meeting of the Space Commission, **Exh. R-026**, para. 117.6.3.

<sup>172</sup> Letter of 15 February 2011 from the MOD to the DOS with attachments (Redacted), **Exh. R-030**.

<sup>173</sup> Press Information Bureau, “CCS Decides to Annul Devas-Antrix Deal”, 17 February 2011, **Exh. R-031**.

<sup>174</sup> Memo from V.K. Pant, DOT, to Member (Finance), DOS, 1 April 2015, with enclosure, **Exh. R-043** (referring to a Cabinet meeting of 21 January 2015).

national security hierarchy of the country “engaged in a bad faith conspiracy to reserve the space segment of S-band capacity for illegitimate reasons of ‘political and commercial expediency’”.<sup>175</sup> The standard of proving bad faith is high and such allegations “should be supported not by disputable references but by clear and convincing evidence”.<sup>176</sup> The Claimant’s “strained inferences drawn from a couple of newspaper articles” do not warrant second guessing the sovereign determination of the Indian national security organs.

**b. *India’s measures as “prohibition” or “restriction”***

187. India refutes DT’s argument that Article 12 requires a “prohibition” or “restriction” implying a measure of general application. A “prohibition” or “restriction” within the meaning of Article 12 need not necessarily apply to a large number of persons or entities. The CCS decision leaves no doubt that it did reflect a broader policy of spectrum usage, when it stated that “the Government will not be able to provide orbit slot in S band to Antrix for commercial activities”.<sup>177</sup> The fact that, at the time of the CCS decision, the Agreement with Devas was the only existing contract for the commercial use of the spectrum does not mean that the decision to reserve the spectrum for strategic use was not a general policy determination.
188. The Respondent opposes the Claimant’s argument that the CCS decision did not affect the commercial use of the S-band spectrum by two Government-owned terrestrial operators. The spectrum of 40MHz allocated to those operators in 2003 “was not available to meet the strategic requirements for S-Band spectrum and could not be used efficiently even if it could eventually be coordinated for such use”.<sup>178</sup>
189. According to the Respondent, there is no merit either in the Claimant’s submission that the CCS decision was not a final policy decision as it has been “perennially revisited”. The fact that different opinions were voiced within the Government as to the potential of reassigning the spectrum for commercial use does not mean that the decision has been revisited. Far from that, the full Cabinet

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<sup>175</sup> Rejoinder, para. 130.

<sup>176</sup> Rejoinder, para. 131.

<sup>177</sup> Press Information Bureau, “CCS Decides to Annul Devas-Antrix Deal”, 17 February 2011, **Exh. C-031**.

<sup>178</sup> Rejoinder, para. 137.

of Ministers recently reconfirmed the CCS decision and denominated S-band as “Defence Band and Defence Interest Zone”.<sup>179</sup>

**c. No requirements of urgency and proportionality**

190. Contrary to DT’s position, India submits that Article 12 of the BIT does not require urgency for the application of the essential security interests defense. The Claimant erroneously conflates Article 12 of the BIT with the customary international law plea of necessity. In particular, the *CMS* and *Sempra ad hoc* committees rejected this view. They considered that the essential security interests clause in the Argentina-U.S. BIT excludes the application of the substantive obligations of the treaty as a result of which there can be no breach of the treaty if the clause applies. By contrast, the state of necessity contemplated by Article 25 of the International Law Commission Articles on State Responsibility (“ILC Articles”) is a circumstance precluding wrongfulness, which only comes into play when there is a breach of a primary treaty obligation:

“Article XI [the ‘essential security interests’ provision of the U.S.-Argentina BIT] is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 [of the ILC Articles on State Responsibility] is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations”.<sup>180</sup>

191. Consequently, so argues the Respondent, the requirement of urgency applying to the customary rule of state of necessity cannot be transposed to the BIT’s essential security interests clause. Matters of defense pertain quintessentially to national security. The CCS decision to reserve S-band for defense and strategic use was a matter of national security in the short and long term, and the Respondent is not required to show urgency or an imminent threat.
192. The Respondent also opposes the Claimant’s argument that the term “necessary” in Article 12 of the BIT implies that the contested measures must be proportionate to or imperatively required for advancing the purported national security interests.

<sup>179</sup> Memo from V.K. Pant, DOT, to Member (Finance), DOS, 1 April 2015, with enclosure, **Exh. R-043** (referring to a Cabinet meeting of 21 January 2015).

<sup>180</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **Exh. RLA-004**, paras. 128-136; See also *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Annulment Proceeding), Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, **Exh. RLA-005**, paras. 186-219.

According to India, this argument of DT “boils down to the thesis that this Tribunal should review and evaluate India’s defense and security needs and determine for itself, and for India, the best way to ensure the nation’s security”.<sup>181</sup> The Claimant’s suggestion that less restrictive measures were available to achieve the security goal pursued is again premised on a misplaced analogy with the customary rule of state of necessity, and must therefore be discarded. In any event, the less restrictive alternative measures that DT suggests are meaningless:

- The 40 MHz spectrum allocated to terrestrial operators which DT puts forward as an alternative cannot be used to satisfy military requirements.<sup>182</sup> In any event, according to the 2013 report of the Indian National Satellite System (“INSAT”), India’s defense requirements have increased to 235.2 MHz.<sup>183</sup>
- Another alternative advanced by DT is that Devas could have provided the services for the military. As explained by witness Mr. Sethuraman, however, “India would not permit a commercial enterprise to operate its defense and security transmissions”.<sup>184</sup>
- The Claimant’s contention that India failed to show why S-band spectrum was essential is equally unconvincing. A sophisticated party like DT knows that S-band is unique as it allows transmission by hand-held devices.<sup>185</sup> No other band except L-band, which is not available to India, is comparable in this regard.<sup>186</sup>

193. India further rejects DT’s submission that India’s measures did not contribute to the protection of its essential security interests, as it made no use of S-band since the annulment of the Agreement. Since the CCS decision in 2011, the first satellite GSAT-6 was reconfigured for military use and was finally launched on 27 August 2015. This satellite, together with two others (GSAT-6A and GSAT-7S)

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<sup>181</sup> Rejoinder, para. 150.

<sup>182</sup> Rejoinder, para. 57.

<sup>183</sup> INSAT report, 10 July 2013, Sethuraman WS, Annex 3, **App. KS-14**.

<sup>184</sup> Sethuraman WS, Annex 2, para. 22.

<sup>185</sup> Rejoinder, para. 56.

<sup>186</sup> Counter-Memorial, fn. 67.

which have also been configured for military use are advancing India's military needs as determined by the military authorities, irrespective of the Claimant's view.<sup>187</sup>

194. Accordingly, so contends India, it has sufficiently established that it took the contested measure in furtherance of the essential security interests. It need not show that such interests were urgent nor that the measure was proportionate.

**d. *India's alleged contribution to the spectrum scarcity***

195. The Respondent denies that spectrum scarcity was its own creation. It cites to Jeswald Salacuse to argue that the essential security interest clause is not limited to situations to which the state has not contributed.<sup>188</sup>
196. India considers that the decisions related to the Argentine economic crisis which the Claimant invokes are inapposite. In those cases, Argentina had contractual commitments from which it sought to excuse itself as a result of the economic crisis.
197. Moreover, the Claimant does not establish that India contributed to the creation of the scarcity of S-Band spectrum required for essential security interests. In particular, so argues the Respondent, DT's argument that India should have reserved S-band for military use from the outset instead of allocating it for commercial use lacks merit. The concept of national security is not frozen in time and nothing in the BIT "precludes a government from constantly assessing and reassessing its security needs".<sup>189</sup>

**e. *Article 12 excludes the obligation to compensate DT***

198. Contrary to the Claimant's contention, the Respondent argues that Article 12 of the BIT excludes the obligation to compensate DT. It relies, *inter alia*, on the CMS annulment committee, which noted that "if and so long as [the essential security interests clause] applied, it excluded the operation of the substantive provisions

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<sup>187</sup> Rejoinder, para. 151.

<sup>188</sup> Rejoinder, para. 157, citing to Jeswald W. Salacuse, *The Law Of Investment Treaties* (Oxford University Press 2010), **Exh. RLA- 132**, p. 385.

<sup>189</sup> Rejoinder, para. 160.

- of the BIT. That being so, there could be no possibility of compensation being payable during that period”.<sup>190</sup>
199. In the Respondent’s opinion, DT’s submission that Article 5(1) of the BIT requires compensation even if the expropriation is for a public purpose is ill-founded, because the Respondent does not rely on a defense of public purpose under Article 5, but on Article 12, which excludes “the operation of the substantive provisions of the BIT”.<sup>191</sup>
200. The Claimant’s reliance on *EDF* is also inapposite. While assessing Argentina’s state of necessity defense, the *EDF* tribunal stated that “at some reasonable point in time, Respondent should have compensated Claimant for injury suffered as a result of measures enacted during any arguable period of necessity”.<sup>192</sup> This finding cannot apply to the present case. India relies on the treaty provision about essential security interests, which, as explained above, substantially differs from the defense of state of necessity. Awarding compensation where the essential security interests clause applies would deprive that BIT provision of any effect.
201. For all these reasons, the Respondent requests the Tribunal to defer to India’s policy decision to reserve S-band for non-commercial use and to refrain from assessing the compliance of this measure with the substantive provisions of the BIT, the application of which is excluded pursuant to Article 12 of the BIT.

## 2. The Claimant’s position

202. It is the Claimant’s position that India failed “to discharge the burden of proving that the annulment of the Agreement was necessary to protect India’s essential security interests”.<sup>193</sup>

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<sup>190</sup> *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, **Exh. CLA-101**, para. 1170.

<sup>191</sup> Rejoinder, para. 168.

<sup>192</sup> Rejoinder, para. 169, citing *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, **Exh. CLA-101**, paras. 1177-1178.

<sup>193</sup> Reply, para. 278.

**a. No substantial deference owed by the Tribunal**

203. The Claimant submits that the Respondent's argument according to which the Tribunal must accord "substantial deference" or a "margin of appreciation" to India when determining whether its measure was necessary to protect essential security interests is unsupported by investment treaty case law and doctrine. Only in *Continental Casualty* did the tribunal recognize a margin of appreciation based on the specific language of the US-Argentina BIT, which refers to the state's "own essential security interests". The tribunal put the emphasis on the word "own", which does not appear in the Germany-India BIT, with the result that the findings in *Continental Casualty* are inapposite.
204. DT further relies on the UNCTAD Report in support of its position that the Tribunal does not owe substantial deference to India, which report reads in relevant parts as follows:

"It goes without saying that a non-self-judging exception clause would limit the Contracting Parties' sovereign right to protect their national security considerably. It would give arbitral tribunals in such a critical area as national security the right and duty to decree what a country is and is not allowed to do. To some extent, IIA Contracting Parties would be putting their destiny into the hands of arbitrators. The tribunal would make a final and binding judgment as to whether or not the measures of the host country were actually necessary to protect its national security.

[...]

Under the above approach, arbitration tribunals would have the power to judge whether the respective host country measure was indeed required to respond to the threat, or whether there would have been less severe means with a smaller impact on the investment. The approach would thus allow for a proportionality test. This reduces the regulatory discretion of the Contracting Parties considerably, but it also enhances legal clarity and predictability for the foreign investor".<sup>194</sup>

205. Moreover, according to DT, awards and annulment committee decisions are unanimous in interpreting non-self-judging essential security interests clauses to require an "objective, substantive review of whether the terms of that clause are met".<sup>195</sup>

<sup>194</sup> Reply, discussing *BG Group Plc v. Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007, **Exh. CLA-13**, p. 93.

<sup>195</sup> Reply, para. 288, citing *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 17 July 2003, **Exh. CLA-098**, paras. 373- 374 ("The Tribunal must conclude next that this judicial review is not limited to an examination of whether the plea has been invoked or the measures have been taken in good faith. It is

206. Contrary to the Respondent's opinion, for DT, the Tribunal does not need to infer bad faith in order to reject India's essential security interests defense. This might have been the case if Article 12 of the BIT contained a self-judging essential security interests clause. According to the Claimant, none of the twelve publicly available investment awards addressing non-self-judging essential security interests clauses require a showing of bad faith. While the record may well show that India failed to act in good faith, Article 12 does not require such a finding.<sup>196</sup>

**b. No prohibition or restriction**

207. The Claimant argues that the reference to "prohibition" or "restriction" in Article 12 of the BIT implies "a measure that has general application". India's targeted action against the Agreement was not such a measure for the following reasons:

- The decision to annul the Agreement specifically targeted Devas. It was taken much earlier than the CCS meeting on 17 February 2011. In fact, it was the Space Commission which decided to get rid of the Agreement on 2 July 2010.<sup>197</sup>
- India's decision did not affect the Government-owned terrestrial operators who utilized 40MHz of S-band spectrum for commercial purposes.<sup>198</sup>

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a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness"); *LG&E Energy Corp and others v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **Exh. CLA-040**, paras. 205 and 212-213; *Enron Corporation, Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, **Exh. CLA-028**, paras. 339-340 ("The judicial control must be a substantive one as to whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness"); *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision of the ad hoc Committee on the Application for Annulment, 30 July 2010, **Exh. CLA-102**, para. 357; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **Exh. CLA-061**, para. 388 ("The judicial control must be a substantive one, and concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness").

<sup>196</sup> Reply, paras. 292-293.

<sup>197</sup> Minutes of 117<sup>th</sup> Meeting of the Space Commission, 2 July 2010, **Exh. C-145**, para. 117.6.12(a).

<sup>198</sup> Reply, para. 303.c.

- The CCS decision hardly qualifies as a final policy decision since it “has perennially been revised and the Government departments continue to argue over what use should be made of the S-band”.<sup>199</sup>

208. Therefore, for DT, India’s decision to annul the Agreement does not come under the exemption contained in Article 12 of the BIT.

**c. No emergency**

209. The Claimant stresses that Article 12 applies to “*essential* security interests”, which implies that there must be an imminent threat of severe consequences.

210. DT notes that the Argentine cases in which the investment tribunals resorted to the essential security interests clause involved a national crisis, which in the words of the *Continental Casualty* tribunal “brought about [...] the near-collapse of the domestic economy; the soaring inflation; the leap in unemployment; the social hardships bringing down more than half of the population below the poverty line; the immediate threats to the health of young children, the sick and the most vulnerable members of the population, the widespread unrest and disorders; the real risk of insurrection and extreme political disturbances, the abrupt resignations of successive Presidents and the collapse of the Government, together with a partial breakdown of the political institutions and an extended vacuum of power”.<sup>200</sup>

211. The *LG&E* tribunal also circumscribed necessity under the customary rule, which – in DT’s submission - can assist the Tribunal in interpreting Article 12, as follows:

“an extremely serious threat to [the state’s] existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace”.<sup>201</sup>

212. Nothing of that sort can be drawn from India’s “vague assertion that military needs ‘crystalized’ in December 2009”, a fact that is in any event unsupported by evidence. Nor do the “references to amorphous other ‘strategic’ and ‘societal’

<sup>199</sup> Reply, para. 303.d.

<sup>200</sup> *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **Exh. RLA-031**, para. 180.

<sup>201</sup> *LG&E Energy Corp and others v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **Exh. CLA-040**, para. 257.

needs” offer any help. Alleged needs such as “train-tracking” and “public utility services” do not come close to “essential security interests”.<sup>202</sup>

213. Furthermore, the Government “repeatedly acted contrary to MOD’s claims for spectrum, most notably approving GSAT-6A for commercial use just six weeks before the military needs supposedly ‘crystallised’”. Similarly, the Government allowed Government-owned terrestrial operators to continue to use 40 MHz of other S-band spectrum for commercial use. Moreover, India made no use of the Devas Spectrum for five years since the Space Commission’s decision to annul the Agreement. For the Claimant, these facts demonstrate that India itself neglected its now-alleged essential security interests.
214. In conclusion, according to DT, India “failed to plead, let alone prove, that there was any ‘situation of emergency’ or any threat at all to India’s essential security interests at the time the Government annulled the Agreement”.<sup>203</sup>

**d. No necessity and proportionality**

215. In this context, the Claimant first asserts that the annulment of the Agreement was not necessary to protect India’s essential security interests, nor was it proportionate to that objective. It relies on the dictionary definition of the word “necessary” pursuant to which such word denotes something that is “indispensable, vital, essential” or “required” or “imperative”.<sup>204</sup> Along the same lines, the *LG&E* tribunal understood the word “necessary” to refer to “situations in which a State has no choice but to act”.<sup>205</sup>
216. The Claimant also looks to the object and purpose of the BIT, which is to create conditions favorable for providing and protecting investments, and stimulating private business initiative. Accordingly, the Claimant argues that the requirement that the measure be necessary implies that no less restrictive measure be available.

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<sup>202</sup> Reply, para. 312.

<sup>203</sup> Reply, para. 314.

<sup>204</sup> Oxford English Dictionary definition of “necessary”, meanings (a) and (d), **Exh. CLA-128**.

<sup>205</sup> *LG&E Energy Corp and others v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **Exh. CLA-040**, para. 239.

217. The Claimant further resorts to the customary international law rule of necessity to provide guidance for the interpretation of Article 12 of the BIT. In particular, the Commentary to the ILC Articles states that the plea of necessity “is excluded if there are other (otherwise lawful) means available even if they may be more costly or less convenient”.<sup>206</sup>
218. In addition, the Claimant submits that India has failed to satisfy the requirements of necessity and proportionality. First, India’s measures did not contribute to protecting its essential security interests. The situation here is different from the one in the Argentine cases. Indeed, had Argentina not taken the contested measures, there was a threat of a widespread collapse of the Argentine economy. Here, by contrast, had India refrained from annulling the Agreement, no such consequence would have ensued. This is evidenced by the fact that India made no use of the spectrum, in the five years following the annulment of the Agreement.<sup>207</sup>
219. Second, so argues DT, India has failed to show that no less restrictive measures existed. The Claimant mainly refers to the following alternative measures:
- The Government could have used other S-band spectrum, namely the 40 MHz allocated to the DOT;
  - Devas could have provided services to the MOD through the Devas System;
  - The Government could have renegotiated the Agreement and taken back some but not all the spectrum from Devas;
  - The Government could have used other spectrums, such as C-band, Ku-band, L-band, X-band or Ka-band;
  - The frequency re-use technology could have allowed the Government to multiply the capacity which it already had in order to satisfy the military demand.<sup>208</sup>

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<sup>206</sup> International Law Commission, “Draft articles on Responsibility of states for internationally wrongful acts, with commentaries” [2001-II(2)], Yearbook of the International Law Commission 1, **Exh. CLA-126**, p. 83, article 25(15).

<sup>207</sup> Reply, para. 324.

<sup>208</sup> Reply, para. 83.

220. It is thus the Claimant's submission that India has not established that the annulment of the Agreement was necessary and proportionate to any essential security interests.

**e. India's contribution to the alleged spectrum scarcity**

221. The Claimant submits that India may not invoke Article 12 of the BIT, since it is responsible for the spectrum scarcity on which it now relies as an excuse. In support, DT relies on arbitral awards holding that a State may not benefit from an essential security interests clause if it contributed to the creation of the situation, to which it claims to be responding.<sup>209</sup>

222. According to the Claimant, the Respondent was entirely responsible for the alleged spectrum scarcity since instead of reserving the spectrum for military use in 2005, it allocated (i) 70 MHz of S-band for commercial use to DOS, which was subsequently leased to Devas and (ii) 40 MHz of S-band to Government-owned operators for commercial use.<sup>210</sup>

**f. Duty to compensate irrespective of Article 12**

223. The Claimant also submits that Article 12 of the BIT does not exclude the state's duty to compensate investors for the harm caused. It claims that such interpretation is warranted by the context of the Treaty. Article 6 in particular mandates compensation for "losses owing to war or other armed conflict, a state of national emergency or civil disturbances". Under the BIT, "liability and

<sup>209</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exh. CLA-025**, paras. 613-626: "As any other provision of the BIT, Article XI is interpreted on the basis of the Vienna Convention on the Law of Treaties. Further, as also recognized in *Continental*, concepts used in Article 25 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts "assist in the interpretation of Article XI itself". When interpreted in light of the above principles, the requirement under Article XI that the measures must be "necessary" presupposes that the State has not contributed, by acts or omissions, to creating the situation which it relies on when claiming the lawfulness of its measures"; *LG&E Energy Corp and others v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **Exh. CLA-040**, para. 256; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **Exh. RLA-031**, para. 234; *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award, 3 November 2008, **Exh. RLA-107**, paras. 260-263.

<sup>210</sup> Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**, pp. 92, 97.

compensation are expressly mandated, not excused”.<sup>211</sup> In this regard, the Claimant also invokes Article 5(1) of the BIT which requires compensation for expropriation irrespective of a public purpose.

224. For DT, the customary international law defense of necessity offers further guidance in this regard. Especially, “a successful plea of [...] necessity is ‘without prejudice’ to ‘the question of compensation for any material loss caused by the act in question’”.<sup>212</sup> Thus, even if successful, India’s argument based on Article 12 of the BIT does not excuse it from the obligation to compensate the Claimant.

### 3. Analysis

#### a. *Introductory remarks*

225. Article 12 of the BIT reads as follows:

“Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests”.

226. According to Article 31 of the VCLT, a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The starting point of the interpretation is the “ordinary meaning” of the text. The latter must be ascertained in the light of the context and the treaty’s object and purpose, any subsequent agreement or practice of the Contracting Parties related to the interpretation of the treaty, and any other relevant rules of international law applicable in the relations between the Contracting Parties.

227. Article 12 entitles a Contracting Party to take measures “to the extent necessary” for the protection of its essential security interests without incurring responsibility under the substantive provisions of the BIT otherwise providing protection to investors. As held by the *ad hoc* committee in *CMS v. Argentina* in relation to the

<sup>211</sup> *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, **Exh. CLA-013**, para. 382.

<sup>212</sup> Reply, para. 338; UNGA Resolution No 56/83 “Responsibility of States for internationally wrongful acts”, 28 January 2002, **Exh. CLA-086**, Article 27; *Nagymaros Project (Hungary/Slovakia)*, [1997], ICJ Reports, **Exh. CLA-104**, para. 48; *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, **Exh. CLA-101**, paras. 1177-1178.

similarly worded Article XI of the U.S.-Argentina BIT,<sup>213</sup> “if [the essential security interests clause] applies, the substantive obligations under the Treaty do not apply”.<sup>214</sup>

228. As a preliminary point, Article 12 must be distinguished from the customary international law defense of state of necessity, which is codified in Article 25 of the ILC Articles. As explained by the *CMS ad hoc* committee, the essential security interest clause and the state of necessity defense are “substantively different”; they are subject to different requirements and have “a different operation and content”.<sup>215</sup> Thus, as further remarked by the *ad hoc* committee in *Sempra v. Argentina*, “Article 25 cannot [...] be assumed to ‘define necessity and the conditions for its operation’ for the purpose of interpreting Article XI” of the U.S.-Argentina BIT.<sup>216</sup>
229. This is also true of Article 12 of the Germany-India BIT, which must be interpreted on its own terms, without incorporating requirements from the customary international law state of necessity defense which are not present in the text of the Treaty. Thus, contrary to the Claimant’s view, the Tribunal does not consider that Article 12 is limited to situations of “emergency”, or that the state must prove that a measure is the “only one” available, or that it must not have contributed to

<sup>213</sup> Article XI of the U.S.-Argentina BIT reads as follows: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests”.

<sup>214</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **Exh. RLA-004**, para. 129. See also, in similar terms *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Annulment Proceeding), Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, **Exh. RLA-005**, para. 187 (“the terms of the treaty itself exclude the protection to the investor that the treaty would otherwise have provided”) and *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **Exh. RLA-031**, para. 164 (“the consequence would be that, under Art. XI, such measures would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision”).

<sup>215</sup> See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **Exh. RLA-004**, paras. 129-131.

<sup>216</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Annulment Proceeding), Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, **Exh. RLA-005**, para. 200.

the situation of necessity at issue.<sup>217</sup> In other words, the requirements under Article 25 of the ILC Articles are stricter than those under Article 12 of the BIT. As noted by one commentator, the possibility exists “that a state could meet the requirements of a treaty exception clause and therefore be exempt from liability under an investment treaty without satisfying the state of emergency requirements envisioned by Article 25”.<sup>218</sup>

**b. The requirements under Article 12 of the BIT**

230. The Tribunal now turns to the requirements that must be fulfilled for an essential security interest defense to succeed. Article 12 (quoted in full *supra* at para. 225) provides for the following conditions:

- (i) a Contracting Party must apply a “prohibition[] or restriction[]”;
- (ii) for the protection of a state’s “essential security interests”;
- (iii) “to the extent necessary for” such protection.

231. Before examining whether India meets these conditions, the Tribunal addresses the threshold question whether Article 12 is self-judging or not. India does not argue that Article 12 is a self-judging clause, and rightly so. Clear indications in the text of the treaty would be required in order to infer that a provision is self-judging. Such indications are absent from Article 12.<sup>219</sup> As the ICJ stated in relation to a similarly worded exception clause, “by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a

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<sup>217</sup> Cf. Article 25 ILC Articles (act must be “the only way for the State to safeguard an essential interest against a grave and imminent peril” and necessity may not be invoked if “the State has contributed to the situation of necessity”). See also Jeswald W. Salacuse, *The Law Of Investment Treaties* (Oxford University Press 2010), **Exh. RLA-132**, pp. 384-385 (“normal principles of treaty interpretation require that the exception clause be read on its own terms and that the state of necessity defense not be unjustifiably incorporated into the treaty”) and Peter Tomka, *Defenses Based on Necessity under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties*, in *Building International Investment Law: The First 50 Years of ICSID 477* (M. Kinnear et al. eds., ICSID 2016) **Exh. RLA-167**, p. 493 (“nowhere does a clause such as Article XI provide that such a measure must be the only one available, nor that a State should not have contributed to the occurrence of the emergency”).

<sup>218</sup> Jeswald W. Salacuse, *The Law Of Investment Treaties* (Oxford University Press 2010), **Exh. RLA-132**, p. 385.

<sup>219</sup> See e.g. GATT, Article XXI (providing that “[n]othing in this Agreement shall be construed [...] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”, emphasis added).

party is not [...] purely a question for the subjective judgment of the party; the text does not refer to what the party 'considers necessary' for that purpose".<sup>220</sup> The interpretation given by investment tribunals to Article XI of the U.S.-Argentina BIT is to the same effect.<sup>221</sup>

232. With this in mind, the Tribunal will examine whether India's act, i.e. the CCS decision of 17 February 2011, qualifies as a "prohibition or restriction" which was "necessary" to protect India's "essential security interests".
233. Starting from the first requirement ("prohibition" or "restriction"), the Tribunal is of the view that nothing in the text of Article 12 requires a prohibition or restriction to be general in nature, namely to affect a large number of persons or entities. As a result, it has no difficulty to consider that the disputed measure was a prohibition and restriction in the sense that the CCS decision held that "the Government will not be able to provide orbit slot in S band to Antrix for commercial use" and consequently determined that the Devas Agreement needed to be annulled. India's measure thus fulfils this first requirement.
234. The assessment of the two other requirements ("essential security interests" and "necessary") is more complex. In this respect, India argues that its determinations in matters of national security are owed "substantial deference" and that "international tribunals should not second-guess national security determinations made by national authorities, as the latter are uniquely positioned to determine *what constitutes a State's essential security interests in any particular circumstance and what measures should be adopted to safeguard those interests*".<sup>222</sup>
235. In respect of the existence of essential security interests, the Tribunal accepts that a degree of deference is owed to a state's assessment. However, such

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<sup>220</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Judgment on Merits, 27 June 1986, in I.C.J. REPORTS 14 (1986) **Exh. RLA-157**, para. 282. See also *ibid.*, para. 222 (where the Court compared the exception clause contained in the treaty applicable in that case with GATT Article XXI (referred to in fn. 219 *supra*) and noted that the applicable treaty "speaks simply of 'necessary' measures, not of those considered by a party to be such").

<sup>221</sup> Amongst many, see *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **Exh. RLA-031**, paras. 187-188. See also Mauritius BIT Award, para. 219.

<sup>222</sup> Counter-Memorial, paras. 50, 56 (emphasis added).

deference cannot be unlimited. In support of its argument, India cites to an ECtHR decision in which the Court, in India's words, "refused to accept the State's contention that drug trafficking was a matter of national security, even though the latter term does have a broad scope".<sup>223</sup> In reality, the ECtHR held that the notion of national security cannot be stretched "beyond its natural meaning":

"the notion of 'national security' [...] may, indeed, be a very wide one, with a large margin of appreciation left to the executive to determine what is in the interests of that security. However, *that does not mean that its limits may be stretched beyond its natural meaning* [...]. It can hardly be said, *on any reasonable definition of the term*, that the acts alleged against the first applicant – as grave as they may be, regard being had to the devastating effects drugs have on people's lives – were capable of impinging on the national security of Bulgaria or could serve as a sound factual basis for the conclusion that, if not expelled, he would present a national security risk in the future".<sup>224</sup>

236. To paraphrase the ECtHR judgment, the limits of essential security interests contemplated in Article 12 cannot be stretched beyond their natural meaning. For the Tribunal, the natural meaning of the treaty terms requires the presence of interests concerned with *security* (as opposed to other public or societal interests) that are "*essential*", i.e. that go to the core (the "essence") of state security. In that sense, one may distinguish the "essential security interests" required for a successful invocation of Article 12 from the requirement that an expropriation be carried out in the public interest pursuant to Article 5(1) of the Treaty. Since Article 12 excludes all the obligations of the Treaty, including the obligation to provide compensation for a lawful taking under Article 5, it must protect something of higher value than any "public interest".
237. As a third condition, Article 12 requires that the prohibition or restriction be imposed only "to the extent necessary for" the protection of such essential security interests. In this respect, India suggests that national authorities are "uniquely positioned to determine" (and the Tribunal may not "second-guess") "*what measures should be adopted to safeguard those interests*".<sup>225</sup> The Respondent adds that while "it is [not] impossible to imagine a case of improper

<sup>223</sup> Rejoinder, para. 124, fn. 305.

<sup>224</sup> *C.G. and Others v. Bulgaria*, *European Court of Human Rights*, Application No. 1365/07, Final Judgment, 24 July 2008, **Exh. RLA-131**, para. 43 (emphasis added), cited in Rejoinder, para. 124, fn. 305.

<sup>225</sup> Counter-Memorial, para. 56 (emphasis added).

assertion of an 'essential security interests' defence, [...] where the decision on its face is *obviously related to* issues of defence and national security, the 'essential security interests' provision clearly applies".<sup>226</sup>

238. For Article 12 to come into play, a prohibition or restriction must not simply be "related to" essential security interests, but indeed must be "necessary for the protection" of such interests. Whether a measure is "necessary" or imposed "to the extent necessary" under Article 12 is subject to review by the Tribunal, as the clause is not self-judging (see *supra* para. 231). In that review, the Tribunal will undoubtedly recognize a margin of deference to the host state's determination of necessity, given the state's proximity to the situation, expertise and competence. Thus, the Tribunal would not review *de novo* the state's determination nor adopt a standard of necessity requiring the state to prove that the measure was the "only way" to achieve the stated purpose. On the other hand, the deference owed to the state cannot be unlimited, as otherwise unreasonable invocations of Article 12 would render the substantive protections contained in the Treaty wholly nugatory.

239. To assess the necessity of the measures to safeguard the state's essential security interests, the Tribunal will thus determine whether the measure was principally targeted to protect the essential security interests at stake and was objectively required in order to achieve that protection, taking into account whether the state had reasonable alternatives, less in conflict or more compliant with its international obligations.

**c. Was the CCS decision necessary for the protection of India's essential security interests?**

240. With those principles in mind, the Tribunal will now review the evidence to determine whether the CCS decision to annul the Devas Agreement, was "necessary for the protection of [India's] essential security interests". In performing this review, the Tribunal cannot analyze the CCS decision in isolation; it must assess the decision taking account of its background and must also consider subsequent facts to the extent they may shed light on the purported necessity of the measure for the protection of India's essential security interests.

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<sup>226</sup> Counter-Memorial, para. 59 (emphasis added).

241. At the outset of its review of the evidence, the Tribunal observes that it did not have the benefit of the testimony of those senior officials directly involved in the process leading to the CCS decision, in particular Dr. Radhakrishnan, who was since 2009 Chairman of the Space Commission, Chairman of ISRO, Secretary of the DOS and, until July 2011, Chairman of Antrix;<sup>227</sup> or Mr. Balachandran, Additional Secretary of the DOS in the relevant period; or Ms. Geeta Varadhan, who appears to have liaised closely with the military in respect of the alleged military needs. Neither did the Tribunal hear any testimony from officials of the MOD. The witnesses whom India did put forward, Messrs. Sethuraman, Anand and Hegde, while helpful in some respects, had either no personal knowledge or only peripheral knowledge of many of the relevant events.<sup>228</sup> The Tribunal's analysis is thus necessarily centered on the documentary evidence, which is examined in some detail in the following paragraphs so as to put the CCS decision in its proper context.
242. It is convenient to start with an examination of the military needs that allegedly prompted the decision to annul the Devas Agreement. The Respondent is of course correct that, during the years 2005-2009, military demands repeatedly surfaced as to the S-band spectrum. The following facts are particularly important in this respect:
- a. In 2005-2006, the IDS urged that the DOT block bandwidth in S-band.<sup>229</sup>

<sup>227</sup> In respect of Dr. Radhakrishnan, it was suggested by India's witnesses at the Hearing that he was a "terribly busy person" (Anand, Transcript, Day 4, p. 20, line 16 – p.21, line 8) and "too senior [in] stature to travel for a long time outside" of India, despite being now retired (Transcript Day 5, p.7, line, 11 - 18).

<sup>228</sup> See Sethuraman (Transcript, Day 3, p. 56, line 19 – p. 64, line 11); Anand (Transcript, Day 4, p. 9, line 13 – p. 20, line 13) and Hegde (Transcript, Day 5, p. 3, line 25 – p. 10, line 7). Mr. Anand was not involved in discussions with the military until 2014 (Transcript, p.4, line 11 / p.19, line 22).

<sup>229</sup> See Anand WS, Annex 1, **App. VA-2**, HQ Integrated Defence Staff, Note, 14 October 2005, Appendix H (stating that the projected bandwidth requirements of the Army, Navy and Air Force in S-band were for 86 MHz by 2010, 151 MHz by 2015 and 208 MHz by 2020); Anand WS, Annex 1, **App. VA-4**, HQ Integrated Defence Staff Ops Branch/IW & IT Dte, Note, Requirements – Satellite Commn, 9 August 2006. See also Anand WS Annex 1, **App. VA-3**, Minutes of Third Task Force Meeting with DOS held on 21 February 2006 at HQ IDS New Delhi, 6 March 2006, para. 14, stating that "Services especially Army has an ambitious plan 'for phased development of MSS. Consequent of this there is inescapable necessity for continue of S-band [sic]. The total [bandwidth] contemplated for S-band would be 86 MHz – 151 MHz – 208 MHz for short, medium & long term respectively (extract from DSV-2020)".

- b. In 2007, the "Expert Committee on Spectrum and Satellite Uses of Frequency Band 2.5 to 2.69 GHz (S-band) by Defence Services" stated that "[i]f this spectrum (2.5 – 2.69 GHz) is lost to commercial operators, it would severely jeopardize the future Defence services plans of providing mobile SATCOM connectivity"; it thus "strongly recommended that the 'S' band Spectrum be safeguarded from being poached by the commercial operators for meeting the future requirements of the Defence Services", and concluded that "non availability of the Spectrum could stymie the future operational plans of the Defence services".<sup>230</sup>
- c. In 2008, the military and ISRO then met for the purpose of determining how "the scarce 'S' band spectrum should be optimally utilized", with ISRO requesting "HQ IDS to interact with respective service HQs and forward a consolidated proposal regarding the same".<sup>231</sup>
243. In response to ISRO's request to forward a "consolidated proposal" regarding the optimal utilization of the "scarce" S-band spectrum, the military presented its formulation of requirements for S-band at a meeting held on 15 December 2009 between the Integrated Space Cell of the IDS and ISRO.<sup>232</sup> It is worth looking more closely at the unredacted version of the minutes of this meeting at which, so the Respondent contends, India's military needs "crystallized".<sup>233</sup> The relevant passage of the minutes reads as follows:
- "7. 'S' Band.
- (a) Requirement. The requirement of the 'S' Band is as follows:-
- (i) To cater for requirements up to 2012 - 120 Carrier, 17.5 MHz. Out of which 50 Carriers are being used by the Armed Forces.

<sup>230</sup> Anand WS, Annex 1, **App. VA-7**, Report of the Expert Committee on Spectrum and Satellite Uses of Frequency Band 2.5 to 2.69 GHz (S-band) by Defence Services, September 2007, paras. 11-12. See also Anand WS, Annex 1, **App. VA-5**, Minutes of the Integrated Space Cell Meeting held on 19 February 2007 at HQ IDS, 26 March 2007 ("[I]t is evident that the present series of INSAT and GSAT cannot meet Army's [futuristic] requirements of bandwidth").

<sup>231</sup> Anand WS, Annex 1, **App. VA-8**, Minutes of the Special ISC Meeting between Reps of ISRO & Reps of Three Services to Address Satellite Based Communication Related Issues, 25 November 2008, para. 4.

<sup>232</sup> Minutes of meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO (redactions further removed), 25 January 2010, **Exh. C-252**.

<sup>233</sup> Counter-Memorial, para. 6 citing Anand WS, Annex 1, **App. VA-10**, Minutes of Meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO, 25 January 2010.

(ii) Additional in 12th Plan — 40 MHz.

(iii) Additional in 13th Plan —50 MHz.

(b) ISRO expressed their inability to provide any other carriers other than the existing 50 Carriers in 'S' Band. When clarified by DACIDS [Deputy Assistant Chief of Integrated Defence Staff], ISC [Integrated Space Cell], ISRO affirmed that the Armed Forces were free to explore other avenues to make good the shortfall. DACIDS, ISC directed Army to explore new avenues.

(c) ISRO also brought out that the existing BW is not being exploited fully. This was objected to by the Army representatives. Though Armed Forces hire additional BW to cater for operational requirements, in this case it was not so and unlike in the past, today available spectrum is being exploited. It was further brought out that problems were being faced by the user while using the brief case terminals. Army has been interacting with BEL and DEAL to identify the problems. A representative was required from ISRO also to analyse the problems. This was agreed to by ISRO.

(d) In addition, Sci Secy ISRO, brought that the technology being used currently is of older generation and newer methods have to be tried out. The country has been allotted only 20 MHz for BSS and 15 MHz for MSS in S band for the country and our solutions have to be fit in it. He also detailed various options available in 'S' Band to overcome this limitation. He said that star topology in multiple beam configuration with a master hub and a DR hub is one of the most viable solution to meet the requirements. On query by Col P Dikshit, Dir DSA, it was clarified that ISRO will give out the exact number of simultaneous connections possible in that architecture.

(e) DACIDS, ISC brought out that, in view of Sci Secy, ISRO, statement, pending launch of GSAT 7S, the services have to best utilise available 'S' Band spectrum. Further, he directed that deeper analysis be carried out by the army in consultation with ISRO and BEL and all necessary modifications are to be included in the GSAT 7 S program without further delaying the project". (emphasis added)

244. It appears from these minutes that, in response to ISRO's indication that spectrum was limited, the IDS agreed "to explore new avenues",<sup>234</sup> accepted that the IDS needed "to best utilise available S-band spectrum" and directed that "deeper analysis be carried out by the army" once informed of the possibilities of frequency re-use.<sup>235</sup> There is no suggestion in these minutes that military needs were irreconcilable with the Devas Agreement. Moreover, the IDS position appears to be that its existing demands may be satisfied by exploring future avenues, and that its future requirements will be satisfied by GSAT-7S (as modified following "deeper analysis" into frequency re-use). The Tribunal notes

<sup>234</sup> Minutes of meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO (redactions further removed), 25 January 2010, **Exh. C-252**, para. 7(b).

<sup>235</sup> *Id.*, para. 7(e).

that none of the attendees of this meeting – which included ten persons from ISRO – was presented to testify.

245. The Tribunal further observes that no evidence was presented about the results of the exploration of “other avenues” and the “deeper analysis” of the modifications to GSAT-7S decided at the meeting just discussed. Nor is there any evidence that the result of the military’s “deeper analysis” was considered in the decision to annul the Devas Agreement. There is thus no proof that the military concluded that a solution to its needs could not be found, e.g. by frequency re-use, and that its needs could not be met by the remaining S-band and the planned dedicated military satellite, GSAT-7S.
246. In addition to the military needs just addressed, the records show that a host of other factors played a determinant role in the events leading to the CCS decision. The following paragraphs recount the emergence of such other factors as they surfaced in the most important documents in the record.
247. Around the same time as the 15 December meeting, on 8 December 2009, Dr. Radhakrishnan, who had assumed his responsibilities as DOS Secretary, Chairman of ISRO, Chair of the Space Commission and Chairman of Antrix two months earlier, constituted the Suresh Committee to review “the legal, commercial, procedural and technical aspects” of the Devas Agreement.<sup>236</sup> On 7 June 2010, Dr. Suresh transmitted his report, dated May 2010, to Dr. Radhakrishnan. The 17-page report concludes with a set of recommendations, which in relevant part read as follows:

“15. Recommendations

Overall review of GSAT-6, which is a state of the art satellite, in conjunction with the ground segment which is in the process of development by the service provider reveals a significant step for bringing a new satellite based service to India. This review also brings out that there is scope to reexamine some of the aspects which have been highlighted under specific review observations in the earlier section (14) and accordingly the following specific recommendations have been made for consideration.

(i) The utilization of the S-band frequency spectrum allotted for satellite based services to ISRO/DOS for satellite communications is extremely important. Therefore this aspect has to be critically examined considering all usages including GSAT-6 and GSAT-6A by a competent technical team on high

<sup>236</sup> Suresh Report (unredacted - also exhibited in redacted form at **Exh. C-023**), **Exh. C-130**, p. 3 and Enclosure 1.

priority. The strategic and other essential needs of the country should also be considered.

[...]

(iii) Considering the fact ISRO/DOS has developed GSAT 6 Satellite with complex technologies to start a new service in the national interest it is important that the agreement includes appropriate clauses to give explicit preference to ISRO in case of a demand for use of this service under emergent conditions for strategic or any other essential applications. As of today 47 months have elapsed from the payment date of first installment i.e. June 2006. As per the agreement delay of 12 months in delivery attracts a penalty of US\$ 5 million this clause looks severe considering the fact that the satellite demands development of a few complex technologies for the first time. In view of these factors, the agreement needs to be re-visited taking into account all issues like ICC [Indian Satellite or INSAT Coordination Committee] guidelines, importance of preserving the spectrum for essential national needs, international standards, and also due weightage for the upfront payment made by Devas.<sup>237</sup> (emphasis added)

248. The Suresh report thus noted the “extremely important” use of the S-band, as well as the “strategic and other essential needs of the country”. The report further pointed to the need to include in the contract a clause to give explicit preference to ISRO in case of a demand for use “under emergent conditions for strategic or any other essential applications”, as well as the “severe” penalty clause included in the contract for delays in the delivery of the satellites. Because of these latter factors, the report concluded that the Devas Agreement needed to be “revisited” taking into account, among other aspects, the “importance of preserving the spectrum for essential national needs”.
249. Meanwhile, the existence of the Devas Agreement had also attracted attention from the press. On 31 May and 1 June 2010, two articles appeared in the *Hindu Business Line*, entitled “Devas gets preferential allocation of ISRO’s spectrum” and “Another spectrum sold on the quiet”.<sup>238</sup> One article suggested that “the 2005 agreement should be annulled and the ISRO quota should be auctioned so that the Government can raise some more much-needed money”.<sup>239</sup> One should recall that such criticism was raised in the context of the 2G Scandal which later culminated in the arrest of several former DOT officials, including the Minister of Telecommunications.

<sup>237</sup> Suresh Report, **Exh. C-130**, p. 16.

<sup>238</sup> “Devas gets preferential allocation of ISRO’s spectrum” and “Another spectrum sold on the quiet”, *The Hindu Business Line*, 31 May and 1 June 2010, **Exh. C-024**.

<sup>239</sup> *Id.*

250. The news reports on Devas appeared to be taken seriously by a number of senior officers within the Government. On 4 June 2010, Dr. Chandra of the Ministry of Communications and Information Technology and the DOT wrote to Mr. Balachandran, the Additional Secretary of ISRO, enclosing copies of these news reports and requesting him "to kindly provide your comments on the news reports immediately". The letter specifically stated: "Kindly look into the matter personally".<sup>240</sup> Ten days later, on 14 June 2010, Mr. Thomas, Secretary of the Ministry of Telecommunications and the DOT, wrote to Mr. Radhakrishnan, referring to the earlier letter from his department and noting that ISRO's comments were still outstanding. The most recent letter re-attached copies of the news articles and concluded as follows: "In view of the above, you are requested to kindly look into the matter personally and expedite your comments".<sup>241</sup> On the same day, Mr. Balanchandran requested and obtained copies of the Devas Agreement.<sup>242</sup>
251. On 16 June 2010, Dr. Radhakrishnan sent two practically identical memoranda, one to the Secretary of the DOT<sup>243</sup> and the other to the Advisor to the Law Minister,<sup>244</sup> attaching copies of the Devas Agreement and raising, among other things, two issues:
- (i) With these two satellites blocking a significant portion of our S-band satellite spectrum, we do face crunch for accommodating our strategic needs that has emerged subsequently after signing of ANTRIX-Devas contract.
  - (ii) The satellite based Devas Multimedia services also call for terrestrial supplementation (enclosure-2) wherever there are high rising buildings (that means all major urban areas). Whether this would deny a level playing ground for other service providers using terrestrial spectrum."

<sup>240</sup> Letter from DOT (Dr. Chandra) to ISRO (Mr. Balachandhran) enclosing press articles, 4 June 2010, **Exh. C-135**.

<sup>241</sup> Letter of 14 June 2010 from DOT (Mr. Thomas) to DOS / ISRO (Secretary Radhakrishnan) enclosing press articles, **Exh. C-138**.

<sup>242</sup> Letter of 14 June 2010 from DOS (Mr. Balachandhran) to Antrix (Mr. Murthi), **Exh. C-139**.

<sup>243</sup> Memorandum from DOS to DOT, 16 June 2010, **Exh. C-140**.

<sup>244</sup> Memorandum from DOS (Secretary Radhakrishnan) to the Ministry of Law and Justice (Mr. TK Viswanathan), 16 June 2010, **Exh. C-141**.

252. The question that Dr. Radhakrishnan asked the DOT Secretary and the Advisor to the Law Minister was as follows:

"In the above context, we seek your legal opinion on whether ANTRIX-Devas contract need be annulled invoking any of the provisions of the contract in order to (i) to preserve the precious S band spectrum for the strategic requirements of the nation and, (ii) to ensure a level playing field for the other service providers using terrestrial spectrum."

253. On 18 June 2010, the Advisor to the Law Minister provided his reply.<sup>245</sup> Referring to a meeting held with Dr. Radhakrishnan, he stated:

"4. During the discussion, it was told to us that after the signing of aforesaid agreement, new strategic needs have been emerged which require accommodation in our S Band spectrum. Department have to provide sufficient space/accommodation in the satellite to meet the demand for strategic needs of BSF [Border Security Force], CISF [Central Industrial Security Force], RPF [Railway Police Force] and CRPF [Central Reserve Police Force]."

254. The Advisor then offered the following opinion:

"12. Therefore, the Central Government (Department of Space) in exercise of its sovereign power and function, if so desire and feel appropriate, may take a policy decision to the effect that due to the needs of strategic requirements, the Central Govt/ISRO would not be able to provide orbit slot in S band for operating PS1 to the ANTRIX for commercial activities. In that event, ANTRIX in terms of Article 7(c) read with Article 11, of the agreement may terminate the agreement and inform M/s DEVAS accordingly.

13. As far as the second issue relating to terrestrial supplementation and level playing field since the Department of Telecom is administratively concerned that Department may also be consulted."

255. With a view to the upcoming 117<sup>th</sup> meeting of the Space Commission of 2 July 2010, the Additional Secretary of the DOS, Mr. Balachandran, prepared a "Note to the Space Commission", dated 30 June 2010, which extensively set out the background of the facts until that time.<sup>246</sup> The purpose of the Note was set out as follows:

"[...] to (i) apprise Space Commission on certain concerns that have arisen over a contract signed between ANTRIX Corporation, a public sector unit and the commercial arm of DOS with M/s DEVAS Multimedia Pvt Limited on January 28, 2005 for lifetime lease of 90% capacity of S-band Transponders on two Satellites built by ISRO (GSAT-6 and 6A); (ii) to further apprise on the imperative demand for S-band transponders for strategic and societal applications that have emerged since signing of the above contract; (iii) to

<sup>245</sup> Memorandum from Ministry for Law and Justice (Mr. TK Viswanathan) to DOS (Secretary Radhakrishnan) 18 June 2010, **Exh. C-142**.

<sup>246</sup> Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**.

seek guidance on the prudent utilization of the S-band spectrum of 150 MHz allocated to ISRO; and (iv) further course of actions to be followed by the Department."<sup>247</sup>

256. The Note then set out the "Requirements of Strategic Users and Societal Services for S-Band Transponders" as follows:

"8.1. The GSAT-7 Satellite (for strategic user) being built by ISRO since 2006 and with launch targeted in mid-2010 has S-Band transponders for MSS applications with 15 MHz bandwidth each for up-linking and down-linking. Further, the Armed Forces have been discussing with ISRO on the imminent need to build Satellites with capacity in various frequency bands including significant component in S-band (GSAT-7S).

8.2 The Directorate of Integrated Space Cell, Ministry of Defence, during their meeting with ISRO in December 2009, has projected a need for 17.5 MHz in S-band for immediate use and addition of 40 MHz during 12th Plan period and a further addition of 50 MHz during the 13th Plan period. The demands received in this regard are at para 7 at page-3 of Annexure-III.

8.3 There are also demands for S-band transponders from Internal Security Agencies viz. BSF, CISF, CRPF, Coast Guard and Police, and further, there are requirements projected by Indian Railways for train-tracking.

8.4 From societal services point of view, currently the GSAT-2 (MSS) and INSAT-3C (BSS and MSS) have S-band Transponders. There are other national societal requirements for emergency communication, dissemination of disaster warnings, tele-education, tele-health and rural communication". (emphasis added)

257. The Note also referred to other concerns, such as the "existence on record of a few anomalies that suggest that full information has not been provided to Cabinet and Space Commission"<sup>248</sup> and the fact that "DEVAS, which has a large foreign equity, can assign or sell or sub-licence any and all of its rights under this agreement without any approvals from ANTRIX, the security implications that can arise as a consequence, would need serious consideration".<sup>249</sup>

258. In view of the preceding discussion, the Note essentially indicated three reasons for seeking legal advice from the Law Minister on how to annul the contract:

"Considering all these facts it was decided in the Department of Space that:

(i) in order to give priority to the demand for fulfillment of strategic requirements that have been received at DOS (Annexure-IV refers), which is in tune with DOS's stated policy as seen by DOS's correspondences with various fora of Govt. (Annexure-XI refers);

<sup>247</sup> Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**, para. 1.

<sup>248</sup> *Id.*, para. 13.2.

<sup>249</sup> *Id.*, para. 13.2.j.

(ii) due to the opaqueness being seen in the preliminary examination of the documents in hand (Annexures V-X refers) of Antrix-Devas contract which would suggest, inter-alia, that the non exclusiveness to be ensured while allotting S-Band to private players was not observed; and,

(iii) considering the fact that Dept of telecommunications had not been consulted over a service that includes terrestrial connectivity and the implications thereon including denial of a level playing field,

it was decided to request Ministry of Law and justice to give its opinion as to how to annul the contract." (emphasis added)

259. The Note concluded that it was "inevitable to annul" the Devas Agreement, and proposed the following "[f]urther courses of action and implications":

"15.1 Annulling the Contract: Considering the need (i) to preserve S-band spectrum for national requirements in strategic sector and for societal applications, (ii) certain concerns on technical, managerial, financial and contractual aspects of ANTRIX-DEVAS contract, and (iii) issues involved in DEVAS obtaining the Spectrum License for the proposed services, (para 13.2 j refers) it would be inevitable to annul the ANTRIX-DEVAS contract."

260. The Tribunal notes that the annulment of the Agreement, presented now as "inevitable", was justified by the DOS Additional Secretary on a host of very different reasons. The Note first refers to "strategic requirements", put alongside with the requirement for "societal applications". In that respect, the Note, in particular, speaks of "Indian Railways for train-tracking" and "national societal requirements for emergency communication, dissemination of disaster warnings, tele-education, tele-health and rural communication". In addition, the Note refers to other concerns, including the Agreement's alleged "opaqueness" and the possibility that Devas could assign its rights without Antrix's approval.

261. It bears noting further that, even when referring to the national security grounds (para. 8.2 of the Note quoted *supra*), the only document invoked to justify the annulment of the Agreement are the minutes of the 15 December 2009 meeting, discussed above, where the military needs allegedly "crystallized".<sup>250</sup> However, as observed earlier, that document establishes no incompatibility between those needs and the Devas Agreement, but rather envisages that "other avenues" could have been pursued. The Note does not explain whether the military had been

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<sup>250</sup> See Minutes of meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO (redactions further removed), 25 January 2010, **Exh. C-252**, discussed *supra*.

successful in seeking to meet spectrum limitations by the IDS decision "to explore new avenues".

262. On 2 July 2010, the Space Commission held its 117<sup>th</sup> meeting.<sup>251</sup> The minutes record as follows:

"117.6.3. [...] The Integrated Space Cell of IDS, Ministry of Defence have projected a need for 17.5 MHz in S band for meeting the immediate requirements of Armed Forces, another 40 MHz during the 12th plan period and an additional 50 MHz during the 13th plan period. Armed Forces have also projected the need to build S band satellite capacity through GSAT-7S, for national security related mobile communications. There are further demands for S band transponders from internal security agencies viz., BSF, CISF, CRPF, Coast Guard and Police for meeting their secured communication needs. Indian Railways have also projected S band requirements for traintracking.

117.6.4. Commission noted that, in view of these emerging requirements, there is an imminent need to preserve the S band spectrum for vital strategic and societal applications. Besides this, there were also certain concerns on the technical, commercial, managerial and financial aspects of the Antrix-Devas contract such as, severe penalty clauses for delayed delivery of the spacecraft and for performance failure/service interruptions, violation of the INSAT Coordination Committee's (ICC) guideline of 'non-exclusiveness' in leasing the capacity, the contract enabling Devas to sub-lease the capacity without any approvals- which could even give rise to security concerns, etc." (emphasis added)

263. Furthermore:

"117.6.6. [...] It was noted that Space spectrum is a vital national resource and it is of utmost importance to preserve it for emerging national applications for Strategic uses and societal applications. Given the limited availability of S band spectrum, meeting the strategic and societal needs is of higher priority than commercial /entertainment sectors." (emphasis added)

264. In light of these observations, the Space Commission gave the following directions:

"(a) Department, in view of priority to be given to nation's strategic requirements including societal ones may take actions necessary and instruct Antrix to annul the Antrix-Devas contract.

(b) Department may revive the ICC [Indian Satellite or INSAT Coordination Committee] mechanism.

(c) Department may evolve a revised utilization plan for GSAT-6 and GSAT-6A satellites, taking into account the strategic and societal imperatives of the country. [...]" (emphasis added)

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<sup>251</sup> Minutes of 117<sup>th</sup> Meeting of the Space Commission, 2 July 2010, **Exh. C-145**.

265. It is clear from a plain reading of these minutes that the military needs were only one of several reasons for the annulment of the Agreement – together with broader societal needs, such as train-tracking, and concerns about the contract terms. In fact, the lack of transparency and the contractual terms perceived as unduly favorable to Devas were not secondary concerns. This is evident from the note (marked “secret”) which Mr. Chandrasekhar, Cabinet Secretary, who had attended this Space Commission meeting, sent a few months later to the Prime Minister.<sup>252</sup> In his account on the annulment to the Prime Minister, Mr. Chandrasekhar reported that:

“[...] since the agreement has now had to be cancelled *on account of reasons related to non-transparency and one-sided skew in risk sharing arrangements*, ISRO / DoS are left with a satellite [...] which has no immediate commercial application.”<sup>253</sup>

266. A few days after the Space Commission meeting of 2 July 2010, Dr. Radhakrishnan wrote to the ASG, seeking legal advice. The DOS Secretary recalled that “[s]ubsequent to signing of [the Devas] agreement, the Government has received a lot of demands from various wings of the Government for allocation of S band spectrum to them to meet up the strategic and societal requirements of the nation”.<sup>254</sup> His request to the ASG read as follows:

“7. The Department of Space has been advised by the Space Commission to get vetted by the legal expert:

(i) the relevant resolution of the Space Commission in this regard;

(ii) the letter to be written by Dept of Space to Antrix intimating them that the required s-band spectrum would not be made available to them due to nation's requirements to utilise the same in strategic and societal areas; and

(iii) the letter from Antrix to Devas intimating them that Antrix is not able to get the relevant clearance from the Government for release of spectrum and hence the agreement is terminated.” (emphasis added)

<sup>252</sup> See Minutes of 117<sup>th</sup> Meeting of the Space Commission, 2 July 2010, **Exh. C-145**, p. 1.

<sup>253</sup> Note by Cabinet Secretary (Mr. Chandrasekhar) on the Charturvedi Report 12 April 2011, **Exh. C-191**.

<sup>254</sup> Letter of 8 July 2010 from DOS (Secretary Radhakrishnan) to the ASG (Mr. Parasaran) with enclosures, **Exh. C-146**, para. 2.

267. On 12 July 2010, the ASG provided his opinion.<sup>255</sup> He set out the issue before him in the following terms:

“The core issue which arises for consideration is as to whether there are justifiable or legal grounds existing for termination of Antrix-Devas contract.”

268. The ASG recalled the “tremendous demand for allocation of spectrum for national needs, including for the needs of the Defence, para-military forces, railways and other public utility services as well as for societal needs”. He excluded that the conditions stipulated in Article 7 (in particular 7(c) on Antrix’s right of “termination for convenience” “in the event Antrix is unable to obtain the necessary frequency and orbital slot coordination required”) could be invoked to terminate the Devas Agreement and rather advised to rely on the *force majeure* provision contained in Article 11:

“It is always advisable that in the present case, instead of the Department of Space taking a decision to terminate, it would be more prudent that a decision is taken by the Government of India, as a matter of policy, in exercise of its executive power or in other words, a policy decision having the seal and approval of the Cabinet and duly gazetted as per the Business Rules of the Government of India: That would give a greater legal sanctity to the decision to terminate the contract in as much as the contractual provisions expressly stipulate that for the force majeure event, to disable one of the parties to perform its obligations under the contract, the act must be an act by the governmental authority acting in its sovereign capacity. Several reasons exist to resort to this sovereign power for preserving national interest. In my view, instead of the Department of Space directing Antrix to terminate the contract, it will be advisable from a legal perspective that the direction comes from the Department of Space on the basis of a governmental policy decision, as indicated above. I have nothing further to add.” (emphasis added)

269. Several months then passed. On 16 February 2011, Dr. Radhakrishnan submitted a “Note to the Cabinet Committee on Security” (CCS), the purpose of which was “to seek approval of Cabinet Committee on Security for [a]nnulling” the Devas Agreement “in view of priority to be given to nation’s strategic requirements including societal ones”.<sup>256</sup> Although it is clear from the evidence reviewed above that there were several reasons for the annulment, in light of the ASG advice only the strategic and societal needs were put forward at this juncture to justify reliance on the agreement’s *force majeure* clause.

<sup>255</sup> Opinion of the ASG (Mr. Parasan), 12 July 2010, **Exh. C-147**.

<sup>256</sup> DOS Note to the CCS, Annuling the “Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft by Devas Multimedia Pvt Ltd.”, with attachments, 16 February 2011, **Exh. R-028**.

270. In addition to reviewing in detail the factual background until that date, including all of the developments described above, Dr. Radhakrishnan's note of 16 February 2011 reported certain "inter-Ministerial consultations", which reflected the views of various Ministries on the draft note to the CCS which had previously been circulated. For these purposes, the responses from the MOD and the Ministry of Telecommunications as well as the comments from the DOS appear relevant:

"44.2) Ministry of Defence: The Ministry has not raised any objection to the proposals contained in the draft Note.

The Ministry has indicated that there is a requirement of S Band capacity for strategic uses which is already addressed in this Note. It has also been stated that the Defence Services have extensive existing as well as planned usages in the S-Band. The barest minimum requirement of Services is projected as 120 MHz. Further, they have also suggested that any planned release of S Band capacity may be done in consultation with Ministry of Defence/Services. A copy of the communication received from the Ministry is placed at Annexure-8 (Page 128).

Comments of DOS: The comments/suggestions in respect of allocation of S Band capacity are noted and would be placed before the INSAT Coordination Committee and the Technical Advisory Group, which are empowered to take decisions in the matter.

44.3) Ministry of Telecommunications: The Ministry has not raised any objection to the proposals contained in the draft Note. However, they have made a number of suggestions in respect of the usage of the S Band and recommended that the present and future strategic requirements for national security related mobile communications and societal applications may be discussed in the meetings of the INSAT Co-ordination Committee (ICC) where representatives of Department of Space, Department of Telecommunications, Ministry of Information and Broadcasting, Ministry of Finance, Department of Science and Technology and even Ministry of Defence could be invited to attend. A copy of the communication received from the Ministry is placed at Annexure-9 (Page 129-131).

Comments of DOS: The comments/suggestions in respect of allocation of S Band capacity are noted and would be placed before the INSAT Coordination Committee and the Technical Advisory Group, which are empowered to take decisions in the matter." (emphasis added)

271. At the end of this note, Dr. Radhakrishnan set out the "approval sought" from the CCS in the following terms:

"45.1) Taking note of the fact that government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been a[n] increased demand for the allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provided orbit slot in S band to Antrix for commercial activities including for

those which are the subject matter of existing contractual obligations for S Band.

45.2) In the light of this policy not providing orbit slot in S Band to Antrix for commercial activities, the "Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd." entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith.

46) Further, Department of Space may take action to implement the decisions of the Space Commission referred to in paragraph 42 of the Note." (emphasis added)

272. Reflecting these terms, the CCS finally resolved to annul the Devas Agreement on 17 February 2011. It is important to set out the Press Information Bureau release in full:<sup>257</sup>

"CCS Decides to Annul Antrix-Devas Deal

Cabinet Committee on Security (CCS) has decided to annul the Antrix-Devas deal. Following is the statement made by the Law Minister, Shri M. Veerappa Moily on the decision taken by the CCS which met in New Delhi today:

Taking note of the fact that Government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix for commercial activities, including for those which are the subject matter of existing contractual obligations for S band.

In light of this policy of not providing orbit slot in S Band to Antrix for commercial activities, the "Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd." entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith." (emphasis added)

273. On its face, the CCS decision effected the removal of the S-band spectrum from Antrix for commercial use and, as a result of such removal, ordered that the Devas Agreement be annulled forthwith.<sup>258</sup> The reasons cited for such action

<sup>257</sup> Press Information Bureau, "CCS Decides to Annul Devas-Antrix Deal", 17 February 2011, **Exh. C-031**.

<sup>258</sup> In accordance with this decision, on 23 February 2011, DOS informed Antrix that the Government would not be able to provide orbit slot in S-band to Antrix for commercial activities including those which were the subject-matter of existing agreements. It thus directed Antrix that the Devas Agreement "shall be annulled forthwith". See Letter from B.S. Anantharamu, DOS, to Executive Director, M/s. Antrix Corporation Ltd., 23 February 2011, **Exh. R-032**. On 25 February 2011, Antrix terminated the Devas Agreement with immediate effect. See Letter from Antrix (Mr. Madhusudhan) to Devas, 25 February 2011, **Exh. C-032**.

were “national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs” as well as “the needs of the country's strategic requirements”. While taking back the S-band from Antrix-Devas, it is important to note that there is no indication that the CCS at the same time allocated the “precious S-Band” to the military or the MOD or otherwise earmarked that spectrum for security interests.

274. The fact that the S-band was not so assigned is confirmed by the subsequent discussions within the Government, which continued for a considerable amount of time. In particular, in the ensuing inter-ministerial debate, the DOS advocated for satellite, “strategic and societal” use, while the DOT pleaded for terrestrial, commercial use. In the context of the discussions in the Empowered Group of Ministers (EGOM), before which the issue was first brought,<sup>259</sup> the DOS stated that “Services in S band will be used by strategic and government services and the requirement is only for MSS [...]”.<sup>260</sup> The DOT understood this to mean that the DOS had “no plan for BSS applications” and accordingly requested vacation of the BSS S-band by the DOS to allow the spectrum to be used for (terrestrial, commercial) BWA.<sup>261</sup>
275. The matter was then submitted to a sub-committee of the INSAT Coordination Committee (ICC). The 10 July 2013 Report of the ICC Sub-Committee on S-band Utilization Plan is particularly illustrative of the impasse reached within the Government:

“Introduction

ICC-72 during its meeting held on July 27, 2012 constituted the ICC Sub-Committee to prepare S-band Utilization Plan (2500 MHz — 2690 MHz) with the members from Department of Space (DOS), Department of Telecommunications (DOT), Ministry of Defense (MOD) and Telecom Regulatory Authority of India (TRAI).

<sup>259</sup> See Sethuraman, Annex 2, paras. 4-11.

<sup>260</sup> Note for the Empowered Group of Ministers (EGoM) on vacation of spectrum (redacted), 1 March 2012, **Exh. C-244**, Annex 9, para. 3.b.i.

<sup>261</sup> Note for the Empowered Group of Ministers (EGoM) on vacation of spectrum (redacted), 1 March 2012, **Exh. C-244**, pp. 10/11 of 59 (“Recently DoS has proposed to utilize the frequency band 2555-2635 MHz for MSS instead of BSS [...] the frequency band 2555-2635 MHz may be considered for BWA if DoS has no plan to use this frequency band for BSS. A letter to this affect [sic] for vacation of this band has been written to DoS”; “Approval sought: [redacted] (d) DoS may make the frequency band 2535-2555 MHz be available for BWA services; (e) Vacation of part of the frequency band 2555-2635 MHz for BWA by DOS, if no plan for BSS applications in this band”).

The committee had three meetings (Nov 16, 2012, Jan 18, 2013 and March 08, 2013) to discuss and finalise the task assigned. Members participating in the meetings are attached in Annexure — 1.

## 2. Deliberations

Members of the committee deliberated current and future usage of Sband (2500 MHz — 2690 MHz) in the country. After the first meeting, attempts were made to prepare a draft report. However consensus could not be reached and members provided separate inputs to the Sub-Committee.

(a) DOS/ISRO (enclosed in Annexure — 2)

(b) WPC/DOT (enclosed in Annexure — 3)

(c) MOD (enclosed in Annexure — 4)

(d) TRAI (enclosed in Annexure — 5)

While DOS and MOD is in favor of using 80 MHz of S-BSS and 70 MHz of S-BSS for satellite based services, WPC/DOT and TRAI is not in agreement with the approach. The committee could not converge on the final recommendation with regard to the utilization plan and use of Sband by terrestrial and satellite services.

## 3. Conclusions

Opinion of each Department/Ministry is attached as an Annexure and is submitted for the consideration of ICC for further directives".<sup>262</sup> (emphasis added)

276. The report just quoted demonstrates the divergences on spectrum allocations and needs among ministries and departments that had continued for years after the CCS decision. The outcome of this debate is not entirely clear. It appears that, in a Cabinet decision of 21 January 2015, i.e. almost four years after the CCS decision which took back the S-band from Antrix-Devas, India finally allocated the MSS part of the spectrum to the MOD.<sup>263</sup> The only documentary evidence in the record is a half-page extract of a DOT document communicating a 21 January 2015 Cabinet decision. That DOT extract on the "Defence Band and Defence Interest Zone" identifies certain frequencies reserved for "Defence Services"<sup>264</sup> and contains the following chart:

<sup>262</sup> Anand WS, Annex 4, DOS, Report of INSAT Coordination Committee (ICC) Sub-Committee on S-band Utilization Plan, 10 July 2013 (Redacted).

<sup>263</sup> Memo from V.K. Pant, DOT, to Member (Finance), DOS, 1 April 2015, with enclosure, **Exh. R-043** (referring to a Cabinet meeting of 21 January 2015).

<sup>264</sup> Memo from V.K. Pant, DOT, to Member (Finance), DOS, 1 April 2015, with enclosure, **Exh. R-043** (referring to a Cabinet meeting of 21 January 2015).

**Defence Band: Identified frequency bands for Defence Services:**

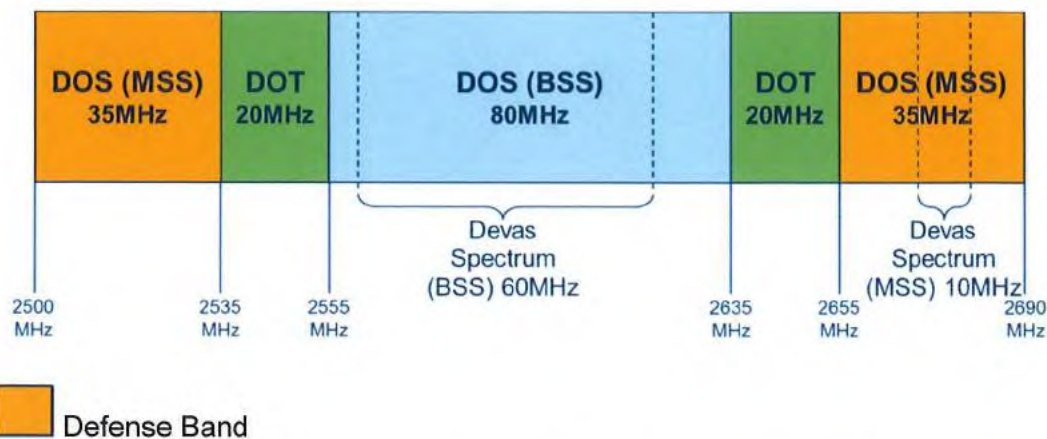
Frequency band	Remarks
2500-2535 MHz	The band segments (a) 2500 – 2535 MHz (35 MHz) (b) 2555-2635 MHz (80 MHz) and (c) 2655-2690 MHz (35 MHz) will be used for Defence, security and societal applications.
2655-2690 MHz	

277. This chart shows a discrepancy between the “Frequency band” and the “Remarks” columns. In the former, two frequency bands are identified, namely the 70 MHz (two times 35 MHz) of the MSS portion of the S-band (of which Devas was leasing 10 MHz). In the latter, in addition to those two, the BSS portion of 80 MHz (of which Devas was leasing 60 MHz) is also included, and is earmarked “for Defence, security *and societal* applications”.<sup>265</sup> It is thus unclear whether the BSS portion of the spectrum was finally allocated to the Defence band. In this connection, it is noteworthy that the military had focused on the MSS portion, not the BSS portion, which constituted the majority (60 out of 70 MHz) of the spectrum subject to the Devas Agreement.<sup>266</sup>
278. By contrast, the DOT extract establishes that the DOT was allowed to retain its portion of S-band, the two times 20 MHz in the frequency bands of 2535-2555 and 2635-2655 MHz. The following diagram, excerpted from the Claimant’s opening presentation,<sup>267</sup> depicts the allocation of S-band following the 2015 Cabinet decision, being noted that assignment of the 80 MHz DOS (BSS) to defense band is unclear due to the discrepancy in the chart as discussed above:

<sup>265</sup> Memo from V.K. Pant, DOT, to Member (Finance), DOS, 1 April 2015, with enclosure, **Exh. R-043** (referring to a Cabinet meeting of 21 January 2015) (emphasis added).

<sup>266</sup> See Anand WS, Annex 1, para. 4; **App. VA-2**, HQ Integrated Defence Staff, Note, 14 October 2005, p. 59; **App. VA-3**, Minutes of Third Task Force Meeting with DOS held on 21 February 2006 at HQ IDS New Delhi, 6 March 2006, para. 14 (refers to “an ambitious plan for phased development of MSS”; **App. VA-5**, Minutes of the Integrated Space Cell Meeting held on 19 February 2007 at HQ IDS, 26 March 2007, paras. 5, 8.

<sup>267</sup> See Claimant’s opening presentation, 6 April 2016, slide 73.



279. With regard to the 40 MHz of S-band which the DOT retained, the Tribunal notes that it was intended to be sold at forthcoming commercial auctions by the DOT, with a high reserve price set, as confirmed by the Telecom Regulatory Authority of India ("TRAI").<sup>268</sup> The planned auction by the DOT of its S-band for commercial use was completed in October 2016.<sup>269</sup>
280. Having set out the thrust of the evidence on record, the Tribunal reverts now to the question whether India has established that (i) "essential security interests" existed and that (ii) it was "necessary" to protect such interests by way of the impugned measure, i.e. the CCS decision.
281. On the first point, it is beyond doubt that the documents leading to the CCS decision evince in a constant fashion that a mix of reasons or objectives led to the annulment of the Devas Agreement. The mention of "strategic" and "societal" needs is recurrent in the vast majority of documents and these needs are almost invariably presented together.<sup>270</sup> The Tribunal would of course accept that the so-called strategic needs expressed by the Armed Forces meet the test for essential security interests. Likewise, it would accept the same qualification for the national

<sup>268</sup> See Extracts from TRAI Consultation Paper on Valuation and Reserve Price of Spectrum in 700, 800, 900, 1800, 2100, 2300 and 2500 MHz Bands, 26 November 2015, **Exh. C-259** (confirming that "only 40 MHz are available for commercial use in frequency slots of 2535-2555 MHz and 2635-2655 MHz" (para. 2.72). See also *ibid.*, paras. 1.19, 2.28.

<sup>269</sup> See Spectrum Auction, October 2016, **Exh. C-264**.

<sup>270</sup> See, e.g., Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**; Minutes of 117<sup>th</sup> Meeting of the Space Commission, 2 July 2010, **Exh. C-145**; Letter from DOS (Secretary Radhakrishnan) to the ASG (Mr. Parasaran) with enclosures, 8 July 2010, **Exh. C-146**; DOS, Note to the Cabinet Committee on Security, *Annulling the "Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft by Devas Multimedia Pvt Ltd."*, 16 February 2011, with attachments, **Exh. R-028**.

security interests expressed by the so-called “internal security agencies”, such as the Border Security Force, the Central Industrial Security Force or the Central Reserve Police Force.<sup>271</sup> By contrast, it cannot see how, on any reasonable reading of Article 12, other “societal needs”, such as train-tracking,<sup>272</sup> disaster management, tele-education, tele-health and rural communication,<sup>273</sup> appearing side by side with the strategic interests in numerous documents, could be included within the “essential security interests” without distorting the natural meaning of such term. These needs may constitute “public interests” that may become relevant for other Treaty provisions, such as Article 5. However, as already explained, to achieve the far-reaching consequences that a successful invocation of Article 12 entails, that of entirely dis-applying the Treaty, the existence of a much more restricted range of interests must be shown.

282. The “strategic and societal” interests, just discussed, were not, however, the only reasons that led India to revoke the S-band spectrum allocated to Antrix-Devas. The record demonstrates that a number of other factors played a crucial role in India’s decision:

- a. First, starting from 2009, there was a clear concern that Devas had acquired valuable spectrum for too low a price. At various junctures, the press focused on this concern in the belief that the Devas-Antrix deal could reveal a political scandal similar to the 2G Scandal.<sup>274</sup> The concerns voiced in the media were taken very seriously at least by certain arms of the Indian Government, in particular within the DOT.<sup>275</sup> Moreover, within the DOS there was a belief that Devas had acquired the spectrum in a non-

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<sup>271</sup> See, e.g., Memorandum from Ministry for Law and Justice (Mr. TK Viswanathan) to DOS (Secretary Radhakrishnan) 18 June 2010, **Exh. C-142**, para. 4; Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**, para. 8.3; Minutes of 117<sup>th</sup> Meeting of the Space Commission, 2 July 2010, **Exh. C-145**, para. 117.6.3.

<sup>272</sup> See Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**, para. 8.3.

<sup>273</sup> *Id.*, para. 8.4.

<sup>274</sup> See, e.g., “Devas gets preferential allocation of ISRO’s spectrum” and “Another spectrum sold on the quiet”, The Hindu Business Line, 31 May and 1 June 2010, **Exh. C-024**.

<sup>275</sup> See Letter of 4 June 2010 from DOT (Dr. Chandra) to ISRO (Mr. Balachandhran) enclosing press articles, **Exh. C-135**; Letter of 14 June 2010 from DOT (Mr. Thomas) to DOS / ISRO (Secretary Radhakrishnan) enclosing press articles, **Exh. C-138**.

transparent or opaque fashion<sup>276</sup> – “on the sly”, as India’s witness Mr. Anand testified.<sup>277</sup>

- b. Second, there were concerns about certain commercial terms of the Devas Agreement which were perceived as too onerous to the Indian party, in particular the penalties for delays in satellite deliveries.<sup>278</sup> The various reports also refer to the risk of new foreign investment into the asset, reflecting a concern that there was no control over a possible assignment of the Agreement.<sup>279</sup>
- c. Finally, there was a further worry that there was no “level playing field” so far as terrestrial operators were concerned, as clearly emerges from various letters of Dr. Radhakrishnan.<sup>280</sup>

283. It barely needs mentioning that none of the concerns just referred to, whether well-founded or not, may be considered matters of “essential security interests” within the meaning of Article 12 of the BIT.

284. By way of conclusion on the question of whether essential security interests existed based on India’s contemporaneous assertions during the process leading to the CCS decision, it is clear that there was a mix of reasons for the annulment of the Agreement and only some of those can, on an objective analysis, be said to relate to “essential security interests” within the meaning of Article 12 of the BIT. The question is thus whether the CCS decision was “necessary” to protect those interests, in the sense that it was principally targeted to safeguard “to the extent necessary” the defense and other strategic needs that fall within the purview of “essential security interests”.

285. On this second point, the Tribunal finds that India has failed to establish that the CCS decision was necessary to protect those essential security interests. This

<sup>276</sup> See, e.g., Note from DOS to Space Commission, 30 June 2010, **Exh. C-144** (“due to the opaqueness being seen in the preliminary examination of the documents in hand [...] of Antrix-Devas contract”); Note by Cabinet Secretary (Mr. Chandrasekhar) on the Charturvedi Report 12 April 2011, **Exh. C-191** (“the agreement has now had to be cancelled on account of reasons related to non-transparency”).

<sup>277</sup> Transcript, Day 4, p.256, line17.

<sup>278</sup> See, e.g., Suresh Report, **Exh. C-130**, para. 15(iii); Minutes of 117<sup>th</sup> Meeting of the Space Commission, 2 July 2010, **Exh. C-145**.

<sup>279</sup> See, e.g., Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**, para. 13.2.j.

<sup>280</sup> See Memorandum from DOS to DOT, 16 June 2010, **Exh. C-140**; Memorandum from DOS (Secretary Radhakrishnan) to the Ministry of Law and Justice (Mr. TK Viswanathan), 16 June 2010, **Exh. C-141**.

ensues mainly from the import and intended effect of the CCS decision, as well as from subsequent events.

286. Starting from the CCS decision, it is clear from a simple reading of the text that such measure was only directed at taking away the relevant S-band spectrum from Antrix-Devas, thereby creating the legal conditions for Antrix to invoke *force majeure* and effect termination. The CCS decision did not, by contrast, reserve the spectrum for “essential security interests”. It referred to the “needs of defence, para-military forces, railways and other public utility services as well as for societal needs”, and did not allocate the S-band to one or the other among those very different needs. Because the import of the CCS decision remained undetermined, such measure was not principally targeted to safeguard India’s essential security interests. In other words, as long as the choice among these *potential* usages (some of which were unrelated to essential security interests, as the Tribunal has noted above) remained open, the measure was not “necessary” to protect the state’s essential security interests.
287. The absence of any necessity is corroborated by the events after the CCS decision. Had there been any essential security interests necessary to protect, there would have been no protracted debate lasting almost four years among organs of the Government about the use of this spectrum for strategic and societal purposes, on the one hand, or commercial auctioning purposes, on the other hand. The Tribunal thus agrees with the Dissenting Opinion in the Mauritius BIT Arbitration, whereby:

“In these circumstances, it is impossible to say that the decision of the CCS was directed towards the “essential security interests” of India. The question of S-band spectrum allocation remained open in February 2011 and the debate as to where that S-band spectrum could have gone could just as readily have favoured DOT’s preference for public auction by terrestrial users as it could have gone to DOS and or MOD to be used for military purposes or disaster management or railway tracking. As long as these various potential uses remained under consideration and subject to debate, there was no identified purpose for the CCS decision. There were only possible uses and until it was determined, there was no action directed at the protection of essential security interests or the military interests no matter what the MOD or its several different arms may have requested or wished for.”<sup>281</sup>

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<sup>281</sup> *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. India*, PCA Case 2013-09, Dissenting Opinion by David Haigh Q.C., 25 July 2016, para. 96 (emphasis added).

288. Thus, in light of the evidence presented before it, including certain unredacted portions of documents which may not have been available to the Mauritius BIT tribunal, this Tribunal cannot reach the same conclusion as the one reached by that tribunal on the fulfilment of the essential security interest clause, including as to a 60/40 apportionment of spectrum between essential security interests and other concerns. The Tribunal also wishes to underscore that the non-precluded measures clause in the BIT applicable in this case requires it to find that a measure was “necessary” to protect essential security interest, and not merely “directed at the protection” of such interests as was required under the treaty at issue in the Mauritius BIT Arbitration.<sup>282</sup> In the Tribunal’s view, the phrase “to the extent necessary” implies a more stringent nexus between the measure at issue and the interests pursued. Given the lack of determinacy of the CCS decision and the protracted debate between branches of the Government which ensued, the Tribunal finds that India has not established the presence of such nexus in the circumstances of this case.
289. The facts that several years later (part of) the S-band may have been assigned to defense band and the GSAT-6 launched in January 2015 for strategic purposes only show that, after several years of impasse, one of the two contenders within the Indian administration succeeded with its demands. It does not, however, in any way affect the Tribunal’s conclusion that India’s measure was not necessary at that point in time.
290. The absence of essential security interests necessary to protect is also shown by India’s treatment of the remaining part of the S-band. Initially, the Government allowed the Government-owned terrestrial operators to continue using the DOT S-band portion for commercial purposes. The shortage of S-band which allegedly crystallized in December 2009 is hard to reconcile with India’s decision to license part of the S-band to these Government-owned operators for commercial use in May 2010.<sup>283</sup> It is true that the DOT later took this spectrum back from those

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<sup>282</sup> The non-precluded measures clause (Art. 11(3)) in the Mauritius-India BIT, at issue in the Mauritius BIT Arbitration, reads as follows: “The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pests or animals or plants”).

<sup>283</sup> See Extract of Auction of 3G and BWA Spectrum – Notice Inviting Applications, 25 February 2010, **Exh. C-127**, pp. 8-9; Extracts from TRAI Consultation Paper on

entities.<sup>284</sup> However, as discussed above in the context of the January 2015 Cabinet decision, the DOT was allowed to retain 40 MHz of S-band for commercial use. The Tribunal is unconvinced by India's explanation that, because it did not have the relevant international coordination for those 40 MHz, it had to start the coordination process with the ITU which could have taken years without guarantee of success.<sup>285</sup> If there was a true instance of "essential security interests", it would have been logical to nonetheless start the coordination process especially as time did not seem to be of the essence for the Government which allowed the debate between the DOT and DOS to continue for almost four years. Neither the Space Commission, nor the CCS even considered those reasonable, least restrictive alternative measures, although they were clearly available.

291. In conclusion, the Tribunal finds that India has not established that its measure to take back the S-band spectrum from Antrix-Devas, which in turn triggered the annulment of the Agreement, was necessary for the protection of its essential security interests. As a consequence, the BIT's substantive standards apply to DT's investment.

## VI. LIABILITY

292. The Claimant contends that India's conduct violated the fair and equitable treatment ("FET") standard (A); constituted direct and indirect expropriation (B); and violated the full protection and security ("FPS") standard.

### A. FAIR AND EQUITABLE TREATMENT

293. The Parties diverge on whether India's measures breached the FET standard guaranteed by Article 3(2) of the BIT.

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Valuation and Reserve Price of Spectrum in 700, 800, 900, 1800, 2100, 2300 and 2500 MHz Bands, 26 November 2015, **Exh. C-259**.

<sup>284</sup> See *Id.*, para. 2.28 (confirming that 20 MHz had been assigned to BSNL and MTNL and were later returned by them to DOT). See also "Govt to auction 4G spectrum of MTNL, BSNL", DNA, 10 January 2014, **Exh. C-198**. At the Hearing, Mr. Sethuraman confirmed that BSNL and MTNL handed back their rights to use the S-band spectrum not because of a request from the military. See Sethuraman, Transcript, Day 3, p.250, line 21 - 23).

<sup>285</sup> See R-PHB, paras. 116-117.

## 1. The Claimant's position

### a. *International minimum standard and FET*

294. The Claimant notes that Article 3(2) of the BIT guarantees fair and equitable treatment without reference to the minimum standard under general international law. Thus, for DT, there is no “plausible justification to limit the interpretation of fair and equitable treatment to the international minimum standard”.<sup>286</sup> The authorities invoked by India in support of its argument that FET under the BIT is equivalent to the minimum standard in *Neer v. Mexico*<sup>287</sup> are inapposite.<sup>288</sup> More specifically:

- The cases under the North American Free Trade Agreement (“NAFTA”) on which the Respondent relies are irrelevant, given that NAFTA tribunals are under an obligation to equate FET with the customary international law minimum standard by virtue of the NAFTA Free Trade Commission’s interpretation;<sup>289</sup>
- In invoking the dissenting opinion of Pedro Nikken in *Suez v. Argentina*, the Respondent overlooks the majority’s view that the FET provisions of the France-Argentina and Spain-Argentina BITs are not confined to the minimum standard;
- Equally misconceived is India’s reliance on the *travaux* of the India-Russia BIT, which are not pertinent for the interpretation of this BIT and in any event do not show that FET is limited to the minimum standard of treatment.<sup>290</sup>

295. Moreover, even if the FET in the BIT were to be construed to reflect the minimum standard of treatment, the Claimant argues that contemporary minimum standards incorporate FET. This is so because the minimum standard is not

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<sup>286</sup> Reply, para. 229.

<sup>287</sup> *LFH Neer and Pauline E Neer v. Mexico*, US General Claims Commission, Docket No. 136, Opinion, 15 October 1926, 21 AJIL 555 (1927), **Exh. RLA-091**, p. 556.

<sup>288</sup> Reply, paras. 230 et seq.

<sup>289</sup> Reply, para. 235.

<sup>290</sup> Reply, para. 231.

frozen in time and has evolved since the interpretation given in *Neer*. Numerous investment treaty tribunals have adopted such approach:

- In *CMS v. Argentina*, the tribunal ruled that the treaty standard of FET requiring “stability and predictability of business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law”,<sup>291</sup>
- In *Occidental v. Ecuador*, the tribunal considered that “the Treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment”,<sup>292</sup>
- In *Biwater Gauff v. Tanzania*, the tribunal held that “the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law”.<sup>293</sup>

296. Therefore, so argues DT, irrespective of whether Article 3(2) of the BIT is held to refer to the minimum standard (and based on its text, it does not), India's measures must be tested against the FET standard, which mandates respect for the investors' legitimate expectations as well as compliance with the principles of good faith, transparency, consistency, and non-discrimination.<sup>294</sup>

297. More specifically, DT asserts that its FET claim is based on “three independent limbs”:<sup>295</sup>

“(a) India's conduct frustrated the legitimate expectations DT relied on when investing in India;

<sup>291</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/08, Award, **Exh. CLA-098**, para. 284.

<sup>292</sup> *Occidental Exploration & Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, **Exh. CLA-050**, para. 190.

<sup>293</sup> *Biwater Gauff (Tanzania) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, **Exh. CLA-014**, para. 592.

<sup>294</sup> Reply, para. 199.

<sup>295</sup> C-PHB, para. 42.

(b) India's conduct was unjustified, arbitrary, unreasonable, disproportionate and lacking in good faith; and

(c) India's conduct was non-transparent and failed to accord DT due process."<sup>296</sup>

**b. India's violation of DT's legitimate expectations**

298. The Claimant explains that the obligation to accord FET requires India to abide by specific undertakings made to, and relied upon by, foreign investors.<sup>297</sup>

299. DT submits further that, when investing in Devas, it relied on India's assurances that the Agreement guaranteed the exclusive allocation of the relevant S-band spectrum to Devas, and that no steps would be taken to frustrate Devas's contractual rights. India also committed itself to launch two satellites for the exploitation of the Devas Spectrum. These assurances were given in December 2007 at the meetings between the representatives of the DOS, ISRO and Antrix, on the one hand, and DT, on the other. In particular, the Claimant makes reference to the following main sources of its expectations:

- Based on the National Frequency Allocation Plan<sup>298</sup> and India's SatCom Policy,<sup>299</sup> DT expected that the commercial terrestrial re-use of spectrum would be allowed and indeed encouraged;
- In December 2004, Antrix's Board approved the Agreement and later allowed it to enter into force, thereby creating the expectation that the Agreement would be honored according to its terms;<sup>300</sup>

<sup>296</sup> C-PHB, para. 42. See also DT's Outline of Opening Submissions (Mr. Sam Wordsworth QC), para. 3.

<sup>297</sup> *BG Group Plc v. Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, **Exh. CLA-013**, para. 294; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **Exh. CLA-061**, para. 113.

<sup>298</sup> National Frequency Allocation Plan, 2002, **Exh. C-055**; National Frequency Allocation Plan, 2008, **Exh. C-097**.

<sup>299</sup> Policy framework for satellite communications in India, 1997, **Exh. C-004**.

<sup>300</sup> Memorial, para. 53.

- The DOT granted ISP<sup>301</sup> and IPTV<sup>302</sup> licenses to Devas and the WPC issued a license to re-use spectrum terrestrially for the purposes of experimental trials;<sup>303</sup>
- Throughout the development of the Devas Project, the Indian Space Authorities repeatedly assured Devas and DT that the construction of the GSAT-6 satellite was underway in compliance with the Agreement;<sup>304</sup>
- As to the WPC License, although DT had received no specific assurance that it would be granted, it legitimately expected that the license application, once made, "would be dealt with fairly, rationally and consistently with India's space policies".<sup>305</sup>

300. Hence, DT's expectation that Devas was entitled to the spectrum under the Agreement was substantiated by concrete assurances from the hierarchy of the competent Indian authorities. India's measure to annul the Agreement and to make the leased spectrum unavailable was thus contrary to DT's legitimate expectations in reliance on which it decided to invest in India.

**c. *India's unjustified, unreasonable, arbitrary and bad faith conduct***

301. DT submits that India's conduct was arbitrary in the sense used by the ICJ in *ELSI*, that is "willful disregard of due process of law, an act which shocks, or at least surprises, judicial propriety".<sup>306</sup> This standard of arbitrariness does not require a showing of bad faith, although India also breached the basic obligation to act in good faith.<sup>307</sup> In reliance on *AES v. Hungary*, DT argues that "the rational policy is not enough to justify all the measures taken by a state in its name". Rather, one must also consider "the nature of the measure and the way it is

<sup>301</sup> License from DOT to Devas for Provision of Internet Services, 2 May 2008, **Exh. C-083**.

<sup>302</sup> Letter of 31 March 2009 from DOT to Devas, **Exh. C-102**.

<sup>303</sup> The WPC experimental license to Devas, 7 May 2009, **Exh. C-105**.

<sup>304</sup> Reply, para. 208.

<sup>305</sup> Memorial, para. 319.b.

<sup>306</sup> *Elektronika Sicula S.p.A. (ELSI) (United States v. Italy)*, International Court of Justice, Judgment, 20 July 1989, I.C.J. REPORTS 15 (1989), **Exh. RLA-109**, para. 128.

<sup>307</sup> Reply, para. 213.

implemented".<sup>308</sup> It further cites to *Gold Reserve v. Venezuela*, where the tribunal deemed Venezuela in breach of the FET standard, because the state's actions were dictated by reasons other than those officially stated.<sup>309</sup> Similarly, here, the reason why India decided to annul the Agreement is that it was starting to view it as a bad deal.

302. Even if it were true that India faced strategic needs, the manner in which it implemented its decision was arbitrary and unreasonable. In this context, DT points to the fact that, although the Agreement was under review, the Indian Space Authorities continued to assure Devas that the preparation for the launch of the satellites was proceeding and went on to work with Devas to finalize the draft WPC License application. Moreover, the CCS ratified the annulment of the Agreement at a time when Mr. Radhakrishnan had already announced on television the decision "to take actions to annul the Agreement".<sup>310</sup> Although the Respondent tries to portray its action as a general policy decision on spectrum usage, the measure resulted in a targeted scrutiny of the Agreement and Devas was the only entity affected by the measure.<sup>311</sup>
303. Furthermore, for DT, the FET standard requires that a measure be proportionate to the declared policy objective. In the Claimant's view, India could resort to less harmful measures to satisfy its alleged military needs. For instance, it could have re-negotiated with Devas to take back some spectrum, or used the Devas system to provide military applications (as had been discussed with Devas), or re-assigned some or all of the 40MHZ of S-Band spectrum which DOS had relinquished to DOT for terrestrial use.<sup>312</sup>
304. For all these reasons, the Claimant concludes that India's conduct breached Article 3(2) of the BIT.

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<sup>308</sup> *AES Summit Generation Limited v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, **Exh. RLA-111**, para. 10.3.9.

<sup>309</sup> *Gold Reserve v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **Exh. CLA-107**, para. 609.

<sup>310</sup> Transcript of ISRO Press Conference, 8 February 2011, **Exh. C-026**, p. 4.

<sup>311</sup> Reply, para. 217.

<sup>312</sup> Reply, para. 220.

**d. *India's violation of due process and transparency***

305. The Claimant also asserts that the Respondent's measures were not transparent and violated due process, in that the Indian Space Authorities failed to explain their concerns to Devas or its shareholders. The Claimant refers in particular to the following facts to show a lack of transparency on the part of the Indian Government:

- While Mr. Radhakrishnan had instigated a review of the Agreement in December 2009, Antrix assured Devas at the end of the same month that "Antrix / ISRO is putting all efforts to meet the launch schedule of July 2010".<sup>313</sup> Moreover, in February 2010, with the review still pending, Mr. Radhakrishnan gave Devas a new launch deadline of September 2010.<sup>314</sup>
- Whereas the Space Commission had decided to annul the Agreement in July 2010,<sup>315</sup> at the joint status review of the following month, Antrix and ISRO represented to Devas that the GSAT-6 would be ready for shipment in December 2010.<sup>316</sup>
- On 14 September 2010, Antrix's Executive Director again assured Devas that the satellites would be launched in one to two months.<sup>317</sup> And, on 29 September 2010, Mr. Radhakrishnan himself repeated these assurances that the satellite would be launched soon.<sup>318</sup>
- Throughout the second half of 2010, numerous Government officials in a position to have knowledge of the annulment decision met with Devas and

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<sup>313</sup> Letter of 30 December 2009 from Antrix (Mr. Murthi) to Devas (Mr. Viswanathan), **Exh. C-122**.

<sup>314</sup> Memorial, para. 141 citing Viswanathan WS, para. 95

<sup>315</sup> Minutes of the 117th meeting of the Space Commission, 2 July 2010, **Exh. C-145**.

<sup>316</sup> SRO, "GSAT-6, Status Overview – Discussions with Devas Multimedia Systems", 5 August 2010, **Exh. C-151**, p. 24.

<sup>317</sup> Viswanathan WS, para. 114; Letter of 11 October 2010 from Devas (Mr. Viswanathan) to ISRO / Antrix (Secretary Radhakrishnan), **Exh. C-160**, p. 2.

<sup>318</sup> Viswanathan WS, para. 116; Letter of 11 October 2010 from Devas (Mr. Viswanathan) to ISRO / Antrix (Secretary Radhakrishnan), **Exh. C-160**, p. 1.

with its shareholders, including DT,<sup>319</sup> to discuss the Devas business, including its potential strategic and societal applications, and gave no indication that the Agreement was under threat.<sup>320</sup>

- On 10 January 2011, Antrix's Executive Director told Devas that the satellite would be completed within three to four months.<sup>321</sup>

**e. Attribution**

306. DT contends that, in addition to the conduct of the DOS, ISRO, the Space Commission, the CCS, and the WPC, the conduct of the state-owned enterprise Antrix must be attributed to India. To this effect, there is no need to show that Antrix was exercising a governmental function under Article 5 of the ILC Articles, since the ground for attribution in this case is that Antrix was under the direction and control of India pursuant to Article 8 of the ILC Articles.
307. In particular, India cannot dispute that throughout the relevant period the same person wore the "four hats" of Chairman of Antrix, Chairman of ISRO, Secretary of the DOS, and Chairman of the Space Commission.<sup>322</sup> Antrix itself was devoid of distinct personality, having "no effective independent existence from ISRO" and being "under the control of the DOS".<sup>323</sup>
308. Having established that Antrix was under the direction and control of India, DT does not need to also show that, when "repeatedly misleading Devas and DT about its intention to perform the Agreement", Antrix acted in the exercise of governmental authority.<sup>324</sup> Indeed, being under India's control, Antrix's acts were in any event attributable to India under international law.

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<sup>319</sup> Email of 19 October 2010 from Mr. Kozel to Mr. Gunther and Mr. Copp re "DEVAS Trip Report", **Exh. C-236**.

<sup>320</sup> Viswanathan WS, paras. 111-115.

<sup>321</sup> Viswanathan WS, para. 112.

<sup>322</sup> Memorial, para. 29; Extract from ISRO website, **Exh. C-049**.

<sup>323</sup> Reply, para. 240; Bhat Committee, "Report of the Committee constituted by DOS for Review of the working and structure of Antrix Corporation Ltd., (ACL)", **Exh. C-189**, p. 13.

<sup>324</sup> Reply, para. 242.

## 2. The Respondent's position

309. It is the Respondent's submission that the Claimant's "broad interpretation of the FET standard, coupled with allegations of 'assurances' of a generalized nature from unspecified Indian officials" cannot make out a legal claim for the violation of the BIT.

### a. *International minimum standard and FET*

310. The Respondent contends that the BIT standard of FET is confined to the minimum standard of treatment under customary international law. By reference to the *travaux* of the India-Russia BIT, India asserts that, when it entered into its early BITs, it relied on the OECD Draft Convention of Foreign Property. Such draft incorporated an "FET standard [...] aimed at providing protection equal to the minimum treatment standard under customary international law".<sup>325</sup> The Claimant's argument that the *travaux* of the Russia-India BIT do not reflect the mutual intent of Germany and India misses the point, since the FET language of the Germany-India and Germany-Russia BITs is almost identical, and it should thus be assumed that India intended to follow the OECD Draft Convention in both treaties.<sup>326</sup> In addition, as an OECD member State, Germany had the same intention to equate FET and minimum standard when it entered into the BIT with India.

311. The Respondent also refutes DT's argument that reference to NAFTA practice and the US and Canada Model BITs is irrelevant, because these instruments contain specific language linking FET and minimum standard of treatment. According to India, the US, Canada and the NAFTA Free Trade Commission were compelled to clarify the scope of FET after a number of tribunals veered towards an overbroad interpretation which was contrary to the intentions of the contracting states.<sup>327</sup>

312. India cites numerous authorities to support its argument that the customary international law standard of minimum treatment is a far more stringent standard

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<sup>325</sup> Rejoinder, para. 234; OECD Council Resolution, 12 October 1967, **Exh. RLA-072**.

<sup>326</sup> The India Russia BIT, 5 August 1996, **Exh. RLA-154**.

<sup>327</sup> Rejoinder, paras. 238, 241.

than the loose FET standard upon which the Claimant relies.<sup>328</sup> The Claimant is wrong when it asserts that there is no difference between FET and the international minimum standard. If such was the case, there would have been no reason for the NAFTA states to issue an interpretative statement.

313. For the Respondent, the Claimant's additional argument that the minimum standard of treatment developed to encompass the FET standard "evinces a fundamental misunderstanding of how customary international law evolves".<sup>329</sup> In support, India quotes the ICJ in *North Sea Continental Shelf*, where the Court articulated the principles governing the evolution of customary law as follows:

"State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

[...]

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."<sup>330</sup>

314. According to India, the Claimant's interpretation of FET is far from being part of customary international law. The following sources specifically disprove the Claimant's argument:

<sup>328</sup> Counter-Memorial, para. 141; *LFH Neer and Pauline E Neer v. Mexico*, US General Claims Commission, Docket No. 136, Opinion, 15 October 1926, 21 AJIL 555 (1927), **Exh. RLA-091**, p. 556 (in order to violate the minimum standard of treatment under customary international law, the treatment of an alien "should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency"); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, **Exh. RLA-093**, para. 367 ("Under international law, this [FET] requirement is generally understood to 'provide a basic and general standard which is detached from the host State's domestic law.' While the exact content of this standard is not clear, the Tribunal understands it to require an 'international minimum standard' that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith").

<sup>329</sup> Rejoinder, para. 243.

<sup>330</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Kingdom of Denmark; Federal Republic of Germany v. Kingdom of the Netherlands)*, International Court of Justice, Judgment, 20 February 1969, in I.C.J. REPORTS 3 (1969), **Exh. RLA-156**, paras. 74, 77.

- The NAFTA Free Trade Commission issued an interpretative statement precisely because certain tribunals went beyond the minimum standard of treatment in interpreting FET;
- The contracting states of the Dominican Republic - Central American – United States Free Trade Agreement (“CAFTA”) adopted a restrictive approach to the interpretation of FET in line with the NAFTA Free Trade Commission. They considered that FET “does not require treatment in addition or beyond” that required by the minimum standard of treatment.<sup>331</sup>
- The OECD Draft Convention, upon which India based its early BITs, took the same stand.<sup>332</sup>
- The European Parliament has adopted a resolution on investment policy that confines FET to protection under customary international law. The report accompanying the resolution stated that the reason for clarifying the relationship between FET and the customary international law standard was to “restrict the breadth of interpretation by the judiciary and ensure better protection of [the] public intervention domain”.<sup>333</sup>
- Model investment treaties, including the ones of the US and Canada, introduce language assimilating FET to minimum standards, precisely to “avoid too wide interpretations and provide clear guidelines to tribunals”.<sup>334</sup>
- Decisions of investment tribunals, although they do not constitute state practice, also contradict the proposition that the international minimum standard evolved so as to incorporate the broad FET standard. For instance, *Thunderbird v. Mexico* noted that despite the evolution of the customary standard of protection since *Neer*, “the threshold still remains

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<sup>331</sup> CAFTA, **Exh. RLA-163**, Articles 10.5.1, 10.5.2.

<sup>332</sup> OECD Council Resolution, 12 October 1967, **Exh. RLA-072**, comments to Article 1, para. 4(a).

<sup>333</sup> EU Parliament Committee on International Trade, *Report on the Future European International Investment Policy* (2010/2203(INI)), Report No. A7-0070/2011, 22 March 2011, Explanatory Statement, **Exh. RLA-089**, pp.11-12.

<sup>334</sup> Canada-European Union: Comprehensive Economic and Trade Agreement, signed 5 August 2014, **Exh. RLA-166**.

high”.<sup>335</sup> Similarly, the *Glamis Gold v. United States* tribunal considered the modern minimum standard of treatment to provide protection against conduct which is “egregious or shocking - a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons”.<sup>336</sup>

- A 2007 UNCTAD study supports the view that “for a country to violate the minimum standard of treatment of aliens requires a conduct by the Government amounting to gross misconduct, manifest injustice, an outrage, bad faith or willful neglect of duty”.<sup>337</sup>
- Commentators also support the proposition that the expansive interpretation of FET is “broad-reaching”<sup>338</sup> and does not accord with cases or State practice, which suggest that fair and equitable treatment is equivalent to minimum standards, providing protection for procedural fairness and diligent consideration of the effects of a proposed Government policy on foreign investors.<sup>339</sup>

315. For all these reasons, the Respondent asks the tribunal to reject the Claimant’s proposition of a broad FET standard.

**b. No legitimate expectations**

316. According to the Respondent, even if FET encompasses the protection of legitimate expectations, India has never given any specific assurances to DT that the licenses necessary for its project would be granted or that the Government would not take steps that would adversely affect the project. DT cannot prove otherwise. The only communications to which it refers and that preceded DT

<sup>335</sup> *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL (NAFTA), Award, 26 January 2006, **Exh. RLA-057**, para. 194.

<sup>336</sup> *Glamis Gold, Ltd v. United States of America*, UNCITRAL (NAFTA), Award, 8 June 2009, **Exh. RLA-094**, para. 602.

<sup>337</sup> UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking*, UNCTAD Series On Division On Investment, Technology And Enterprise Development (United Nations 2007), **Exh. RLA-036**, p. 29.

<sup>338</sup> J. Roman Picherack, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, 9(4) *The Journal of World Investment & Trade* 255 (August 2008), **Exh. RLA-074**, p. 272.

<sup>339</sup> Gus Van Harten, *Investment Treaty Arbitration And Public Law* (Oxford University Press 2007), **Exh. RLA-076**, p. 89.

Asia's acquisition of Devas shares were those at the meetings in Bangalore in December 2007 and with Mr. Copp and the WPC, as well as the following telephone call between Mr. Akhavan and the WPC. No representations or assurances were made on any of these occasions. DT's witness Mr. Axmann cannot even identify with whom he met and cannot recall any particular statement made by those unidentified persons.<sup>340</sup>

317. DT itself admits, so continues India, that the relevant officials from the WPC specifically refrained from giving assurances about the WPC License, which was crucial for rolling out the Devas System. DT in fact asked Devas to obtain such assurances from the Government but, in light of the Government's position, Devas expressed "reluctan[ce] to approach the authorities with the request for a formal clarification".<sup>341</sup>
318. India further argues that the Claimant's position about the alleged assurances that "there was no regulatory impediment to the terrestrial re-use of the spectrum contemplated under the Agreement" is also unsupported by the facts. Indeed, the Claimant's witness Mr. Axmann testified that WPC "did not raise any issues or concerns".<sup>342</sup> This is clearly insufficient to constitute a specific assurance.
319. For the Respondent, DT's allegation that it had a specific assurance that India was committed to leasing S-band to Devas for full terrestrial re-use is equally unsupported by the record. India, not being a party to the Agreement, "only acknowledged that Antrix contracted with Devas", that the satellite was being built and "certain people within the DOS and ISRO were favorably disposed towards the Devas Project". All this, however, falls short of being an explicit or even an implied commitment from the Government that it would issue the permits for the Devas Project or that it would allow the "full terrestrial re-use" of the spectrum.<sup>343</sup>

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<sup>340</sup> Rejoinder, para. 252.

<sup>341</sup> DT Briefing of the "Meeting with Devas-Shareholders on 19 Feb. 2008" and "Board Meeting on 19 Feb. 2008", **Exh. C-076**, p. 2 ("DT requested to eliminate any uncertainties by way of confirmatory letter either from WPC directly or from ISRO/DoS, explicitly confirming either the approval from, or the non-responsibility of WPC. This has not been obtained so far and Devas has indicated that, at least at this stage, it is reluctant to approach the authorities with the request for a formal clarification").

<sup>342</sup> Axmann WS 2, para. 11.

<sup>343</sup> Rejoinder, para. 255.

320. Similarly, argues India, the fact that it issued ISP and IPTV licenses and an experimental license to DT did not constitute a specific assurance that the spectrum would be available for terrestrial re-use. These licenses have nothing to do with the indispensable WPC License. Moreover, the experimental license was by its very terms “[p]urely temporary” and could “be withdrawn any time without notice”.<sup>344</sup>
321. Furthermore, the Respondent signals a number of documents allegedly belying the Claimant’s case on legitimate expectations:
- After the meeting of 11 December 2007 with the Indian Space Authorities, Mr. Akhavan, the CEO of T-Mobile, noted that “it became apparent that Devas’ assumption is [*sic*] has secured a substantial spectrum via its contract with ISRO may not go unchallenged by authorities other than ISRO, with the WPC-Chairman indicating a need for further review”;<sup>345</sup>
  - DT’s briefing note following the meetings with the Indian Space Authorities refers to an “unclear regulatory regime” and to the fact that the feedback from the Director of the WPC about the terrestrial usage of the spectrum “was non-committal”;<sup>346</sup>
  - The Claimant’s presentation at its Management Board meeting on 19 February 2008 mentioned the risk of delay and observed that a “worst-case scenario would be a severe limitation in flexibility for terrestrial usage, or a total loss of spectrum” due to the fact that the “terrestrial utilization of spectrum requires an authorization by the [DOT]”.<sup>347</sup>
322. Therefore, according to the Respondent, the record shows no specific commitment from the Government that the use of the leased spectrum would be allowed or that the spectrum would be made available. The mere fact that Devas had a contract with a state-owned enterprise does not represent a commitment from the Government and the existence of such a contract cannot restrict the

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<sup>344</sup> Rejoinder, para. 257; Letter of 7 May 2009 from the DOT regarding Devas’ Experimental License, **Exh. R-035**.

<sup>345</sup> DT Briefing of the “Meeting with Devas-Shareholders on 19 Feb. 2008” and “Board Meeting on 19 Feb. 2008” **Exh. C-076**.

<sup>346</sup> *Ibid.*

<sup>347</sup> Briefing Presentation for DT Management Board Meeting on 19 February 2008, **Exh. C-219**.

State's right to take legitimate sovereign actions that adversely affect the state-owned entity's contractual commitments.

**c. No arbitrary, unreasonable, disproportionate or bad faith conduct**

323. The Respondent denies that it acted arbitrarily and in bad faith. In particular, it rebuts DT's argument that the Government failed to timely notify Devas of the decision to annul the Agreement, which was taken in July 2010 by the Space Commission. For India, this thesis ignores that the final decision on this matter was taken by the CCS after consultation with all relevant entities including the Space Commission. The Space Commission, indeed, recommended reserving the spectrum for strategic purposes, but it resolved to seek further advice from the ASG, who then took up the matter to the highest authority, namely the CCS.<sup>348</sup> Shortly before the final decision of the CCS, the Prime Minister indicated that "this issue concerns many other Ministries apart from the Dept. of Space. These include Dept. of [Telecommunications], Defense, Home, Finance and Law. The matter is expected to be put before Cabinet Committee on Security for its final decision".<sup>349</sup>
324. India further challenges DT's complaints that the decision on the annulment of the Agreement was made behind closed doors. According to India, the Claimant fails to explain why Devas or any of its shareholders should have been informed of or involved in the internal deliberations of the Government on matters pertaining to national security.
325. For the Respondent, it is irrelevant that, in parallel to its internal deliberations, the Government continued to provide updates about the progress of the satellite launch and assisted Devas in the preparation of the WPC License application. Until the final decision on annulment, the Agreement remained in force and there was nothing unreasonable or inconsistent in Antrix's continued performance of its terms.
326. Furthermore, India disputes DT's contention that the contested measures targeted only the Devas Agreement, and thus left the 40MHz of S-band to the Government-owned operators. As explained in the context of its essential

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<sup>348</sup> Rejoinder, para. 260.

<sup>349</sup> "Prime Minister Manmohan Singh's interactions with Editors of the Electronic Media on Feb 16, 2011", The Hindu, 16 February 201, **Exh. C-185**, p. 7.

security interests defence, India submits that the concerned 40MHz of S-band was of no use for strategic purposes.

327. The Respondent further opposes the Claimant's submissions on proportionality for the reasons already set out in the context of essential security interests. In this regard, it ultimately notes that "it is for the Indian authorities to make the determination as to the amount of spectrum that is required to reach an appropriate level of comfort with respect to the nation's strategic needs".<sup>350</sup>
328. According to India, it is similarly unfounded to argue that it acted in bad faith concealing its real intention behind the measure, which was to extricate the Government from a bad bargain. The record shows that the Government did not re-auction the respective spectrum in order to strike a better deal. To the contrary, it reinforced the policy decision by designating the relevant S-band spectrum as "Defence Band and Defence Interest Zone". Therefore, the Claimant's speculation that the CCS and the entire hierarchy of the Indian Government did not mean what they said in the official decisions and communications should be rejected.

**d. Attribution**

329. For the Respondent, the Claimant's attribution argument adds nothing to the case. Assurances given by Antrix are assurances given by a legal entity separate from the Government under Indian law,<sup>351</sup> a fact of which the Claimant was well aware from the outset. This is so despite the control or supervision exercised by the Government over Antrix. In any event, the fact remains that the Government did not commit to refrain from using its sovereign powers in order for the Devas Project to proceed. Neither did it undertake to issue the necessary licenses and permits. Therefore, any assurances given by Antrix could not have created a

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<sup>350</sup> Rejoinder, para. 265.

<sup>351</sup> As the International Court of Justice observed in *Ahmadou Sadio Diallo*: "In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law". *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Judgment (Preliminary Objections), 24 May 2007, Reports of Judgements, Advisory Opinions and Orders, I.C.J. REPORTS 582 (2007), **Exh. RLA-112**, para. 61.

legitimate expectation that the Government would not take sovereign measures to the detriment of the Agreement.<sup>352</sup>

### 3. Analysis

#### a. *Introductory remarks*

330. The Tribunal starts its analysis by elucidating the content of the fair and equitable treatment standard in the BIT. Article 3(2) of the Treaty, entitled “Promotion and Protection of Investment”, reads as follows:

“Each Contracting Party shall accord to investments as well as to investors in respect of such investments at all times fair and equitable treatment and full protection and security in its territory.”

331. A threshold question is whether Article 3(2) of the BIT reflects the so-called customary international law minimum standard of treatment, as the Respondent argues, or whether it embodies an autonomous and different standard, as the Claimant submits. The Tribunal observes that the BIT does not refer to “international minimum standard” or similar formulations, unlike other treaties.<sup>353</sup> The BIT simply speaks of “fair and equitable treatment”. The question is thus what “fair and equitable” means.<sup>354</sup>

332. In light of the rules of treaty interpretation as codified in Articles 31 and 32 of the VCLT and in particular of the primacy of the text, the Tribunal first notes, like a number of tribunals, that the plain meaning of the terms “fair and equitable” does

<sup>352</sup> Rejoinder, para. 268.

<sup>353</sup> See, e.g., NAFTA, Article 1105, which is entitled “Minimum Standard of Treatment”.

<sup>354</sup> The Tribunal further considers that, even if FET were to be equated to the customary international law minimum standard, the public international law principles concerning the treatment of aliens have undergone significant developments since the *Neer* case, on which the Respondent relies as the applicable benchmark to define FET. In this sense, see, e.g., *ADF v. United States*, Award, para. 179, in the context of NAFTA (holding that “what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development”); *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 218, in the context of the DR-CAFTA (concluding that the minimum standard of treatment is “constantly in a process of development”, including since *Neer*’s formulation). The Tribunal also agrees with the *El Paso* tribunal that this discussion is “somewhat futile” and “the issue is not one of comparing two undefined or weakly defined standards; it is to ascertain the content and define the BIT standard of fair and equitable treatment”. See *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exh. CLA-025**, para. 335.

not provide much assistance.<sup>355</sup> The tribunal in *MTD v. Chile*, for instance, observed that “[i]n their ordinary meaning, the terms ‘fair’ and ‘equitable’ [...] mean ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’”,<sup>356</sup> while the tribunal in *S.D. Myers v. Canada* stated that unfair and inequitable treatment meant “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective”.<sup>357</sup> As noted in *Saluka*, “[t]his is probably as far as one can get by looking at the ‘ordinary meaning’ of the terms of Article 3.1 of the Treaty”.<sup>358</sup>

333. In their attempt to ascertain the ordinary meaning of identically or similarly worded FET provisions in bilateral investment treaties, arbitral tribunals have extracted a number of elements which they considered inherent components of the standard. The Tribunal finds it instructive to refer to these previous discussions for its elucidation of the meaning of FET in the BIT.

334. For instance, the tribunal in *Rumeli v. Kazakhstan* held that:

“The parties rightly agree that the fair and equitable treatment standard encompasses inter alia the following concrete principles: - the State must act in a transparent manner; - the State is obliged to act in good faith; - the State’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; - the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor’s reasonable and legitimate expectations.”<sup>359</sup>

335. The tribunal in *Lemire v. Ukraine* identified similar components as part of the FET standard:

“whether the State has failed to offer a stable and predictable legal framework; - whether the State made specific representations to the investor; - whether due process has been denied to the investor; - whether there is an absence of transparency in the legal procedure or in the actions of the State; - whether there has been harassment, coercion, abuse of power or other bad faith

<sup>355</sup> See, e.g., *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **Exh. CLA-036**, para. 504.

<sup>356</sup> *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, **Exh. CLA-046**, para. 113.

<sup>357</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000, **Exh. RLA-096**, para. 263.

<sup>358</sup> *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh. CLA-060**, para. 297. See also *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **Exh. CLA-036**, para. 504.

<sup>359</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **Exh. CLA-056**, para. 761.

conduct by the host State; - whether any of the actions of the State can be labeled as arbitrary, discriminatory or inconsistent."<sup>360</sup>

336. While formulations have varied across awards and the Tribunal does not endorse every nuance set out in previous cases, a consensus appears to emerge from jurisprudence about the core components of FET. In line with that consensus and to the extent relevant to the facts and claims at issue here, the Tribunal considers that FET includes the protection of legitimate expectations, the protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency.

**b. Did India's conduct breach FET?**

337. In ascertaining whether India's conduct was fair and equitable, the Tribunal must return to the facts reviewed in the context of the essential security interest defense.<sup>361</sup> Not only did these facts not meet the high threshold required to disapply the BIT, but the overall pattern of conduct that emerges from them also constitutes a breach of FET, as will be seen in the following paragraphs.

338. At the outset, the Tribunal recalls that it did not have the benefit of the testimony of the Indian officials directly involved in the process leading to the CCS decision, but was only presented with witnesses having either no personal knowledge or only peripheral knowledge of many of the relevant events.<sup>362</sup> The Tribunal's analysis is thus necessarily centered on the documentary evidence which is set out in the following paragraphs, to the extent it is relevant to the FET analysis.

339. In the Tribunal's view, the facts giving rise to the chain of events leading to the annulment of the Devas Agreement essentially start on 8 November 2009, when Mr. Anand received a whistleblower complaint that the S-band spectrum had been leased to Devas on the basis of corrupt practices.<sup>363</sup> One month later, on 8 December 2009, representatives of the Indian Space Authorities met to discuss the complaint, as a result of which the Suresh Committee was constituted.<sup>364</sup>

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<sup>360</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **Exh. RLA-068**, para. 284.

<sup>361</sup> See *supra* section V.C.3.

<sup>362</sup> See *supra* para. 240.

<sup>363</sup> DOS memorandum, "Source Information", **Exh. C-193**.

<sup>364</sup> Suresh Report, **Exh. C-130**, Enclosure 1.

340. Around the same time, on 15 December 2009, at a meeting between the IDS, MOD and ISRO, the military formulated its requirements for S-band. It is worthwhile recalling the Tribunal's findings on this key meeting made above in respect of the essential security interest defense.<sup>365</sup> First, it appears from the unredacted minutes of the meeting that, in response to ISRO's indication that spectrum was limited, the IDS agreed "to explore new avenues",<sup>366</sup> accepted that it needed "to best utilise available S-band spectrum", and directed that "deeper analysis be carried out by the army in consultation with ISRO and BEL and all necessary modifications are to be included in the GSAT-7S program".<sup>367</sup> There is no suggestion in these minutes that the military needs were irreconcilable with the Devas Agreement. To the contrary, the IDS position appeared to be that its existing demands could be satisfied by exploring "new avenues", and that its future requirements would be satisfied by GSAT-7S (as modified following "deeper analysis" into frequency re-use). None of the attendees of this meeting – which included ten persons from ISRO – was presented to testify.
341. The Tribunal further observes that India presented no evidence about the results of the exploration of these "new avenues" and the "deeper analysis" of the modifications to GSAT-7S decided at the meeting just discussed. Nor is there any evidence on record that the result of the military's "deeper analysis", if any, was considered in the decision to annul the Devas Agreement. There is thus no proof that the military concluded that its existing and future needs could not be met, e.g. by frequency re-use, the remaining S-band, and the planned military satellite GSAT-7S.
342. On 4 February 2010, Devas and DT met with Dr. Radhakrishnan and Mr. Anand.<sup>368</sup> At this meeting, Devas made a presentation to the Indian authorities in which it explained the strategic, societal and commercial applications of the Devas platform, including services for the railways, security,

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<sup>365</sup> See *supra* paras. 243-245.

<sup>366</sup> Minutes of meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO (redactions further removed), 25 January 2010, **Exh. C-252**, para. 7(b).

<sup>367</sup> *Id.*, para. 7(e).

<sup>368</sup> Devas presentation to Secretary Radhakrishnan on the Devas System, 4 February 2010, **Exh. C-126**.

emergency and disaster relief, health and education.<sup>369</sup> Secretary Radhakrishnan stated that a new deadline was set on 1 September 2010 for the launch of the satellite.<sup>370</sup> No mention was made of the ongoing investigation nor the alleged crystallization of the military needs. The Tribunal will revert to the significance of this meeting for the purposes of FET below.<sup>371</sup>

343. On 31 May and 1 June 2010, the press published certain reports in which it discussed the alleged “preferential allocation of spectrum” to Devas, spoke of “spectrum sold on the quiet”, and suggested that the “agreement should be annulled [...] so that the Government can raise some more much-needed money”.<sup>372</sup> It should be recalled that this criticism was made at a time when the media were extensively discussing the 2G Scandal, which was unrelated to Devas and which later culminated in the arrest of several former DOT officials, including the Minister of Telecommunications.
344. The Indian Government took the press reports concerning Devas seriously. On 4 June 2010, Dr. Chandra of the DOT wrote to the ISRO Additional Secretary asking him to “provide your comments on the news reports immediately [...] kindly look into the matter personally”.<sup>373</sup>
345. Around the same time, on 7 June 2010, Dr. Suresh transmitted his report (dated “May 2010”) to Dr. Radhakrishnan, in which he noted the “extremely important” use of the S-band, as well as the “strategic and other essential needs of the country” (without further specification). He also pointed to the need to insert into

<sup>369</sup> See *id.*, esp. p. 5, discussing the following portfolio of services available under the Devas System: (i) “strategic” (i.e., “Railways: Real time location information and support for collision avoidance”; “Security: Secure satellite communications in remote areas”; “Emergency: Reliable, resilient communications for national threats and disaster relief”); (ii) “societal” (i.e., “Rural: Enabling personalized interactions in remote and underdeveloped areas”; “Public health: Improving health awareness through access to information”; “Education: Enabling personalized learning through access to new curricula”); and (iii) “commercial” (i.e., “Multimedia: Information and entertainment content and applications”; “Interactive Data: Connection to the Internet and other interactive applications”).

<sup>370</sup> Viswanathan WS, para. 95.

<sup>371</sup> See *infra* paras. 376-380.

<sup>372</sup> “Devas gets preferential allocation of ISRO’s spectrum” and “Another spectrum sold on the quiet”, The Hindu Business Line, 31 May and 1 June 2010, **Exh. C-024**. See also *supra* para. 249.

<sup>373</sup> See Letter of 4 June 2010 from DOT (Dr. Chandra) to ISRO (Mr. Balachandhran) enclosing press articles, **Exh. C-135**. See also *supra* para. 250.

the Devas Agreement a clause giving preference to ISRO in case of a demand for use “under emergent conditions for strategic or any other essential applications” and to revise the “severe” penalty provided in the contract for delays in the delivery of the satellites. Because of these latter factors, the report concluded that the Devas Agreement needed to be “re-visited” taking into account, among other aspects, the “importance of preserving the spectrum for essential national needs”.<sup>374</sup>

346. Dr. Suresh’s recommendation was as follows:

“The utilization of the S-band frequency spectrum allotted for satellite based services to ISRO/DOS for satellite communications is extremely important. Therefore this aspect has to be critically examined considering all usages including GSAT-6 and GSAT-6A by a competent technical team on high priority. The strategic and other essential needs of the country should also be considered.”<sup>375</sup>

347. The Tribunal notes that nowhere in the report did Dr. Suresh recommend that the Agreement be annulled, which was also acknowledged at the hearing by Mr. Anand.<sup>376</sup> Instead, Dr. Suresh suggested an amendment of the contract.<sup>377</sup>

348. A week later, on 14 June 2010, the DOT had still not received any reply from ISRO in respect of the press reports. The Secretary of the DOT, Mr. Thomas, thus wrote to Dr. Radhakrishnan, referring to the DOT’s letter of 4 June and requesting him “to kindly look into the matter personally and expedite your comments”.<sup>378</sup> The escalation within the hierarchy in the administration shows the level of concern over the matters raised in the press reports.

349. Dr. Radhakrishnan reacted to this letter within 48 hours and sent two almost identical memoranda to the DOT Secretary,<sup>379</sup> and the Advisor to the Law Minister,<sup>380</sup> requesting “whether” the contract needed to be annulled in order to

<sup>374</sup> Suresh Report, **Exh. C-130**, para. 15(iv) See also *supra* paras. 247-248.

<sup>375</sup> Suresh Report, **Exh. C-130**, para. 15(i).

<sup>376</sup> Transcript, Day 4, p. 118, line 4 - p. 119, line 14.

<sup>377</sup> Suresh Report, **Exh. C-130**, para. 15(iv).

<sup>378</sup> Letter of 14 June 2010 from DOT (Mr. Thomas) to DOS / ISRO (Secretary Radhakrishnan) enclosing press articles, **Exh. C-138**.

<sup>379</sup> Memorandum from DOS to DOT, 16 June 2010, **Exh. C-140**.

<sup>380</sup> Memorandum from DOS (Secretary Radhakrishnan) to the Ministry of Law and Justice (Mr. TK Viswanathan), 16 June 2010, **Exh. C-141**.

“preserve the precious S band spectrum” and ensure a level playing field for other service providers.<sup>381</sup>

350. It is notable that, despite Dr. Suresh’s recommendations, Dr. Radhakrishnan rushed to ask the Ministry of Justice “whether” the Agreement needed to be annulled. There is a dispute on the meaning of “whether” in Dr. Radhakrishnan’s memorandum to the MOJ. For the Tribunal, Dr. Radhakrishnan was seeking advice about *how* to annul the Agreement, i.e. he wanted to identify a legally permissible basis for terminating it. This is also how the MOJ understood the request. In reply to Dr. Radhakrishnan’s request, it provided legal advice on the possible basis for terminating the Agreement, rather than any policy advice as to “whether” the Agreement needed to be annulled. This understanding is also confirmed in the subsequent Space Commission Note, which recounted the steps taken by the DOS and stated that the latter had “decided to request [the] Ministry of Law and [J]ustice to give its opinion as to *how* to annul the contract”.<sup>382</sup> The ICC tribunal reached the same conclusions.<sup>383</sup>
351. At the hearing, Mr. Anand confirmed that, following receipt of the Suresh Report, and in the space of 10 days, “there was a discussion Dr. Radhakrishnan had with a few people and then he arrived at a conclusion or a decision based on that”.<sup>384</sup> Importantly, Mr. Anand also confirmed that in these (undocumented) discussions nobody consulted with the MOD.<sup>385</sup> Similarly, there is no evidence before the Tribunal that the DOS or Dr. Radhakrishnan inquired about the outcome of the “deeper analysis” to be carried out by the military as directed at the 15 December 2009 meeting to consider other avenues for their S-band requirements in view of the limited spectrum available. The Tribunal will revert on the implications of this lack of evidence below.<sup>386</sup>

<sup>381</sup> See also *supra* paras. 251-0.

<sup>382</sup> Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**, para. 14.1. (*in fine*) (emphasis added).

<sup>383</sup> *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Final Award, 14 September 2015, **Exh. R-042**, para. 104.

<sup>384</sup> Transcript, Day 4, p. 123, line 8-10.

<sup>385</sup> Transcript, Day 4, p. 123, line 19 – p. 124, line 4.

<sup>386</sup> See *infra* paras. 364-367.

352. On 18 June 2010, the Advisor to the Law Ministry provided his reply to Dr. Radhakrishnan, suggesting that “in exercise of its sovereign power and function [...] [the Central Government] take a policy decision” in order for Antrix to be able to invoke the force majeure clause.<sup>387</sup> He remarked that he “ha[d] been told” by Radhakrishnan in a meeting “that new strategic needs have been [sic] emerged which require accommodation in the spectrum”.<sup>388</sup>
353. Shortly thereafter, on 30 June 2010, the DOS Additional Secretary drafted the “Note to Space Commission” to prepare the meeting that would take place a few days later, the purpose of which was “to apprise Space Commission on certain concerns that have arisen”, and on “the imperative demand [...] for strategic and societal applications that have emerged”.<sup>389</sup> In discussing the alleged military needs, the Note referred to the minutes of the meeting of 15 December 2009, which were attached.<sup>390</sup> The Note did not explain whether the military had “explore[d] new avenues” as decided by the IDS. The Note also mentioned other “demands” from “Internal Security Agencies viz. BSF, CISF, CRPF, Coast Guard and Police”,<sup>391</sup> “requirements projected by Indian Railways for train-tracking”,<sup>392</sup> and “national communication, dissemination of disaster warnings, tele-education, tele-health and rural communication”,<sup>393</sup> all of which were merely asserted, without any further explanation nor substantiation.
354. Furthermore, the Note also referred to other concerns, such as the “existence on record of a few anomalies that suggest that full information has not been provided to Cabinet and Space Commission”<sup>394</sup> and the fact that “DEVAS, which has a large foreign equity, can assign or sell or sub-licence any and all of its rights under

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<sup>387</sup> Memorandum from Ministry for Law and Justice (Mr. TK Viswanathan) to DOS (Secretary Radhakrishnan), 18 June 2010, **Exh. C-142**. See also *supra* paras 253-254.

<sup>388</sup> *Ibid.*

<sup>389</sup> Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**. See also *supra* paras. 255-261.

<sup>390</sup> *Id.*, paras 8.1 et seq.

<sup>391</sup> *Id.*, para. 8.3.

<sup>392</sup> *Ibid.*

<sup>393</sup> *Id.*, para. 8.4.

<sup>394</sup> *Id.*, para. 13.2.

this agreement without any approvals from ANTRIX, the security implications that can arise as a consequence, would need serious consideration".<sup>395</sup>

355. The Note essentially listed three reasons why legal advice had been sought from the Law Minister on "how" to annul the contract:

"Considering all these facts it was decided in the Department of Space that:

(i) in order to give priority to the demand for fulfillment of strategic requirements that have been received at DOS [...], which is in tune with DOS's stated policy as seen by DOS's correspondences with various fora of Govt. [...]

(ii) due to the opaqueness being seen in the preliminary examination of the documents in hand [...] of Antrix-Devas contract which would suggest, inter-alia, that the non exclusiveness to be ensured while allotting S-Band to private players was not observed; and,

(iii) considering the fact that Dept of telecommunications had not been consulted over a service that includes terrestrial connectivity and the implications thereon including denial of a level playing field,

it was decided to request Ministry of Law and [J]justice to give its opinion as to how to annul the contract."<sup>396</sup>

356. After reviewing these grounds, the Note concluded that it was "inevitable" to annul the Agreement, in the following terms:

"15.1 Annulling the Contract: Considering the need (i) to preserve S-band spectrum for national requirements in strategic sector and for societal applications, (ii) certain concerns on technical, managerial, financial and contractual aspects of ANTRIX-DEVAS contract, and (iii) issues involved in DEVAS obtaining the Spectrum License for the proposed services, (para 13.2 j refers) it would be inevitable to annul the ANTRIX-DEVAS contract."<sup>397</sup>

357. On 2 July 2010, the Space Commission met<sup>398</sup> and directed the DOS to instruct Antrix to annul the contract. The minutes of that meeting refer to strategic and societal needs, however without any substantiation. Notably, they also mention other concerns, in particular the alleged lack of transparency and the fact that some contractual terms were perceived as unduly favorable to Devas. A few months later, one of the attendees at this meeting, Cabinet Secretary

<sup>395</sup> *Id.*, para. 13.2.j. (emphasis removed)

<sup>396</sup> *Id.*, para. 14.1.

<sup>397</sup> *Id.*, para. 15.1.

<sup>398</sup> Minutes of the 117th meeting of the Space Commission, 2 July 2010, **Exh. C-145**. See also *supra* 262-265.

Mr. Chandrasekhar, gave the following account on the annulment to the Prime Minister in a note marked "secret": "[...] since the agreement has now had to be cancelled on account of reasons related to non-transparency and one-sided skew in risk sharing arrangements, ISRO / DoS are left with a satellite [...] which has no immediate commercial application".<sup>399</sup>

358. The Tribunal finds it significant that, in his official summary to the highest political organ of the state, one of the attendees in the key meeting in which the annulment was decided named these two reasons for the annulment and none other. In the absence of any evidence to the contrary from anyone present at the Space Commission meeting, the Tribunal considers that Mr. Chandrasekhar's account can be taken as a fair characterization of the principal basis for the annulment decision. Yet, these reasons were not those later alleged to justify the annulment.
359. To the contrary, all later documents up to the CCS decision place greater emphasis on the strategic and societal needs as the reasons for annulment. Thus, when Dr. Radhakrishnan requested a further opinion from the Additional Solicitor General, he referred to the fact that "[s]ubsequent to signing of this agreement, the Government has received a lot of demands from various wings of the Government for allocation of S band spectrum to them to meet up the strategic and societal requirements of the nation".<sup>400</sup> He did not substantiate or otherwise explain these needs. Neither did the ASG inquire about them. Instead, he recommended to invoke *force majeure* in order to give "greater legal sanctity to the decision to terminate the contract".<sup>401</sup>
360. On 16 February 2011, Radhakrishnan sent a "Note to CCS" to "seek approval of CCS for annulling the agreement" "in view of priority to be given to nation's strategic requirements including societal ones".<sup>402</sup>

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<sup>399</sup> Note by Cabinet Secretary (Mr. Chandrasekhar) on the Charturvedi Report, 12 April 2011, **Exh. C-191**.

<sup>400</sup> Letter of 8 July 2010 from DOS (Secretary Radhakrishnan) to the ASG (Mr. Parasaran) with enclosures, **Exh. C-146**. See also *supra* para. 266.

<sup>401</sup> Opinion of the ASG (Mr. Parasaran), **Exh. C-147**. See also *supra* paras. 0-268.

<sup>402</sup> DOS Note to the CCS, Annulling the "Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft by Devas Multimedia Pvt Ltd.", with attachments, 16 February 2011, **Exh. R-028**. See also *supra* paras. 269-271.

361. The following day, on 17 February 2011, the reasons cited in the CCS decision for the annulment of the Agreement were the “national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as [...] societal needs” and “the needs of the country’s strategic requirements”.<sup>403</sup>
362. The Tribunal draws two main conclusions from the evidence just reviewed. First, the decision to annul the Devas Agreement was not based on facts and was the result of a flawed process. Second, if the Agreement as it was then framed had been irreconcilable with military and societal needs, *quod non*, the Indian authorities should have engaged with Devas to seek a solution, which they failed to do. These two conclusions are set out in more detail in the following paragraphs.
363. *First*, the decision to annul the Agreement was arbitrary and unjustified inasmuch as it was manifestly not based on facts, but on conclusory allegations, and was the product of a flawed process. Dr. Radhakrishnan’s course to rush to the annulment after the press reports, which as a cascade effect triggered all the other subsequent actions, was taken without any documentary evidence, sound justification, or record. It was further in conflict with the recommendations of the Suresh Committee that Dr. Radhakrishnan himself had set up to review the matter. Indeed, the Suresh report called for a “critical examination” by a “competent team”. Yet, there is no evidence that any such examination was ever performed; Dr. Radhakrishnan precipitated the outcome by aiming for the most extreme solution (the annulment) and then seeking to justify it *ex post*. It is clear from the evidence reviewed above that when Dr. Radhakrishnan first wrote to the DOT and the Ministry of Justice for advice, he had already decided that the Agreement should be annulled, and was only seeking the “best” way to go about it (“how”).<sup>404</sup>
364. In particular, as far as the military needs are concerned, it is true that there had been military “demands” from 2005 to 2009. However, the outcome of the “crystallization” of these needs in December 2009 was that the military was to search for other avenues. Yet, the record does not show whether that search

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<sup>403</sup> Press Information Bureau, “CCS Decides to Annul Devas-Antrix Deal”, 17 February 2011, **Exh. C-031**. See also *supra* paras. 272-273.

<sup>404</sup> See *supra* paras. 349-351.

- even took place, what its results were, and whether it was considered in the decision to annul the Agreement. There is no evidence that the military had reached the conclusion that its needs could not be met.
365. The fact that the minutes of the December 2009 meeting do not show the existence of essential military needs is confirmed by the absence of any follow up action. Indeed, no military needs were put before the 115th or 116th meetings of the Space Commission or elevated to the Space Secretary.<sup>405</sup> The Tribunal has difficulty in following the suggestion of one of India's witnesses that all those attending at the December 2009 meeting on behalf of DOS/ISRO were negligent.<sup>406</sup> Neither is there an indication that those present from the IDS elevated the matter within their hierarchy, which one would expect had there been any essential military needs.
366. It is also important to note Mr. Anand's testimony that, in preparing his report, Dr. Suresh received input from two DOS attendees of the 15 December 2009 meeting, Mr. Sayeenathan and Ms. Varadhan. Mr. Anand further stated that Dr. Suresh could have received the documents regarding strategic needs that pre-dated this meeting from Ms. Varadhan and thus "he would have looked at all the strategic needs".<sup>407</sup> Thus, if military needs justifying annulment had existed, Dr. Suresh would have ascertained them from the direct sources and incorporated them into his recommendations. However, Dr. Suresh did not do so; neither did he recommend annulment.
367. Furthermore, even assuming that a rational policy existed, namely the need to protect military needs, the Tribunal considers that there was no appropriate correlation between the asserted public policy objective and the measure adopted to achieve it,<sup>408</sup> as the course of action chosen conflicts with the

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<sup>405</sup> See, e.g., Anand, Transcript, Day 4, p.113, line 17 - 24.

<sup>406</sup> Transcript, Day 4, p. 108, line 6 – 25; Transcript, Day 4, p.116, line 6.

<sup>407</sup> Transcript Day 4, p. 120 - p.121.

<sup>408</sup> See *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, **Exh. RLA-111**, cited by both Parties, whereby "a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented" (para. 10.3.9). See also *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh. CLA-060**, para. 460

recommendations of the committee entrusted with reviewing the issue for that specific purpose.

368. Turning now to the so-called “societal needs”, the Tribunal cannot but conclude that there is nothing in the record documenting these needs. Not only are there no reports from any governmental office or agency substantiating these needs, not even the *demands* from the relevant authorities have been produced. The Tribunal is simply faced with bare assertions of categories of needs, which start to appear in the documents around the time when Dr. Radhakrishnan comes to the conclusion that the Agreement should be annulled. The timing of these assertions is critical and their mere repetition *in the documents leading to the annulment* without any explanation, content, or justification for the types of needs listed does not lend credibility either to the process or the purported justifications.
369. By contrast, the record does evince that the appearance of the proclaimed military and strategic demands and societal needs coincided with the unfolding of the unrelated political scandal involving the corrupt sale of terrestrial spectrum in India, and with the manifestation of personal animosities within the DOS towards the Devas Agreement.
370. In particular, starting from 2009, there was a concern that Devas had acquired valuable spectrum for too low a price. At various junctures, the press focused on this concern in the belief that the Devas-Antrix deal could reveal a political scandal similar to the 2G Scandal,<sup>409</sup> which concerns were taken very seriously at least by certain arms of the Indian Government, in particular within the DOT, as recalled above.<sup>410</sup> Within the DOS there was also a belief that Devas had acquired the spectrum in a non-transparent or opaque fashion<sup>411</sup> – “on the sly” as

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(holding that “unreasonable” conduct would require “a showing that the State’s conduct bears a reasonable relationship to some rational policy”).

<sup>409</sup> See, e.g., “Devas gets preferential allocation of ISRO’s spectrum” and “Another spectrum sold on the quiet”, *The Hindu Business Line*, 31 May and 1 June 2010, **Exh. C-024**.

<sup>410</sup> See *supra* paras. 343-344, discussing Letter from DOT (Dr. Chandra) to ISRO (Mr. Balachandhran) enclosing press articles, 4 June 2010, **Exh. C-135**; Letter of 14 June 2010 from DOT (Mr. Thomas) to DOS / ISRO (Secretary Radhakrishnan) enclosing press articles, **Exh. C-138**.

<sup>411</sup> See, e.g., Note from DOS to Space Commission, 30 June 2010, **Exh. C-144** (“due to the opaqueness being seen in the preliminary examination of the documents in hand [...] of Antrix-Devas contract”); Note by Cabinet Secretary (Mr. Chandrasekhar) on the

India's witness Mr. Anand testified.<sup>412</sup> There were further concerns about certain commercial terms of the Devas Agreement which were perceived as too onerous to the Indian party, in particular the penalties for delays in satellite deliveries.<sup>413</sup> The various reports also refer to the preoccupation that there was no control over a possible assignment of the Agreement.<sup>414</sup> Finally, there was a further worry that there was no "level playing field" so far as terrestrial operators were concerned, as it emerges from Dr. Radhakrishnan's letters.<sup>415</sup> As already observed, it is significant that the "secret" note to the Prime Minister mentioned the lack of transparency and the one-sided clauses in the contracts, but made no mention of other reasons that were officially brought forward in the CCS decision.<sup>416</sup> As it has already noted, the Tribunal has no reason not to accept that this note reflects the principal factors behind the annulment of the Agreement.

371. The post-annulment facts corroborate the conclusion that there were no military needs which were irreconcilable with the Devas Agreement. As already discussed in the section on essential security interests,<sup>417</sup> the discussion within the Government on the use of spectrum continued for almost four years, culminating in the Cabinet decision of 21 January 2015. The Tribunal has already highlighted the significant areas of uncertainty arising out of the only document on record on the final spectrum allocation, i.e. the half-page document contained in Exh. R-43.<sup>418</sup>
372. In addition, before that decision, the DOT was heavily agitating in favor of a commercial use of the spectrum. The Tribunal notes that there are almost no documents on record as to the DOT's communications to the Cabinet or the DOS

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Charturvedi Report 12 April 2011, **Exh. C-191** ("the agreement has now had to be cancelled on account of reasons related to non-transparency").

<sup>412</sup> Transcript, Day 4, p. 256, line 17.

<sup>413</sup> See, e.g. Suresh Report, **Exh. C-130**, para. 15(iv); Minutes of 117<sup>th</sup> Meeting of the Space Commission, 2 July 2010, **Exh. C-145**.

<sup>414</sup> See, e.g., Note from DOS to Space Commission, 30 June 2010, **Exh. C-144**, para. 13.2.j.

<sup>415</sup> See Memorandum from DOS to DOT, 16 June 2010, **Exh. C-140**; Memorandum from DOS (Secretary Radhakrishnan) to the Ministry of Law and Justice (Mr. TK Viswanathan), 16 June 2010, **Exh. C-141**.

<sup>416</sup> Note by Cabinet Secretary (Mr. Chandrasekhar) on the Charturvedi Report 12 April 2011, **Exh. C-191**.

<sup>417</sup> See *supra* paras. 274 et seq.

<sup>418</sup> See *supra* paras. 276-277.

in or before early 2015 concerning its change of position on the use of S-band spectrum.<sup>419</sup> The Tribunal has difficulty in following the testimony that the DOT, after battling for years, communicated its decision to relinquish its demand for S-band worth billions of dollars simply by placing telephone calls to Mr. Anand<sup>420</sup> and Mr. Sethuraman.<sup>421</sup>

373. Besides the oral testimonies that the GSAT-6 satellite was eventually launched and is used for strategic and societal purposes,<sup>422</sup> the Tribunal has not been presented with any documents evidencing the actual and planned usage of that and of the other S-band satellites. At the hearing, Mr. Anand referred to an S-band "utilisation plan" in response to a question from the Tribunal.<sup>423</sup> He then, however, backtracked when it came to questions seeking to elicit a copy the plan.<sup>424</sup>

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<sup>419</sup> Transcript, Day 4, p. 194, line 23 – p.197, line 19.

<sup>420</sup> Transcript, Day 4, p. 196, line 1 - 18.

<sup>421</sup> Transcript Day 3, p. 143 - p. 144.

<sup>422</sup> Transcript, Day 3, p. 53, line 11 – p. 54, line 21; Transcript, Day 4, p. 8, line 16 - p. 9, line 4.

<sup>423</sup> Transcript, Day 4, p. 236, line 20 - 25.

<sup>424</sup> See Transcript, Day 4, p. 261, line 21 – p. 263, line 9:

"Q. The first question comes out of a question put to you by Professor Stern. She was asking you a question about MSS uplink and downlink, and she was asking: 'So for what use now is the downlink of MSS? Is it not used? You said it's uplink MSS, downlink BSS. So what is the purpose of the downlink of MSS?' And you answered: 'No, no, no. That will all get used in the upcoming satellites. So the entire spectrum -- there is a utilisation plan for using the spectrum from end to end. So what we do is: GSAT-6, 6A, 7S, all these have to be allocated spectrum.' So my question is simply about the utilisation plan that you referred to. That utilisation plan would show to us precisely how the spectrum is planned to be utilised, I presume?

A. Any utilisation plan will tell you how it's going to be utilised.

Q. Is that a utilisation plan that you've seen, I presume?

A. No, I have not seen. I have only heard about the utilisation from the experts.

Q. Okay. Where would the utilisation plan be? Would it be with DOS? I presume it would be. Is that correct?

A. The person in charge of utilisation of spectrum is sitting right here, Mr. Sethuraman, so he would know better.

Q. Right. So he would be able to provide a copy of that utilisation plan for the Tribunal?

A. I didn't say there is a document. I said there is an utilisation plan. It would be disjointed; there won't be one single document, (a), (b), (c), (d). It would be scattered across various documents relating to various satellites.

374. In the presence of documented needs, the Tribunal would not second-guess the Government's decision to adopt a certain course of action. The difficulty here is that the assertions found only in documents prepared with a view to the annulment decision do not constitute such evidence. The fact that the annulment decision was not backed by evidence in support of the reasons invoked is a strong indication that these reasons were not well-founded.
375. The Tribunal comes now to its second conclusion deriving from the review of the record. Even *if* there were proof of any military and societal needs irreconcilable with the Agreement, *quod non*, the Tribunal is of the opinion that it was incumbent upon India to raise the issues it had identified in the Agreement with Devas/DT.<sup>425</sup> Despite the fact that the Devas platform appeared to cater for the possibility to offer various services, the Indian authorities made no attempt to engage with Devas/DT to examine whether and how these services could accommodate the public needs that had allegedly arisen. At no time after Dr. Radhakrishnan had come to the conclusion that the Agreement needed to be annulled did Devas/DT get the opportunity to explain, fix, amend, or try to meet the concerns asserted.
376. What is more, not only did India fail to engage with a view to attempting to reach an acceptable solution with its counterparty or an amendment of the Agreement (as recommended by Dr. Suresh), but it positively misled the investor on a number of occasions. On 4 February 2010, after the alleged military demands had crystalized at the 15 December 2009 meeting,<sup>426</sup> Devas and DT met with Dr. Radhakrishnan and Mr. Anand.<sup>427</sup> As already recalled, at this meeting, Devas made a presentation to the Indian authorities in which it explained the strategic, societal and commercial applications of the Devas platform, including services

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Q. So he would be able to gather together those documents to demonstrate to the Tribunal how the various satellites you've referred to are going to be utilised; is that correct?

A. That question should be directed to Mr. Sethuraman, if he can produce such a document."

<sup>425</sup> See *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, **Exh. CLA-69**, paras. 287-289 (failure to engage with investor in a straightforward manner found to constitute an FET breach).

<sup>426</sup> Minutes of meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO (redactions further removed), 25 January 2010, **Exh. C-252**.

<sup>427</sup> Devas presentation to Secretary Radhakrishnan on the Devas System, 4 February 2010, **Exh. C-126**.

for the railways, security, emergency and disaster relief, health and education.<sup>428</sup> It is undisputed that no reference was made to the ongoing investigation nor to the crystallization of the military needs at this point in time. The Tribunal finds it particularly difficult to understand why no mention was made to Devas/DT of the allegedly competing military needs. If irreconcilable military needs had indeed arisen, as India argues, this incompatibility with the Agreement should have been communicated to Devas and DT.

377. In this respect, the Tribunal does not share India's position that the very nature of the subject matter pertaining to national security prevented it from sharing information with the investor. India did not need to disclose sensitive or classified national security information, but could simply have advised Devas/DT in general terms that the military needed some of the spectrum, thus allowing the investor to be aware of the situation and act accordingly.<sup>429</sup>
378. In the Tribunal's view, the failure to engage in a dialogue with Devas/DT is particularly troubling under the circumstances for a number of reasons. With regard to the alleged military needs, the preponderance of the evidence before this Tribunal establishes that throughout the years the military constantly asserted needs for *MSS spectrum*,<sup>430</sup> while the Devas-held portion of the spectrum was *BSS spectrum*. Even after the annulment, in the context of the EGOM proceedings and the discussions between the DOT and DOS, the DOS stated unequivocally that "[s]ervices in S band will be used by strategic and

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<sup>428</sup> See *ibid.*, esp. p. 5, quoted *supra* at footnote 369.

<sup>429</sup> The Tribunal shares the observation by the Mauritius BIT tribunal on this point. See Mauritius BIT Award, para. 469 ("It would be to no avail for the Respondent to argue that such strategic information could not be communicated to the Claimants. Indeed, the required disclosure would not entail informing the Claimants of the nature of those needs or revealing any secret information. The Respondent could and should have simply informed the Claimants that the Agreement was in jeopardy because of societal and strategic needs; it would then have been up to the Claimants to decide how much financial and other resources they were willing to put at risk in that context or to propose to the Respondent possible alternative solutions").

<sup>430</sup> See, e.g., Anand WS, Annex 1, para. 4; Minutes of Third Task Force Meeting with DOS held on 21 February 2006 at HQ IDS New Delhi, 6 March 2006, **App. VA-3**, para. 14; Minutes of the Integrated Space Cell Meeting held on 19 February 2007 at HQ IDS, 26 March 2007, **App. VA-5**; HQ Integrated Defence Staff, Convening Order, "Constitution of Expert Committee on Spectrum and Satellite Uses of Frequency Band 2.5 GHz to 2.69 GHz (S-band) by Defence Services", 30 August 2007, **App. VA-6**.

government services and the requirement is only for MSS [...].<sup>431</sup> The same request for MSS spectrum is evident from a letter of September 2012 from the Armed Forces to ISRO.<sup>432</sup> The Tribunal cannot follow Mr. Anand's explanation at the hearing that this letter, authored by an Air Vice Marshall and Chairman of the Integrated Space Cell (Armed Forces), was "a pretty incompetent letter".<sup>433</sup> A dialogue with Devas/DT could have clarified whether the Agreement could be amended instead of wholly annulled.

379. Moreover, Devas showed on numerous occasions that it had applications that could potentially be used to cater for India's strategic and societal needs. As was already mentioned above in relation to the 4 February 2010 meeting and as will be further highlighted below, these potential functions were presented on several occasions to departments within the Indian Government, including those most closely related to security, such as the National Security Advisor and the National Security Council ("NSC") Secretariat. There is no indication on record that India even considered any of these services. In fact, India has not alleged that the use of the Devas System was ever reviewed for its ability to meet strategic and societal needs, or that means other than the outright annulment were considered.
380. At the 4 February 2010 meeting referred to above, instead of informing DT/Devas of possible threats to the Agreement, Secretary Radhakrishnan stated that a new deadline was set for the launch of the satellite on September 2010.<sup>434</sup> The lack of transparency is manifest. At the same time, the Government was both telling Devas that the satellite would be launched and taking steps towards the annulment of the Agreement. Not only did it not disclose relevant facts, it actually concealed them by affirmatively creating a misleading impression of the status of

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<sup>431</sup> Note for the Empowered Group of Ministers (EGoM) on vacation of spectrum (redacted), 1 March 2012, **Exh. C-244**, Annex 9, para. 3(b)(i)).

<sup>432</sup> Letter from MOD to ISRO (Dr. Radhakrishnan) (redacted), 27 November 2012, **Exh. C-247** ("As envisaged in 2008, the requirement for Armed Forces worked out to be 70 Mhz in the MSS band. [...] This satellite was required to be programmed with 70 Mhz in dual polarization for MSS applications for Defence Forces. [...] The requirement for MSS applications by the Armed Forces has gone up to 120 Mhz [...]. [...] a void of 33% in 'S' band remains and this can only be met by re-appropriating 20+20 Mhz from BSS spectrum towards MSS applications of Armed Forces").

<sup>433</sup> Transcript, Day 4, p. 189, line 23.

<sup>434</sup> Viswanathan WS, para. 95.

- the project. The Tribunal is struck by the failure to provide Devas/DT with due process at that time, especially given the drastic outcome that was contemplated.
381. The lack of transparency continued and, even worsened thereafter. After the MOJ had provided its advice on 18 June 2010, on 22 June 2010 Devas and DT met in Delhi with Mr. Menon, India's National Security Advisor, who was also a member of the Space Commission. At this meeting, Devas and DT presented once again the strategic and societal applications available under the Devas System.<sup>435</sup> Again, no mention was made of the Agreement being in jeopardy.
382. As was recalled above, on 2 July 2010, the Space Commission decided to revoke the spectrum and annul the Agreement, a decision that was not conveyed to Devas or DT.
383. One month later, in August 2010, Devas met again with the Secretariat of the NSC and explained how its services could be used by the user agencies represented in the NSC, including proposals to develop the Devas Defense Network.<sup>436</sup> Later that month, on 27 August 2010, Devas presented its services to the Joint Secretary of the Prime Minister's Office.<sup>437</sup>
384. At none of these meetings were any military requirements mentioned nor, to the extent some of these meetings took place after 2 July 2010, was DT/Devas informed that the Government had made the decision to annul the Agreement.<sup>438</sup>
385. In October 2010, DT's Chief Technology and Information Officer Mr. Kozel traveled to India and met with the Minister of State Chavan (who had attended the 2 July 2010 Space Commission meeting).<sup>439</sup> No reference was made then to the Space Commission's decision to annul the Agreement or to competing military demands for Devas's S-band. According to Mr. Kozel's contemporaneous email report, the Minister of State merely "reiterated the concerns about

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<sup>435</sup> Devas presentation to Mr. Menon, 22 June 2010, **Exh. C-143**.

<sup>436</sup> Devas presentation to National Security Council Secretariat, "Satellite Based Multi-Media Applications: Perspective for National Security", 6 August 2010, **Exh. C-152**, slides 13-14.

<sup>437</sup> Devas presentation to Mr. T.K.A. Nair, "Devas Multimedia Innovative Satellite System Serving Critical Needs of the Nation", 27 August 2010, **Exh. C-157**.

<sup>438</sup> See Transcript, Day 3, p. 8, line 9 - p. 10, line 12; WS Viswanathan, paras. 105-106.

<sup>439</sup> See attendees listed in Minutes of the 117th meeting of the Space Commission, 2 July 2010, **Exh. C-145**, p. 1.

frequencies not being auctioned” and suggested that a commission would in the future be appointed to review the situation. Mr. Kozel’s report expressed the confidence that a satellite launch would be scheduled in the first quarter of 2011 and that DT’s investments were not at risk.<sup>440</sup>

386. Thereafter, as was explained at the hearing, DT and Devas continued work to prepare for the launch of GSAT-6 and GSAT-6A satellites over the second half of 2010.<sup>441</sup> In particular, Devas submitted a draft WPC licence to Antrix and communicated with ISRO’s frequency management office to finalize the application.<sup>442</sup> DT also conducted a successful second round of experimental trials in Germany (August 2010) and China (October 2010).<sup>443</sup> Dr. Larsen testified at the hearing that these trials would not have happened if the annulment decision had been communicated to Devas/DT.<sup>444</sup>
387. The lack of transparency and forthrightness is manifest. The Indian authorities continued acting as if the project were on track and it was business as usual, when in fact the contract had been annulled. As a result, DT and Devas continued to take active steps towards the realization of the project. In other words, after the annulment was decided, Devas and DT were affirmatively misled and made to believe that the project was alive when in fact it was dead.
388. The decision to revoke the spectrum and annul the Agreement was finally communicated to Devas/DT through the CCS decision of 8 February 2011, i.e. more than seven months after it had been taken by the Space Commission. The Tribunal agrees with the Mauritius BIT tribunal which held that:

“if the Respondent had acted in good faith, it would have informed the Claimants about the decision of the Space Commission of 2 July 2010 to annul the Agreement. Unfortunately, nothing of the sort occurred; in fact, the evidence shows that right up to February 8, 2011, the Claimants were

<sup>440</sup> See Email from Mr. Kozel to Mr. Gunther and Mr. Copp re “DEVAS Trip Report”, 19 October 2010, **Exh. C-236**, p. 2.

<sup>441</sup> See Transcript, Day 2, p. 46, line 5 - p. 47, line 3; Transcript, Day 2, p.72, line 1 - 7; Transcript, Day 2, p. 198, line 19 – 21.

<sup>442</sup> See Letter of 20 July 2010 from Devas (Mr. Viswanathan) to Antrix (Mr. Murthi) and ISRO / Antrix / DOS (Secretary Radhakrishnan) with enclosures, **Exh. C-148**; Letter from Antrix (Mr. Murthi) to ISRO (Mr. Neelakantan) enclosing the draft application by Devas for WPC licence on 20 July 2010, 4 September 2010, **Exh. C-159**.

<sup>443</sup> See Transcript, Day 2, p. 46, line 5 - 12; Transcript, Day 2, p. 65, line 3 - 13; Transcript, Day 2, p. 72, line 1 - 7; Larsen WS, paras. 62-63.

<sup>444</sup> See Transcript, Day 2, p.117, line 2 – 12.

completely left in the dark about the Space Commission's decision and the alleged growing needs of the military and their possible impact on the Agreement.<sup>445</sup>

389. In conclusion, India acted in "wilful disregard of due process of law" through conduct "which shocks, or at least surprises, a sense of juridical propriety", to use the words of the ICJ in *ELSI*, to which both Parties have referred.<sup>446</sup>
390. For all of these reasons, the Tribunal finds that India's conduct did not comply with the fair and equitable treatment standard in multiple respects. It barely needs noting that all of the acts reviewed by the Tribunal and giving rise to an unlawful conduct, including those of the DOS, ISRO, and the CCS, are attributable to India as they were performed by organs of the State within the meaning of Article 4 of the ILC Articles. Having reached this conclusion, the Tribunal can dispense with examining whether India also breached DT's legitimate expectations, as it would make no difference to its finding that an FET breach occurred.
391. In the second phase of this arbitration, the Tribunal will assess the harm caused by India's actions in breach of FET as identified above.

## **B. EXPROPRIATION**

392. The Parties diverge on whether India's measures constituted an expropriation and, if so, whether the expropriation complied with the requirements set by the BIT for a lawful taking.

### **1. The Claimant's position**

393. The Claimant submits that India's measures constituted both direct and indirect takings. In particular, India directly expropriated the contractual rights under the Devas Agreement, which resulted in indirect deprivation of DT's shares in Devas.

#### **a. Indirect expropriation**

394. DT claims that India *indirectly* expropriated its shares in Devas and its in-kind contributions to Devas by annulling the Agreement and thereby rendering DT's investment worthless. Although Devas may have some small amount of cash left

<sup>445</sup> Mauritius BIT Award, para. 468.

<sup>446</sup> See *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, International Court of Justice, Judgment, 20 July 1989, I.C.J. REPORTS 15 (1989), **Exh. RLA-109**, para. 128.

in the bank, bankruptcy is not a pre-condition for expropriation. What matters is that India's measures prevented "any further implementation of Devas's business plan".<sup>447</sup>

**b. Direct expropriation**

395. The Claimant further submits that India *directly* expropriated Devas's contractual rights under the Agreement. The effect of India's measures was to bring the Agreement and the Devas Project to an end. In a similar case, the *ADC v. Hungary* tribunal concluded that the measure, which "had the effect of causing the rights of the Project Company to disappear and/or become worthless" constituted an expropriation.<sup>448</sup> In this regard, the Claimant refutes the following arguments made by India.
396. First, the fact that India was not a party to the Devas Agreement is irrelevant, since it is undisputed that India intervened to annul the Agreement using its sovereign power. That fact reinforces the Claimant's argument that the annulment of the Agreement was an extra-contractual measure, which in the words of *Bayindir v. Pakistan* "is by definition an act of '*puissance publique*'".<sup>449</sup>
397. Second, contrary to India's contentions, the Agreement was not subject to further approvals. It entered into force after "Antrix through ISRO/DOS" obtained the necessary orbital slot and frequency clearance, as was confirmed by the ICC Award.<sup>450</sup> The absence of the WPC License does not alter the fact that the Government expropriated Devas's rights under the Agreement. According to DT, India fails to "explain how any uncertainty surrounding the eventual issuance of the WPC License required in light of the terrestrial segment of the business, which was not subject of the Agreement, could mean that the Agreement did not give rise to acquired rights in respect of the lease of satellite capacity and S-band

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<sup>447</sup> Reply, para. 245.

<sup>448</sup> Reply, para. 247, discussing *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, Award, **Exh. CLA-006**, para. 304.

<sup>449</sup> Reply, para. 250, discussing *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, **Exh. CLA-010**, para. 183.

<sup>450</sup> *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Final Award, 14 September 2015, **Exh. R-042**, paras. 178-182.

spectrum that was its subject matter”.<sup>451</sup> In fact, the ICC Award confirmed that the Agreement gave Devas the exclusive right to lease 70MHz of S-band and Devas was the only entity capable of using that spectrum terrestrially.<sup>452</sup> This contradicts India’s submission that Devas had no acquired rights under the Agreement.

398. Third, India may not rely on the contractual defenses under Articles 7 and 11 of the Agreement in order to avoid responsibility under the Treaty. By its own assertion, India is not a party to the Agreement and therefore it cannot raise contractual defenses. In fact, the ICC Award rejected Antrix’s attempt to invoke Articles 7 and 11 of the Agreement to justify the annulment.<sup>453</sup> Moreover, if the contractual defense of *force majeure* based on a governmental act excused a state from liability under an international treaty, “then contracts governed by municipal law could never be the basis for ‘acquired rights’ protected by an investment treaty”.<sup>454</sup> In any event, even if India could invoke contractual defenses, here they would be “fictitious” or based on pretext. Investment tribunals usually disallow attempts to exercise a contractual defense that was “merely a pretext designed to conceal a purely expropriatory measure”.<sup>455</sup>

399. Therefore, India’s sovereign decision to annul the Agreement constituted a direct expropriation of Devas’s acquired contractual rights.

**c. Unlawfulness of the expropriation**

400. Article 5 of the BIT requires an expropriation to be “in the public interest”, “authorized by the laws of” the host State, “on a non-discriminatory basis” and “against compensation”. For DT, it is undisputed that these conditions of lawfulness are cumulative. Because India’s expropriation failed to satisfy those criteria, DT submits that the expropriation was unlawful.

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<sup>451</sup> Reply, para. 254.

<sup>452</sup> *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Final Award, 14 September 2015, **Exh. R-042**, paras. 6, 7, 339(b).

<sup>453</sup> *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Final Award, 14 September 2015, **Exh. R-042**, paras. 187-192.

<sup>454</sup> Reply, para. 256.

<sup>455</sup> Reply, para. 258, citing to *Malicorp v. Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, **Exh. CLA-109**, para. 142.

401. As to the requirement of compensation, the Claimant argues that there has been no offer, let alone a payment of compensation. Antrix's offer to refund the Upfront Capacity Reservation Fees was manifestly inadequate, since the BIT requires "compensation which shall be equivalent to the value of the expropriated or nationalized investment". In addition, the ICC Award dismissed Antrix's argument that it only owed the Upfront Capacity Reservation fee to Devas.<sup>456</sup> India's failure to provide compensation is in and of itself sufficient to render the expropriation unlawful.<sup>457</sup>
402. The Claimant further contends that India expropriated its investments in a discriminatory manner. In particular, DT relies on the fact that the Government's alleged policy decision to reserve S-Band for strategic purposes left untouched the 40 MHz of S-band leased to the Government-owned operators. It is the Claimant's view that this is a clear case of a measure affecting a foreign investor and not domestic investors in like circumstances.
403. The Claimant also argues that India's measures lacked a public purpose. The relevant case law shows that a mere invocation of "public interest" does not satisfy the treaty requirement in this respect.<sup>458</sup> As argued in connection with FET and India's essential security interests defence, the Government acted with ulterior political and commercial motives when annulling the Agreement. Furthermore, the public purpose requirement implies that the expropriatory measure be proportionate,<sup>459</sup> which it was not.
404. Therefore, the Claimant considers that the expropriation of DT's investment was illegal on multiple counts.

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<sup>456</sup> *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Final Award, 14 September 2015, **Exh. R-042**, paras. 309-310.

<sup>457</sup> Reply, para. 264, citing to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **Exh. CLA-020**, para. 7.5.21.

<sup>458</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, Award, **Exh. CLA-006**, para. 432.

<sup>459</sup> *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh. CLA-023**, para. 522.

## 2. The Respondent's position

405. The Respondent argues that the expropriation claim is meritless. It submits that the measures that DT challenges were not expropriatory and were, in any event, in full compliance with Article 5 of the BIT.

### a. No expropriatory measure

406. According to India, "a protected property right is the *sine qua non* of an expropriation".<sup>460</sup> Neither Devas nor DT had any protected right under the Agreement that could be expropriated, since the implementation of the Devas Project required Governmental approvals, which had not been obtained. Any contractual rights that Devas had under the Agreement had not materialized by the time the CCS took the decision to disallow the allocation of the relevant spectrum for commercial use.

407. India submits that, in a similar situation where the government had not issued a necessary renewal of broadcasting rights, the tribunal in *Emmis v. Hungary* held that there was no "property right or asset ... vested (directly or indirectly) in the claimant for him to seek redress".<sup>461</sup> *Accession Mezzanine v. Hungary* took the same stand dismissing the expropriation claim where "the Claimants did not have a property right, contractual right or any other vested legal right in Hungarian law in relation to the exploitation of a national radio frequency in Hungary on the critical date of the alleged expropriation".<sup>462</sup>

408. The Respondent refutes DT's argument that the uncertainty surrounding the WPC License did not alter the existence of Devas's contractual rights to the spectrum. In making this argument, so says the Respondent, the Claimant assumes that the WPC License was required only for the terrestrial and not for the satellite component of the project. This assumption is wrong, given that

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<sup>460</sup> Rejoinder, para. 214; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, **Exh. RLA-055**, paras. 6.2, 20.7-20.8

<sup>461</sup> *Emmis International Holding, B.V., Emmis Radio Operating, B.V. and Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, **Exh. RLA-061**, para. 168.

<sup>462</sup> *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, **Exh. RLA-152**, para. 146.

“...Devas could not provide any services – including satellite-only services (the subject of the purported ‘acquired rights’) – without a WPC operating license”.<sup>463</sup>

409. India finds it irrelevant that the Government may not invoke contractual defenses, such as *force majeure*, to excuse itself from treaty breaches. Indeed, India is not invoking *force majeure* as an excuse. What matters is that the Agreement on which DT relies as the purported basis for the acquired right to implement the Devas Project did not provide for such right, since the contractual obligations were expressly excluded where they contravened sovereign decisions.<sup>464</sup> Thus, in the Respondent’s submission, DT’s direct expropriation case fails as a matter of law because the Claimant has identified no property right which may give rise to an expropriation claim.

410. For the Respondent, there is no room either for a claim of indirect expropriation, since Devas remains under the management and control of DT Asia and other shareholders, and has in fact pursued its claims in the ICC arbitration and obtained an award in its favor. In any event, the shares in the local company do not constitute a relevant investment for purposes of the expropriation claim, as the dispute does not relate to the deprivation of the shareholders’ rights. In *CME v. Czech Republic*, invoked by the Claimant in this regard, the situation was different; the tribunal found there to be “substantial accrued legal rights”, including a TV broadcasting license, which formed the basis of an operating business.<sup>465</sup>

411. In sum, so argues India, its measures were not expropriatory as they did not affect rights capable of being expropriated.

**b. Lawfulness of the expropriation**

412. In the alternative, if India’s measures were found to be expropriatory, India opposes the view that the alleged expropriation was unlawful. It disputes DT’s submission about non-compliance with the conditions for a lawful expropriation, namely compensation, non-discrimination and public purpose.

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<sup>463</sup> Rejoinder, para. 219.

<sup>464</sup> Rejoinder, para. 217.

<sup>465</sup> *CME Czech Republic B.V. v. The Czech Republic*, (UNCITRAL), Partial Award, 13 September 2001, **Exh. CLA-017**, para. 520.

413. First, as to compensation, the Respondent submits that an offer or a payment of compensation is not a pre-requisite of legality. As the *Tidewater v. Venezuela* tribunal held, where there is a genuine dispute about the expropriatory nature of the measure, “an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation”.<sup>466</sup>
414. Second, regarding discrimination, India emphasizes that DT does not and cannot claim that it was discriminated based on nationality. In any event, the portion of S-band leased to the Government-owned operators is an inappropriate comparator, since “the referenced 40 MHz of S-band is not similarly situated to the satellite S-band spectrum [...] and could not be used effectively for strategic purposes”.<sup>467</sup>
415. Third, the Respondent also challenges the Claimant’s position that the measure lacked a public purpose. In support, it refers to the arguments raised in respect of the essential security interests and of FET. In addition, it stresses that the CCS decision expressly stated that it was reserving S-band for strategic purposes due to “an increased demand for allocation of spectrum for national needs, including for the needs of defense, para-military forces, railways and other public utility services”.<sup>468</sup> The Claimant’s allegation that this decision did not mean what it said and was “a contrivance designed to extricate Antrix from the Devas Agreement” is “irresponsible” and “cannot be taken seriously”.<sup>469</sup>

### 3. Analysis

416. The Tribunal has concluded above that India’s conduct breached the FET Treaty standard in multiple respects. As a consequence of the acts which the Tribunal has deemed contrary to FET, the Devas Agreement was annulled. As far as expropriation is concerned, in essence DT claims that by unlawfully annulling the Devas Agreement India expropriated its contractual rights, which resulted in an indirect deprivation of DT’s shares in Devas. For reasons of judicial economy, the

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<sup>466</sup> *Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, **Exh. RLA-153**, paras. 138, 140.

<sup>467</sup> Rejoinder, para. 228.

<sup>468</sup> Press Information Bureau, “CCS Decides to Annul Devas-Antrix Deal”, 17 February 2011, **Exh. R-031**.

<sup>469</sup> Rejoinder, para. 230.

Tribunal can dispense with addressing these claims, since even if the same facts were found to also constitute an expropriation, the ensuing damages would not be greater.

### C. FULL PROTECTION AND SECURITY

#### 1. The Claimant's position

417. DT contends that "in the absence of any express limitation in the treaty" the obligation to accord full protection and security contained in Article 3(2) of the BIT "is not limited to physical security".<sup>470</sup> In this sense, it overlaps with the FET standard.<sup>471</sup> Therefore, for DT, India's conduct described above in relation to FET also breached the full protection and security standard contained in Article 3(2) of the BIT.<sup>472</sup>

#### 2. The Respondent's position

418. According to the Respondent, the full protection and security clause "only protects physical security of foreign investments", irrespective of a specific mention of physical security in the clause.<sup>473</sup> This standard "is not a substitute for a stabilization clause" and it is undisputed that India made no stabilization commitment. As a result, the claim for violation of Article 3(2) is ill-founded.

#### 3. Analysis

419. For reasons of judicial economy, given its holding on FET, the Tribunal dispenses with addressing the Claimant's FPS claim, as any resolutions of this claim, assuming it were well-founded, would not change the outcome of the dispute in terms of quantification of damages.

<sup>470</sup> Memorial, para. 333, discussing *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, **Exh. CLA-009**, para. 406.

<sup>471</sup> *Ibid.*

<sup>472</sup> Memorial, para. 334; Reply, paras. 270-272.

<sup>473</sup> Counter-Memorial, paras. 167-170; Rejoinder, paras. 270-273, discussing, *inter alia*, *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh. CLA-060**, paras. 483-484; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, **Exh. CLA-048**, **Exh. RLA-069**, para. 165.

## VII. COSTS

420. Both Parties request an award of costs in respect of the legal fees and expenses and the costs incurred in connection with the jurisdiction and liability phase of this arbitration and have filed statements quantifying their costs.<sup>474</sup>

421. In particular, the Claimant claims the following amounts:

- i. its share of the fees of the Tribunal and the PCA, amounting to EUR 400,000;
- ii. its witness costs in the sum of GBP 19,791.29 and EUR 5,082;
- iii. its costs for fees, disbursements and photocopying charges of its international counsel, Freshfields Bruckhaus Deringer LLP, in the sum of GBP 4,972,260.40;
- iv. its costs for the fees and disbursements of Mr. Samuel Wordsworth QC, in the sum of GBP 180,775.01;
- v. its costs for the fees and disbursements of its Indian counsel Platinum Partners and Mr. Aman Ahluwalia, in the sums of EUR 28,895.00 and GBP 77,185.00; and
- vi. the costs of the appointing authority in the sum of USD 10,000.

422. The Respondent claims the following items:

- i. its share of the fees of the Tribunal and the PCA, amounting to EUR 400,000;
- ii. its costs for the legal fees of its counsel Curtis Mallet-Prevost, Colt & Mosle LLP in the sum of USD 2,578,155.00;
- iii. its costs for travel and other charges in the sum of USD 116,850.79.

423. As the case will continue to the quantum phase, the Tribunal considers it more appropriate to defer its decision on the apportionment of the costs to such phase.

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<sup>474</sup> See Claimant's Submission on Costs, 8 July 2016; Respondent's letter, 8 July 2016.

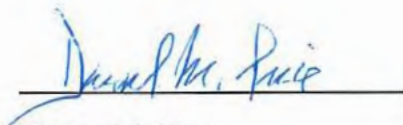
**VIII. DECISION**

424. For the reasons set forth above, the Tribunal decides as follows:

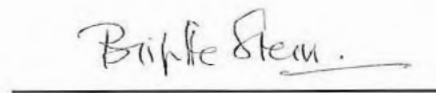
- a. The Tribunal has jurisdiction over this dispute involving the Claimant and the Respondent;
- b. The Respondent has breached the fair and equitable treatment standard provided in Article 3(2) of the BIT;
- c. The Tribunal will take the necessary steps for the continuation of the proceedings toward the quantum phase.

Seat of arbitration: Geneva, Switzerland

Date: 13 November 2017



Mr. Daniel Price



Prof. Brigitte Stern



Prof. Gabrielle Kaufmann-Kohler