Exhibit 1

to the declaration of Christopher Boog
dated May 18, 2022

FEDERAL SUPREME COURT 2 May 2022

REVISION APPLICATION
(Articles 119a FSCA and 190a PILA)

on behalf of the

REPUBLIC OF INDIA, acting through the Department of Space of India ("**DOS**"), Antariksh Bhavan, New BEL Road, Bangalore 560 231, India, but domiciled for the purposes of these proceedings in the offices of Schellenberg Wittmer Ltd, Löwenstrasse 19, PO Box 2201, 8021 Zürich, represented by Dr. Christopher Boog, attorney-at-law (**Exhibit A-000**, Power of Attorney dated 2 May 2022).

Applicant

against

DEUTSCHE TELEKOM AG, with its registered office at Friedrich-Ebert-Allee 140, 53113 Bonn, Germany.

Respondent

concerning

The Interim Award rendered on 13 December 2017 in the Permanent Court of Arbitration ("**PCA**") Case No. 2014-10; and

The Final Award rendered on 27 May 2020 in the same case

Schellenberg Wittmer

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I. PRAYERS FOR RELIEF

1. The Republic of India respectfully requests that it

pleases the Federal Supreme Court to

Procedurally

(1) Declare the present request for revision admissible.

On the merits

(2) Grant the present request for revision directed against the Interim Award dated 13 December 2017 and Final Award dated 27 May 2020 in the Permanent Court of Arbitration Case No. 2014-10 between the Republic of India and Deutsche Telekom AG.

(3) Annul the Interim Award dated 13 December 2017 and Final Award dated 27 May 2020 in the Permanent Court of Arbitration Case No. 2014-10 between the Republic of India and Deutsche Telekom AG.

(4) Remand the case to an arbitral tribunal under the auspices of the Permanent Court of Arbitration.

(5) Order Deutsche Telekom AG to pay all costs and expenses of these proceedings, including a fair indemnity as a contribution to the fees of the undersigned counsel.

(6) Dismiss any and all other, further or contrary claims and prayers for relief raised by Deutsche Telekom AG.

II. INTRODUCTION

2. The present revision application (the "**Application**") is brought by the Republic of India ("**India**" or the "**Applicant**") in the broader context of its dispute with Deutsche Telekom AG ("**Deutsche Telekom**" or the "**Respondent**") in relation to the latter's purported investment into Devas Multimedia Pvt. Ltd. ("**Devas**"). India is respectfully submitting this Application to the Swiss Supreme Court following the recent discovery of a serious, fraudulent scheme that had been committed by Devas and its shareholders.

3. In the course of 2008, Deutsche Telekom acquired an indirect, minority stake in Devas, a company incorporated in India on 17 December 2004. On 28 January 2005, shortly after its incorporation, Devas entered into a commercial agreement (the "**Devas Agreement**") with Antrix Corp. Ltd. ("**Antrix**"), a State-owned entity, administratively controlled by the Indian Department of Space (the "**DOS**"). Under the Devas Agreement, Antrix agreed to the long-term lease of two satellites operating in the "S-band" spectrum, which is a specific electromagnetic spectrum allotted to India. The aim of the Devas Agreement was to establish a hybrid satellite and terrestrial communications network across India.

4. India's goal in leasing those satellites (and hence the corresponding space segment capacity) to Devas was to ensure the best possible use of the S-band spectrum, a scarce and valuable portion of the electromagnetic spectrum. Considering how valuable this resource was, India viewed the Devas Agreement as an opportunity for millions of citizens to obtain access to multimedia and information services. At the time, Devas had represented to Antrix and other agencies of the Government of India that it had the technical competence and ability to provide a wide range of services using a unique hybrid communications platform. However, Devas never delivered on any of its obligations under the Devas Agreement, and no unique technology was ever deployed (or shown to be deployed) in India. Devas further never created the revolutionary communication system it had promised to deliver. In fact, and as India recently discovered, Devas never had the intention (let alone the means) to achieve the project it had represented to Antrix.

5. In parallel, following the execution of the Devas Agreement, demand for the S-band spectrum increased markedly, in part due to the increased needs of the Indian military. This prompted a review of the legal, commercial, procedural and technical aspects of the Devas Agreement in late 2009, and ultimately led to its termination on 25 February 2011. The reports issued by various committees and government agencies at the time raised a number of red flags, which led the Indian authorities to suspect illegal conduct. At that point in time, however, the investigations into the dubious circumstances surrounding the conclusion of the Devas Agreement and Devas' incorporation were in their very early stages.

6. Following the termination of the Devas Agreement, India was faced with a flurry of claims brought by Devas, Deutsche Telekom and other Devas shareholders, namely CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Pvt. Ltd. and Telecom Devas Mauritius Ltd. (the "**Mauritian Devas Shareholders**"). In particular, on 2 September 2013, Deutsche Telekom initiated arbitration proceedings against India based on the Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments dated 13 July 1998 (the "**Germany-India BIT**").[1] This arbitration, which was seated in Geneva, was administered by the Permanent Court of Arbitration (the "**PCA**") under reference PCA Case No. 2014-10. Deutsche Telekom alleged in those proceedings that India had breached Articles 3 and 5 of the Germany-India BIT and claimed over USD 270 million in damages.

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1 **Exhibit A-001**, Agreement between Germany and India for the Promotion and Protection of Investments dated 10 July 1995 (Exhibit C-1 in the arbitration).

7. The three-member arbitral tribunal constituted in the case (the "**Arbitral Tribunal**") decided to bifurcate the arbitral proceedings and to decide in a first stage on the jurisdictional objections raised by India and India's alleged liability under the Germany-India BIT, then in a second stage on the quantum of Deutsche Telekom's claims (if applicable).

8. On 13 December 2017, the Arbitral Tribunal issued an interim award, by which it found that it had jurisdiction over Deutsche Telekom's claims and that India had breached Article 3(2) of the Germany-India BIT (the "**Interim Award**").[2] On 29 January 2018, India filed a setting-aside application against the Interim Award before the Federal Supreme Court, which was rejected on 11 December 2018 (case 4A_65/2018).

9. On 27 May 2020, following the second phase of the arbitration, the Arbitral Tribunal issued its final award (the "**Final Award**", together with the Interim Award, the "**Awards**"), ordering India to pay Deutsche Telekom USD 93.3 million plus part of the costs of the proceedings.[3]

10. While the arbitration proceedings were unfolding, the Indian authorities conducted investigations into the suspected illegal conduct in connection with the conclusion and performance of the Devas Agreement. The Indian Central Bureau of Investigation (the "**CBI**") initiated a criminal investigation into these matters, and filed formal criminal charges against Devas, certain of its officers and directors, as well as certain individuals working for Antrix and the Indian Space Research Organization ("**ISRO**"). A separate investigation was also initiated by the Enforcement Directorate of India in relation to suspected offences of money laundering committed by Devas and its officers and directors at around the same period. However, the investigation did not progress markedly during the arbitration, in part due to delays linked to mutual assistance proceedings and to dilatory appeals filed by the accused. The criminal investigations, which focus on acts of corruption of Indian officials and on money laundering, remain ongoing to this day.

11. After the close of the arbitration, new, significant elements came to light regarding the (un)lawfulness of Deutsche Telekom's purported investment, i.e. its indirect shareholding in Devas. Specifically, in the course of the criminal investigation, grounded suspicions arose that Devas had in fact been created for fraudulent purposes, to carry out a fraudulent scheme in collusion with certain former officials of Antrix, and that the Devas Agreement had been obtained by fraud and without the approval or knowledge of the Government of India.

12. This led Antrix, in January 2021, to initiate civil proceedings for the winding-up of Devas. In those proceedings, it was submitted that Devas had been incorporated for a fraudulent purpose and carried out its affairs in a fraudulent manner, in breach of Indian law, and must therefore be wound up. On 17 January 2022, the Indian Supreme Court, based on its own independent review of the record, rendered a judgment confirming that Devas is to be wound up (the "**Indian Supreme Court Judgment**") based on Section 271(c) of the Indian Companies Act 2013 (the "**Companies Act**").[4]

13. The Indian Supreme Court, whose rulings state the law of the land in India, was the first judicial body to have rendered a determinative, reasoned finding on the fraudulent scheme behind Devas. The Indian Supreme Court Judgment was preceded by two orders issued by quasi-judicial bodies, namely by the National Company Law Tribunal of India (the "**NCLT**") on 25 May 2021 (the "**NCLT Order**")[5] and by the National Company Law Appellate Tribunal (the "**NCLAT**") on 8 September

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2 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017.
3 **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, para. 357.
4 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022.
5 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021. The NCLT Order consists of three parts, i.e. the dispositive part of the order (one page), the reasoned order rendered in matter Company

2021 (the "**NCLAT Order**").[6] Importantly, the Indian Supreme Court "*did not find any perversity in the* [factual] *findings recorded by*" the NCLT and the NCLAT.[7] On the contrary, the Indian Supreme Court considered that "[t]*hese findings are actually borne out by documents, none of which is challenged as fabricated or inadmissible*".[8]

14. Although the Indian Supreme Court Judgment will be discussed in greater detail in this Application below, some of its key findings warrant particular attention already at this stage, as they shed light on the three main prongs of the fraudulent scheme behind Devas:

(1) First, the Indian Supreme Court found that "*Devas offered a bouquet of services known as (a) Devas Services through a device called (b) Devas device in a hybrid mode of transmission, which is a combination of satellite and terrestrial transmissions, and which is called (c) Devas Technology but none of which existed at the relevant point of time or even thereafter*".[9] It was therefore established that, contrary to what it had represented to the Government of India, Devas never had the technology required to provide the services it had promised to deliver under the Devas Agreement. In particular, and as will be further explained, Devas never intended to use the system architecture known as Digital Video Broadcasting-Satellite Handheld ("**DVB-SH**"), which combines a satellite component and a complementary terrestrial component to develop an innovative hybrid communication system.

(2) Second, the Indian Supreme Court found that "*Devas did not even hold necessary intellectual property rights in this regard though they claimed to have applied*".[10] It was therefore revealed that, contrary to what it had stated at the relevant time, Devas never owned the intellectual property rights over the design of the devices (specifically, multimedia receivers) that were critical for the provision of the services contemplated under the Devas Agreement.

(3) Third, the Indian Supreme Court mentioned that "*a total amount of* [INR] *579 crores* [approx. USD 76 million] *was brought in, but almost 85% of the said amount was siphoned out of India, partly towards establishment of a subsidiary in the US* [specifically, in Delaware], *partly towards litigation expenses*".[11] As will be further explained, Devas had indeed (fraudulently) sought and obtained the approval of the Indian Foreign Investment Promotion Board (the "**FIPB**") to bring foreign capital into India. In this regard, the Indian Supreme Court highlighted that "[t]*he kind of licenses obtained* [by Devas] *and the object for which FIPB approvals were taken but showcased as those sufficient for fulfilling the obligations under the* [Devas Agreement] *demonstrated that the affairs of the company were conducted in a fraudulent manner*".[12] This finding directly calls into question the validity of the FIPB approvals, in view of the fraudulent representations that were made at the time.

Petition No. 06/BB/2021 (99 pages) and an order in sub-proceedings relating to a request for intervention by Devas Employees Mauritius Pvt. Ltd., one of the Mauritian Devas Shareholders (14 pages), which was dismissed. In the following, all references pertain to the reasoned order.

6 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021. The NCLAT Order consists of two separate orders: the Judicial Order (pp. 1-204 of the exhibit) and the Technical Order (pp. 205-357 of the exhibit). When referring to the NCLAT Order, the Applicant specifies to which of the two orders the reference pertains.

7 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.7.

8 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.7.

9 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(vii) (emphasis added).

10 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(viii).

11 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).

12 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).

15. The Indian Supreme Court Judgment revealed that the fraudulent scheme behind Devas operated at three distinct levels. First, Devas and its shareholders engaged in contractual fraud towards their contract partner, as they knowingly made false statements in order to procure the Devas Agreement. Second, their fraudulent behavior also amounts to statutory fraud under Indian law, which has consequences not only on the validity of the Devas Agreement, but also on the incorporation of Devas as a company. Finally, Devas and its shareholders also engaged in public fraud towards the Indian State, specifically by acting in collusion with public officials and ensuring that crucial information be concealed from the competent authorities. As per the Indian Supreme Court, "*a public largesse was doled out in favour of Devas, in contravention of the public policy in India*".[13] More generally the Supreme Court of India confirmed that, "[a] *product of fraud is in conflict with the public policy of any country including India*".[14]

16. What is more, the Indian Supreme Court found that, due to the collusion of certain officials acting in concert with Devas, the existence of Devas and of the Devas Agreement had been concealed from the relevant Indian authorities at the time of its execution. It also emerged that, contrary to what was represented to the FIPB when it was seeking its approval to bring foreign capital into India, Devas siphoned off the largest part of the foreign investments it received into a subsidiary created in Delaware, under the guise of providing business support services.

17. The Indian Supreme Court also examined the responsibility of Devas' shareholders (e.g. Deutsche Telekom) for this fraudulent scheme. It highlighted that, as each shareholder was represented on Devas' board of directors, they could not feign ignorance of and benefit from the fraudulent scheme put in place, in collusion with government officials. In other words, by purportedly investing in the elaborate fraudulent scheme orchestrated by Devas, Devas' shareholders became not only privy to, but also party to, this fraudulent scheme.

18. The extent of the fraud exposed in the Indian Supreme Court Judgment was unknown to India in the arbitral proceedings, and had not been presented to the Arbitral Tribunal. The findings of the Indian Supreme Court Judgment reveal that Deutsche Telekom's purported investment in Devas was tainted by illegality and fraud. With the issuance of the Indian Supreme Court Judgment, it became clear and established that Devas had in fact been incorporated for a fraudulent and unlawful purpose, and hence that the investment purportedly made by Deutsche Telekom (namely its indirect acquisition of shares in Devas) had not been made "*in accordance with the national laws*" of the Republic of India, as required under Article 1(b) of the BIT.[15]

19. Had these significant, newly discovered and established circumstances been known to the Arbitral Tribunal at the time, they could have changed the outcome of the arbitration. In particular, those recently discovered facts, on which India could not have relied in the course of the arbitral proceedings as the investigations were only in their early stages and the facts were not established, are of significant relevance as regards the Arbitral Tribunal's jurisdiction (or lack thereof) over Deutsche Telekom's claims, India's purported liability under the Germany-India BIT and the quantum of any damages to be awarded to Deutsche Telekom.

20. For the reasons set out in this Application, the recent findings of the Indian Supreme Court warrant that the Awards be annulled, and that the case be remanded to an arbitral tribunal under the auspices of the PCA, so that it can rule on the legality of Deutsche Telekom's purported investment in full cognizance of the facts that have been brought to light.

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13 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(vi).
14 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 13.5.
15 **Exhibit A-001**, Agreement between Germany and India for the Promotion and Protection of Investments dated 10 July 1995 (Exhibit C-1 in the arbitration), Article 1(b).

III. FACTUAL BACKGROUND

1. General context of the dispute between the Parties

21. The dispute between India and Deutsche Telekom has its roots in the Devas Agreement, concluded between Devas and Antrix on 28 January 2005, which provided for the lease of space segment capacity in the S-band spectrum from Antrix to Devas. The Devas Agreement contemplated *inter alia* that Devas would be "*developing a platform capable of delivering multimedia and information services via satellite and terrestrial systems to mobile receivers, tailored to the needs of various market segments*".[16] The Devas Agreement further envisaged that Devas would be providing "*a new digital multimedia and information service, including but not limited to audio and video content and information and interactive services, across India that will be delivered via satellite and terrestrial systems via fixed, portable, and mobile receivers* [i]*ncluding mobile phones, mobile video/audio receivers for vehicles, etc.*".[17] Devas ultimately did not render any of those services.[18]

22. The below summary provides an overview of the main aspects of the project as it was pitched by Devas (see below **Section III.1.1**), the Devas Agreement (see below **Section III.1.2**), Deutsche Telekom's involvement in Devas (see below **Section III.1.3**), some of the various representations made by Devas following the execution of the Devas Agreement (see below **Section III.1.4**), and the circumstances that led to the termination of the Devas Agreement (see below **Section III.1.5**).

23. The Republic of India is conscious that the Federal Supreme Court's power of review in these proceedings does not extend to factual matters, which is why this Application is based exclusively on (i) the factual findings set out in the Awards; and (ii) the new facts and evidence uncovered by the Applicant, which form the basis of this Application. For the avoidance of any doubt, any reference to the Arbitral Tribunal's findings of fact in this first section should not be understood as India's acquiescence to these findings.

1.1 The Devas Project

24. Pursuant to the regulations of the International Telecommunications Union, 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 (the "**S-band**"). Since 1983, India's entire S-band spectrum has been at the disposal of the DOS.[19]

25. In 1997, the Cabinet of Ministers of the Republic of India approved a new policy framework for satellite communications (the "**SATCOM Policy**"). Among other things, the SATCOM Policy contemplated "[e]*ncouraging the private sector investment in the space industry in India and attracting foreign investments*".[20] In 2000, the Government then approved 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*

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16 **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Recital 3.

17 **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Recital 4.

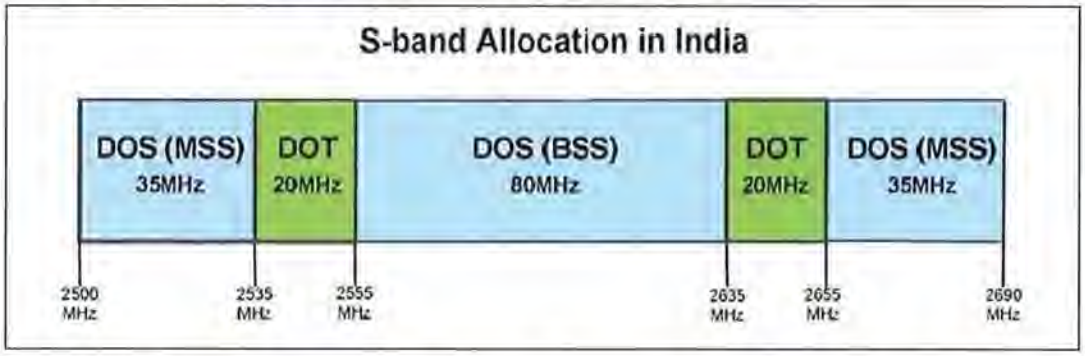
18 See below paras. 120-124.

19 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 51.

20 **Exhibit A-008**, Policy framework for satellite communication in India as approved by the Government of India in 1997 (Exhibit C-4 in the arbitration), p. 1.

procedures", such as "*auction, good faith negotiations, first come first served, or any other equitable method*".[21]

26. In 2003, the DOS transferred 40 MHz of S-band spectrum to the Department of Telecommunications (the "**DOT**") for use for commercial terrestrial services.[22] 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**"). The following chart describes the resulting allocation of S-band:



Source: ***Exhibit A-002***, *Interim Award in PCA Case No. 2014-10 dated 13 December 2017, p. 17*

27. In mid-2003, a US consultancy firm named Forge Advisors LLC ("**Forge Advisors**"), which would later found Devas, began negotiating a potential collaboration for commercializing some of the DOS's S-band spectrum with the ISRO, the DOS and the Indian Space Commission (which advises the Prime Minister on India's space program). In particular, Forge Advisors represented that it could establish a hybrid (satellite-terrestrial) communications platform to provide a range of services.[23]

28. A committee comprising of public officials led by Dr. K. N. Shankara, the Director of ISRO's Space Applications Centre, under the guidance of Dr. Madhavan Nair (Chairman ISRO, Chairman Antrix, Chairman Space Commission and Secretary, DOS) was constituted, to review the feasibility of the Devas project. In May 2004, the committee issued an undated 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*".[24]

1.2 The Devas Agreement

1.2.1 Overview of the Devas Agreement

29. In July 2004, based on the undated Shankara Report, the board of directors of Antrix, which is the marketing arm of the DOS and the entity through which the ISRO engages in commercial activities, approved that the company enter into a partnership with Forge Advisors.[25]

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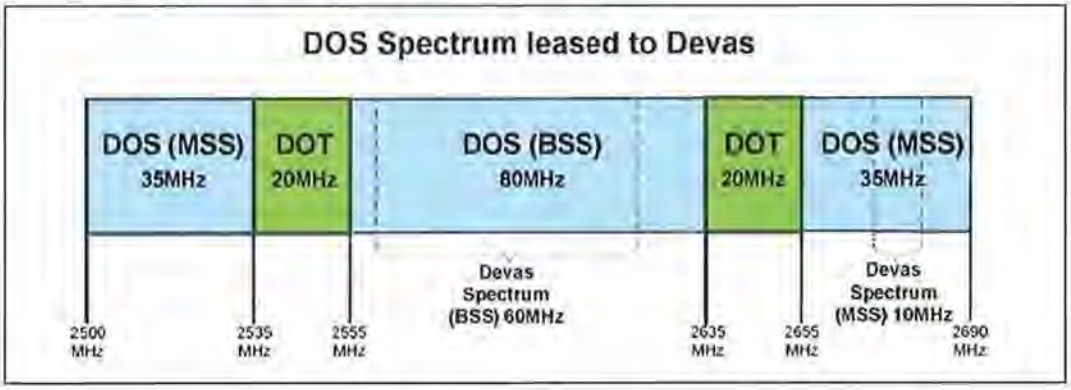
21 **Exhibit A-009**, Government of India, The Norms, Guidelines and Procedures for Implementation of the Policy Frame-work for Satellite Communications in India, 2000, available at www.dos.gov.in (Exhibit R-40 in the arbitration), Article 2.6.2.
22 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 53.
23 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 54.
24 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 55.
25 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 56.

30. In the course of the negotiations of the Devas Agreement throughout the fall of 2004, the ISRO and Antrix, on the one hand, and Forge Advisors, on the other, exchanged a number of communications.[26] Following the negotiations, the board of directors of Antrix approved the final version of the Devas Agreement.[27]

31. On 17 December 2004, Devas was incorporated in the Indian State of Karnataka for the purpose of entering into the Devas Agreement with Antrix.[28]

32. On 28 January 2005, Antrix and Devas entered into the Devas 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 launched by the 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**").[29] The following chart indicates the location of the Devas Spectrum:



Source: ***Exhibit A-002***, *Interim Award in PCA Case No. 2014-10 dated 13 December 2017, p. 20*

33. Under the terms of the Devas Agreement, Devas undertook to pay (i) an upfront capacity reservation fee of USD 20 million per satellite, to be paid in installments; (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; and (iii) critical component acquisition fees.[30]

34. Pursuant to its Article 27, the Devas Agreement was to take effect "*on the date that Antrix is in receipt of all required approvals and communicates to Devas in writing regarding the same*".[31] In this regard, the Union Cabinet, which is the supreme executive decision-making body in the Government of India, approved on 1st December 2005 the construction of a "*state-of-the art National Satellite System* [...] *that will offer a Satellite Digital Multimedia Broadcasting (S-DMB) service, via mobile phones and mobile video/audio receivers for vehicles*".[32] As will be further explained,[33] the Union Cabinet's approval was issued based on a note dated 26 May 2005, which

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26 For a more detailed overview of the communication between the Parties, *see* **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 57.
27 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 58.
28 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 58.
29 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 59.
30 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 60. *See* **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Article 4 and Exhibit B. Sections 1.2, 1.2.3, 2.1.1, 2.1.2.B. and 2.1.2.1.
31 **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Article 27.
32 **Exhibit A-010**, Press Information Bureau, "Multimedia mobile s-band satellite mission (GSAT-6/INSAT 4-E)" dated 1 December 2005 (Exhibit C-7 in the arbitration).
33 See below paras. 97-98.

had been prepared by a (then) director at the ISRO for a meeting of the Space Commission, and a note prepared by the (then) Secretary of the DOS on 17 November 2005, in which key facts had been concealed and which contained misleading statements.[34] Indeed, despite being prepared after the Devas Agreement had been executed, these notes made no mention of either Devas or the Devas Agreement and in fact actively concealed the existence of the agreement.[35]

35. On 2 February 2006, Antrix sent a letter to Devas stating that it had received "*necessary approval for building, launching, and leasing the capacity of S-band satellite*".[36] It is important to highlight that the "*necessary approval*" mentioned in Antrix's letter is a reference to the Union Cabinet's decision dated 1st December 2005.[37] As conclusively established in the Indian Supreme Court Judgment, the Union Cabinet's approval was only obtained through suppression and misrepresentation of vital facts.[38]

1.2.2 Terms governing technologies and obligations

36. The services Devas had undertaken to provide (the "**Devas Services**") were defined in the Devas Agreement as Satellite-Terrestrial Digital Multimedia Broadcasting services ("**S-DMB**" services) as follows:

> "*'Devas Services' means S-DMB services that include subscription multimedia packages with digital audio, visual, and textual data, delivered via satellite and terrestrial systems via fixed, portable, and mobile receivers including mobile phones, mobile video/audio receivers for vehicles, etc. to subscribers' receivers, having capability to send back textual and audio visual data, with additional related activities such as service design, production, packaging and encoding, providing multimedia content that consist of channels of audio, video, internet and text content in various packages, sourced and customized as required by the audio, video and internet content producers and service providers with additional content related activities such as content selection, sourcing, editing, production and programming.*"[39]

37. One of Deutsche Telekom's witnesses in the arbitration, Mr. Gary Parsons, simplified the concept behind the Devas Services and explained that the Devas Services consisted of "*two main services*", i.e. (i) audio-visual ("**AV**"), which consisted of delivering television and cable programming to handheld and mobile terminals; and (ii) broadband wireless access ("**BWA**") services, which consisted of providing broadband internet access to homes (fixed) and to nomadic users, i.e. internet access for computers, laptops, tablets, and mobile devices.[40]

38. In support of its technical competence and ability to provide the Devas Services, Devas represented and warranted in the Devas Agreement that, *inter alia*:

> "*(i)* [Devas] *has the capacity and power to enter into and perform this Agreement in terms thereof;*
>
> *(ii)* [Devas] *has the ability to design Digital Multimedia Receivers ('DMR');*
>
> *(iii)* [Devas] *has the ability to design Commercial Information Devices ('CID');*

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34 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xii).
35 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xii).
36 **Exhibit A-011**, Letter from Antrix (Mr Murthi) to Devas (Mr Viswanathan) dated 2 February 2006 (Exhibit C-8 in the arbitration). *See* **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 62.
37 *See* **Exhibit A-010**, Press Information Bureau, "Multimedia mobile s-band satellite mission (GSAT-6/INSAT 4-E)" dated 1 December 2005 (Exhibit C-7 in the arbitration).
38 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, paras. 12.6 and 12.8(x) and (xii).
39 **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Annexure I, para. 14.
40 **Exhibit A-012**, First Witness Statement of Mr Gary Parsons dated 2 October 2014, paras. 19-23.

> *(iv)* [Devas] *has the ownership and right to use the Intellectual Property used in the design of DMR and CID;*
>
> [...]
>
> *(vii)* [Devas] *shall 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.*"[41]

39. Antrix had agreed, in the Devas Agreement, to lease the space segment capacity in the S-band spectrum to Devas under the condition that Devas would commercialize the leased S-band spectrum as to provide the above stipulated Devas Services.[42] In other words, Antrix agreed to the lease of the space segment capacity to Devas because the purpose of the lease was to establish a hybrid communications platform, which would offer services delivering television and cable programming as well as internet access to India's rural population.

1.2.3 Terms governing the regulatory approvals

40. The Devas Agreement included the following provisions allocating the obligation to obtain 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]".[43]
- Further, under Article 12(a)(ii), Antrix, through the 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*".[44]
- 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*".[45]

1.3 Deutsche Telekom's involvement in Devas

41. In October 2007, one of Devas' representatives first approached the then CEO of T-Mobile International AG, a Deutsche Telekom subsidiary, to discuss a possible partnership.[46] By that

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41 **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Article 12(b).

42 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 54; **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Recitals 3 and 4.

43 **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Article 3(c).

44 **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Article 12(a)(ii).

45 **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Article 12(b)(vii).

46 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 66.

time, Devas had already secured equity investment from Columbia Capital LLC and Telcom Ventures LLC, that had both invested in Devas through their Mauritian subsidiaries.[47]

42. On 19 February 2008, Deutsche Telekom's management board discussed the possibility of investing in Devas and approved an initial equity investment of USD 75 million.[48] On 19 March 2008, Deutsche Telekom's wholly-owned Singaporean subsidiary Deutsche Telekom Asia Pte Ltd ("**DT Asia**") signed a share subscription agreement with Devas.[49] The agreement contemplated that DT Asia would acquire Class C Shares in Devas in exchange for a USD 75 million equity contribution.[50] 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' paid up share capital.[51]

43. On 29 September 2009, following approval by Deutsche Telekom's supervisory board, DT Asia agreed to make a further equity contribution into Devas in the amount of USD 22.2 million.[52] Consequently, DT Asia acquired a further 8,400 Class C shares in Devas and increased its shareholding to 20.73% of Devas' paid up share capital.[53] Following subsequent minor changes in Devas' shareholding, DT Asia's shareholding decreased to 19.62%.[54]

1.4 The representations made by Devas after the execution of the Devas Agreement

44. In the course of the negotiations of the Devas Agreement, i.e. between 2003 and 2005, Forge Advisors made several representations to the ISRO, the DOS and Antrix regarding the technical competence and ability of the team that would be involved in the project.[55] Following the execution of the Devas Agreement, those affirmative representations continued (and, in many respects, escalated).

45. In particular, Devas gave various presentations to these agencies of the Government of India in the course of 2010, including one to the Advisor to the Prime Minister of India, which contained the following depiction of the progress that Devas had purportedly made until then in respect of the Devas Services:[56]

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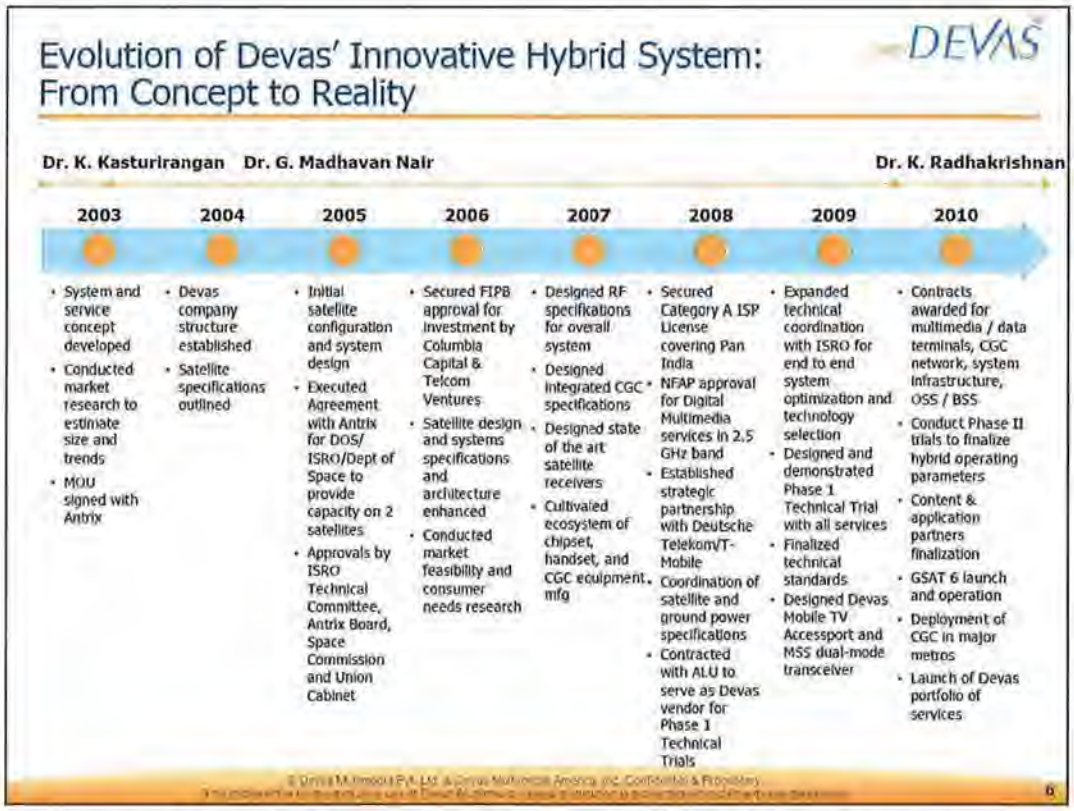
47 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 66.
48 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 68.
49 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, paras. 68-69.
50 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 69.
51 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 69.
52 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 70.
53 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 70.
54 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 70.
55 *See* **Exhibit A-013**, Consolidated minutes of meetings between Forge Advisors and Antrix / ISRO held on 6 May 2004, 21 May 2004 and 24 May 2004 (Exhibit C-58 in the arbitration).
56 **Exhibit A-014**, Devas presentation to Secretary Radhakrishnan on the Devas System dated 4 February 2010 (Exhibit C-126 in the arbitration), Slide 8; **Exhibit A-015**, Devas presentation to Director SCNP, ISRO dated 21 April 2010 (Exhibit C-132 in the arbitration), Slide 14; **Exhibit A-016**, Devas presentation to Sam Pitroda dated 10 June 2010 (Exhibit C-137 in the arbitration), Slide 8.



Source: ***Exhibit A-016***, *Devas presentation to Sam Pitroda dated 10 June 2010 (Exhibit C-137 in the arbitration), Slide 6*

46. Two of the representations made in this slide warrant special discussion, in particular the purported conduct of Phase I and Phase II trials for the use of the DVB-SH technology for the delivery by Devas of the AV services (see below **Section III.1.4.1**); and (ii) Devas' claim that it had "[d]*esigned state of the art satellite receivers*" (see below **Section III.1.4.2**).[57] Indeed, and as will be further explained,[58] it was recently established in the Indian Supreme Court Judgment that these (mis)representations were part of an elaborate fraudulent scheme, as Devas never intended to use the DVB-SH technology to deliver the Devas Services and never owned the IP rights to design state-of-the-art satellite receivers. In addition, and as will be explained,[59] Deutsche Telekom could not have been unaware. In turn, Deutsche Telekom repeated this false narrative in the arbitration, meaning that the Arbitral Tribunal was not presented with a truthful account of the facts.

1.4.1 Devas represented that it would use the DVB-SH technology to deliver the Devas Services

47. Devas indicated in its presentation to the Advisor to the Prime Minister of India that it had conducted Phase I and Phase II technical trials in 2009 and 2010.[60] Devas made representations

57 **Exhibit A-016**, Devas presentation to Sam Pitroda dated 10 June 2010 (Exhibit C-137 in the arbitration), Slide 6.
58 See below paras. 120-122 and 158.
59 See below paras. 125-126 and 165.
60 **Exhibit A-016**, Devas presentation to Sam Pitroda dated 10 June 2010 (Exhibit C-137 in the arbitration), Slide 6.

to the same effect in other presentations and at various meetings.[61] Deutsche Telekom and its witnesses also hinted at these Phase I and Phase II trials during the arbitration.[62]

48. One of the stated objectives of the Phase I trials was to "*understand, characterize and evaluate different emerging satellite/terrestrial IP base*[d] *technologies*".[63] As Devas stated at the time, after the trials, a system architecture known as Digital Video Broadcasting-Satellite Handheld (or DVB-SH) was chosen by Devas for its audio-visual (or AV) services, as "*DVB-SH has been evolved for use in hybrid satellite/terrestrial networks*" and "*has many advance features*".[64] Mr. Gary Parsons, one of Deutsche Telekom's witnesses during the arbitration, explained that the DVB-SH technology is a "*system architecture specifically developed for transmitting content to mobile devices in hybrid satellite-terrestrial systems*".[65]

49. Thereafter, according to Deutsche Telekom, the Phase II trials were conducted in Germany (supposedly with the support of Deutsche Telekom's technicians and engineers) and China in April 2010. The principal purpose of the Phase II trials was purportedly to check whether the technology for the AV services, i.e. DVB-SH, could co-exist with the technology for the other component of the Devas Services, the broadband wireless access (or BWA) services.[66]

50. As will be explained,[67] Devas misrepresented the scope and conduct of these Phase I and Phase II trials. Similarly, Deutsche Telekom peddled a false narrative in the arbitration proceedings, despite the fact that it could not have been unaware of the fraudulent scheme that had been put in place.

1.4.2 Devas represented that it had the necessary intellectual property rights over receivers

51. In the Devas Agreement, Devas expressly represented and warranted, *inter alia*, that it had (i) "*the ability to design Digital Multimedia Receivers*" ("**DMRs**"), (ii) "*the ability to design Commercial Information Devices*" ("**CIDs**"), as well as (iii) "*the ownership and right to use the Intellectual Property used in the design of DMR and CID*".[68] These two types of receivers were indeed critical for the provision of the Devas Services to users on their devices, such as fixed, portable, and mobile receivers (including mobile phones, mobile AV receivers for vehicles, etc.); DMRs and

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61 **Exhibit A-017**, Devas presentation to ISRO / Antrix, "Devas Multimedia" dated 15 December 2008 (Exhibit C-94 in the arbitration), Slides 4-5 and 10; **Exhibit A-018**, Devas presentation to Secretary Nair, "Devas Multimedia: Technical Demonstrations of Devas Hybrid Satellite-Terrestrial System" dated 28 September 2008 (Exhibit C-114 in the arbitration), Slide 7-15; **Exhibit A-019**, Minutes of a meeting of the Devas Board of Directors dated 31 March 2010 (Exhibit C-129 in the arbitration), para. 7 (mentioning that the Phase II trials were being conducted with the help of certain third party suppliers and vendors to test the DVB-SH ecosystem); **Exhibit A-020**, Devas presentation to Mr Adwal "Indian Railways" dated 10 December 2010 (Exhibit C-168 in the arbitration), Slide 3 (referring to "*successful trials conducted in 2009 and 2010*").

62 *See* **Exhibit A-021**, Witness Statement of Dr Kim Kyllesbech Larsen dated 2 October 2014, paras. 41-52 and 60-64; **Exhibit A-022**, First Witness Statement of Mr Ramachandran Viswanathan dated 2 October 2014, paras. 98 and 107.

63 **Exhibit A-023**, Letter from Devas (Mr Venugopal) to WPC enclosing report on the experimental trials dated 29 September 2009 (Exhibit C-116 in the arbitration), Appendix – Report on Experiments, para. 2(a).

64 **Exhibit A-023**, Letter from Devas (Mr Venugopal) to WPC enclosing report on the experimental trials dated 29 September 2009 (Exhibit C-116 in the arbitration), Appendix – Report on Experiments, para. 3.3. *See* also: **Exhibit A-024**, Devas presentation to DT, "Business Plan Summary" dated 21 November 2007 (Exhibit C-70 in the arbitration), Slide 14 ("*A/V modeled based on DVB-SH technology*").

65 **Exhibit A-012**, First Witness Statement of Mr Gary Parsons dated 2 October 2014, para. 20.

66 **Exhibit A-021**, Witness Statement of Dr Kim Kyllesbech Larsen dated 2 October 2014, paras. 60-64; **Exhibit A-022**, First Witness Statement of Mr Ramachandran Viswanathan dated 2 October 2014, para. 107.

67 *See below paras. 114-119 and 120-124.*

68 **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Article 12(b)(ii)-(iv).

CIDs are indeed specific types of receivers that are capable of receiving signals coming from satellites.[69]

52. In its presentations following the execution of the Devas Agreement, Devas claimed to have already designed "*integrated* [complementary ground component] *specifications*" and "*state of the art satellite receivers*" in 2007.[70] Along similar lines, Devas represented to Antrix that it had, already in 2009-2010, "[d]*esigned and developed a variety of Devas terminals, including Multimedia Receivers* [i.e. DMRs] *and Consumer Information Devices* [i.e. CIDs]".[71]

53. However, no agency of the Government of India or Antrix ever saw any of these satellite receivers (be it DMRs or CIDs) that Devas claimed to have designed already in 2007, be it before the termination of the Devas Agreement or thereafter. Contrary to what Devas represented and to what Deutsche Telekom alleged in the arbitration, the Indian Supreme Court conclusively established that Devas had not designed any receivers in 2007 or thereafter, and that it never owned the necessary intellectual property rights to do so.[72]

1.5 The termination of the Devas Agreement

54. The Devas Agreement attracted public scrutiny when it emerged that Devas had acquired a considerable part of the S-band spectrum at a suspiciously low price, in particular when compared to the price paid by other operators.[73] Indeed, in mid-May 2010, the DOT managed to raise USD 15 billion by licensing 20 MHz of S-band capacity, which starkly contrasted with the price paid by Devas under the Devas Agreement, in particular lease fees ranging between USD 9 to 11.25 million per year, for 70 MHz of S-band capacity.[74]

55. At around the same time, allegations surfaced in Indian media that certain government officials at the DOT had engaged in corrupt dealings in the context of the allocations of 2G spectrum to terrestrial mobile operators.[75] This led the CBI to search the DOT's premises, and certain government officials were subsequently arrested in connection with this scandal.[76] Following this, additional criticism arose in relation to the Government's allocation of the S-band spectrum to Devas at a low price.[77]

56. As suspicions of irregularities arose in relation to the Devas Agreement in late 2009/early 2010, the DOS decided to establish a committee to review "*the legal, commercial, procedural and technical aspects*" of the Devas Agreement.[78] This committee issued its report in May 2010, which recommended, amongst other things:

> "*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*

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69 *See* **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Judicial Order, para. 242.

70 *See* **Exhibit A-014**, Devas presentation to Secretary Radhakrishnan on the Devas System dated 4 February 2010 (Exhibit C-126 in the arbitration), Slide 8; **Exhibit A-015**, Devas presentation to Director SCNP, ISRO dated 21 April 2010 (Exhibit C-132 in the arbitration), Slide 14; **Exhibit A-016**, Devas presentation to Sam Pitroda dated 10 June 2010 (Exhibit C-137 in the arbitration), Slide 6.

71 **Exhibit A-025**, Letter from Devas (Mr Viswanathan) to Antrix (Mr Murthi) and ISRO / Antrix / DOS (Secretary Radhakrishnan) with enclosures dated 20 July 2010 (Exhibit C-148 in the arbitration), p. 1 (emphasis added).

72 See below paras. 123-124.

73 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 78.

74 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, paras. 59-60 and 78. See above para. 33.

75 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 75.

76 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, paras. 75 and 85.

77 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 85.

78 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 247.

> *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 on today 47 months have elapsed from the payment date of first installment i.e. June 2006. As per the agreement a delay of 12 months in delivery attracts a penalty of US$ 5 million. This clause looks severed 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 guidelines, importance of preserving the spectrum for essential national needs, international standards, and also due weightage for the upfront payment made by Devas.*"[79] (emphasis added)

57. The committee also highlighted that, as a result of the Devas Agreement, only 10% of the capacity would be available to the ISRO, which would bring "*limitations on the availability of the spectrum for any essential demands in the future*".[80]

58. The committee's report echoed concerns raised by the DOT and the Indian Ministry of Defence (the "**MOD**") regarding the Indian armed forces' projected needs for S-band spectrum for defense, security and military purposes.[81] Following the committee's report, the DOS prepared a further report, which noted that the Government did not have complete information about the Devas Agreement at the time of its conclusion and that the Devas Agreement did "*not leave enough spectrum for ISRO/DOS use if required*".[82]

59. Following this, based on input provided by multiple agencies and ministries, the Government of India concluded that India's essential security needs could not be met if Devas, as a commercial operator, was allowed to use a major portion of the S-band spectrum.[83] In particular, in a note dated 16 February 2011 prepared for India's Cabinet Committee on Security, the highest governmental body entrusted with national security matters, it was observed 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.*"[84]

60. In response to this note, the MOD commented that "[t]*he Defence Services have extensive existing as well as planned usages in* [S-band]".[85] It was therefore recommended that an orbital slot in the S-band for commercial activities should not be provided to Antrix, thus necessitating the annulment of the Devas Agreement.[86]

61. On 17 February 2011, the Government of India announced, by way of a press release, the decision taken by the Cabinet Committee on Security to annul the Devas Agreement. The press release contained a statement made by the Law Minister of India on the decision:

> "*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.*

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79 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 247.
80 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 77.
81 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, paras. 74-80.
82 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 84.
83 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, paras. 262-263.
84 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 263.
85 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 89.
86 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 91.

> *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.*"[87] (emphasis added)

62. Antrix notified Devas of the termination of the Devas Agreement on 25 February 2011.[88] Antrix primarily based the termination on the *force majeure* clause under Article 11 of the Devas Agreement.[89]

63. However, it recently emerged that, when the Cabinet Committee on Security decided to terminate the Devas Agreement on the ground of *force majeure*, a select few officials at the ISRO, Antrix and the DOS concealed and suppressed documents flagging that Devas might not have obtained the rights to use the DVB-SH technology. Specifically, a whistleblower who had been working at the DOS between 2009 and 2010 stepped forward and explained that Devas conspired and colluded with certain officials, so as to ensure that its fraudulent representations about the DVB-SH technology did not reach the higher echelons of the Government.[90] Although these revelations are still being considered in the context of ongoing criminal investigations,[91] and were not available to the Indian Supreme Court, they further highlight the extent of the fraudulent scheme that was put in place.

2. The proceedings before the Arbitral Tribunal and the Awards

64. On 2 September 2013, relying on the arbitration clause contained in the Germany-India BIT, Deutsche Telekom initiated arbitration proceedings against India for the purpose of obtaining damages for breach of Articles 3 and 5 of the Germany-India BIT. A three-member Arbitral Tribunal was constituted under the Arbitration Rules of the United Nations Commission on International Trade Law (the "**UNCITRAL Rules**") under the auspices of the PCA, with its seat in Geneva. In respect to the law applicable to the merits, the Tribunal was to apply Indian national law and generally recognized principles of international law whenever appropriate in accordance with Article 9.2(b)(ii) of the Germany-India BIT.[92] English was designated as the language of arbitration.[93]

65. The Tribunal was constituted on 11 April 2014 and was composed of Mr. Daniel M. Price, appointed by Deutsche Telekom; Professor Brigitte Stern, appointed by India; and Professor Gabrielle Kaufmann-Kohler as Presiding Arbitrator, appointed by the Parties upon proposal of the ICSID Secretary General.

66. In Procedural Order No. 1, the Tribunal agreed to bifurcate the proceedings and to address the issues of jurisdiction and the principle of India's liability, and to address later, if necessary, the quantum of damages claimed by Deutsche Telekom.[94]

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87 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 272.
88 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 92.
89 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 92.
90 **Exhibit A-026**, The Sunday Guardian Live, "Delay in punishing several Devas scam perpetrators" dated 5 February 2022, available at: <https://www.sundayguardianlive.com/news/delay-punishing-several-devas-scam-perpetrators> (last accessed on 26 April 2022).
91 See below paras. 77-81.
92 **Exhibit A-001**, Agreement between Germany and India for the Promotion and Protection of Investments dated 10 July 1995 (Exhibit C-1 in the arbitration), Article 9.2(b)(ii). This provision of the BIT reads as follows: "*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 recognized principles of international law*".
93 **Exhibit A-027**, Terms of Appointment dated 3 June 2014, para. 42.
94 **Exhibit A-028**, Procedural Order No. 1 in PCA Case No. 2014-10 dated 22 May 2014, para. 1.1.

67. India raised three jurisdictional objections to Deutsche Telekom's claims: first, it argued that the BIT protects only investors who have made direct investments in India, which was not the case of Deutsche Telekom, since the German company had initially structured its investment in the form of a contribution of funds to its Singapore subsidiary, which then invested these funds in Devas; second, it argued that all the activities deployed by Deutsche Telekom, via its subsidiary, had remained at the preparatory stage, so that they constituted only pre-investments not protected by the Germany-India BIT; and third, it disputed Deutsche Telekom's right to avail itself of the substantive protections of the treaty, since the contested measures were necessary for the protection of its essential security interests, as reserved by Article 12 of the Germany-India BIT.[95]

68. In a letter dated 24 October 2016, India brought to the Tribunal's attention "*certain recent developments in the Devas matter*", including the filing of criminal charges by India's CBI against a number of Government officials, Devas and certain of Devas' officers and directors.[96] India indicated that these criminal charges, "*if upheld, would constitute additional grounds for dismissal* [of Deutsche Telekom's claims], *as the alleged investment will not have been made in accordance with Indian law*".[97] India further noted "*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*" and requested that the arbitral proceedings be stayed.[98]

69. The Arbitral Tribunal did not analyze the issue of illegality of the investment. At that point in time, the criminal charges were mere suspicions that had not been sufficiently established, let alone upheld in court.[99] On 20 February 2017, the Arbitral Tribunal therefore denied India's request to stay the arbitration proceedings.[100]

70. In its Interim Award of 13 December 2013, the Tribunal first noted that "*it is not clear whether, in its letter of 24 October 2016,* [India] *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 onto the record, as untimely and not in accordance with the procedural rules, which require prior leave*".[101]

71. In its Interim Award, the Tribunal found that it had jurisdiction to hear the dispute between the Parties, held that India had violated the standard of fair and equitable treatment in the sense of Article 3(2) of the Germany-India BIT and decided that it would proceed to the quantum phase of the arbitration.[102]

72. On 29 January 2018, India motioned the Federal Supreme Court to set aside the Interim Award, arguing *inter alia* that the Arbitral Tribunal had wrongly assumed jurisdiction to decide Deutsche Telekom's claims by rejecting India's three jurisdictional objections. India's setting aside application was rejected by the Federal Supreme Court's decision of 11 December 2018.[103]

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95 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, paras. 120, 122-130, 158-165 and 183-201.
96 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 115.
97 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 115.
98 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 115.
99 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 119.
100 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 117.
101 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 118.
102 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 424.
103 **Exhibit A-029**, Federal Supreme Court, Decision 4A_65/2018 dated 11 December 2018.

73. The second phase of the arbitral proceedings then continued with regard to the amount of compensation, if any, that should be awarded to Deutsche Telekom for India's alleged breach of the Germany-India BIT. In its Final Award of 27 May 2020, the Tribunal ordered India to pay Deutsche Telekom USD 93.3 million, plus interest and part of the costs of the arbitration.[104]

3. The arbitrations initiated by Devas and the Mauritian Devas Shareholders

74. In parallel to the arbitration initiated by Deutsche Telekom, India also had to face arbitral proceedings commenced by Devas, on the one hand, and the Mauritian Devas Shareholders, on the other hand:

(i) In July 2011, Devas initiated arbitral proceedings with the International Court of Arbitration of the International Chamber of Commerce against Antrix under the arbitration agreement contained in the Devas Agreement (the "**ICC Arbitration**"). The ICC Arbitration resulted in a final award dated 14 September 2015 (the "**ICC Award**"), ordering Antrix to pay Devas USD 562.5 million in damages (plus interest).

(ii) A year later, in July 2012, the Mauritian Devas Shareholders commenced an investor-State arbitration against India under the Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments. These proceedings resulted in a partial award dated 25 June 2016 and a final award dated 13 October 2020 (the "**Mauritian Awards**"), ordering India to pay the Mauritian Devas Shareholders approximately USD 111 million plus interest.

75. Deutsche Telekom, Devas and the Mauritian Devas Shareholders are all currently taking steps to enforce the decisions that have been rendered in these arbitral proceedings.[105] However, the Mauritian Awards are currently the subject of setting-aside proceedings before the Dutch courts,[106] where the arbitration in that case was seated.

76. Furthermore, as investigations progressed into the fraudulent scheme that had been put in place by Devas and its shareholders, the enforcement of the ICC Award in India has been suspended.[107] As will be explained, the new elements that came to light in the context of these investigations have recently been brought before the highest court in India, which conclusively ruled that Devas had been incorporated for a fraudulent and unlawful purpose and that the affairs of the company were conducted in a fraudulent manner, in breach of Indian law.

4. The criminal proceedings against Devas in India

77. In March 2015, a first information report was registered with the CBI and, based on this report, criminal investigations commenced against several accused persons involved in the execution of the Devas Agreement. That investigation, which is still ongoing,[108] was launched in respect of the allegedly corrupt behavior of eight representatives of the DOS, the ISRO, Antrix and Devas itself in connection with the Devas Services and the Agreement under the Prevention of Corruption Act ("**PoCA**") and the Indian Penal Code ("**IPC**"). In parallel to the CBI investigation, the Indian Enforcement Directorate initiated a separate investigation in respect of offences of money

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104 **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, para. 357.
105 **Exhibit A-030**, Global Arbitration Review, "India wins US stay of satellite award" dated 4 April 2022; **Exhibit A-031**, Global Arbitration Review, "India gets more time to challenge enforcement in Singapore" dated 15 March 2022; **Exhibit A-032**, Global Arbitration Review, "Deutsche Telekom takes India award to US" dated 20 April 2021.
106 **Exhibit A-030**, Global Arbitration Review, "India wins US stay of satellite award" dated 4 April 2022.
107 **Exhibit A-033**, Supreme Court of India, Order dated 4 November 2020.
108 See below para. 80.

laundering against certain Devas officers and directors, Devas and Devas Multimedia America Inc. ("**Devas Delaware**"), a wholly-owned subsidiary of Devas incorporated in Delaware, United States.

78. In the course of the CBI investigation, the CBI issued reports in the form of a Charge Sheet on 11 August 2016[109] and of a Supplementary Charge Sheet on 8 January 2019,[110] containing accusations against said persons for offences under the PoCA and the IPC. In both Charge Sheets, the CBI noted that it would continue investigating offences, which needed to be further particularized.[111]

79. In view of the cross-border aspects of the scheme being investigated, the CBI initiated international mutual assistance proceedings and letter rogatories have been sent to the competent authorities in the United States, France, Singapore and Mauritius. While the French authorities acceded to the mutual assistance request, the letter rogatories sent to the United States, Singapore and Mauritius are pending execution, despite the CBI regularly following up through diplomatic channels.

80. The next step in these criminal proceedings will be for the designated trial court in India to take cognizance of the offences and to officially frame charges under Section 228 of the Indian Code of Criminal Procedure. That is when the criminal trial against the accused persons would commence. This step has not yet taken place in the criminal proceedings. The delay in framing of charges is due to an appeal filed by the accused. Specifically, when the trial court wanted to proceed further to frame charges, the accused took the matter on appeal to the Delhi High Court to stop such framing of charges until the CBI and the Enforcement Directorate concluded their investigation. The matter is still pending, and the proposition of law advanced by the accused is being contested actively.

81. For the avoidance of doubt, the present Application is not based on any allegations of corruption or money laundering (which remain to be substantiated and tried in court), but is solely based on the fraudulent behavior that has been exposed through the decision of the Indian Supreme Court in relation to the winding-up of Devas.[112] India reserves all rights in relation to the outcome of the criminal investigations and its potential impact on the Awards.

5. The winding-up of Devas in India

82. Antrix commenced winding-up proceedings against Devas under the Indian Companies Act in January 2021. Antrix relied on the ground that the incorporation and conduct of Devas were fraudulent. This ground is defined in Section 271(c) of the Companies Act in the following terms:

> *"if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up."*[113]

83. These winding-up proceedings culminated in a judgment of the Indian Supreme Court, rendered on 17 January 2022, which conclusively established, after carefully reviewing all facts and

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109 **Exhibit A-034**, CBI Charge Sheet.
110 **Exhibit A-035**, CBI Supplementary Charge Sheet dated 8 January 2019.
111 *See* **Exhibit A-034**, CBI Charge Sheet para. 16(156); **Exhibit A-035**, CBI Supplementary Charge Sheet dated 8 January 2019, para. 16(49).
112 See above paras. 88-126.
113 **Exhibit A-036**, Indian Companies Act 2013 (excerpts), Section 271(c).

circumstances that had emerged, that Devas had been incorporated "*for a fraudulent and unlawful purpose*"[114] and that "*the affairs of the company were conducted in a fraudulent manner*".[115] The Indian Supreme Court thus considered that the winding-up of Devas was justified based on Section 271(c) of the Companies Act.

84. The Indian Supreme Court Judgment was preceded by decisions of two quasi-judicial bodies, the NCLT and the NCLAT, which were rendered on 25 May 2021 and 8 September 2021, respectively.[116] Both the NCLT Order and the NCLAT Order held that Devas was to be liquidated based on Section 271(c) of the Companies Act.[117]

85. After unsuccessful appeals against the NCLT Order, Devas and one of the Mauritian Devas Shareholders appealed the NCLAT Order before the Supreme Court of India. They alleged, *inter alia*, that the NCLT and the NCLAT had made erroneous findings of fact, had incorrectly applied the standard of proof to the question of fraud and reached erroneous conclusions regarding the consequence of fraud (assuming that fraud was established). They also disputed the NCLT's and NCLAT's findings against Devas' shareholders on the question of fraud.[118]

86. At this juncture, it should be reiterated that the NCLT and NCLAT are quasi-judicial bodies that have been specifically set up to adjudicate issues and disputes relating to companies incorporated in India. The NCLT and NCLAT are deemed to be quasi-judicial authorities because their powers are limited to a specific area of expertise, namely issues of company law, insolvency, etc. They are composed of judicial members, who are retired or serving high court judges, and technical members, who must be from the Indian Corporate Law Service. They render their determinations by virtue of executive discretion rather than the application of the law.[119] Accordingly, the NCLT Order and the NCLAT Order were not *per se* judicial determinations of fraud.

87. The Indian Supreme Court was thus the first judicial authority to examine and assess the winding-up of Devas and to reach a determination on the fraudulent scheme surrounding the incorporation of Devas and the execution of the Devas Agreement.[120] It dismissed the appeal with its judgment dated 17 January 2022. The Indian Supreme Court is the apex court in India (from which there is no avenue of appeal) and its Judgment is final and binding on all concerned parties, including the Devas shareholders.[121] In line with Article 141 of the Indian Constitution,[122] according to which the Indian Supreme Court states the law of the land, the Indian Supreme Court Judgment becomes part of Indian law.

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114 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(ix).
115 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).
116 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021; **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021.
117 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 38 (p. 98); **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 249.
118 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, paras. 4.1 and 4.2.
119 **Exhibit A-037**, Supreme Court of India, Judgment in *Namit Sharma v. Union of India* [2013] 13 SCR 1 dated 13 September 2012, paras. 72-74 ("*Where the function to determine a dispute is exercised by virtue of an executive discretion rather than the application of law, it is a quasi-judicial function*"); **Exhibit A-038**, Supreme Court of India, Judgment in *State of Himachal Pradesh & Ors v. Raja Mahendra Pal & Anr.*, 1995 Supp (2) SCC 731 dated 31 March 1999.
120 See below paras. 88-126.
121 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 35 (p. 97).
122 **Exhibit A-039**, Constitution of India as on 26 November 2021 (excerpts), Article 141 ("*Law declared by Supreme Court to be binding on all courts.– The law declared by the Supreme Court shall be binding on all courts within the territory of India*").

6. The winding-up proceedings established that the incorporation and the conduct of Devas were fraudulent

88. The winding-up proceedings have uncovered that Devas was established and operated in a fraudulent manner. In its judgment of 17 January 2022, the Indian Supreme Court unveiled and conclusively established the complex factual matrix behind Devas' fraudulent scheme.[123]

89. In particular, India's highest court made several findings of fraud and, in summary, concluded the winding-up proceedings of Devas with the following statement:

> *"If the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the Agreement, the disputes, arbitral awards etc., are all infected with the poison of fraud. A product of fraud is in conflict with the public policy of any country including India. The basic notions of morality and justice are always in conflict with fraud and hence the motive behind the action brought by the victim of fraud can never stand as an impediment."*[124]
>
> *We do not know if the action of Antrix in seeking the winding up of Devas may send a wrong message, to the community of investors. But allowing Devas and its shareholders to reap the benefits of their fraudulent action, may nevertheless send another wrong message namely that by adopting fraudulent means and by bringing into India an investment in a sum of INR 579 crores, the investors can hope to get tens of thousands of crores of rupees, even after siphoning off INR 488 crores."*[125] (emphasis added)

90. The Indian Supreme Court Judgment marks the end point of Devas' winding-up proceedings, which were initiated in January 2021.[126] The Indian Supreme Court did not see any erroneous or perverse findings during the previous proceedings, in particular the finding of the NCLAT that the NCLT Order was "*undoubtedly cemented on, just, fair, reasonable and equitable grounds*" and "*is free from any legal flaws*".[127] The NCLT Order found, *inter alia*, that "*the incorporation of Devas itself was with fraudulent intention*",[128] that there "*is a long history of fraud and fraudulent activities committed by Devas and its Management before and after its incorporation*",[129] "*Devas did not stop its fraudulent activities even after termination of the Contract in question*"[130], the "*acts of Devas are nothing but fraudulent*",[131] "*even the idea to incorporate Devas was with fraudulent intentions coupled with malafide objects*"[132] and that "*the incorporation of Devas* [was] *made with fraudulent intentions* [and] *isabinitio* [sic] *void and its name should be struck from the Register* [...] *of Companies*".[133]

91. In order to arrive at these conclusions, the Indian Supreme Court examined whether the requirements for the winding-up of Devas under Section 271(c) of the Companies Act were fulfilled, i.e. whether (i) Devas conducted its affairs in a fraudulent manner, (ii) Devas was formed

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123 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8. See below paras. 88-126.
124 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 13.5.
125 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 13.6.
126 See above para. 82.
127 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Judicial Order, para. 332.
128 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 14 (p. 75). See **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Judicial Order, para. 332.
129 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 19(1) (pp. 78-80).
130 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 15 (p. 76).
131 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 19(6) (p. 82).
132 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 21 (p. 89).
133 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 21 (p. 89).

for a fraudulent and unlawful purpose or (iii) the persons concerned in the formation or management of its affairs committed fraud, misfeasance or misconduct.[134]

92. It will be shown that the Indian Supreme Court established numerous instances showing that the incorporation and the conduct of Devas was fraudulent, in particular that the Devas Agreement was procured in a fraudulent manner and concealed from the Government of India and the public (see below **Section III.6.1**); that Devas fraudulently sought approval from the FIPB to avoid scrutiny by the DOS (see below **Section III.6.2**); that Devas conducted its affairs contrary to its representation under the FIPB approvals (see below **Section III.6.3**); that Devas failed to obtain the necessary licenses and violated the regulatory framework in India (see below **Section III.6.4**); and that Devas could not provide the services it contracted to provide under the Devas Agreement (see below **Section III.6.5**).[135] The Indian Supreme Court also emphasized in its decision that Devas' shareholders, such as Deutsche Telekom, also bore responsibility for Devas' fraudulent incorporation and the unlawful scheme that had been put in place (see below **Section III.6.6**).

6.1 The Devas Agreement was procured in a fraudulent manner and concealed from the public and the Government of India

93. The Indian Supreme Court found that Devas had acted in collusion with a number of government officials to obtain the Devas Agreement through a fraudulent scheme and in a "*surprising* [...] *and shocking*" manner.[136]

94. When the Indian Supreme Court scrutinized the Devas Agreement, it identified several irregularities. For example, it was held that the Devas Agreement was concluded without observing the requirements for an auction or tender process even though it was "*of a huge magnitude*".[137] Further, the winding-up proceedings determined that the Devas Services under the Agreement were contrary to the requirements in the SATCOM Policy and were "*not permitted by law*".[138]

95. Specifically, the SATCOM Policy, in its version in force when the Devas Agreement was executed, prescribed the procedure for allocating space segment capacity to private, commercial entities, so as to ensure that the use of this valuable natural resource is properly regulated.[139] It notably required that a tender be announced for participation by non-governmental users before any allocation or lease agreement can be finalized.[140] The Indian Supreme Court commented on the absence of any tender in the following terms:

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134 See above para. 82.

135 *See* generally **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12; **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Judicial Order, paras. 237-340 and Technical Order, paras. 39-240; **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, paras. 2 (pp. 2-18) and 12-36 (pp. 68-98).

136 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(i).

137 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(i).

138 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xi) and (vi); *see* also **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Judicial Order, para. 257; Technical Order, paras. 74-108; **Exhibit A-009**, Government of India, The Norms, Guidelines and Procedures for Implementation of the Policy Frame-work for Satellite Communications in India, 2000, available at www.dos.gov.in (Exhibit R-40 in the arbitration), Article 2.4.1.

139 **Exhibit A-009**, Government of India, The Norms, Guidelines and Procedures for Implementation of the Policy Frame-work for Satellite Communications in India, 2000, available at www.dos.gov.in (Exhibit R-40 in the arbitration).

140 **Exhibit A-009**, Government of India, The Norms, Guidelines and Procedures for Implementation of the Policy Frame-work for Satellite Communications in India, 2000, available at www.dos.gov.in (Exhibit R-40 in the arbitration), Articles 2.5.2, 2.6.2 and 3.6.10.

> *"An agreement of a huge magnitude, for leasing out five numbers of C X S transponders each of 8.1 MHz capacity and five numbers of S X C transponders each of 2.7 MHz capacity on the primary Satellite-I (PS-I), was surprisingly and shockingly entered into by Antrix with Devas, without same being preceded by any auction/tender process."*[141]

96. The Indian Supreme Court went on to explain the following:

> *"SATCOM Policy perceived telecommunication and broadcasting services to be independent of each other and also mutually exclusive. Therefore, a combination of both was not permitted by law. It is especially so since no deliberation took place with the Ministry of Information and Broadcasting. Moreover, unless* [the Indian national Satellite System Coordination Committee (**"INSAT"**) Coordination Committee] *allocates space segment, to a private player, the same becomes unlawful. This is why the conduct of the affairs of the company became unlawful."*[142]

97. In order to sweep the irregularities of the Devas Agreement under the rug, the persons involved went out of their way to conceal the existence of the Devas Agreement from the Government of India. For example, the Devas Agreement was concealed from the Space Commission and from the Union Cabinet before important decisions with respect to grant of approvals to Devas were taken.[143] Moreover, the individuals involved in the scheme doctored the minutes of a meeting so as to allow Devas to unduly obtain a license.[144] These decisions thus were made without full knowledge of the relevant facts. To the contrary, the decisions were a result of willful suppression and misrepresentation of the facts.

98. In particular, governmental notes were prepared by certain officials of the ISRO and/or the DOS, ahead of the 104th meeting of the Space Commission and for the Union Cabinet.[145] As the Indian Supreme Court noted, none of these notes mention either Devas or the Devas Agreement.[146] Not only this, but the note for the Union Cabinet dated 17 November 2005 actively misrepresented that the "*ISRO is already in receipt of several firm expressions of interest by service providers to utilise this Satellite capacity on commercial terms*".[147] At that point in time, however, the Devas Agreement had already been executed, and 70 MHz of space segment capacity in the S-band spectrum had already been leased to Devas.[148] It is therefore only with the collusion of select few officials, who mentioned "*receipt of several firm expressions of interest*" over a natural resource that had already been leased out, that material facts could be concealed from the Space Commission and the Union Cabinet. As the Indian Supreme Court found:

> *"That the officials of the Department of Space and Antrix were in collusion and that it was a case of fence eating the crop (and also allowing others to eat the crop), by joining hands with third parties, is borne out by the fact that the Note of the 104th Space Commission did not contain a reference to the Agreement. The Cabinet Note dated 17.11.2005 prepared after ten months of signing of the Agreement, did not make a mention about Devas or the Agreement,*

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141 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(i).
142 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xi).
143 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xii).
144 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiii).
145 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xii). *See* **Exhibit A-040**, Note (undated) on Agenda Item No. 5(a), 104th Meeting, by Mr A Bhaskaranarayana for the approval of the Space Commission; **Exhibit A-041**, Note by Mr G. Madhavan Nair to the union Cabinet dated 17 November 2005.
146 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xii). *See* **Exhibit A-040**, Note (undated) on Agenda Item No. 5(a), 104th Meeting, by Mr A Bhaskaranarayana for the approval of the Space Commission; **Exhibit A-041**, Note by Mr G. Madhavan Nair to the union Cabinet dated 17 November 2005.
147 **Exhibit A-041**, Note by Mr G. Madhavan Nair to the union Cabinet dated 17 November 2005, para. 5 (emphasis added).
148 See above para. 32.

> *but proceeded on the basis as though ISRO received several Expressions of Interest. These materials show the complicity of the officials to allow Devas to have unjust enrichment."*[149]

99. In addition, Devas fraudulently obtained a license based on manipulated minutes of a Technical Advisory Group ("**TAG**") sub-committee meeting.[150] The TAG is an expert group within the INSAT Coordination Committee, which is the committee in charge of the allocation of space segment capacities. During a meeting held on 6 January 2009, involving representatives of Devas, the Wireless Planning & Coordination Wing of the DOT (the "**WPC**"), the ISRO and the DOT, Devas' right to use the S-band spectrum for a hybrid satellite-terrestrial communication system, as well as its application for an experimental license, had been discussed.[151] However, the minutes of this TAG meeting had been doctored to remove all references to the fact that Devas was not entitled to use the S-band spectrum for terrestrial retransmission.[152] The original minutes of the meeting read as follows:

> "[Devas] *will have to apply for license for spectrum to WPC and submit a proposal* [...] *for the experimental plan along with all the technical details and results expected. WPC reps stated that license for terrestrial transmission is permitted in certain allocated bands but not in this portion of S-band.*"[153] (emphasis added)

100. In other words, this crucial passage of the minutes pointed out in no unclear terms that the Devas Services could not be rendered insofar as the terrestrial retransmission of satellite signals was concerned.[154] It was however deleted from the minutes that were ultimately circulated to other agencies of the Government of India.[155] It is only based on these manipulated meeting minutes that Devas received an experimental license from the WPC in May 2009.[156] The minutes were corrected only in November 2009, after Devas had obtained its experimental license.[157] The Indian Supreme Court highlighted the manipulation of the TAG meeting minutes in its findings relating to the collusion between Devas and certain officials:

> "*It is on the record that the minutes of the meeting of the Sub Committee dated 06.01.2009 were manipulated and the experimental licence was granted on 07.05.2009. Only thereafter, the original minutes were restored on 20.11.2009 and that too after protest.*"[158]

101. Based on these numerous irregularities, the Indian Supreme Court considered the incorporation of Devas as "*the first ingredient of Section 271(c) of the Companies Act, 2013, namely, the*

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149 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xii).

150 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiii). *See* **Exhibit A-042**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 dated 19 November 2009 (revised version); **Exhibit A-043**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 (manipulated version).

151 **Exhibit A-042**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 dated 19 November 2009 (revised version); **Exhibit A-043**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 (manipulated version).

152 **Exhibit A-042**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 dated 19 November 2009 (revised version); **Exhibit A-043**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 (manipulated version).

153 **Exhibit A-042**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 dated 19 November 2009 (revised version).

154 **Exhibit A-042**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 dated 19 November 2009 (revised version).

155 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiii); **Exhibit A-043**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 (manipulated version).

156 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiii). *See* **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, paras. 57-58.

157 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiii); **Exhibit A-042**, Minutes of the TAG Sub-Committee Meeting held on 6 January 2009 dated 19 November 2009 (revised version).

158 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiii).

formation of the company for a fraudulent and unlawful purpose".[159] Furthermore, it was established that Devas "*hardly has any other business except to grab PS1 and PS2 from Antrix in terms of Agreement and to carry out its illegal object to divert money*"[160] and that it "*remained a company without business operations*".[161]

6.2 Devas fraudulently approached the FIPB to obtain a license for ISP services *in lieu* of Devas Services

102. The Indian Supreme Court Judgment also finally and conclusively established that Devas' application with the FIPB to bring foreign funds into India described a business model that was fundamentally different from what was described in the Devas Agreement.[162]

103. Specifically, Devas applied to the FIPB to obtain approval to bring foreign investment into India on the basis of the Internet Service Provider ("**ISP**") license it had obtained from the DOT on 2 May 2008 and of the Internet Protocol Television ("**IPTV**") license it obtained on 31 March 2009, also from the DOT.[163] As the NCLAT explained, ISP and IPTV services can be delivered via the Internet, without a satellite.[164]

104. However, as mentioned,[165] the Devas Agreement contemplated the provision of so-called Devas Services, which included broadcasting and telecommunication services.[166] Those could not be provided without a satellite.[167]

105. This means that Devas obtained the FIPB approval for the stated purpose of providing ISP services, although the Devas Agreement contemplated hybrid services relying on a hybrid mode of transmission. This hybrid mode of transmission was supposed to be a combination of satellite and terrestrial transmission for which neither the device nor the technology existed at the time.[168]

106. As the NCLAT explained, a separate FIPB approval was available for an investment that involved establishing a satellite for Devas (specifically a FIPB approval for "Satellite Establishments and

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159 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(ix); see also **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 32 (p. 95).

160 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 34 (pp. 96-97).

161 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 190.

162 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(v), (x) and (xv)

163 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(v) and (x).

164 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, paras. 172-181.

165 See above paras. 36-39.

166 *See* **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Recital 4 ("*DEVAS has requested from ANTRIX space segment capacity for the purpose of offering a S-DMB service, a new digital multimedia and information service, including but not limited to audio and video content and information and interactive services, across India that will be delivered via satellite and terrestrial systems via fixed, portable, and mobile receivers including mobile phones, mobile video/audio receivers for vehicles, etc.*").

167 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(vii). *See* also: **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, paras. 172-181; **Exhibit A-007**, Agreement for the Lease of Space Segment Capacity between Devas and Antrix dated 28 January 2005 (Exhibit C-6 in the arbitration), Recitals 3-5.

168 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, paras. 12.3 and 12.8(v), (vi), (vii), (viii) and (x).

Operations"), and Devas ought to have approached the FIPB via this avenue.[169] This specific type of FIPB approval was subject to sectoral guidelines issued by the DOS and the ISRO.[170]

107. It appears that the reason why Devas fraudulently approached the FIPB based on the licenses obtained from DOT was that, while the Indian regulatory regime provided for a licensing and approval regime for ISP services, there was no such regime in place for the so-called Devas Services, which required hybrid satellite-terrestrial communications system. The Devas Services were therefore more controversial in nature as far as their regulation was concerned, and "*there were no guidelines for a service like Devas Services*".[171] The Indian Supreme Court therefore came to the ultimate conclusion that the fact that Devas had obtained the FIPB approval based on the ISP and IPTV licenses, which were insufficient to provide the Devas Services contemplated in the Devas Agreement, "*demonstrated that the affairs of the company were conducted in a fraudulent manner*".[172]

6.3 Devas conducted its affairs contrary to its representation under the FIPB approvals and siphoned off tens of millions of dollars offshore

108. The winding-up proceedings also conclusively established that Devas conducted its affairs contrary to its representation to develop technologies for providing Devas Services indigenously in India, and in violation of the condition under the FIPB approvals that Devas would provide ISP services only.

109. Specifically, the Indian Supreme Court found that a total of INR 579 crores (today around USD 75 million) was brought into India. However, the Supreme Court finally and conclusively established that *almost 85% of the said amount was siphoned out of India, partly towards establishment of a subsidiary in the US, partly towards business support services and partly towards litigation expenses*".[173] None of these purported "services" pertained to the provision of ISP services. Thus, these amounts were siphoned off for non-ISP (and thus, non-approved) purposes under the FIPB approvals.[174]

110. By the same token, the winding-up proceedings brought to light that despite "*such a massive amount of money to* [Devas Delaware], *Devas never showed any benefit in India*" and "*remained a company without business operations despite the alleged business support/technical help*".[175] Throughout the winding-up proceedings, Devas failed to show any evidence that it received any support and/or services from its US subsidiary that could justify the payments outside of India.[176]

111. More generally, the winding-up proceedings highlighted the central role played by Devas Delaware in the fraudulent scheme that had been put in place. This wholly-owned subsidiary, which had been established in 2006, had ostensibly been created for the purpose of providing

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169 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 203.
170 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 204.
171 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 204.
172 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).
173 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).
174 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).
175 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 190.
176 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 191.

"*business support services*".[177] Rather, the examination of Devas' books revealed that Devas had sent the vast majority of its funds to Devas Delaware and conducted most of its business activities through that entity, in violation of the FIPB approvals.[178] This led the provisional liquidator to consider that Devas "*was operating as a Sham/Shell company*".[179] Deutsche Telekom did not fully and frankly disclose the exact role played by Devas Delaware in the arbitration. The following circumstances, which were concealed from the Arbitral Tribunal, emerged in the winding-up proceedings:

- A total of INR 579 crores (approx. USD 75 million) was brought into India.[180]
- Devas paid around INR 182 crores (approx. USD 24 million) to Devas Delaware as "*service charge payments*".[181]
- Directors on Devas' board, who were also on the board of Devas Delaware, did not draw their remuneration from Devas, but instead drew it from Devas Delaware through the funds received by Devas Delaware as part of the service agreement.[182]
- There were "*no significant intangible assets*" in the balance sheets of Devas or Devas Delaware in any given year.[183]

112. At this juncture, the exact role played by Devas Delaware is still being examined in the context of the ongoing investigations into potential violations of anti-money laundering laws by the Enforcement Directorate. India reserves all its rights depending on the outcome of these investigations.

113. For the purpose of establishing fraud under Section 271(c) of the Companies Act, the Indian Supreme Court considered the fact that an investor brought foreign funds into an Indian company, which were then siphoned off "*to foreign countries, into dubious accounts*" was a further indication that the company was created for an unlawful purpose.[184] This was established in the Indian Supreme Court Judgment dated 17 January 2022.[185]

6.4 Devas failed to obtain the necessary licenses to provide the Devas Services and violated the regulatory framework in India

114. The fraudulent conduct of Devas was not limited to the negotiation and conclusion of the Devas Agreement. In principle, the services offered by Devas would have required several licenses pursuant to Indian law and would have had to comply with the regulatory framework, in particular, the SATCOM Policy.

115. Specifically, two types of approvals and licenses had to be obtained:

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177 *See* **Exhibit A-044**, Second Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 23/2021) dated 27 February 2021, para. 8.
178 *See* **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).
179 **Exhibit A-045**, First Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 14/2021) dated 3 February 2021, para. 12.
180 **Exhibit A-046**, Third Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 31/2021) dated 11 March 2021, para. 14.
181 **Exhibit A-045**, First Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 14/2021) dated 3 February 2021, para. 20.
182 **Exhibit A-045**, First Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 14/2021) dated 3 February 2021, para. 19.
183 **Exhibit A-044**, Second Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 23/2021) dated 27 February 2021, para. 16.
184 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 21 (p. 89).
185 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).

- The first ones were the approvals from the FIPB to bring foreign investment into India, based on the ISP and IPTV licenses Devas had obtained from DOT.[186] These approvals were predicated on Devas' (mis)representations that the relevant technology would be developed indigenously in India, and that Devas would provide ISP services, as opposed to Devas Services.
- The second one was the WPC experimental license, and a subsequent license from the WPC to reuse the spectrum leased to Devas terrestrially following the completion of the Phase I and Phase II trials.[187]

116. The Indian Supreme Court Judgment conclusively established that Devas was not allowed to provide the services under Indian law because the Devas Services (i) fell outside the scope of the relevant government approvals, and (ii) were in contravention of the SATCOM Policy. While Devas obtained several authorizations and licenses, the Indian Supreme Court considered them to be obtained "*for completely different services*" than those envisaged under the Devas Agreement.[188]

117. The winding-up proceedings indeed revealed that the Devas Services could not be provided with the ISP and IPTV licenses obtained and that these licenses have "*nothing to do with what was offered as* [Devas Services]".[189] In essence, the winding-up proceedings brought to light that all that Devas did was to obtain a few, very limited licenses, but failed to obtain any licenses that would have enabled it to provide the actual Devas Services under the Devas Agreement.[190] Specifically, Devas only obtained the FIPB's approval to deliver ISP services, which did not encompass the (hybrid) Devas Services. Moreover, and contrary to what Devas had represented to the FIPB, the majority of the funds received by Devas were siphoned off out of India, instead of being invested in the indigenous development of the relevant technology.[191]

118. In addition, the WPC experimental license that Devas managed to obtain in May 2009 was obtained illegally because as explained,[192] this experimental license was only obtained following the manipulation of the TAG meeting minutes.[193]

119. On the basis of these findings, the Indian Supreme Court, having analyzed the relevant facts and law, established that "[t]*he kind of licenses obtained* [by Devas] *demonstrated that the affairs of the company were conducted in a fraudulent manner.*"[194] The Indian Supreme Court reaffirmed that the absence of the required authorizations and licenses made it impossible for Devas to provide the Devas Services under the Devas Agreement in India.[195]

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186 See above paras. 102-107. *See* **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, paras. 56-58.

187 *See* **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, paras. 57 and 59-60.

188 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(vi)(c).

189 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.5(ix), (x) and (xii); **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Judicial Order para. 258 and Technical Order, para. 157.

190 *See* **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, paras. 143-144.

191 See above paras. 109-111.

192 See above paras. 99-100.

193 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiii); *see* for further details: **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, paras. 164 and 169.

194 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).

195 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(vi), (vii) and (x). *See* also **Exhibit A-031**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 45(viii).

6.5 Devas could not provide the services it contracted to provide under the Devas Agreement

120. In the course of the negotiations of the Devas Agreement, Devas claimed to have the capability to offer the Devas Services to "*deliver video, multimedia and information services via high powered satellite to mobile receivers in vehicles and mobile phones across India*" through a device (the "**Devas Device**") in a hybrid mode of transmission between satellite and terrestrial transmission (the "**Devas Technology**"), by the end of 2006.[196] Therefore, the Devas Agreement was entered into with the expectation that the Devas Services existed by the end of 2006.[197] Devas also made representations to Antrix that it had ownership of certain intellectual property rights in this respect.[198]

121. However, the Indian Supreme Court found that these representations were false. According to the Indian Supreme Court, it was "*not possible at that point of time to provide this bouquet of services via satellite*" because they did not exist "*at the relevant point of time or even thereafter*".[199] Therefore, Devas "*enticed Antrix/ISRO to enter into an MoU followed by an Agreement by promising to provide something that was not in existence at that time and which did not come into existence even later*"[200] and was "*never launched as promised in 2006*".[201] Put differently, the Indian Supreme Court confirmed that, contrary to what it had represented, Devas lacked the technical competence, ability and willingness to use the DVB-SH system architecture. The Indian Supreme Court went on to state that:

> "[...] *Devas offered a bouquet of services known as (a)* ***Devas Services*** *through a device called (b)* ***Devas device*** *in a hybrid mode of transmission, which is a combination of satellite and terrestrial transmissions, and which is called (c)* ***Devas Technology*** *but none of which existed at the relevant point of time or even thereafter.*"[202] (emphasis in the original)

122. Considering that Devas did not have the required technology (at any point in time), this "*shows the lack of intention of Devas to develop even portions of*" the devices affiliated with the DVB-SH technology.[203]

123. The Indian Supreme Court further established that Devas did not hold the necessary intellectual property rights over designs of DMRs and CIDs.[204] In the same vein, it was found that Devas lacked the necessary experience, infrastructure and expertise to provide the Devas Services under the Devas Agreement.[205] The winding-up proceedings notably established that Devas had made false representations of ownership and intellectual property over the DMRs and CIDs (*inter alia*). In this regard, the NCLAT Order stated that "[w]*hen the Devas' Device was not developed, and portions of it, DMR and CID, were to be developed at a future date* [...], *it only shows the lack of intention of Devas to develop even portions of the Devas' Device, if not the Devas' device itself*".[206]

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196 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(iv) and (vii).
197 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(iv).
198 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(viii).
199 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(iv) and (vii).
200 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(vi)(b).
201 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(iv) and (vii).
202 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(vii).
203 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 70 (emphasis added).
204 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(viii).
205 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 14 (pp. 75-76).
206 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order paras. 70 and 72.

124. The Indian Supreme Court concluded that Devas misrepresented that it could and would deliver certain technology, when in fact the relevant technology did not exist at that time and Devas did not hold the relevant intellectual property rights to do so. These facts serve as further proof that Devas was a company whose affairs had been conducted in a fraudulent manner and that Devas was formed for a fraudulent and unlawful purpose under Section 271(c) of the Companies Act.[207]

6.6 Devas' shareholders bear responsibility for the fraudulent scheme behind Devas

125. The Indian Supreme Court also elaborated on the fraudulent activities committed by Devas' shareholders themselves, including DT Asia (and, indirectly, Deutsche Telekom).[208] It noted that each shareholder had a representative on Devas' board of directors, which controlled the company.[209] The directors were therefore guilty of the fraudulent conduct of the company's affairs, meaning that the shareholders are responsible for the misdeeds of the directors.[210]

126. The Indian Supreme Court further found that "*the shareholders were fully aware of the fact that the application*" for the FIPB approval "*was for ISP services*",[211] but that the share subscription agreement they entered into expressly mentioned the provision of "Devas Services".[212] The Indian Supreme Court considered that "*the shareholders, who now want to reap the fruits of a tree, fraudulently planted and unlawfully nurtured, cannot feign ignorance and escape the allegations of fraud*".[213]

IV. PROCEDURAL ISSUES

1. Jurisdiction *ratione materiae*

127. Pursuant to Article 119a(1) of the Federal Supreme Court Act ("**FSCA**") and Article 191 of the Private International Law Act ("**PILA**"), the Federal Supreme Court has exclusive jurisdiction to rule on revision applications directed against an international arbitral award rendered by an arbitral tribunal seated in Switzerland.

128. As the seat of arbitration in this case was Geneva,[214] the Federal Supreme Court has jurisdiction to rule on the present revision application.

2. Decisions subject to revision

129. An application for revision can be made against all arbitral awards that are binding on the arbitral tribunal, be they interim, partial or final.[215] The present Application is therefore admissible against the Interim Award and the Final Award.

130. Specifically, and as will be explained,[216] the facts and evidence India recently uncovered could have impacted the Arbitral Tribunal's jurisdictional findings, and led it to decline jurisdiction over

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207 **Exhibit A-031**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 73.
208 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiv)-(xv).
209 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiv).
210 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiv).
211 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xv).
212 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xv).
213 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xv).
214 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 107; **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, para. 65.
215 BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1967.
216 See above paras. 167-173.

the Respondent's claims under the Germany-India BIT (thus leading to the annulment of the Interim Award and, by implication, the Final Award).

131. Moreover, the new facts and evidence that have come to light could also have material implications for the Arbitral Tribunal's decision on liability and quantum, thus (independently) warranting the annulment of the Awards in any event.

3. Standing to bring the Application

132. As a party to the arbitral proceedings that led to the issuance of the Awards, the Applicant has standing to bring the present Application. The Applicant is directly impacted by the Awards, as the Arbitral Tribunal assumed jurisdiction, found that the Applicant had breached the Germany-India BIT and ordered the Applicant to pay USD 93.3 million, plus interest and part of the costs of the arbitration, to the Respondent.[217]

133. Deutsche Telekom (as well as the Mauritian Devas Shareholders) has initiated a number of proceedings around the world seeking enforcement of the Final Award.[218] In particular, Deutsche Telekom is actively trying to enforce the Awards in Singapore and in the United States.[219] The Applicant thus has an actual, practical and personal interest in the annulment of the Awards, and in an arbitral tribunal ruling over the case anew, taking into account the elements that have emerged since the issuance of the Awards. In other words, if granted, the present Application would ensure that the Applicant obtains the desired outcome, namely the consideration by the Arbitral Tribunal of the Indian Supreme Court Judgment.

134. The Applicant therefore has a legal interest worthy of protection in the revision of the Awards, and hence has standing to bring the present Application.

4. Time-limit for the Application

135. The present Application is brought on the basis of Article 190a(1)(a) PILA, which provides for revision of an arbitral award in case of discovery of relevant facts or conclusive evidence which could not have been submitted in the arbitral proceedings. Specifically, this Application is based on the findings of the Indian Supreme Court Judgment, which was the first judicial decision that finally established the fraudulent scheme behind Devas to a sufficient degree of certainty.

136. Article 190a(2) PILA provides that the request for revision must be filed within 90 days of the date the ground of revision was discovered.

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217 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 424; **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, para. 357.

218 **Exhibit A-032**, Global Arbitration Review, "Deutsche Telekom takes India award to US" dated 20 April 2021; **Exhibit A-031**, Global Arbitration Review, "India gets more time to challenge enforcement in Singapore" dated 15 March 2022; **Exhibit A-030**, Global Arbitration Review, "India wins US stay of satellite award" dated 4 April 2022.

219 **Exhibit A-032**, Global Arbitration Review, "Deutsche Telekom takes India award to US" dated 20 April 2021; **Exhibit A-031**, Global Arbitration Review, "India gets more time to challenge enforcement in Singapore" dated 15 March 2022; **Exhibit A-030**, Global Arbitration Review, "India wins US stay of satellite award" dated 4 April 2022. *See also above para. 75.*

137. "Discovery" under Article 190a(2) PILA means certain knowledge,[220] which must be based on firm grounds.[221] A mere supposition or vague knowledge, meanwhile, is not sufficient.[222] The Applicant bears the burden of proving compliance with the time limit under Article 190a(2) PILA.[223]

138. With regard to the discovery of newly-obtained evidence, the Federal Supreme Court has consistently held that the 90-day period starts "*when the evidence is in the applicant's possession or when the applicant acquires sufficient knowledge of its content to request its admission*".[224] As regards newly-discovered facts, the deadline only starts to run once "*the applicant has sufficiently certain knowledge of the new fact to be able to invoke it, even though he may not be able to adduce conclusive evidence; a mere supposition is not sufficient*".[225]

139. The Applicant acquired sufficiently certain knowledge of the grounds for revision on 17 January 2022, when the Indian Supreme Court handed down its judgment ordering the winding-up of Devas, establishing that Devas was incorporated for fraudulent purposes and conducted its business in a fraudulent manner, in breach of Section 271(c) of the Companies Act, which means that the Respondent's purported investment in India, which lies at the heart of the Awards, is tainted by illegality.[226]

140. In view of the specific standards of "discovery" under Article 190a(2) PILA for evidence, on the one hand, and for facts, on the other hand, the Applicant will show that, either way, it only acquired sufficiently certain knowledge of the ground for revision on 17 January 2022, when the Indian Supreme Court rendered its judgment, and that it could not have done so earlier. First, the Indian Supreme Court Judgment constitutes *per se* newly obtained, material evidence. In the alternative, India only acquired sufficiently certain knowledge of the facts underlying the present Application when the Indian Supreme Court issued its decision on 17 January 2022.

141. As explained,[227] the Indian Supreme Court Judgment came into India's possession on 17 January 2022, the day it was rendered. It is therefore only on that date that India obtained sufficient knowledge of the judgment's content.

142. In any event, even if the Federal Supreme Court were to consider that the Indian Supreme Court Judgment does not constitute material evidence pursuant to Article 190a(1)(a) PILA, the 90-day limitation period set out in Article 190a(2) PILA only started to run as of 17 January 2022, as the Applicant only acquired sufficiently certain knowledge of the relevant facts underlying this

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220 BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1974a; Decision of the Federal Supreme Court 4F_8/2010, dated 18 April 2011, para. 1.3.

221 BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1974a.

222 Federal Supreme Court, Decision 4A_422/2021 dated 14 October 2021, para. 4.4.2; Federal Supreme Court, Decision 4A_666/2012 dated 3 June 2013, para. 5.1; Federal Supreme Court, Decision 4A_222/2011, dated 22 August 2011, para. 2.1.

223 Federal Supreme Court, Decision 4A_422/2021 dated 14 October 2021, para. 4.4.2; Federal Supreme Court, Decision 4A_666/2012 dated 3 June 2013, para. 5.1; Federal Supreme Court, Decision 4A_222/2011, dated 22 August 2011, para. 2.1.

224 Federal Supreme Court, Decision 4A_666/2012 dated 3 June 2013, para. 5.1 (translation with emphasis added; quote in the original French: "*Quant au moyen de preuve concluant, le requérant doit pouvoir disposer d'un titre l'établissant ou en avoir une connaissance suffisante pour en requérir l'administration*"); see also Federal Supreme Court, Decision 4A_222/2011 dated 22 August 2011, para. 2.1.

225 Federal Supreme Court, Decision 4A_666/2012 dated 3 June 2013, para. 5.1 (translation with emphasis added; quote in the original French: "[...] *sa découverte implique que le requérant a une connaissance suffisamment sûre du fait nouveau pour pouvoir l'invoquer, même s'il n'est pas en mesure d'en apporter une preuve certaine; une simple supposition ne suffit pas*"); see also Federal Supreme Court, Decision 4A_222/2011 dated 22 August 2011, para. 2.1.

226 See above paras. 88-126.

227 See above paras. 82-87.

Application, as further detailed below,[228] when the Supreme Court of India handed down its judgment.

143. Investigating allegations of fraud is a time-consuming and complex process. Fraud can generally only be established based on circumstantial evidence and requires a detailed examination of complex factual issues. This is especially true for an investigation into an elaborate fraudulent scheme that, as in the case at hand, was put in place over an extended period of time and involved several conspiring perpetrators.

144. Simply put, the fraudulent scheme behind Devas was not revealed with one single "smoking gun", but could only be exposed after a careful assessment of all relevant factual circumstances and legal considerations. Accordingly, the facts underlying this application transpired only gradually in the course of the winding-up proceedings. Uncovering this scheme was made all the more difficult by Devas' refusal to cooperate in establishing the facts that the Indian Supreme Court ultimately found to be true.[229] For instance, the provisional liquidator appointed by the NCLT contacted several of Devas' directors, none of whom addressed his queries or engaged with him.[230]

145. Therefore, the facts underlying this Application were only finally established when the Supreme Court of India, as the first court of law ruling on the allegations of fraud and without the possibility of any further appeal, laid down its judgment on 17 January 2022, putting an end to the winding-up proceedings and thereby finally and conclusively establishing the fraudulent scheme surrounding Devas.

146. Accordingly, India only had sufficiently certain knowledge of the facts underlying this Application to be able to invoke them once it received the Indian Supreme Court Judgment on 17 January 2022.

147. Accordingly, the *dies a quo* under Article 190a(2) PILA only started to run as of 17 January 2022, meaning that the deadline to submit the present Application, accounting for the court recess period provided for under Article 46(1)(a) FSCA, expires on 2 May 2022. The present Application is therefore submitted within the deadline.

5. Formal requirements and language of the Application

148. This Application meets the formal requirements of Article 42(1) FSCA, and is thus admissible.

149. It is filed in the English language in accordance with Articles 119a(2) and 77(2[bis]) FSCA read together so as to best ensure consistency with the wording used in the Awards and the Indian Supreme Court Judgment, which were all rendered in English.

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228 See below paras. 156-163 and 190.

229 See above paras. 88-126.

230 *See* **Exhibit A-045**, First Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 14/2021) dated 3 February 2021, paras. 24-25; **Exhibit A-044**, Second Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 23/2021) dated 27 February 2021, para. 8; **Exhibit A-046**, Third Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 31/2021) dated 11 March 2021, para. 15 ("*The provisional liquidator has tried several times but in vain to obtain material information from the ex-management about the books of accounts, electronic records of* [Devas]. *However, there has been no co-operation from the ex-directors*").

V. GROUND FOR REVISION

1. Introduction

150. Revision is an extraordinary remedy against an arbitral award aimed at correcting a final judgment that subsequently proves to be based on incorrect facts or to have been influenced by criminal acts.[231] Its purpose is therefore to address situations where fairness requires that a decision in force be annulled and rectified, because it was based on flawed premises.[232] In this sense, the revision of an arbitral award "*is considered an essential (additional) remedy both in terms of policy considerations and due process of law*".[233] As the Federal Supreme Court puts it:

> "*This remedy is a compromise between legal certainty at the level of res judicata on the one hand, and justice, which consists in not upholding a fundamentally flawed judgment on the other hand* [...]. *It must be possible to challenge the preclusive effect of a judgment again if it turns out that, through no fault of the parties, the findings of fact were wrong and that knowledge of the true facts would have led to a different legal assessment.*"[234]

151. This is why "*if an award is based on factual findings that are distorted by an unlawful conduct or established incorrectly and in (non-faulty) ignorance of the real situation, then the absence of any review would amount to a clear violation of fundamental procedural principles*".[235] The objective is therefore to allow the substantive truth to prevail, so that the court or arbitral tribunal can render a just and fair decision, based on correct factual premises.[236]

152. To that effect, Article 190a(1)(a) PILA provides that a party may request the revision of an award if it has subsequently become aware of significant facts or uncovered conclusive evidence which it could not have submitted in the earlier proceedings despite exercising due diligence.

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231 BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1919; KUNZ C.-A., Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera? A Review of Decisions Rendered by the Swiss Supreme Court on Revision Requests over the Period 2009-2019, in: ASA Bulletin, Vol. 38(1) 2020, pp. 6-31, p. 6.

232 Federal Supreme Court, Decision 142 III 521 dated 7 September 2016, para. 2.1 ("*Toute loi de procédure prévoit un moment à partir duquel les décisions de justice sont définitives, qu'elles émanent de tribunaux étatiques ou de tribunaux privés. Effectivement, il arrive toujours un moment où la vérité matérielle, si tant est qu'elle puisse être établie, doit s'effacer devant la vérité judiciaire, quelque imparfaite qu'elle soit, sous peine de mettre en péril la sécurité du droit. Il est cependant des situations extrêmes où le sentiment de la justice et de l'équité requiert impérativement qu'une décision en force ne puisse pas prévaloir, parce qu'elle est fondée sur des prémisses viciées. C'est précisément le rôle de la révision que de permettre d'y remédier*"). *See* Federal Supreme Court, Decision 127 III 496 dated 12 September 2001, para. 3(a).

233 BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1919.

234 Federal Supreme Court, Decision 118 II 199 dated 11 March 1992, para. 2(b)(cc) ("*Ce moyen constitue un compromis entre, d'une part, la sécurité du droit au niveau de la validité des décisions et, d'autre part, la justice à ne pas maintenir un jugement vicié dans ses fondements* [...]. *La force de chose jugée rattachée à un jugement doit pouvoir être remise en cause lorsque, sans la faute des parties, les constatations de fait apparaissent fausses, et que la connaissance des faits exacts aurait conduit à une appréciation juridique différente*"). *See* also: BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1919.

235 Federal Supreme Court, Decision 118 II 199 dated 11 March 1992, para. 2(b)(cc) ("*En revanche, si une sentence repose sur un état de fait faussé par un comportement délictueux ou constaté inexactement et en méconnaissance non fautive de la situation réelle, l'absence de tout réexamen consacrerait alors une violation claire de principes fondamentaux de procédure*").

236 HERZOG N., Basler Kommentar – Schweizerisches Zivilprozessordnung (ZPO), 3rd ed., Basel 2017, ad Article 328, para. 2 ("*Damit ist gesagt, dass der Zweck der Revision darin besteht, der materiellen Wahrheit zum Durchbruch zu verhelfen. Es geht m.a.W. darum, einen bereits erledigten Prozess auf verbesserter Grundlage nochmals durchzuführen*"). *See* also: STIRNIMANN FUENTES F.-X., Chapter 13: Revision of Awards, in: ARROYO M. (edit.), Arbitration in Switzerland: The Practitioner's Guide, 2nd ed., Alphen aan den Rijn 2018, pp. 1347-1366, para. 40 ("[...] *the role of the revision is to remedy those circumstances where justice and equity imperatively require for the substantive truth (vérité matérielle) to stand up to the judicial truth (vérité judiciaire)*").

Article 190a(1)(a) PILA makes a distinction between a revision request based on "*significant facts*" or "*conclusive evidence*". As per the Federal Supreme Court's case law, this provision sets out five requirements that must be met in order for a revision application to be granted based on new facts:

(1) the Applicant relies on one or more fact(s);

(2) these facts are "*relevant*" (or important), meaning that they may influence the factual findings underlying the decision and lead to a different outcome based on a correct legal assessment;

(3) these facts already existed when the decision was rendered (so-called "*pseudo nova*", meaning facts that predate the decision or, more specifically, facts that occurred up to the time when, in the main proceedings, factual allegations were still admissible);

(4) these facts were only discovered after the award was issued; and

(5) despite exercising due diligence, the applicant was unable to invoke these facts in the previous proceedings.[237]

153. According to the Federal Supreme Court's case law, the requirements are broadly the same when it comes to an application based on new evidence.[238] As will be explained, however, evidence postdating the decision whose revision is sought, but shedding light on facts predating it, should be admissible.

154. These requirements will be examined in turn below. Specifically, the Applicant will show that the Indian Supreme Court Judgment, on which this Application is based, constitutes in and of itself evidence of new facts or, in the alternative, allowed India to acquire sufficiently certain knowledge of the relevant new facts (see below **Section V.2**, addressing requirement No. 1); that those facts, had they been known to the Arbitral Tribunal, could have led to a different outcome in the arbitral proceedings (see below **Section V.3**, addressing requirement No. 2); that the new facts uncovered predate the Awards (see below **Section V.4**, addressing requirement No. 3); that these facts were only discovered after the Awards were rendered and that the Applicant could not reasonably have been expected to invoke them in the arbitration (see below **Section V.5**, addressing requirements No. 4 and 5).

2. The Applicant relies on evidence of new facts or, in the alternative, on new facts that only became sufficiently certain following the Indian Supreme Court Judgment

155. The Indian Supreme Court Judgment constitutes, in and of itself, evidence that Devas was incorporated for fraudulent purposes and conducted its business in a fraudulent manner. The complex and nebulous fact pattern that emerged at the close of the winding-up proceedings shows the magnitude of the fraudulent scheme behind Devas.

156. In the alternative, the Applicant submits that it only acquired sufficiently certain knowledge of the new facts underlying this Application when the Indian Supreme Court, as the first judicial body to hear the case[239] and the supreme judicial authority within the Indian legal system (and whose rulings state the law of the land),[240] ruled over the liquidation of Devas based on Section 271(c)

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237 *See* Federal Supreme Court, Decision 4A_464/2021 dated 31 January 2022, para. 6.2.1; Federal Supreme Court, Decision 4A_422/2021 dated 14 October 2021, para. 4.4.1.

238 *See* Federal Supreme Court, Decision 143 III 272 dated 2 May 2017, para. 2.2.

239 See above paras. 86-87.

240 See above para. 87.

of the Companies Act. It is indeed only following this decision that the facts were finally and conclusively established, and that the legal situation was irrefutably clarified under Indian law.

157. In particular, the Indian Supreme Court fully unveiled and finally established that the Devas Agreement, despite its alleged financial and strategic importance, had never been preceded by any auction or tender process, and had never been subject to any form of public scrutiny.[241] In fact, as the Indian Supreme Court established, after procuring the Devas Agreement, Devas – in collusion with certain government officials – proceeded to conceal the existence of the Devas Agreement from the Indian authorities.[242] In particular, materials prepared for the Space Commission and the Union Cabinet made no mention of Devas or the Devas Agreement, but rather conveyed the (incorrect) impression that the ISRO had received several expressions of interest.[243] Moreover, the minutes of the TAG meeting, based on which Devas was granted the WPC experimental license, had been doctored.[244] This collusion between the DOS and Antrix allowed Devas to be unjustly enriched.[245]

158. The Indian Supreme Court Judgment further finally established that, contrary to what it had represented, Devas was unable to deliver the services it promised under the Devas Agreement, because the relevant technology did not exist at the time, and because Devas did not hold the necessary intellectual property rights.[246] As explained, the winding-up proceedings established that Devas had no intention of ever using the DVB-SH technology to provide the Devas Services, and that it never had (and presumably never intended to obtain) the necessary intellectual property rights to design essential elements for the Devas Devices, namely DMRs and CIDs.

159. The Indian Supreme Court also conclusively established that Devas' application with the FIPB to bring foreign funds into India described a business model that was fundamentally different from the Devas Agreement.[247] Specifically, the FIPB gave its approval based on the licenses for ISP services, which can be delivered through the Internet and without a satellite.[248] Under the Devas Agreement, however, the notion of "Devas Services" included broadcasting and telecommunication services that could not be delivered without a satellite.[249] In short, Devas obtained the FIPB approval for the stated purpose of providing Internet services, although the Devas Agreement contemplated hybrid services (based on a technology that did not exist at the

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241 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(i) and (iii).

242 See above paras. 93-101; **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xii). The Union Cabinet is the supreme executive decision-making body in the Government of India, comprising of the Prime Minister of India and Cabinet Ministers of the Central Government. *See also*: **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 2(6)(iii) (p. 6); **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Judicial Order, paras. 252-256.

243 See above para. 98; **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xii).

244 See above paras. 99-100; **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiii).

245 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xii).

246 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(iv), (vii) and (viii).

247 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(v), (x) and (xv).

248 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(v). *See also*: **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, paras. 172-181. As the Technical Member of the NCLAT explained, Devas could have delivered ISP and IPTV services without satellites, as the same license covers both sets of services.

249 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(v). *See also*: **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, paras. 172-181. The Technical Member of the NCLAT further explained that "*ISP services are a small portion of the vast Devas Services bundle*" (para. 178).

time).[250] It appears that the reason why Devas fraudulently approached the FIPB through the ISP route was because there was no license it could have obtained for the delivery of the (hybrid) Devas Services.[251]

160. Moreover, in its application to the FIPB, Devas asserted that "*it would be developing all its technology and systems indigenously in India*",[252] and that the services would be provided through a "*broadband information download channel*" (although the Devas Agreement made no mention of this mode of transmission).[253] The Indian Supreme Court established and made it clear that not only did the Devas Agreement make no mention of this mode of transmission, but Devas siphoned off almost 85% of the foreign funds it received out of India, mostly towards the incorporation of a Delaware subsidiary for "*business support services and partly towards litigation expenses*".[254] It therefore appears that these funds were diverted outside of India for non-ISP purposes, which was incompatible with the approval received from the FIPB for providing ISP services only.[255] More generally, and although the precise role of Devas Delaware is still being investigated by the Enforcement Directorate, the winding-up proceedings revealed that Devas had sent the vast majority of its funds to Devas Delaware, and was in fact "*operating as a Sham/Shell company*".[256]

161. The Indian Supreme Court further addressed the responsibility of Devas' shareholders. Specifically, the Indian Supreme Court found that:

> "*Admittedly, every one of the investors procured shares of the company in liquidation and each shareholder had a representative in the board of directors. Since the board controlled the company, the directors were guilty of the conduct of the affairs of the company in a fraudulent manner. Since each shareholder had a representative in the board, the shareholders had to take the blame for the misdeeds of the directors.*
>
> *Additionally, the shareholders were fully aware of the fact that the application for approval dated 02.02.2006 to the FIPB was for ISP services. But they entered into a Share Subscription Agreement on 06.03.2006 for Devas services. The Share Subscription Agreement discloses that they were aware of the false statements contained in the Agreement dated 28.01.2005. Therefore, the shareholders, who now want to reap the fruits of a tree, fraudulently planted and unlawfully nurtured, cannot feign ignorance and escape the allegations of fraud.*"[257] (emphasis added)

162. On the basis of those facts, the Indian Supreme Court reached the conclusion that Devas had been incorporated for a fraudulent and unlawful purpose and that Devas had conducted its affairs in a fraudulent manner, in breach of Section 271(c) of the Companies Act.[258]

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250 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, paras. 12.3 and 12.8(v), (vi), (vii) and (x).

251 See above para. 107; **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, paras. 12.3 and 12.8(v), (vi), (vii) and (x). *See* also: **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, paras. 203-204.

252 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, para. 195.

253 **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Judicial Order, para. 269.

254 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x).

255 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(x). *See* also: **Exhibit A-006**, National Company Law Appellate Tribunal, Order dated 8 September 2021, Technical Order, paras. 170-181.

256 See above paras. 108-113; **Exhibit A-045**, First Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 14/2021) dated 3 February 2021, para. 12.

257 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiv)-(xv).

258 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(ix)-(x).

163. All of these elements constitute facts, which have been conclusively established by the Indian Supreme Court following its own examination of all the elements pertaining to Devas' fraudulent scheme. As will be examined, these facts, had they been known to the Arbitral Tribunal at the time, could have led to a different outcome in the arbitral proceedings.

3. The facts and evidence identified by the Applicant could have led to a different outcome in the arbitration

164. The newly discovered facts or evidence must be "material", i.e. they must be able to change the findings of fact of the challenged award to the extent that, together with a correct legal assessment, the outcome of the case might no longer be the same.[259] A party applying for revision of an award is, however, not required to demonstrate the precise impact that the facts or evidence on which it is relying would have had on the dispositive part of any new award to be made. The applicant must merely show that the newly asserted facts or evidence could have led to a different outcome, had they been known to the arbitrators before the awards were rendered.[260] The Federal Supreme Court therefore limits its analysis to a hypothetical examination of whether the newly discovered facts or evidence "*might actually have been relevant to the outcome of the case*".[261]

165. In the present case, as explained,[262] the Indian Supreme Court Judgment establishes that Devas was incorporated for a fraudulent and unlawful purpose and that Devas conducted its affairs in a fraudulent manner, in breach of Section 271(c) of the Companies Act.[263] The Indian Supreme Court emphasized the responsibility of (and the role played by) Devas' shareholders in this fraudulent scheme.[264] As aptly put by the Indian Supreme Court, the shareholders could not have been unaware of the activities of Devas' directors and thus "*cannot feign ignorance and escape the allegations of fraud*".[265]

166. The findings of the Indian Supreme Court Judgment directly call into question the Arbitral Tribunal's jurisdiction over the Respondent's claims, the Arbitral Tribunal's finding of liability against the Applicant, as well as the Arbitral Tribunal's findings as regards the amount of compensation to be awarded to the Respondent (if any).

167. First, the first part of Article 1(b) of the Germany-India BIT provides for the following definition of what constitutes a protected investment:

> "'*Investments*' *means every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made* [...]."[266]

168. The Federal Supreme Court explained in its earlier decision in relation to this matter that this so-called "*compliance clause*" (or legality requirement), when read together with Article 3(1) of the

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259 BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1954.

260 Federal Supreme Court, Decision 4P.265/1996 dated 2 July 1996 (published in ASA Bulletin, Vol. 15(3) 1997, pp. 494-505, p. 499), para. 2(a).

261 BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1958.

262 See above paras. 88-126.

263 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(ix)-(x).

264 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiv)-(xv).

265 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(xiv)-(xv).

266 **Exhibit A-001**, Agreement between Germany and India for the Promotion and Protection of Investments dated 10 July 1995 (Exhibit C-1 in the arbitration), Article 1(b).

Germany-India BIT,[267] pertains to the jurisdiction of the Arbitral Tribunal.[268] Specifically, the Federal Supreme Court explained that each Contracting Party consented to arbitration only to the extent that a dispute relates to an investment made in accordance with its national laws.[269] It follows that, if the Respondent's purported investment, consisting in an indirect 19.62% interest in Devas, was not made "*in accordance with the national laws*" of India, then the Respondent never made a protected investment under the Germany-India BIT, and could not avail itself of the arbitration mechanism set out in Article 9(1) of the Germany-India BIT.

169. In the present case, India's position is that the Respondent's purported investment in Devas was tainted by the illegality and fraud behind the incorporation of Devas and the unlawful procurement of the Devas Agreement, as conclusively established by the Indian Supreme Court. This entails that the Respondent's alleged investment is illegal under Indian law. Specifically, the Respondent did not make a protected investment within the meaning of Article 1(b) of the Germany-India BIT, whether by DT Asia's acquisition of shares or by the acquisition of any rights in relation to the Devas Agreement.

170. Accordingly, the facts and evidence identified by the Applicant could have led to a different finding by the Arbitral Tribunal on the issue of jurisdiction, and they therefore qualify as "significant" and/or "conclusive" within the meaning of Article 190a(1)(a) PILA. In this regard, it must be noted that the Arbitral Tribunal never ruled over the (il)legality of the Respondent's purported investment in India under Article 1(b) of the Germany-India BIT, and was never presented with a full picture of the fraudulent scheme behind Devas.

171. In the arbitration, the Applicant promptly notified the Arbitral Tribunal when the CBI issued its first Charge Sheet against certain individuals.[270] The Arbitral Tribunal stated that "*the CBI Charge Sheet* [...] *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.*[271] The Arbitral Tribunal therefore did not fully consider of the issue of whether the Respondent's shareholding in Devas had been "*invested in accordance with the national laws*" of India and whether its jurisdiction was barred on that basis.[272] At most, the Arbitral Tribunal referred to the approval Devas had received from the FIPB to suggest that "*India admitted the Claimant's investment*".[273] This new jurisdictional objection, if upheld, could lead the Arbitral Tribunal to find that it lacks jurisdiction to rule over the Respondent's claims, regardless of the fact that it denied the Applicant's other jurisdictional objections.

172. For instance, given the sheer scale of the fraudulent scheme that was put in place, the following factual findings of the Indian Supreme Court could have led to a different outcome on jurisdiction:

- The Indian Supreme Court conclusively established that Devas and its shareholders orchestrated a fraud, based on which India, and in turn the Arbitral Tribunal, were made to believe that Devas was a company who had the technical competence, the ability and the intention to use the DVB-SH technology to deliver the Devas Services.[274] The Respondent

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267. **Exhibit A-001**, Agreement between Germany and India for the Promotion and Protection of Investments dated 10 July 1995 (Exhibit C-1 in the arbitration), Article 3(1) ("*Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party and also admit investments in its territory in accordance with its laws and policy*").
268 Federal Supreme Court, Decision 4A_65/2018 dated 11 December 2018, para. 4.4.1.
269 *See* Federal Supreme Court, Decision 4A_65/2018 dated 11 December 2018, para. 4.4.1.
270 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 115.
271 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 119.
272 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, Article 1(b).
273 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 178.
274 See above paras. 121-122.

never disclosed Devas' true motives and competences in the arbitration, and the Awards make no mention of the DVB-SH system architecture. It is only recently that it was conclusively established that Devas had defrauded the ISRO, Antrix and other agencies of the Government of India into thinking that it had the technical competence, ability and willingness to use the DVB-SH system architecture to deliver the Devas Services.

- In the same vein, Deutsche Telekom deliberately concealed material information and documents from India and the Arbitral Tribunal regarding the status of Devas' ownership and intellectual property rights over designs of DMRs and CIDs.[275] This was certainly done with a view to preventing the discovery of the fraud committed at the time of execution of the Devas Agreement. Had the Arbitral Tribunal been aware that the representations made under the Devas Agreement were false regarding Devas' alleged ownership and intellectual property rights over the design of DMRs and CIDs, it would have reached the same conclusion as the Indian Supreme Court: it would have found that Devas was created for a fraudulent and unlawful purpose.[276]

- The Arbitral Tribunal had also not been made aware of the true purpose behind Devas Delaware, i.e. to siphon off funds out of India.[277] Neither was the Arbitral Tribunal aware that Devas "*was operating as a Sham/Shell company*".[278] Based on the limited information disclosed by Deutsche Telekom, the Arbitral Tribunal simply found that the FIPB "*approved DT's indirect equity participation in Devas*", meaning that it was entitled to bring foreign funds into India.[279] Following the findings of the Indian Supreme Court, however, it has been conclusively established that Devas concealed material information and made fraudulent representations to the FIPB for the purpose of procuring approval for its shareholders' investments, which were then siphoned off outside India and towards Devas Delaware.[280]

- The perpetrators of this scheme acted in collusion with select government officials, making their actions even more arduous to uncover. Devas and its shareholders thus managed to conceal until recently that the Devas Services could not be delivered under the regulatory framework in India.[281] The orchestrators of this fraud went as far as to doctor the minutes of a TAG meeting so as to ensure that Devas unduly secured an experimental license.[282]

173. All those circumstances show that the incorporation of Devas, the execution and purported "performance" of the Devas Agreement as well as all the dissimulations carried out by the perpetrators involved all formed part of an indissociable, complex fraud. This intricate scheme was only recently exposed, and its potential consequences for the Awards are clear. It has been conclusively established that Devas was incorporated for a fraudulent and unlawful purpose, and carried out its affairs in a fraudulent manner, in breach of Section 271(c) of the Companies Act. Deutsche Telekom, as indirect shareholder of the company created for a fraudulent purpose and to carry out a fraudulent scheme, never made a valid, lawful investment in the territory of India. By operation of Article 1(b) of the Germany-India BIT, the Respondent cannot avail itself of treaty protection, and the Arbitral Tribunal could have declined jurisdiction to hear its claims. Indeed, a

275 See above para. 123.
276 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(ix).
277 See above paras. 108-113.
278 **Exhibit A-045**, First Report of the Provisional Liquidator of Devas under Section 290(1)(n) of the Companies Act 2013 (OLR No. 14/2021) dated 3 February 2021, para. 12.
279 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 178.
280 See above paras. 108-113.
281 See above paras. 102-107.
282 See above paras. 99-100.

sovereign State such as India cannot be deemed to have consented to arbitrate a dispute under the Germany-India BIT in relation to an investment that was never made in accordance with Indian law. Needless to say, once established that the Arbitral Tribunal's jurisdictional findings could have been different but for the fraud, the Arbitral Tribunal's findings on liability and quantum fall automatically.

174. Second, and in the alternative, the Arbitral Tribunal considered that the termination of the Devas Agreement constituted a breach of the Fair and Equitable Treatment ("**FET**") standard as set out in Article 3(2) of the Germany-India BIT.[283] The Tribunal considered 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*".[284] On the Arbitral Tribunal's own interpretation of the FET standard, the findings of the Indian Supreme Court Judgment could have led to a different outcome on liability, had they been available to the Arbitral Tribunal.

175. Although the Tribunal made an incidental, in-passing reference to the suspicion of Devas' fraud and corruption in the Interim Award,[285] it did not derive the necessary consequence in its determinations on liability, since at the time both India and the Arbitral Tribunal were unaware of the true extent of the fraud, as a result of the concealment of material evidence. In particular, the Arbitral Tribunal did not have the benefit of the findings of the Indian Supreme Court Judgment, which reached the conclusion that Devas had committed a fraud in the execution and performance of the Devas Agreement.

176. Based on the incomplete account of the facts presented to it, the Arbitral Tribunal indeed concluded that the decision to terminate the Devas Agreement resulted from a "*flawed process*",[286] whereby India "*misled*"[287] Devas and Deutsche Telekom. To the contrary, with the benefit of the Indian Supreme Court Judgment, the Arbitral Tribunal would have been aware of the fraudulent scheme behind Devas, and would have realized that it was in fact India that had been misled by Devas and its shareholders, and not the other way around. The fact that Antrix ultimately premised its annulment of the Devas Agreement on *force majeure* is immaterial in this regard, considering that at the time India did not have the evidence of the fraud that has now been uncovered in the winding-up proceedings (and which is still being investigated in the criminal investigations).

177. As the NCLT mentioned in passing (as this was not within the scope of the winding-up proceedings *per se*), as a result of the fraudulent scheme that was put in place, the Devas Agreement was null and void *ab initio* under Indian law, meaning that the "termination" expressed by Antrix in 2011 would have had no legal effect.[288] At a minimum, the Devas Agreement would have been voidable by the defrauded party, i.e. Antrix.[289] Either way, the termination of a contract that has been procured by fraud, with the collusion of public officials, cannot be regarded as a

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283 **Exhibit A-001**, Agreement between Germany and India for the Promotion and Protection of Investments dated 10 July 1995 (Exhibit C-1 in the arbitration), Article 3(2) ("*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*"). *See* **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, paras. 389-391.

284 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 336.

285 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 339.

286 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 363.

287 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 376.

288 **Exhibit A-005**, National Company Law Tribunal, Order dated 25 May 2021, para. 19(7) (pp. 82, 83).

289 **Exhibit A-047**, Indian Contract Act 1872, Sections 17 and 19.

"*willful disregard of due process of law*", through conduct "*which shocks, or at least surprises, a sense of judicial propriety*".[290]

178. Moreover, Deutsche Telekom, as a party complicit to a large-scale fraud, would not benefit from any "*legitimate expectations*" that would be worthy of protection under Article 3(2) of the Germany-India BIT. Deutsche Telekom would also not be entitled to avail itself of this substantive treaty standard, as it never made a valid investment within the territory of India. Again, these considerations call into question the Arbitral Tribunal's findings on liability.

179. Finally, the new facts and evidence uncovered by the Applicant may also have led to a different outcome on the quantum of the Respondent's claims. The Respondent's position was that "[t]*he quantification of damages should be based on the fair market value* [the "**FMV**"] *of DT's investment in Devas*".[291] As an indirect shareholder of Devas, the Respondent's purported investment consisted in DT Asia's 19.62% stake in Devas. On the Respondent's own case,[292] Devas' entire value (and, by implication, the FMV of the Respondent's purported investment) rested on the Devas Agreement.

180. As explained,[293] the Indian Supreme Court Judgment established that, contrary to what Devas had represented to Antrix, and to what the Respondent alleged in the arbitration,[294] Devas had never been able to perform the services it was supposed to perform under the Devas Agreement, as it did not have access to the necessary technology and did not have the necessary intellectual property rights to design critical receivers.[295] The necessary inference is that the project envisaged under the Devas Agreement could not have been performed, meaning that Devas could not have generated any revenues from it. This entails in turn that Devas, as a company whose entire value was dependent on this one project, was worthless. The Respondent could therefore have been entitled to a lower compensation than what the Arbitral Tribunal awarded (if any at all).

181. Moreover, the Arbitral Tribunal could have weighed the Respondent's contributory fault should it reach the quantum stage of the dispute despite the shocking nature of the fraudulent scheme exposed by the Indian Supreme Court. This would again have led to a lower amount of compensation (if any at all).

182. In view of the above, the facts and evidence identified by the Applicant could have led the Arbitral Tribunal to reach different conclusions in the Awards, as regards jurisdiction and/or quantum. The Arbitral Tribunal should therefore be afforded the opportunity to look at those new facts and evidence in detail, and to assess their legal implications under the Germany-India BIT.

4. The facts uncovered by the Applicant predate the Awards

183. As mentioned,[296] Article 190a(1)(a) PILA makes a distinction depending on whether a revision application is based on new facts or new evidence. While it is uncontroversial that only facts that

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290 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 389.
291 **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, para. 11.
292 **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, para. 11 ("*In sum, the Claimant submits that the annulment of the Devas Agreement by India 'destroyed the entire value of Devas's business (which rested on the valuable spectrum rights it held under the Agreement) in a single stroke', with the result that DT's investment in Devas is now worthless*").
293 See above paras. 120-124.
294 **Exhibit A-003**, Final Award in PCA Case No. 2014-10 dated 27 May 2020, para. 94 ("*The Claimant submits that the ISP and IPTV Licenses that it already held were sufficiently flexible for the provision of Devas's services*").
295 **Exhibit A-004**, Supreme Court of India, Judgment dated 17 January 2022, para. 12.8(iv), (vii) and (viii).
296 See above paras. 152-153.

predate the decision whose revision is sought ("*pseudo nova*", "*unechte Noven*") are admissible. It remains unsettled whether the same restriction applies to evidence postdating the decision ("*vrai nova*", "*echte Noven*"), but shedding light on facts that predate it.

184. Indeed, as BERGER/KELLERHALS explain, "*evidence ultimately only serves to prove a particular factual allegation*".[297] This is why commentators have advocated for the admissibility of genuinely new evidence that serves to prove facts that predate the decision whose revision is sought. SÖRENSEN, for instance, explains that it is the very purpose of revision as an exceptional legal remedy to strike a balance between the principle of *res judicata*, on the one hand, and that of justice, which warrant not to uphold a manifestly flawed decision to the detriment of the substantive truth.[298] While the principle of *res judicata* justifies that facts that are genuinely new cannot be invoked, SÖRENSEN emphasizes that there is no justification to exclude genuinely new evidence that proves previously unknown facts that existed prior to the judgment whose revision is sought.[299] Other authors are equally critical when it comes to whether a general exclusion of such evidence is justifiable.[300]

185. Accordingly, the Federal Supreme Court has allowed such genuinely new evidence in past decisions. For instance, in its Decision 8F_8/2009 dated 3 December 2009, the Federal Supreme Court declared admissible a revision application based on a medical report that was issued after the judgment at issue was rendered and which described the medical state of the applicant prior to the judgment.[301]

186. In another case, the Federal Supreme Court decided on the admissibility of a salary statement that postdated the judgment whose revision was sought. The Federal Supreme Court shared the view of the abovementioned authors and found that "[t]*he strict limitation of the revision to facts or evidence that existed prior to the decision may lead to unsatisfactory results in cases where – as here – evidence has arisen only after the decision the revision of which is requested and now retroactively appears to be suitable to prove a fact alleged by the applicant for revision before the rendering of that decision*".[302] Ultimately, the Federal Supreme Court left the question open.

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297 BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1955.

298 CPra Matrimonial-SÖRENSEN, Article 328 CPC, para. 26.

299 CPra Matrimonial-SÖRENSEN, Article 328 CPC, para. 26.

300 BSK ZPO-HERZOG, Article 328, para. 46; CARCAGNI ROESLER R., in: Baker & McKenzie (ed.), ZPO, Article 328 para. 8; PC CPC-BASTONS BULLETTI, Article 328 para. 36; BERGER B./KELLERHALS F., International and Domestic Arbitration in Switzerland, 4th ed., Berne 2021, para. 1955; BSK IPRG-PFISTERER, 4th ed., Basel 2021, Article 190, para. 114; STIRNIMANN FUENTES F.-X., Chapter 13: Revision of Awards, in: ARROYO M. (edit.), Arbitration in Switzerland: The Practitioner's Guide, 2nd ed., Alphen aan den Rijn 2018, pp. 1347-1366, para. 42 (with further references). *See* GEISINGER E./MAZURANIC A., Chapter 11 – Challenge and Revision of the Award, in: GEISINGER E./VOSER N. (edit.), International Arbitration in Switzerland – A Handbook for Practitioners, 2nd ed., Alphen aan den Rijn 2013, pp. 223-274, p. 270 ("*The facts relied upon by the party seeking the revision of the award must have existed at the time the award was rendered (or the evidence must relate to facts that existed at that time). The reason for this approach is that the facts or evidence must have been such that they would have been capable of influencing the outcome of the arbitration had it been possible to put them on record*").

301 *See* Federal Supreme Court, Decision 8F_8/2009 dated 3 December 2009.

302 Federal Supreme Court, Decision 5A_313/2013 dated 11 October 2013 para. 4.1. *See* also: Federal Supreme Court, Decision 4A_212/2010 of 10 February 2011, para. 3.1 ("*Secondo questa norma - che ha ripreso il vecchio art. 137 lett. b OG [...] - un fatto è nuovo se si era già verificato nel momento in cui poteva ancora essere addotto nel processo precedente, conformemente alle regole di procedura applicabili, ma una parte non aveva potuto prevalersene perché, pur usando tutta la diligenza necessaria, ne è venuta a conoscenza solo successivamente. Anche la prova, per essere nuova, deve preesistere: la novità va riferita solo alla scoperta o perlomeno alla disponibilità del mezzo di prova, non alla sua esistenza. La prova nuova deve inoltre servire a dimostrare fatti nuovi nel senso appena definito oppure fatti già noti e allegati nel primo*

187. The Republic of India is basing this Application on the Indian Supreme Court Judgment of 17 January 2022, which ordered the liquidation of Devas under Section 271(c) of the Companies Act. While the Indian Supreme Court Judgment undeniably postdates the Awards, it establishes facts that occurred before the Awards were rendered and that could have had a material influence on the outcome of the case.[303] In particular, it is only with the Indian Supreme Court Judgment that it was established to a sufficient degree of certainty that Devas had been incorporated for a fraudulent and unlawful purpose and that Devas had conducted its affairs in a fraudulent manner.

188. Indeed, due to the very nature of any fraud investigation, and the complexity of the issues at stake here, the fraud did not emerge in one go, but had to be established following a careful analysis of all elements available, often relying on circumstantial evidence. Moreover, some of the factual elements that have now become apparent were concealed at the time of the arbitral proceedings, in part as a result of the collusion between Devas and certain government officials. It is therefore only by piecing together the many different elements as they emerged that the Indian Supreme Court could form a sufficiently certain picture of the fraudulent scheme behind Devas, in particular the fact that the vast majority of the moneys invested into Devas had been siphoned off offshore or that the company never was capable of performing the obligations it undertook under the Devas Agreement. However, all of those elements and facts undeniably pre-date the issuance of the Awards.

189. Not admitting the Indian Supreme Court Judgment of 17 January 2022 as evidence in the present case would unduly reward fraudulent conduct that (by its very nature) could only be uncovered following extensive investigations. This would defeat the purpose of Article 190a(1)(a) PILA, namely to have the substantive truth prevail in exceptional circumstances (as is the case here), which would be particularly disturbing in cases involving fraud and deception. Accordingly, the Indian Supreme Court Judgment constitutes admissible evidence of facts predating the Awards, within the meaning of Article 190a(1)(a) PILA.

190. In the alternative, the Applicant submits that the facts underlying this Application only became sufficiently certain when the Indian Supreme Court, as the first judicial authority to rule over the fraudulent scheme that was put in place by Devas and its shareholders in collusion with select government officials, rendered its decision. In this regard, it cannot be disputed that all factual circumstances invoked in support of this Application predate the Awards.[304]

5. The Applicant discovered new facts and evidence after the issuance of the Awards and could not have relied on them during the arbitral proceedings

191. Article 190a(1)(a) PILA requires that the application be based on "facts" or "evidence", and that these "facts" and "evidence" be discovered after the decision which is being challenged was rendered.[305] Under this provision, the applicant must further show that it was unable to discover the new facts and evidence at the time of the award, despite exercising due diligence to identify those facts and adduce evidence in the proceedings.

192. In the present case, it is only after the Awards were rendered that the Applicant discovered that Devas had been incorporated for fraudulent purposes and conducted its business in a fraudulent manner, meaning that the Respondent's purported investment in India was not made "*in*

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processo che però non era stato possibile provare. Infine il rinvenimento tardivo di queste prove non dev'essere imputabile alla parte che se ne prevale [...]").

303 See above paras. 88-126 and 164-182.

304 See above paras. 88-126.

305 *See* Federal Supreme Court, Decision 4A_464/2021 dated 31 January 2022, para. 6.2.1; Federal Supreme Court, Decision 4A_422/2021 dated 14 October 2021, para. 4.4.1.

accordance with the national laws" of India.[305] Indeed, it is only when the Indian Supreme Court rendered its judgment that the fraudulent nature of the Respondent's investment was conclusively established to a sufficient degree of certainty.[307]

193. In that sense, the Indian Supreme Court Judgment constitutes evidence that was only obtained after the Awards were issued. Alternatively, the facts underlying this Application (namely the fraudulent incorporation of Devas and its fraudulent business activities) were only finally established in the Indian Supreme Court Judgment.

194. The Applicant made every reasonable effort to investigate the suspicions of fraud as soon as they arose. It is however only with the issuance of the Indian Supreme Court Judgment that the allegations of fraud were adjudicated by a court of law, and that there was sufficient certainty that Devas had been incorporated for a fraudulent and unlawful purpose.

195. The Applicant acted diligently during the arbitral proceedings, and cannot be blamed for the fact that the fraudulent scheme behind Devas could only be unearthed after the arbitral proceedings had ended. Again, the Applicant promptly notified the Arbitral Tribunal following the issuance of the first CBI Charge Sheet.[308] The Applicant further requested that the proceedings be suspended until the criminal investigations could be carried out properly, however to no avail.[309] It is only in the context of the CBI investigation for corruption and the investigation for money laundering carried out by the Enforcement Directorate that the first elements of the fraudulent scheme behind Devas' incorporation and the conclusion of the Devas Agreement appeared.

196. As mentioned,[310] a fraud investigation is indeed not a straightforward matter and often largely rests on circumstantial evidence, given that direct evidence is generally unavailable. During both phases of the arbitration, the Applicant was in the dark regarding the dubious circumstances behind Devas' incorporation, and only the Indian Supreme Court Judgment finally and conclusively established with the required degree of certainty the fraudulent scheme behind Devas, following a thorough review of the facts and evidence that had emerged over time. At the time the Final Award was issued, no detailed investigation had been carried out (or even initiated) as to whether Devas' incorporation and affairs breached Indian law.

197. In short, despite exercising all due diligence in the arbitration, the Applicant could not reasonably have been expected to unearth the fraudulent scheme behind Devas in the course of the arbitral proceedings, which only became apparent to it with the required degree of certainty when the Indian Supreme Court rendered its decision. It is in fact inherent to fraudulent schemes that their orchestrators try to conceal the fraud, making them difficult to detect. It is therefore only natural that the nebulous complex of facts surrounding Devas' fraudulent incorporation and the conclusion of the Devas Agreement only emerged after careful investigations and extensive litigation.

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305 **Exhibit A-001**, Agreement between Germany and India for the Promotion and Protection of Investments dated 10 July 1995 (Exhibit C-1 in the arbitration), Article 1(b).

307 See above paras. 135-147.

308 See above paras. 68-69; **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 115.

309 **Exhibit A-002**, Interim Award in PCA Case No. 2014-10 dated 13 December 2017, para. 115.

310 See above paras. 143-145 and 187-189.

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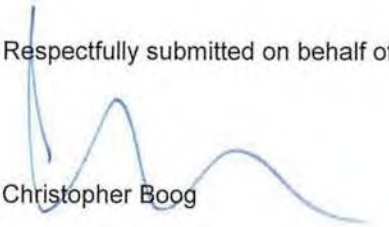
Based on the foregoing explanations, the Applicant maintains the prayers for relief set out at the beginning of this Application.

Respectfully submitted on behalf of the Republic of India:



Christopher Boog

In three copies

Annex: list of exhibits