*Plaintiff: Ina Roth: 4th: . .2022*

**IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

HC/OS 900/2021
HC/SUM 155/2022

In the matter of Section 29 of the International Arbitration Act (Cap. 143A, 2002 Rev. Ed.)

And

In the matter of Order 69A Rule 6 of the Rules of Court (Cap. 322, R 5, 2014 Rev. Ed.)

And

In the matter of an arbitration between Deutsche Telekom AG as Claimant and The Republic of India as Respondent

Between

**DEUTSCHE TELEKOM AG**
(Germany Registration No. T08UF0327J)

…Plaintiff

And

**THE REPUBLIC OF INDIA**
(ID Unknown)

…Defendant

**AFFIDAVIT**

I, **DR. INA ROTH** (ID No. L73Y6T6T2), care of Friedrich-Ebert-Allee 140, 53113 Bonn, Germany, do solemnly affirm and say as follows:

1. I am the Senior Legal Counsel of the Plaintiff, Deutsche Telekom AG ("**DT**"). I am duly authorised to make this affidavit on behalf of DT.

2. Unless otherwise stated, the matters deposed to herein are within my personal knowledge and/or are derived from documents in my possession personally or in my

aforesaid capacity. Insofar as the matters deposed to herein are within my personal knowledge, they are true. Insofar as the matters deposed to herein are not within my personal knowledge, they are true to the best of my information and belief.

3. I make this affidavit in response to the application by the Defendant, the Republic of India ("**India**"), in HC/SUM 155/2022 ("**SUM 155**") to set aside HC/ORC 4992/2021 ("**Leave Order**"), being the Court's order dated 3 September 2021 granting leave for DT to enforce the Final Award dated 27 May 2020 ("**Final Award**") rendered by the arbitral tribunal ("**Tribunal**") comprising Professor Gabrielle Kaufmann-Kohler, Mr Daniel M Price and Professor Brigitte Stern in PCA Case No. 2014-10 between DT and India ("**Arbitration**"), and the affidavits filed by Mr Mandakolathur Subramanian Krishnan ("**Mr Krishnan**") dated 11 January 2022 ("**Mr Krishnan's 1st Affidavit**") and dated 8 February 2022 ("**Mr Krishnan's 2nd Affidavit**") and the affidavits filed by Mr Sudipto Sarkar ("**Mr Sarkar**") dated 11 January 2022 ("**Mr Sarkar's 1st Affidavit**") and dated 8 February 2022 ("**Mr Sarkar's 2nd Affidavit**") in support of SUM 155.

4. In this affidavit, I will only deal with such matters as are factual or relevant to SUM 155. I will leave it to DT's counsel to make the relevant legal submissions. For the avoidance of doubt, the lack of a specific response to any allegation or averment in Mr Krishan's 1st Affidavit, Mr Krishan's 2nd Affidavit, Mr Sarkar's 1st Affidavit and Mr Sarkar's 2nd Affidavit should not be construed as an admission or acknowledgement of any such allegation or averment by DT.

5. India's strategy has become clear over the past few months (in Singapore and other jurisdictions) — a bad faith attempt to circumvent the rule of law and fabricate, retroactively, reasons to avoid its payment obligations to investors, including DT, in clear breach of its obligations under international law. It has now been more than 10 years since India violated DT's rights, and breached its international law obligations. Yet, in the face of a valid and enforceable international arbitral award finding India liable to compensate DT for India's breaches, India continues to raise spurious arguments, despite having failed not just before the Tribunal, but also before the Swiss Federal Supreme Court, being the seat court of the Arbitration.

6. DT's position is that Mr Sarkar's 1st and 2nd Affidavits (and insofar as Mr Krishnan's 1st and 2nd Affidavits are relying on them) opining on matters of Indian law based on the purported findings of the Indian National Company Law Tribunal, Bengaluru Bench ("**NCLT**"), the Indian National Company Law Appellate Tribunal, Chennai ("**NCLAT**") and the Indian Supreme Court in ordering and/or upholding the winding up of Devas Multimedia Pvt Ltd ("**Devas**") pursuant to the winding-up petition filed by Antrix Corporation Ltd ("**Antrix**") (collectively referred to as the "**Winding-up Proceedings**") are not relevant to SUM 155, are scandalous or otherwise oppressive, and should be struck out. DT has thus filed a striking out application. Without prejudice to that position, I respond to India's allegations in that regard in this affidavit, and DT has also filed an affidavit from Mr Harish Salve, QC, SA enclosing his expert opinion in response to Mr Sarkar's 1st and 2nd Affidavits.

7. In summary, India argues that the Leave Order should be set aside on the following grounds:[1]

(a) "*India is entitled to state immunity from the Singapore courts, unless it had agreed to arbitrate the matters in dispute in the Arbitration*" and "*India did not agree to do so*".

(b) "*enforcement of the Final Award should be refused under section 31(2)(b) and/or section 31(2)(d) of Singapore's International Arbitration Act 1994 (the "IAA")*".

(c) "*enforcement of the Final Award should be refused under section 31(4)(b) of the IAA, as its enforcement would be contrary to the public policy of Singapore*".

(d) "*the Leave Order should be set aside because DT had not provided full and frank disclosure in OS 900*".

8. In support of these grounds, India relies on the following arguments:[2]

(a) DT's investment was not made "*in accordance with the national laws of the Contracting Party where the investment is made [i.e., India law]*" because:

(i) "*The agreement for a long-term lease of satellite capacity and the associated part of the "S-band" electromagnetic spectrum between Devas Multimedia Private Limited ("**Devas**") and Antrix Corporation Limited ("**Antrix**"), an Indian state-owned entity, dated 28 January 2005 (the "**Agreement**"), was procured by fraudulent misrepresentations, entered into with an unlawful object, and made in violation of SATCOM Policy and the principles regarding allocation of natural resources in India. The Agreement was therefore not made in accordance with Indian law. Consequently, DT's alleged investment was tainted by fraud and illegality in relation to the Agreement,*

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[1] Mr Krishnan's 1st Affidavit at [10], [102]-[105] of Mr Krishnan's 1st Affidavit

[2] Mr Krishnan's 1st Affidavit at [10]; Mr Krishnan's 2nd Affidavit at [33], [38]

*and therefore was not made in accordance with Indian law*" (referred to as the "**Fraud and Illegality Allegation**").

(ii) "*In any case, DT's alleged investment had not been made in accordance with the terms of approval granted by the Indian Foreign Investment Promotion Board ("FIPB"), and therefore was not made in accordance with Indian law*" (referred to as the "**FIPB Allegation**").

(b) "*The BIT does not cover pre-investment activities, i.e., preparations to make an investment. In this case, because the requisite authorisations required to commercially realise the investment had not been obtained, DT's expenditures amounted only to pre-investment expenditures which were not covered by the BIT*" (referred to as the "**Pre-Investment Allegation**").

(c) "*The BIT does not cover indirect investments, i.e., investments indirectly held by the investor through an entity incorporated in a different jurisdiction. In this case, any "investment" by DT was held through its Singaporean subsidiary, Deutsche Telekom Asia Pte Ltd ("DT Asia"), and was therefore not covered by the BIT*" (referred to as the "**Indirect Investment Allegation**").

(d) "*Pursuant to Article 12 of the BIT, the Tribunal does not have jurisdiction over a dispute where India had validly invoked its essential security interests. India's decision to annul the Agreement, which forms the basis of DT's claim in the Arbitration, was made in furtherance of India's essential security interests. Hence, the Tribunal does not have jurisdiction over the matter*" (referred to as the "**Security Interest Allegation**").

9. India has raised these same arguments, time and again, in the hope of escaping compliance with the final ruling of an international arbitral tribunal, which requires India

to compensate DT for India's breaches of international law. I am advised and believe that the various arguments raised by India are entirely without merit for the following reasons:

(a) First, India is estopped and/or precluded from raising these arguments in seeking to resist the enforcement of the Final Award:

(i) India is attempting to re-litigate matters which have already been decided against India in the Arbitration as well as in the Swiss Federal Supreme Court (being the seat court of the Arbitration) in the proceedings to set aside the Interim Award on Jurisdiction and Liability dated 13 December 2017 ("**Interim Award**") (i.e. the "**Swiss Setting Aside Proceedings**"). India did not file any application to set aside the Final Award, which the Civil Court for the Republic and Canton of Geneva has declared to be legally binding in its form and content on 20 August 2020.

(ii) Insofar as these matters were not raised by India in the Arbitration and the Swiss Setting Aside Proceedings, these matters could have been raised by India, and India chose not to do so.

(iii) India, in choosing not to raise jurisdictional objections in the Arbitration when it could and should have, has waived its right to raise such objections belatedly in these proceedings.

(b) Second, insofar as any of India's arguments are premised on the purported findings of the NCLT, NCLAT and the Indian Supreme Court, this is a blatant attempt by India to usurp the findings of the Tribunal and the Swiss Federal Supreme Court, by reference to subsequent findings made by its own domestic tribunals and courts in questionable circumstances. Besides, this fails to recognise that the question of whether an investor has made an investment in accordance with Article 1(b) of the Agreement between the Federal Republic of Germany and the Republic of India for the Promotion

and Protection of Investments signed on 10 July 1995 ("**1995 BIT**") is one of international law, and not domestic law.

(c) Third, the purported findings of the NCLT, NCLAT and the Indian Supreme Court (which is still subject to a possible challenge) have no legal effect in Singapore because:

(i) The decisions of the NCLT, NCLAT and the Indian Supreme Court (collectively referred to as "**Indian Decisions**") concern a winding-up petition filed by Antrix against Devas. Neither DT nor DT Asia were parties to the Winding-up Proceedings.

(ii) The Indian Decisions concerned issues which are entirely different from the issues in the present enforcement proceedings. The issues before the NCLT, NCLAT and the Indian Supreme Court were not in respect of international law, (Singapore's) public policy, or the enforcement of the Final Award. Moreover, the purported findings in the Indian Decisions which India is relying on in support of its arguments are collateral and/or incidental to the sole and central issue in the Winding-up Proceedings, which is whether Devas should be wound up pursuant to s 271(c) of the Indian Companies Act, 2013. In any case, the Indian Decisions should be limited to the specific context of s 271(c) of the Indian Companies Act, 2013.

(iii) The Indian Decisions were arrived at in breach of natural justice and due process because: (1) the NCLT had pre-judged the winding-up petition filed by Antrix in ordering that a provisional liquidator be appointed by simply accepting the unilateral averments of Antrix — an entity wholly-owned by India which is liable to Devas under an arbitral award for an amount in excess of USD 1 billion — without affording Devas an opportunity to be heard; and (2) Devas was prevented from conducting cross-

examination of Antrix's witnesses even though spurious allegations of fraud were being made against Devas.

(iv) The questionable circumstances in which the Indian Decisions came about suggest that the Indian Decisions are part of a wider political effort on the part of India to undermine the enforcement of various arbitral awards that had been issued against Antrix and India (which includes the Final Award) with the assistance of its domestic tribunals and courts.

(v) India cannot rely on the Indian Decisions as evidence of whether the asset is "*invested in accordance with the national laws of India*" because India is precluded from relying on self-serving evidence that occurred *after* DT's issuance of the Notice of Arbitration against India on 2 September 2013 (i.e. the critical date) pursuant to the critical date doctrine under international law. At the very least, such post-critical date evidence should be given little weight.

(vi) Even if one were to consider the self-serving findings of the Indian Decisions (which DT does not accept should be considered), the alleged fraud that took place in 2005/2006 *pre-dates* DT's investment in 2008, and does not in any way implicate DT, especially since DT does not have any knowledge of the alleged fraud.

(d) There is no lack of full and frank disclosure by DT of the decision of the NCLT dated 25 May 2021 ("**NCLT Decision**"), as DT and DT Asia were not parties to the NCLT Decision. DT Asia does not have any representative on the Board of Devas since 30 November 2019. Besides, as at the time of DT's *ex-parte* application for the Leave Order, India did not articulate its potential immunity arguments and has not relied on the NCLT Decision in the United States ("**US**") enforcement proceedings.

10. I will elaborate on these matters below. In this affidavit, I will first deal with the factual background, in particular, the legal proceedings that have spanned many years, as well as India's continued (and unmeritorious) resistance to the enforcement of the Final Award. I will then explain why India has no basis to resist enforcement of the Final Award in Singapore.

## I. BACKGROUND FACTS

### A. The Parties

11. The Plaintiff and the Claimant in the Arbitration, DT, is a company incorporated under the laws of the Federal Republic of Germany ("**Germany**"). Its registered address is Friedrich-Ebert-Allee 140, 53113 Bonn, Germany. DT is one of the largest telecommunication companies in the world, and the Government of Germany owns a 30.4% shareholding in DT.

12. The Defendant is the Republic of India, a sovereign state, and the Respondent in the Arbitration.

13. The other relevant parties are (i) DT's wholly-owned Singapore-incorporated subsidiary, Deutsche Telekom Asia Pte. Ltd. ("**DT Asia**"), which owns around 19.6% of Devas' paid up share capital, (ii) Devas, and (iii) Antrix, a state-owned company of India.

14. 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. Since 1983, India's entire S-band spectrum has been at the disposal of

India's Department of Space ("**DOS**"). Antrix was the commercial arm of the Indian Space Research Organisation ("**ISRO**"), and administratively controlled by DOS.[3]

15. In 1997, the Cabinet of Ministers of India approved a new policy framework for satellite communications ("**SatCom Policy**") which contemplated "*encouraging the private sector investment in the space industry in India and attracting foreign investments*".[4] In 2000, India approved the Guidelines and Procedures for the Implementation of the SatCom Policy which allowed DOS to allocate the spectrum capacity for commercial use on the basis of "*suitable transparent procedures*", such as "*auction, good faith negotiations, first come first served, or any other equitable method*".[5]

16. In 2003, the DOS transferred 40 MHz of S-band spectrum to the Department of Telecommunications ("**DOT**") for use for commercial terrestrial services. The DOS retained the remaining 150 MHz of S-band spectrum, 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**").[6]

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[3] See Antrix Company Profile (Arbitration Exhibit C-48) (Exhibited at Tab 1 of **IR-4)**

[4] Policy framework for satellite communications in India dated 1997 (Arbitration Exhibit C-4) (Exhibited at Tab 2 of **IR-4)**

[5] [52] of Interim Award (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-2)**; see also Government of India, "*The norms, guidelines and procedures for implementation of the policy frame-work for satellite communications in India as approved by Government in 2000*" dated 2000 (Arbitration Exhibit C-54) ("**SATCOM Policy**") at [2.6.2] (Exhibited at Tab 3 of **IR-4)**

[6] [53] of Interim Award

## B. Devas-Antrix Agreement and DT's investment in India

### *(1) Devas-Antrix Agreement*

17. Devas was incorporated in India on 17 December 2004 by foreign investors as a vehicle to enter into and perform an agreement between Devas and Antrix following years of arm's length negotiations and extensive discussions between a US consultancy firm, Forge Advisors on the one hand, and Antrix and ISRO on the other, on a potential collaboration for the commercialisation of some of the S-Band spectrum of the DOS.[7]

18. On 28 January 2005, Devas entered into the agreement with Antrix where it was agreed that Antrix would lease 70 MHz of S-Band capacity (60 MHz of BSS spectrum and 10 MHz of MSS spectrum) on two satellites to be manufactured and launched by ISRO ("**Devas-Antrix Agreement**").[8] Devas undertook to pay an upfront reservation fee of USD 20 million per satellite in instalments and annual lease payments between USD 9 million to USD 11.25 million over a 12-year period (with a further 12-year period upon payment of a reasonable lease fee), and critical component acquisition fees. On 2 February 2006, Antrix sent a letter to Devas informing that it had received "*necessary approval for building, launching, and leasing the capacity of S-band satellite*", which brought the Devas-Antrix Agreement into effect.[9]

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[7] [54]-[58] of Interim Award

[8] A copy of the Devas-Antrix Agreement is exhibited to Mr Krishnan's 1st Affidavit at **MSK-10**.

[9] [59]-[62] of Interim Award; see also letter from Antrix (Mr Murthi) to Devas (Mr Viswanathan) dated 2 February 2006 (Arbitration Exhibit C-8) (Exhibited at Tab 4 of **IR-4)** and chronology of events at [4] of Suresh Report dated 7 June 2010 (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-21**)

### *(2) DT's investment in India*

19. At the time when Devas and Antrix concluded the Devas-Antrix Agreement in January 2005, DT did not have any investment in Devas (nor did it have plans to do so).

20. Prior to DT's investment into Devas in 2008, two Mauritian subsidiaries of US private equity firms, Telecom Ventures LLC and Columbia Capital LLC, had already been investors in Devas.[10] On 16 March 2006, Telcom Devas Mauritius Limited ("**Telecom Devas**") and CC/Devas (Mauritius) Ltd ("**CC Devas**") entered into a Share Subscription Agreement for the acquisition of 38% of Devas' paid-up share capital.[11]

21. During the investment process in 2006, Devas sought and obtained the requisite approval from the Government of India for the proposed acquisition of 38% of its shares by Telecom Devas and CC Devas:

(a) On 2 February 2006, Devas applied to India Foreign Investment Promotion Board ("**FIPB**") to seek approval for the proposed acquisition ("**2006 FIPB Application**").[12]

(b) On 18 May 2006, the FIPB granted approval for the proposed acquisition, and the transaction was thereafter completed ("**2006 FIPB Approval**").[13]

22. It was only in 2008 that DT first invested into Devas, after extensive negotiations with Devas and representatives from ISRO and the DOS. DT, a publicly-listed company

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[10] [6] of Interim Award

[11] A copy of the Share Subscription Agreement dated 16 March 2006 is exhibited to Mr Krishnan's 1st Affidavit at **MSK-12**

[12] A copy of the 2006 FIPB Application is exhibited to Mr Krishnan's 1st Affidavit at **MSK-11**

[13] A copy of the 2006 FIPB Approval is exhibited to Mr Krishnan's 1st Affidavit at **MSK-13**

owned in part by the Government of Germany, hired prominent Indian legal counsel to advise DT on the corporate transaction. On 19 March 2008, DT's wholly-owned Singapore-incorporated subsidiary, DT Asia, entered into a Share Subscription Agreement with Devas to acquire 17.2% of Devas' paid-up share capital ("**Share Subscription Agreement**").[14]

23. DT's acquisition of shares in Devas through DT Asia was also made with the requisite approval from the Government of India:

(a) On 1 May 2008, Devas applied to the FIPB seeking approval for DT Asia's subscription of approximately 17% of Devas' total paid-up share capital, and subsequent acquisition either by way of subscription and/or transfer further shares up to 26% of Devas' total paid-up share capital ("**2008 FIPB Application**").[15]

(b) On 7 August 2008, the FIPB granted its approval for DT Asia's subscription of 17.2% of Devas' total paid-up share capital, and further approval of DT Asia's subsequent acquisition of up to 26% of Devas' total paid-up share capital ("**2008 FIPB Approval**").[16]

24. The transaction under the Share Subscription Agreement was completed on 18 August 2008, when DT Asia paid USD 75 million to Devas in exchange for 17.2% of its paid-up share capital (comprising 28,349 Class C equity shares).[17] At this time, Mr

[14] [66]-[69] of Interim Award. A copy of the Share Subscription Agreement dated 19 March 2008 is exhibited to Mr Krishnan's 1st Affidavit at **MSK-14**

[15] The 2008 FIPB Application is exhibited to Mr Krishnan's 1st Affidavit at **MSK-15**

[16] A copy of the 2008 FIPB Approval is exhibited to Mr Krishnan's 1st Affidavit at **MSK-16**

[17] [69] of Interim Award

Alugappan Murugappan and Mr Kevin Copp were also appointed to the Board of Devas as DT Asia's nominees.[18]

25. Subsequently in 2009, DT Asia and Devas entered into an agreement for DT Asia to make a further equity contribution to Devas.[19] Devas likewise sought, and obtained the requisite approval from the Government of India:

(a) On 14 September 2009, Devas applied to FIPB seeking approval for increase in foreign investment in Devas by the existing foreign investors, namely, Telecom Devas, CC Devas and DT Asia ("**2009 FIPB Application**").[20]

(b) On 17 September 2009, the FIPB granted approval for the increase in Devas' proposed foreign equity participation, including DT Asia's increase in shareholding in Devas to 20.73% ("**2009 FIPB Approval**").[21]

26. Following the receipt of the requisite FIPB approval, the transaction completed on 29 September 2009 when DT Asia made a further equity contribution of USD 22.2 million in Devas in consideration for 8,400 Class C Shares in Devas, increasing its shareholding to 20.73%. Following subsequent minor changes in Devas' shareholding, DT Asia had a 19.62% shareholding in Devas.[22]

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[18] These nominees subsequently resigned from the Board of Devas, and since 30 November 2019, DT Asia no longer has any representatives on the Board of Devas

[19] [70] of Interim Award; see also Share Subscription Agreement dated 19 March 2008 is exhibited to Mr Krishnan's 1st Affidavit at **MSK-14**

[20] A copy of this letter is exhibited to Mr Krishnan's 1st Affidavit at **MSK-18**

[21] A copy of the 2009 FIPB Approval is exhibited to Mr Krishnan's 1st Affidavit at **MSK-18**

[22] [70] of Interim Award; see also Share Subscription Agreement dated 19 March 2008 is exhibited to Mr Krishnan's 1st Affidavit at **MSK-14**

27. It is incorrect for India to claim at paragraph 33 of Mr Krishnan's 1st Affidavit that "*DT invested in Devas despite knowing various irregularities with Devas's business and, in particular with the [Devas-Antrix] Agreement*". There is absolutely no evidence to support this claim. It is not in dispute that DT / DT Asia's investment in Devas was made after extensive due diligence by DT, who was advised by prominent Indian legal counsel, and with all the requisite approvals from the Government of India. DT's investment in Devas also came *after* the investment from Telecom Devas and CC Devas, which also obtained the requisite approvals from the Government of India. For years, Devas did not face any issue with its business, including the Devas-Antrix Agreement, until India unilaterally and wrongfully caused Antrix to terminate the Devas-Antrix Agreement in February 2011. Even though a decision was taken as early as 2 July 2010 to annul the Devas-Antrix Agreement, that decision was not conveyed to Devas or any of its investors (including DT), and officers from Antrix, ISRO and DOS continued to engage with Devas and its investors (including DT) on the performance of the Devas-Antrix Agreement throughout the years, even right through 2010, until Devas was informed of the termination of the Devas-Antrix Agreement in February 2011.[23]

28. Indeed, the Tribunal had found that India's conduct was duplicitous, that "***the lack of transparency and forthrightness is manifest. The Indian authorities continues acting as if the project was on track and it was business as usual, when in fact the contract had been annulled. As a result, DT and Devas continued to take active steps towards the realization of the project. In other words, after the annulment was decided, Devas***

[23] [82]-[86] of Interim Award

***and DT were affirmatively misled and made to believe that the project was alive when in fact it was dead***." The Tribunal further found that India had acted in "*wilful disregard of due process of law*" through conduct "*which shocks, or at least surprises, a sense of judicial propriety*" and breached its international law obligations to accord fair and equitable treatment to DT.[24]

***(3) India's termination of the Devas-Antrix Agreement***

29. In late 2009, allegations surfaced in the Indian media that the DOT and in particular, Telecommunications Minister A Raja had engaged in corrupt dealings in the context of the allocations of 2G spectrum to terrestrial mobile operators by undervaluing the spectrum and selling it to favoured companies ("**2G Scandal**").[25] The 2G Scandal is entirely unrelated to the allocation of S-band spectrum leased to Devas years prior in 2005,[26] which was an arms-length transaction between Devas and Antrix after extensive discussions stretching over years with Antrix and ISRO.[27]

30. On 22 October 2009, the Indian Central Bureau of Investigations ("**CBI**") raided the offices of the DOT.[28]

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[24] [375]-[390] Interim Award

[25] [75] of Interim Award (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-2**)

[26] [75] of Interim Award

[27] [54]-[62] of Interim Award; see also chronology of events in [4] of Suresh Report (exhibited to Mr Krishnan's 1st Affidavit at **MSK-21**)

[28] [75] of Interim Award

31. On 31 October 2009, Dr K Radhakrishnan ("**Dr Radhakrishnan**") assumed the responsibilities as Chair of the Space Commission, Secretary of the DOS, Chairman of ISRO and Chairman of Antrix.[29]

32. On 8 November 2009, the Joint Secretary of the DOS, Mr Vijay Anand ("**Mr Anand**"), who was one of India's witnesses in the Arbitration, allegedly received an anonymous complaint that the S-band spectrum had been leased to Devas on the basis of corrupt practices.[30]

33. On 8 December 2009, representatives of the Space Commission, DOS and ISRO met to discuss the complaint, as a result of which Dr Radhakrishnan constituted a single-man committee consisting of the Director of the Indian Institute of Space and Technology, Dr. Suresh ("**Suresh Committee**") to review "*the legal, commercial, procedural and technical aspects*" of the Devas-Antrix Agreement.[31] Dr. Suresh was to be assisted by various officials from Antrix and DOS.

34. Around the same time, on 15 December 2009, there was a meeting between the Integrated Defence Staff ("**IDS**"), the Ministry of Defence ("**MOD**") and ISRO to discuss the optimal utilisation of the S-band spectrum at which the military needs allegedly crystallised. In response to ISRO's indication that the S-band spectrum was limited, the

[29] [247] of Interim Award

[30] [76], [247] of Interim Award; see also [8] of Vijay Anand's witness statement dated 2 December 2013 (Exhibited at Tab 5 of **IR-4)**

[31] [76] and [247] of the Interim Award

IDS agreed "*to explore new avenues*", accepted that the IDS needed to "*best utilise available S-band spectrum*" and directed that "*deeper analysis be carried out*" into frequency re-use.[32] There is no suggestion in these minutes that the military needs were irreconcilable with the Devas-Antrix Agreement.[33]

35. More than 5 months later, the Suresh Committee transmitted its report on or around 7 June 2010 ("**Suresh Report**") to the ISRO and DOS.[34] As set out in paragraph 1 of the Suresh Report, the Suresh Committee held "*detailed discussions*" with officials from Antrix, ISRO and DOS and "*scrutinized in detail*" all applicable documents and had "*further discussions on specific issues with all concerned groups*".[35] The Suresh Report was not made public or sent to Devas.

36. The Suresh Report stressed that there was "*absolutely no doubt on the technical soundness*" of the Devas digital multimedia services as proposed and that "***Antrix has been following the policy guidelines for leasing the transponder services to private service providers as per the Satcom policy approved by ICC in the year 2000***".[36] The Suresh Report recommended that the Devas-Antrix Agreement "***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*

[32] [340] of the Interim Award; see also Minutes of meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO dated 25 January 2010, (Arbitration Exhibit C-252) at [7(b)] to [7(e)] (Exhibited at Tab 6 of **IR-4)**

[33] [243]-[245] of Interim Award

[34] Exhibited to Mr Krishnan's 1st Affidavit at **MSK-21**

[35] [1] of the Suresh Report (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-21**)

[36] Page 15 of Suresh Report (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-21**)

*payment made by Devas*".[37] Notably, nowhere in the Suresh Report does it say that the Devas-Antrix Agreement should be annulled,[38] nor that the Devas-Antrix Agreement was obtained at an undervalue or preferentially, nor that there were any corrupt practices.

37. Rather than follow the recommendations of the Suresh Report, which would have been to renegotiate certain terms of the Devas-Antrix Agreement,[39] Antrix, with the sanction and encouragement of the Government of India and the ISRO and DOS, proceeded to unilaterally (and wrongfully) terminate the Devas-Antrix Agreement for the purposes of political capital and easing off media pressure, as will be elaborated below.

38. On 4 February 2010, Devas and DT met with Dr Radhakrishnan and Mr Anand where Devas made a presentation on the strategic, societal and commercial applications of the Devas platform. Dr Radhakrishnan stated that a new deadline of 1 September 2010 was set for the launch of the satellite. No mention was made of the ongoing investigation by the Suresh Committee nor the alleged crystallisation of the military needs.[40] In the Tribunal's words, "*[n]ot only did [India] not disclose relevant facts, it actually concealed them by affirmatively creating a misleading impression of the status of the project. The Tribunal is struck by the failure to provide Devas/DT with due process at that time, especially given the drastic outcome that was contemplated.*"[41]

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[37] Page 15 of Suresh Report (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-21**)

[38] [347] of the Interim Award, See also Transcript Day 4 p 118 – 119 (India's witness Mr Anand) (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-27**)

[39] [347] of Interim Award: "*The Tribunal notes that nowhere in the report did Dr. Suresh recommend that the Agreement be annulled, which was acknowledged at the hearing by Mr Anand. Instead, Dr Suresh suggested an amendment to the contract*"

[40] [342] of Interim Award

[41] [380] of Interim Award

39. In mid-May 2010, the DOT licensed 20 MHz of S-Band spectrum to commercial Government-owned BWA operators as a result of an auction, which raised USD 15 billion. This sparked increased interest from the media that about 5 years earlier, 70 MHz of S-band spectrum had been leased to Devas at what the media considered a low price (although the media failed to recognise that at the time the lease had been issued, this was before the advent of smartphones which enabled mobile media consumption and spurred an explosion in the value of telecommunications spectrum). The media thus called upon the Government of India to annul the Devas-Antrix Agreement in order to "*raise some more much-needed money*".[42]

40. The media reports appeared to be taken seriously by a number of senior officers within the Government of India. On 4 June 2010, the DOT wrote to Mr Balachandran, the Additional Secretary of ISRO, enclosing copies of the media reports and requesting him "*to kindly provide your comments on the news reports immediately*".[43] Around the same time, Dr Suresh transmitted the Suresh Report to Dr Radhakrishnan where it was concluded that the Devas-Antrix Agreement needed to be re-visited; there was no recommendation to annul the Devas-Antrix Agreement.[44]

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[42] [78], [249], [343] of Interim Award; see also *The Hindu Business Line* article titled "*Devas gets preferential allocation of ISRO's spectrum*" dated 30 May 2010 (Arbitration Exhibit C-24) and *The Hindu Business Line* article titled "*Another spectrum sold on the quiet*" dated 1 June 2010 (Arbitration Exhibit C-24) (Exhibited at Tab 7 of **IR-4)**

[43] [250] of Interim Award

[44] [345]-[347] of Interim Award

41. 10 days later on 14 June 2010, the DOT wrote to Dr Radhakrishnan, noting that ISRO's comments on the media reports were still outstanding, and "*requested [him] to look into the matter personally and expedite [his] comments*". On the same day, Mr Balachandran obtained copies of the Devas-Antrix Agreement.[45]

42. Two days later on 16 June 2010, Dr Radhakrishnan reacted to DOT's 14 June 2010 letter by sending two practically identical memoranda, one to the DOT and another one to the Ministry of Law and Justice ("**MOJ**") where he sought their advice on whether the Devas-Antrix Agreement needed to be annulled invoking any of the contractual provisions in order to "*preserve the precious S band spectrum*" and "*ensure a level playing field for the other service providers using terrestrial spectrum*".[46] In effect, Dr Radhakrishnan was asking the MOJ for advice on **how to annul the Devas-Antrix Agreement**, contrary to the recommendations in the Suresh Report.[47]

43. The MOJ replied on 18 June 2010 that the Government's duty was to take care of strategic needs and not "*to provide orbit slot to Antrix for commercial activities, especially when there is [sic] strategic requirements*". The MOJ added that the Government "*may take a policy decision to the effect that due to the needs of strategic*

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[45] [250] of Interim Award

[46] [79], [251] of Interim Award; see also Memorandum from the DOS (Secretary Radhakrishnan) to the DOT dated 16 June 2010 (Arbitration Exhibit C-140) and Memorandum from the DOS (Secretary Radhakrishnan) to the MOJ dated 16 June 010 (Arbitration Exhibit C-141) (Exhibited at Tab 8 of **IR-4**)

[47] [350]-[351] of Interim Award

*requirements, the [Government] would not be able to provide orbit slot in S band for operating PS1 to the ANTRIX for commercial activities*".[48]

44. Dr Radhakrishnan thereafter instructed Mr Balachandran, the Additional Secretary of DOS, to prepare a note on the annulment of the Devas-Antrix Agreement for the upcoming meeting of the Space Commission.[49]

45. The note, dated 30 June 2010,[50] which attached the Suresh Report, recommended the annulment of the Devas Agreement in the following terms "*Considering the need (i) to preserve S-band spectrum for national requirements in strategic sector and for societal applications, (ii)* ***certain concerns on technical, managerial, financial and contractual aspects of ANTRIX-Devas Agreement,***[51] *and (iii) issues involved in DEVAS obtaining the Spectrum License for the proposed services …* ***it would be inevitable to annul the ANTRIX/Devas Agreement***".[52]

[48] [80], [253], [254] of Interim Award; see also Memorandum from the MOJ (Mr TK Viswanathan) to the DOS (Secretary Radhakrishnan) dated 18 June 2010 (Arbitration Exhibit C-142) (Exhibited at Tab 9 of **IR-4**)

[49] [81] of Interim Award

[50] See Note to the Space Commission drafted by the DOS, signed on 2 July 2010 at [15.1] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-5**)

[51] Including the fact that "*Devas, which has a large foreign equity, can assign or sell or sub-licence any and all of its rights under this agreement, without any approvals from ANTRIX*" (Note to the Space Commission drafted by the DOS, signed on 2 July 2010 at [13.2(j)] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-5**))

[52] [81], [255] – [259], [353] – [356] of Interim Award; see also Note to the Space Commission drafted by the DOS, signed on 2 July 2010 at [15.1] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-5**). Pertinently, the note also contains "*[DOS]'s assessment of the Antrix-Devas Agreement*" that "*there are existence on record of a few anomalies that suggest that full information has not been provided to Cabinet and Space Commission; also reasonable surmises are rendered possible that Cabinet and Space Commission have been given incorrect/ incomplete information also. Details follow.*" (at [13.2])

46. At its 117th meeting, on 2 July 2010, the Space Commission considered that note, and directed that the necessary actions be taken by Antrix to annul the Devas-Antrix Agreement, taking into account several reasons including military needs, broader societal needs (such as train-tracking) and concerns about the unduly favourable contractual terms in the Devas-Antrix Agreement.[53] A copy of the meeting minutes is exhibited to Mr Krishnan's 1st Affidavit at **MSK-9**. It is not in dispute that this decision was not communicated to Devas at this juncture.[54] A few months later, one of the attendees at this meeting, Mr Chandrasekhar gave the following account on the annulment of the Devas-Antrix Agreement to the Prime Minister of India in a note marked "secret", "*since the agreement has now had to be cancelled on account of reasons related to non-transparency and one-sided skew in risk sharing arrangements, ISRO/DOS are left with a satellite ... which has no immediate commercial application*".[55] Considering that this is an official summary to the highest political organ of the state, this would be a fair characterisation of the principal basis for the annulment decision, and not those later alleged "security interests" on account of military needs fabricated to justify the annulment.[56]

47. After the meeting, Dr Radhakrishnan sought advice from the Additional Solicitor General ("**ASG**") on **how to annul** the Devas-Antrix Agreement with the least legal

[53] [262] – [264], [357] of Interim Award, see also Minutes of 117th Meeting of the Space Commission held at the Department of Space Branch Secretariat, New Delhi on 2 July 2010, signed on 21 July 2010 (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-6**)

[54] [82] of Interim Award

[55] [36(viii)] of Note by India's Cabinet Secretary (Mr Chandrasekhar) to India's Prime Minister's Office ("**Chandrasekhar Report**") dated 12 March 2011 (Arbitration Exhibit C-191) (Exhibited at Tab 10 of **IR-4**)

[56] [357] – [358] of Interim Award

risks.[57] The ASG explained "*[t]he modus of termination has been specified in the agreement in clause 7. But I am afraid that the conditions stipulated in this clause cannot be invoked at this stage for the purpose of terminating the contract*". Having advised that the modus of termination in Clause 7 of the Devas-Antrix Agreement could not be invoked, the ASG further advised that Article 11(a) of the Devas-Antrix Agreement allowed Antrix to terminate the Agreement in the event of *force majeure*, which included "*acts of or failure to act by any governmental authority acting in its sovereign capacity*". The ASG thus recommended that the Government take a decision to terminate the Devas-Antrix Agreement "***as a matter of policy, in exercise of its executive power***".[58]

48. One month later, in August 2010, Devas met with the Secretariat of the National Security Council ("**NSC**") and explained how its services could be used by the user agencies represented in the NSC. Later that month, on 27 August 2010, Devas presented its services to the Joint Secretary of the Prime Minister's Office. At none of these meetings were any military requirements mentioned nor was DT/Devas informed that the Government of India had made the decision to annul the Devas-Antrix Agreement on 2 July 2010.[59]

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[57] Letter from the DOS (Secretary Radhakrishnan) to India's Additional Solicitor General (Mr Parasaran) dated 8 July 2010 (Arbitration Exhibit C-146) (Exhibited at Tab 11 of **IR-4**); see also [266] of Interim Award

[58] [83], [267] – [268] of Interim Award; see also Opinion of Additional Solicitor General (Mr Parasan) for DOS titled "*Agreement dated 28.1.2005 between M/s. Antrix Corporation Limited and M/s. Devas Multi Media Private Limited*" dated 12 July 2010 (Arbitration Exhibit C-147) (Exhibited at Tab 11 of **IR-4**)

[59] [383]-[384] of Interim Award

49. In October 2010, DT's Chief Technology and Information Office Mr Kozel travelled to India and met with the Minister of State Chavan (who had attended the 2 July 2010 Space Commissions meeting). No reference was made then to the decision to annul the Devas-Antrix Agreement on 2 July 2010 or to competing military demands for the S-band spectrum leased to Devas. [60]

50. DT and Devas continued work to prepare for the launch of the two satellites over the second half of 2010. In particular, Devas submitted a draft Wireless Planning and Coordination ("**WPC**") licence to Antrix and communicated with ISRO's frequency management office to finalise the application. DT also conducted a successful second round of experimental trials in Germany in August 2010 and in China in October 2010.[61]

51. On 2 February 2011, former Minister of Telecommunications Raja and two other officials were arrested in connection with the 2G Scandal.[62]

52. A few days after the arrest, on 8 February 2011, Dr Radhakrishnan and Dr. Kasturirangan, a former ISRO Chairman and the DOS Secretary, announced at a press conference the decision to terminate the Devas-Antrix Agreement.[63] It was through this press conference that Devas learned for the *first* time about the purported termination of

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[60] [385] of Interim Award
[61] [386] of Interim Award
[62] [85] of Interim Award
[63] [86] of the Interim Award; see also *Tehelka* Article titled "*BJP points finger at Manmohan Singh on [Indian Space Research Organisation ("**ISRO**")] spectrum controversy*" dated 7 February 2011 (Arbitration Exhibit C-178), *The Times of India* Article titled "*Another spectrum scam hits govt, this time from ISRO*" dated 8 February 2011 (Arbitration Exhibit C-182), and Transcript of ISRO Press Conference on CNN-IBN dated 8 February 2011 (Arbitration Exhibit C-26) (Exhibited at Tab 12 of **IR-4**)

the Devas-Antrix Agreement.[64] As found by the Tribunal, "*the lack of transparency and forthrightness [on the part of India] is manifest*", and "*Devas and DT were affirmatively misled and made to believe the project was alive when in fact it was dead.*"[65]

53. To proceed with the termination, Dr Radhakrishnan submitted a note to the Cabinet Committee on Security ("**CCS**") on 16 February 2011 to seek its approval to annul the Devas-Antrix Agreement "*in view of priority to be given to nation's strategic requirements including societal ones*"; this is consistent with ASG's advice that only the strategic and societal needs were put forward at this juncture so as to justify reliance on the *force majeure* clause, even though there were various other reasons for the annulment, principally the contractual terms in the Devas-Antrix Agreement that were now viewed as unduly favourable by India.[66]

54. On 16 February 2011, the Prime Minister announced at a press conference that the Government of India "*should take a sovereign policy decision regarding the utilization of [S-band] spectrum having regard to the country's strategic requirements*" and that his office had sought not to "*dilute, in any way the decision taken by the Space Commission*

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[64] [86] of Interim Award; see also Letter from Devas (Mr Viswanathan) to Prime Minister of India (Dr Manmohan Singh) dated 10 February 2011 (Arbitration Exhibit C-27) and Letter from Devas (Mr Viswanathan) to Antrix (Secretary Radhakrishnan) dated 11 February 2011 (Arbitration Exhibit C-28) (Exhibited at Tab 13 of **IR-4**)

[65] [387] of Interim Award

[66] [86] – [87], [269]-[271] of Interim Award; Note by the DOS (Secretary Radhakrishnan) for the Cabinet Committee on Security dated 16 February 2011 (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-22**); Even at this time, India was already alleging that there were "*A number of issues, relating to the selection of [Devas] for the contract, whether the company had the technology to conclude the [Antrix-Devas Agreement], collusive behaviour between some employees of ISRO and affiliated organisations and [Devas], and discrepancies in the Cabinet Note relating to GSAT-6 in December 2005, have been raised and a suggestion has also been made that a thorough investigation may be ordered to fix responsibility in the matter*" (see [44.5] and Annexure 11)

*in July 2010*". According to the Prime Minister, the matter was "*expected to be put before Cabinet Committee on Security for its final decision*".[67]

55. The next day on 17 February 2011, based on Dr Radhakrishnan's note, the CCS made a final decision that *"[i]n light of the policy of not providing orbit slot in S Band to Antrix for commercial activities, the Agreement [...] shall be annulled forthwith*".[68] While taking back the S-band spectrum from Devas, there is no indication that the CCS at the same time allocated the "*precious S-band*" to the military or the MOD or otherwise earmarked that spectrum for security interests.[69] It was only almost four years later, on 21 January 2015, that India finally allocated the MSS part of the S-band spectrum (of just 10 MHz) to the MOD.[70]

56. On 25 February 2011, Antrix notified Devas of the termination of the Devas-Antrix Agreement due to a *force majeure* event, by reference to the decision of the CCS. In addition to *force majeure* under Article 11(a) of the Agreement, the letter also relied on Antrix's inability to obtain the necessary frequency and orbital slot clearance as a ground for the termination pursuant to Article 7(c) of the Agreement.[71]

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[67] [90] – [91] of Interim Award; see also *The Hindu* article titled "*Prime Minister Manmohan Singh's interactions with Editors of the Electronic Media on Feb 16, 2011*" dated 16 February 2011 (Arbitration Exhibit C-185) (Exhibited at Tab 14 of **IR-4**)

[68] [90] – [91], [272] – [273] of Interim Award; see also Press Information Bureau, Government of India *"CCS Decides to Annul Devas-Antrix Deal*" dated 17 February 2011 (Arbitration Exhibit C-31) (Exhibited at Tab 15 of **IR-4**)

[69] [273] of Interim Award

[70] [274]-[276] of Interim Award

[71] [92] of Interim Award; see also Letter from Antrix to Devas dated 25 February 2011 (Arbitration Exhibit C-32) (Exhibited at Tab 16 of **IR-4**)

57. Devas responded three days later on 28 February 2011 stating that (*i*) the purported termination of the Agreement was not in good faith and that Antrix could not rely on a self-induced *force majeure*; (*ii*) Antrix had already confirmed on 26 February 2006 that it had obtained the necessary orbital slot clearances and, hence, Article 7(c) could not serve as a valid ground for termination.[72]

## C. Arbitrations with Devas and Mauritius Shareholders

58. In view of the breaches by Antrix (and India) in unilaterally terminating the Devas-Antrix Agreement, Devas as well as a group of shareholders comprising Telecom Devas, CC Devas and Devas Employees Mauritius Private Limited ("**DEMPL**") (collectively referred to as "**Mauritius Shareholders**") respectively filed arbitrations against Antrix and India respectively. In all three arbitrations, the tribunals ruled in favour of Devas and its shareholders. I set out below a summary of these proceedings.

### *(1) ICC Arbitration and enforcement proceedings*

59. On 19 June 2011, Devas commenced an ICC arbitration against Antrix, seated in India, pursuant to the arbitration clause in the Devas-Antrix Agreement ("**ICC Arbitration**"), requesting specific performance or damages of approximately USD 1.6 billion.[73]

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[72] [93] of Interim Award; see also and Letter from Devas to Antrix dated 28 February 2011 (Arbitration Exhibit C-33) (Exhibited at Tab 16 of **IR-4**)

[73] [13] of ICC Award (Exhibited at Tab 17 of **IR-4**)

60. On 14 September 2015, the three-member tribunal comprising Mr V.V. Veeder QC, Dr Adarsh Sein Anand and Dr Michael Pryles ("**ICC Tribunal**") in the ICC Arbitration rendered its award ("**ICC Award**"), and unanimously found that Antrix had wrongfully terminated the Devas-Antrix Agreement. Antrix had fully participated in the ICC Arbitration.[74] The ICC Tribunal ordered Antrix to pay Devas USD 562.5 million in damages for its wrongful repudiation of the Devas-Antrix Agreement, plus interest:[75]

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

61. On 27 October 2020, the United States District Court, Western District of Washington, confirmed the ICC Award, and held that it will enter judgment against Antrix in the amount of (i) the ICC Award i.e. USD 562.5 million, together with (ii) pre-award simple interest at the rate of three-month USD LIBOR + 4%, from 25 February 2011, to the date of the ICC Award, being 14 September 2015 (USD672,791.593.75); (iii) post-award simple interest at the rate of 18% per annum of the amounts in the aforesaid subsections (i) and (ii), from the date of the ICC Award, being 14 September 2015, to the

[74] A copy of the ICC Award is exhibited at Tab 17 of **IR-4**.
[75] [401] of ICC Award

date that Judgment is entered (at USD 331,787.64 per day); and (iv) post-judgment interest pursuant at the rate of 0.12% per annum.[76]

62. On 4 November 2020, the United States District Court, Western District of Washington entered judgment for Devas for the full amount of the ICC Award (including interest), being USD 1,293,993,410.15 as of that date.[77]

63. To this date, Antrix has not paid the ICC Award, due to Antrix's (and India's) recalcitrant behaviour in stifling any form of enforcement as explained in Section (I)(F) below.

### *(2) Mauritius BIT Arbitration and enforcement proceedings*

64. On 3 July 2012, the Mauritius Shareholders commenced arbitration against India pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (1976) ("**UNCITRAL Rules**") and Article 8 of the Treaty entered into between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments entering into force on 20 June 2000 ("**Mauritius-India BIT**") for¸ *inter alia*, a breach of the Mauritius-India BIT as a result of the wrongful termination of the Devas-Antrix Agreement ("**Mauritius BIT Arbitration**").[78]

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[76] Page 17 of 18 of Decision of the United States District Court, Western District of Washington confirming the ICC Award dated 27 October 2020; A copy of this decision is exhibited at Tab 18 of **IR-4**

[77] Decision of the United States District Court, Western District of Washington entering judgment for Devas for the full amount of the ICC Award dated 4 November 2020; A copy of this decision is exhibited at Tab 18 of **IR-4**

[78] A copy of the Mauritius-India BIT is exhibited at Tab 19 of **IR-4**

65. On 25 July 2016, the three-member tribunal in the Mauritius BIT Arbitration comprising Mr Marc Lalonde PC, OC, QC (Presiding Arbitrator), Justice Anil Dev Singh (nominated by India) and Mr David R Haigh QC (nominated by the Mauritian Shareholders), issued an interim award on jurisdiction and merits, unanimously finding that India's repudiation of the Devas-Antrix Agreement was an unlawful expropriation of Devas' business, in breach of Article 6 of the Mauritius-India BIT ("**Mauritius BIT Interim Award**").[79] India had fully participated in the Mauritius BIT Arbitration.

66. On 13 October 2020, the tribunal in the Mauritius BIT Arbitration issued an award on damages, ordering India to pay the Mauritius Shareholders damages of over USD 111 million plus interest, and USD 10 million in attorneys' fees plus interest ("**Mauritius BIT Award**").[80]

67. To this date, India has not paid the Mauritius BIT Award,[81] due to its recalcitrant behaviour in stifling any form of enforcement as explained in Section (I)(F) below.

68. On 2 February 2022, the Mauritius Shareholders filed a fresh Notice of Arbitration against India for India's unlawful and abusive measures against Devas to preclude it from

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[79] [501] of Mauritius BIT Interim Award. A copy of the Mauritius BIT Interim Award is exhibited at **MSK-49** of Mr Krishnan's 1st Affidavit

[80] [663] of Mauritius BIT Award; A copy of the Mauritius BIT Award is exhibited at Tab 20 of **IR-4**

[81] [123] of Notice of Arbitration issued by CC/Devas (Mauritius) Ltd., Telcom Devas Mauritius Limited and Devas Employees Mauritius Private Limited against India dated 2 February 2022 (Exhibited at Tab 21 of **IR-4**) ("**Mauritius 2022 NOA**")

collecting on the ICC Award, of which the Mauritius Shareholders were entitled to a portion.[82]

## D. Arbitration Proceedings Between DT and India

### *(1) Commencement of the Arbitration*

69. On 15 May 2012, in accordance with Article 9(1) of the BIT, DT notified the Prime Minister of India in writing of the existence of an investment dispute within the meaning of the 1995 BIT.[83]

70. More than six months later, on 19 December 2012, the DOS responded to state that the notice of dispute was premature since the contractual dispute between Devas and Antrix was ongoing.[84]

71. On 15 February 2013, DT wrote again to the Prime Minister, repeating its desire to engage in amicable negotiations. On 21 March 2013, the DOS responded that there was no investment dispute between the parties.[85]

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[82] [124] of Mauritius 2022 NOA

[83] [95] of Interim Award; Letter from DT to Indian Prime Minister dated 15 May 2012 (Arbitration Exhibit C-38) (Exhibited at Tab 22 of **IR-4**)

[84] [95] of Interim Award; Letter from the DOS to DT dated 19 December 2012 (Arbitration Exhibit C-39) (Exhibited at Tab 23 of **IR-4**)

[85] [96] of Interim Award; Letter from DT to Indian Prime Minister dated 15 February 2013 (Arbitration Exhibit C-40) and Letter from the DOS to DT dated 21 March 2013 (Arbitration Exhibit C-42) (Exhibited at Tab 24 of **IR-4**)

72. As the dispute was not resolved within six months of DT's written notice under Article 9(1) of the 1995 BIT, DT filed a Notice of Arbitration against India on 2 September 2013, under the 1995 BIT and the UNCITRAL Rules.[86]

73. On 11 April 2014, the Tribunal comprising Professor Gabrielle Kaufmann-Kohler as Presiding Arbitrator, Mr Daniel M Price (appointed by DT) and Professor Brigitte Stern (appointed by India) was constituted.[87]

74. On 31 April 2014, India filed an Answer to DT's Notice of Arbitration.[88]

75. On 21 May 2014, India and DT held an initial procedural hearing before the Tribunal.[89]

76. On 3 June 2014, DT and India executed the Terms of Appointment of the Arbitral Tribunal ("**Terms of Appointment**"),[90] and agreed, *inter alia*, on the following:

(a) Seat: "*The parties agree that the seat of the arbitration shall be Geneva, Switzerland*" (Terms of Appointment at [37]);

(b) Procedural Rules: "*In order of priority, the procedure in this arbitration shall be governed by the mandatory provisions of the law of the seat on international arbitration,*

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[86] A copy of the Notice of Arbitration is exhibited at Tab 25 of **IR-4**
[87] [11] of Interim Award
[88] [13] of Interim Award; a copy of India's Answer to DT's Notice of Arbitration is exhibited at Tab 25 of **IR-4**
[89] [14] of Interim Award
[90] Exhibited at Tab 26 of **IR-4**

*these Terms of Appointment, the rules on procedure contained in Article 9 of the BIT and the 1976 UNCITRAL Arbitration Rules*" (Terms of Appointment at [40]);

(c) Awards: "*The Arbitral Tribunal shall be free to decide any issue by way of one or more partial or interim awards, or by way of a final award, as it may deem appropriate. All awards, whether interim or final, shall be in writing and shall state the reasons upon which the award is based, the Parties hereby requesting that reasons be given pursuant to Art. 9(2)(b)(vi) of the BIT.*" (Terms of Appointment at [44]);

(d) Substantive Law: "*The arbitral award shall be made in accordance with the provisions of [the BIT], the relevant national laws including the rules on the conflict of laws of the Contracting Party where the investment dispute arises as well as the generally recognised principles of international law*" (Terms of Appointment at [39]).

77. Between 22 May 2014, 1 May 2015, 8 May 2015, 16 February 2016, and 12 April 2016, the Tribunal issued procedural orders containing the procedural rules and procedural calendar.[91]

78. Pursuant to the procedural orders issued by the Tribunal:

(a) On 2 October 2014, DT filed its Memorial on Jurisdiction and Liability.

(b) On 13 February 2015, India filed its Counter-Memorial on Jurisdiction and Liability.

(c) On 6 June 2015, DT filed its Reply on Jurisdiction and Liability.

[91] [15], [20], [21], [27], [30] of Interim Award; These procedural orders are exhibited at Tab 27 of **IR-4**

(d) On 9 October 2015, India filed its Rejoinder on Jurisdiction and Liability.[92]

79. It also bears mention that in Procedural Order No. 4 dated 16 February 2016, the Tribunal directed that the parties shall not submit new factual exhibits "***except to the extent that such new Factual Exhibits either post-date or came into a Party's possession after (i) in the case of [India], the submission of the Reply on Jurisdiction and Liability on 26 July 2015***" in which case, "*[a]ny such new Factual Exhibits, together with any Legal Authorities on which either Party wishes to rely at the hearing [...] shall be sent to the opposing Party and the Tribunal on or before 24 March 2016. After that date, a party may seek leave from the Tribunal or submit new Factual Exhibits or additional Legal Authorities upon showing of good cause.*"[93]

80. In the Arbitration, DT contended that "*India arbitrarily annulled the [Devas-Antrix] Agreement*" and claimed against India for breaches of the 1995 BIT, "*including unlawful expropriation and unfair and unequitable treatment*".[94]

81. In response, India argued that "*three "threshold issues" preclude the Claimant from asserting its claims in this arbitration*" namely that the BIT (a) "*contains an essential security interests clause*", (b) "*does not protect pre-investments*", and (c) "*does not cover indirect investments and indirect investors*", and that in any event, "*India annulled the*

[92] These submissions are exhibited to Mr Krishnan's 1st Affidavit at **MSK-25**, **MSK-26**, **MSK-38** and **MSK-37**, respectively

[93] [13(b)] of PO 4

[94] [6] of the Interim Award

*Agreement based on the policy decision to reserve a segment of the S-band electromagnetic spectrum for non-commercial use by military and other security agencies*" (i.e. in essence, the Security Interest Allegation, the Pre-Investment Allegation, and the Indirect Investment Allegation).[95]

82. The hearing on jurisdiction and liability took place between 6 April 2016 and 11 April 2016 (excluding 10 April 2016).[96]

83. At the hearing on 9 April 2016, Mr Anand who was the Joint Secretary of the DOS and India's witness in the Arbitration, mentioned the existence of investigations conducted by the CBI against various Devas personnel. Mr Anand stated that "*No charges have been brought. The investigations are on and it's confidential*".[97]

84. On 24 October 2016, India issued a letter to the Tribunal informing them of "*certain recent developments in the Devas matter*", enclosing the First Information Report dated 16 March 2015 ("**FIR**")[98] and the Charge Sheet dated 11 August 2016 issued by the CBI ("**CBI Charge Sheet**"),[99] as well as a Complaint filed by the Directorate of Enforcement in India's Ministry of Finance under s 16(3) of India's Foreign Exchange Management Act ("**FEMA**") dated 31 May 2016 ("**FEMA Complaint**").[100]

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[95] [8] of the Interim Award

[96] [28] of Interim Award

[97] A copy of the hearing transcript for 9 April 2016 is exhibited to Mr Krishnan's 1st Affidavit at **MSK-27**; see transcript at p 231:14-232:15 and 265:1-17

[98] A copy of the FIR is exhibited Tab 48 of IR-4

[99] A copy of the CBI Charge Sheet is exhibited to Mr Krishnan's 1st Affidavit at **MSK-28**

[100] A copy of the FEMA Complaint is exhibited at Tab 45 of **IR-4**; see below at [120]-[122]

85. The letter mentioned the filing by the CBI of formal criminal charges against a number of Government officials, Devas and certain of Devas' officers and directors, claiming that the "*the charged illegalities*" "*would constitute additional grounds for dismissal, as the alleged investment will not have been made in accordance with Indian law*" (i.e. the allegations in the CBI Charge Sheet).[101] In its letter, India also sought to suspend the Arbitration on the basis 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*".[102]

86. On 14 November 2016, DT wrote to the Tribunal[103] arguing that it was too late and improper for India to (*i*) "***advance an objection of jurisdiction or admissibility based on alleged "illegalities" in the CBI Charge Sheet that (a) have been addressed in internal Indian Government reports for years*** *" and (b)* ***it has consciously elected not to plead in the jurisdiction and liability phase of this arbitration***", (*ii*) "*seek a suspension of the Arbitration pending resolution of the [CBI] Charges in circumstances where the* ***CBI investigation commenced in March 2015, i.e., more than one whole year before the hearing in April [2016]***", and (*iii*) "*unilaterally to* ***introduce new evidence in the form of the CBI Charge Sheet as well as the "complaint"*** *issued by the Enforcement Directorate dated 31 May 2016 (the ED Complaint) … without first seeking the consent of the Tribunal*".

[101] A copy of India's email to the Tribunal dated 25 October 2016 including India's letter to the Tribunal, List of Appendices, (but without the Appendices) is exhibited at Tab 28 of **IR-4**

[102] [115] of Interim Award

[103] A copy of DT's email to the Tribunal dated 14 November 2016 including DT's letter to the Tribunal and the Appendix 1 (CBI FIR) is exhibited at Tab 29 of **IR-4**

87. Importantly, DT highlighted to the Tribunal that "***India has had knowledge of the key allegations contained in the CBI Charge Sheet for years***", and the "***alleged facts underlying the accusations in the CBI Charge Sheet are already contained in the evidence before this Tribunal***", including "*the Suresh Report (commissioned in December 2009, upon receipt by Mr Anand of this complaint),*[104] *Space Commission Note,*[105] *CCS Note,*[106] *Balachandran Report,*[107] *Chaturvedi Report,*[108] *Chandrasekhar Note*[109] *and Sinha Report*[110]":

> These reports and memoranda, which set out the facts purportedly underlying the allegations of "conspiracy" now raised once again by India, have been in evidence before this Tribunal for some time:
>
> (a) The question of **whether and how Antrix obtained the correct Government approvals before and after entering into the Devas Agreement has been before this Tribunal since the time of India's Counter-Memorial**. For example, the allegation in the CBI Charge Sheet that **the Space Commission and Cabinet were not given full information about the Agreement when they approved the GSAT-6 and GSAT-6A satellites** was raised in the original complaint to Mr Anand attached to his witness

[104] Exhibited at **MSK-21** of Mr Krishnan's 1st Affidavit

[105] Note to the Space Commission drafted by the DOS, signed on 2 July 2010 (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-5**), at [13.2(a)]-[13.2(e)]; See above at [45]

[106] Note by the DOS (Secretary Radhakrishnan) for the Cabinet Committee on Security dated 16 February 2011 (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-22**) at [44.5] and Annexure 11, para 2(vii-viii); See above at [53]

[107] Report by DOS Additional Secretary G Balachandhran titled "*Report on Dr. Suresh Committee Report on ANTRIX-DEVAS Agreement & Issues Arising from Therein*" dated 9 January 2011 (Arbitration Exhibit R-29) (Exhibited at Tab 30 of **IR-4**) at [5.3.4], [7.3.1], [8.1(iii)(b)]

[108] Report by the Chaturvedi Committee titled "*Report of the High Powered Review Committee on Various Aspects of the Agreement between Antrix & Devas Multimedia*" dated 12 March 2011 ("**Chaturvedi Report**") (Arbitration Exhibit C-190) (Exhibited at Tab 31 of **IR-4**) at [3.1.9]-[3.1.10], [3.1.11]-[3.1.12], [3.6.1]; see also Annexure XII to Chaturvedi Report, "*Brief summary of issues discussed with various invitees during the interaction of the two-member committee on ISRO-Devas Agreement*" dated 12 March 2011 (Arbitration Exhibit C-239) (Exhibited at Tab 31 of **IR-4**) Annexure XII to Chaturvedi Report, at [1.2]-[1.3], [13.4]

[109] Note by India's Cabinet Secretary (Mr Chandrasekhar) to India's Prime Minister's Office dated 12 March 2011 (Arbitration Exhibit C-191) (Exhibited at Tab 10 of **IR-4**), at [8]-[9], [11(vi)], [26(iii)]-[26(vi)]

[110] Note by the Government of India titled "*Report of the High Level Team on the Agreement between M/s. Antrix Corporation Limited and M/s. Devas Multimedia Private Limited*" dated 2 September 2011 (Arbitration Exhibit R-54) (Exhibited at Tab 32 of **IR-4**) [3.10]-[3.15], [4.2(i)], [4.4(i)]-[4.4(iii)]

statement (VA-11)[111] and discussed extensively in the reports and memoranda listed above in paragraph 10.5 The allegation in the CBI Charge Sheet that **minutes of meetings of the TAG were tampered with** has similarly been extensively discussed in the pleadings, witness statements and exhibits.[112]

(b) The question of whether **the use of the spectrum intended by Devas was permissible under Government regulations, and of whether the necessary licences were and could have been obtained, has also been extensively pled before this Tribunal**. For example, the allegation that the hybrid use intended by Devas was not permissible under the National Frequency Allocation Plan was addressed extensively in Mr Sethuraman's witness statements.[113]

(c) The allegation in the Charge Sheet that **Devas did not have the necessary technological experience and intellectual property** was referred to by India in its Rejoinder (at paragraph 178)[114] and in Mr Hegde's witness statement (Hegde, Annex 1, para 9).[115] The issue is also discussed extensively in a number of Government documents that are on the record.

(d) **The extent of foreign investment that Devas received and the question of whether it complied with the terms of its FIPB approval** have similarly been in evidence before this Tribunal for some time.

88. On 20 February 2017, the Tribunal declined India's request to suspend the Arbitration, and deferred its determination on the other submissions in relation to the allegations in CBI Charge Sheet to its forthcoming award.[116]

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[111] DOS memorandum titled "*Source Information*" dated 13 June 2011, annexed to Mr Anand's Witness Statement as Annex 11 (Arbitration Exhibit VA-11) (Exhibited at Tab 33 of **IR-4**)

[112] See for e.g., DT's Reply on Jurisdiction and Liability at [206(c)] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-38**); India's Rejoinder at [60], [80] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-37**)

[113] Exhibited at Tab 34 of **IR-4**

[114] India's Rejoinder is Exhibited to Mr Krishnan's 1st Affidavit at **MSK-37**

[115] Exhibited at Tab 35 of **IR-4**

[116] [47], [117] of Interim Award; see Tribunal's letter to the parties dated 20 February 2017 (Exhibited at Tab 36 of **IR-4**)

***(2) The Interim Award***

89. On 13 December 2017, the Tribunal issued its Interim Award.[117] There is no dispute that India had fully participated in the Arbitration.

90. Ultimately, the Tribunal dismissed India's preliminary objections (i.e. the Pre-Investment Allegation, Indirect Investment Allegation and Security Interest Allegation), and found India liable for a breach of fair and equitable treatment under the BIT.[118] This is not disputed by India, as apparent from paragraphs 55 to 62 of Mr Krishnan's 1st Affidavit.

91. It is also pertinent to note that the only jurisdictional objections that were raised before the Tribunal were the Pre-Investment Allegation and the Indirect Investment Allegation. While part of the preliminary objections to be determined, the Security Interest Allegation was raised by India as a substantive defence to DT's claims under the 1995 BIT and not as a jurisdictional objection (see further below at [180]-[182]).

92. In respect of the Fraud and Illegality Allegation and the FIPB Allegation, which are premised on the FIR and the CBI Charge Sheet, the Tribunal held as follows:[119]

> 118 The Tribunal first notes that it is **not clear** whether, **in its letter of 24 October 2016**, the **Respondent sought to raise a new jurisdictional or admissibility objection** based on an **alleged illegality in the making of the investment**. To the extent that this was the case, the Tribunal finds that **such objection is untimely and contrary to the procedural calendar established in this arbitration**. Indeed, such purported objection was raised well after the Parties' written submissions and the Hearing. The Tribunal

[117] A copy of the Interim Award is exhibited to Mr Krishnan's 1st Affidavit at **MSK-2**

[118] [424] of Interim Award

[119] [117] and [118] of Interim Award

> likewise denies the introduction of new evidence into the record, as untimely and not in accordance with the procedural rules, which require prior leave.
>
> 119 In any event, **even if the illegality objection were deemed timely, the Tribunal would deny it on its merits**. Indeed, **the Respondent has not sufficiently substantiated its objection, if it was one**. It only devoted a few sentences in its letter of 24 October 2016 arguing that, if upheld, the criminal charges in question would be grounds for dismissal of the claims, as the investment would not have been made in conformity with Indian law. Second, and more importantly, the **CBI Charge Sheet on which the Respondent relies was issued in the context of an investigation commenced by the CBI in March 2015 and contains mere allegations that have not yet been tried, let alone upheld, in court.** Third, **none of the allegations contained in the CBI Charge Sheet relate to actions or conduct of DT. The Respondent has not explained how, as a result of the CBI Charge Sheet, DT's investment (made through the acquisition of shares in Devas) would have been contrary to Indian law.** For all of these reasons, **the Tribunal cannot follow the Respondent's argument that the claims should be dismissed for reasons of illegality.**

93. At paragraph 424 of the Interim Award, the Tribunal declared that:

(a) The Tribunal has jurisdiction over the dispute involving DT and India;

(b) India had breached the fair and equitable treatment standard provided in Article 3(2) of the BIT;

(c) The Tribunal will take the necessary steps for the continuation of the proceedings toward the quantum phase.

94. On 5 February 2018, the Tribunal issued the Corrections to the Interim Award of 13 December 2017, to make amendments to the identity of counsel for DT at page 2 and paragraph 2 of the Interim Award.

***(3) India's application to set aside the Interim Award in Switzerland***

95. On 29 January 2018, India applied to the Swiss Federal Supreme Court to set aside the Interim Award i.e. the Swiss Setting Aside Proceedings.

96. India's grounds to set aside the Interim Award were detailed in India's Setting-Aside Application dated 29 January 2018[120] and India's Setting-Aside Reply dated 31 May 2018[121], namely:

(a) The Tribunal lacked jurisdiction because DT's investments were indirect (i.e. the Indirect Investment Allegation); [122]

(b) The Tribunal breached its right to be heard by refusing India's request for leave to admit the *travaux préparatoires* of the Netherlands-India bilateral investment treaty in support of its contention based on comparative treaty practice in relation to the Indirect Investment Allegation;[123]

(c) The Tribunal lacked jurisdiction to rule on the claims since the dispute related only to pre-investment activities by DT which are not protected by the BIT (i.e. the Pre-Investment Allegation);[124]

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[120] India's Setting-Aside Application dated 29 January 2018 ("**India's Setting-Aside Application**") and an English translation of India's Setting-Aside Application (Exhibited at Tab 37 of **IR-4**)

[121] India's Setting-Aside Reply dated 31 May 2018 ("**India's Setting-Aside Reply**") and an English translation of India's Setting-Aside Reply (Exhibited at Tab 38 of **IR-4**)

[122] Section (VII)(A) of India's Setting-Aside Application and Section (II)(C)(1) of India's Setting-Aside Reply

[123] Section (VII)(B) of India's Setting-Aside Application and Section (II)(C)(1) of India's Setting-Aside Reply

[124] Section (VII)(C) of India's Setting-Aside Application and Section (II)(C)(3) of India's Setting-Aside Reply

(d) The Tribunal did not have jurisdiction to decide on India's essential security interests (i.e. the Security Interest Allegation now raised as a jurisdictional objection, instead of as a substantive defence in the Arbitration);[125]

(e) The Tribunal did not have jurisdiction because the various alleged unlawful acts by Devas, its managers and directors, and its investors, meant that the Devas-Antrix Agreement was unlawful, and the "*alleged investment would not have been made in accordance with Indian law*" and therefore would not be "*protected under the [BIT]*" (i.e. the Fraud and Illegality Allegation and FIPB Allegation).

(f) Further, the Tribunal's refusal to suspend the Arbitration pending the resolution of the criminal proceedings concerning Devas and/or to admit India's evidence (being the CBI Charge Sheet, FIR and documents relating to the FEMA Complaint) was unjustified and deprived India of its right to be heard (i.e. the Fraud and Illegality and FIPB Allegation).[126]

97. DT duly filed its Response to India's Setting-Aside Application on 15 March 2018 and a Rejoinder dated 18 June 2018.[127]

98. On 11 December 2018, the Swiss Federal Supreme Court – the highest court in Switzerland – roundly rejected India's application to set aside the Interim Award, finding that the Tribunal had correctly concluded that it had jurisdiction under the 1995 BIT, and

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[125] Section (VII)(D) of India's Setting-Aside Application and Section (II)(C)(4) of India's Setting-Aside Reply

[126] Section (VII)(E) of India's Setting-Aside Application and Section (II)(C)(4) of India's Setting-Aside Reply

[127] A copy of DT's Response to India's Setting-Aside Application dated 15 March 2018 and an English translation of the same are exhibited at Tab 39 of **IR-4**

that the Tribunal had conducted the Arbitration proceedings fairly. In summary, the Swiss Federal Supreme Court held:

(a) The Tribunal was correct in finding that it had jurisdiction because DT's investments in India were not indirect investments based on the review of established case-law and international law principles (i.e. dismissing the Indirect Investment Allegation);

(b) The Tribunal was correct in rejecting India's request to submit the *travaux préparatoires* because it was not credible for India to argue that it, being a signatory party to the treaty, could not have discovered the *travaux préparatoires* earlier (i.e. dismissing the Indirect Investment Allegation);[128]

(c) The Tribunal was correct in finding that DT's investment activities did not only amount to pre-investments (i.e. dismissing the Pre-Investment Allegation);[129]

(d) India, having failed to raise the issue of essential security as a matter of jurisdiction before the Tribunal, is precluded from raising it before the Swiss Federal Supreme Court, which in any case, was not an issue of jurisdiction (i.e. dismissing the Security Interest Allegation);[130]

(e) India having failed to raise arguments that the Devas-Antrix Agreement was purportedly unlawful and that DT's investment was purportedly not made in accordance with Indian law in a timely manner when it could have, was precluded from raising them in the Swiss Setting Aside Proceedings. In any event, **"*<u>the arbitral tribunal, as an international forum, is not bound by any prior assessments made by national courts</u>***

[128] [3.2.1.2.5] of Swiss Setting-Aside Decision (Exhibited at Tab 40 of **IR-4**)

[129] [3.2.2.2] of Swiss Setting-Aside Decision

[130] [3.2.3] of Swiss Setting-Aside Decision

***under such relevant national law; rather it is required to make its own legal determination***" and it was questionable whether findings of an Indian domestic court could affect the Tribunal's determination. Further, **the allegations raised by India did not pertain to DT, but to Devas.** Effectively, the Fraud and Illegality Allegation and the FIPB Allegation were dismissed.[131]

99. A copy of the decision of the Swiss Federal Supreme Court and its translation are exhibited at Tab 40 of **IR-4**, which decision India mentioned at [74] of Mr Krishnan's 1st Affidavit, but conveniently fails to exhibit.

100. In the present proceedings, India is seeking to raise the *same* arguments, which have already been considered by and conclusively dismissed by the Swiss Federal Supreme Court, being the seat court of the Arbitration. I am advised and I believe that the seat court has primacy and judicial supervision over the arbitral award, and the enforcement court should respect the finality of the determinations on challenges to arbitral awards made by the seat court, and accord deference to the seat court. I will elaborate on this below at Section II.

***(4) Final Award***

101. Following India's failed attempt to set aside the Interim Award, the Arbitration proceeded to the quantum stage. The hearing on the quantum phase of the Arbitration took place from 29 April 2019 to 3 May 2019 in Paris.[132]

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[131] [4.4] of Swiss Setting-Aside Decision

[132] [33] of Final Award (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-3**)

102. On 27 May 2020, the Tribunal rendered the Final Award.[133] In the Final Award, the Tribunal ordered that:[134]

(a) India shall pay to DT the amount of USD 93.3 million, together with interest on such amount at a rate of 6-month USD LIBOR (or any other comparable rate in case LIBOR were to be discontinued in the future) plus 2% p.a., compounded semi-annually, from 17 February 2011 until payment in full;

(b) The costs of the Arbitration are fixed at EUR 1,460,544.64;

(c) India shall pay to DT the amounts of EUR 730,272.32 as reimbursement of the costs of the arbitration, as well as GBP 5,250,011.70 and EUR 33,977.00 and USD 10,000.00 as reimbursement of part of DT's legal fees and other expenses, together with interest on such amounts at a rate of 6-month USD LIBOR (or any other comparable rate in case LIBOR were to be discontinued in the future) plus 2% p.a., compounded semi-annually, starting to run 30 days after the date of the Final Award until payment in full;

(d) Except as stated in subparagraph (c) above, each party shall bear the legal fees and other expenses which it incurred in connection with the Arbitration;

(e) The Tribunal takes note of DT's undertaking that it does not seek double recovery in relation to its investment, and will take appropriate steps to ensure that it is not compensated twice in the event that any damages were to be paid by Antrix to Devas pursuant to the ICC Award; and

(f) All other claims and requests are dismissed.

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[133] A copy of which is exhibited at Mr Krishnan's 1st Affidavit at **MSK-3**

[134] [357] of Final Award

103. India did not apply to set aside the Final Award. On 20 August 2020, the Civil Court of the Republic and Canton of Geneva certified that the Final Award was enforceable and declared that the Final Award was legally binding in its form and content.[135]

## E. Enforcement Proceedings relating to the Final Award

104. Following the certification of the Final Award, and because India has failed to satisfy any of its payment obligations, DT has been forced to incur additional costs to enforce the Final Award in various jurisdictions, only to meet much (unmeritorious) resistance from India. To this date, India has refused to pay, and has not paid, any sum ordered by the Tribunal in the Final Award in violation of India's obligation under Article 9(2)(v) of the BIT to "*abide by and comply with the terms of [the Final Award]*". I set out below a brief summary of the enforcement proceedings in the US and Singapore.

### *(1) US enforcement proceedings*

105. On 19 April 2021, DT filed a Petition to Recognize and Confirm Foreign Arbitral Award before the United States District Court, District of Columbia.[136]

106. On 23 July 2021, DT and India filed a Joint Motion to Set a Briefing Schedule on the Respondent's (*i.e.* India's) Motion to Dismiss ("**Joint Motion**").[137]

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[135] A copy of this certification is exhibited at Tab 41 of **IR-4**.
[136] Exhibited at Tab 42 of **IR-4**
[137] Exhibited at Tab 42 of **IR-4**

107. On 23 September 2021, India filed its Motion to Dismiss the Petition to Confirm an Arbitration Award together with its accompanying Statement of Points and Authorities. In summary, India sought to invoke the doctrine of *forum non conveniens* and sovereign immunity, relying on, amongst other things, the decisions of the NCLT and NCLAT to wind-up Devas as "*evidence of fraudulent activity – including during the procurement and implementation of the Devas-Antrix Agreement*",[138] to argue that DT's "*claims are precluded because the underlying 2005 contract is invalid due to fraud and collusion*" under Arts V(1)(a), V(1)(c), V(2)(a), and V(2)(b) of the New York Convention.[139]

108. On 15 October 2021, DT filed its Points and Authorities in Opposition to India's Motion to Dismiss. Amongst other things, DT contended that the US District Court should reject India's allegations on fraud and collusion:

(a) India's alleged defence does not contain a single allegation that DT knew about or participated in any alleged fraud. Nor could it, as all the factual allegations concern events in 2005/2006, and DT only first invested in Devas in 2008.[140]

(b) The assertion that DT "*can be held* ***vicariously liable as a shareholder for an alleged fraud committed by other people*** *(including Indian officials) years before [DT] became a shareholder—****raises serious concerns about fairness and the rule of law in India***". Moreover, DT maintained that even if Indian law is that draconian, "*India's need to rely on such an extreme theory of vicarious liability is an acknowledgment that [DT] did not commit the purported underlying fraud*".[141]

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[138] Page 20 of India's Submissions in Support of Motion to Dismiss (Exhibited at Tab 42 of **IR-4**)
[139] Pages 9, 20-25 of India's Submissions in Support of Motion to Dismiss (Exhibited at Tab 42 of **IR-4**)
[140] Page 44 of DT's Reply (Exhibited at Tab 42 of **IR-4**)
[141] Page 44 of DT's Reply (Exhibited at Tab 42 of **IR-4**)

109. On 12 November 2021, India filed its Reply Memorandum in Support of the Republic of India's Motion to Dismiss, in which they maintained their position on *forum non conveniens* and sovereign immunity.[142]

***(2) Singapore enforcement proceedings***

110. On 2 September 2021, DT applied, on an *ex-parte* basis, for leave to enforce the Final Award in Singapore in HC/OS 900/2021. On 3 September 2021, the Court allowed DT's application and granted the Leave Order.[143]

111. On 6 September 2021, DT filed a Request for Service of Document out of Singapore in respect of, *inter alia*, the Leave Order. On 20 October 2021, the Leave Order was deemed served on India.

112. Pursuant to India's application by way of HC/SUM 5125/2021, the Honourable Justice S Mohan ordered that India had two months and twenty one days from 20 October 2021 (*i.e.* until 11 January 2022) to apply to set aside the Leave Order pursuant to the State Immunity Act, and further ordered that the Final Award shall not be enforced until after 11 January 2022 or, if India applies by 11 January 2022 to set aside the Leave Order, until that application is finally disposed of.

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[142] India's Reply (Exhibited at Tab 42 of **IR-4**)

[143] The Leave Order is exhibited to Mr Krishnan's 1st Affidavit at **MSK-4**.

113. On the very last day of India's two-month and twenty-one day timeline to apply to set aside the Leave Order (*i.e.* 11 January 2022), India filed its application in SUM 155, effectively obtaining a stay on the enforcement of the Final Award in Singapore, pending the disposal of SUM 155.

114. As foreshadowed in my 3rd affidavit filed on 6 December 2021, through a host of delay tactics in these proceedings, India has managed to delay the enforcement of the Final Award in Singapore, while taking steps to dissipate its assets. It was recently announced that India would be disposing part of its shares in Life Insurance Corporation of India ("**LIC**"), a wholly owned state entity, which in turn wholly owns Life Insurance Corporation Singapore ("**LIC Singapore**"), a Singapore incorporated company, and that this transaction would be completed by March 2022.[144]

## F. India's and Antrix's attempts to stifle the enforcement of the ICC Award, the Final Award and the Mauritius BIT Award

115. In parallel with the above timelines, India and Antrix engaged in a series of malicious acts which are clearly for the purposes of stifling the enforcement of the ICC Award, the Final Award and the Mauritius BIT Award. I set out below a summary of the key events that transpired, which I will also collocate with the corresponding proceedings described above.

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[144] *Channel News Asia* article titled "*India's Life Insurance Corp files $8 billion IPO papers*" dated 14 February 2022 (Exhibited at Tab 43 of **IR-4**)

### *(1) ROC and ED Investigations and the FEMA proceedings*

116. In June 2011, in parallel with Devas' filing of its Request for Arbitration in the ICC Arbitration, India's Office of the Registrar of Companies ("**ROC**") and Directorate of Enforcement, Ministry of Finance, Department of Revenue ("**ED**") launched investigations into Devas (and not against DT Asia and DT).[145]

117. In August 2011, the ROC made repeated demands for documents as part of this investigation into unspecified "*violations*".[146]

118. Devas filed a writ petition before the Delhi High Court to stay the ROC's investigations on 5 December 2011, and complained that the ROC was "*on a day to day basis harassing [Devas] and its officers*".[147]

119. The Delhi High Court agreed with Devas and directed that "*no coercive steps shall be taken against [Devas]*" by way of its order dated 7 December 2011. This order did not stop India's use of the ROC to harass Devas. Devas again approached the Delhi High Court in respect of 8 show cause notices and by its order dated 29 May 2012, the Delhi High Court directed that "*any orders that may be passed by the [ROC] on the notices to show cause shall be kept in abeyance till the next date of hearing*".[148]

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[145] [37] of Mauritius 2022 NOA (Exhibited at Tab 21 of **IR-4**)
[146] [38] of Mauritius 2022 NOA
[147] [39] of Mauritius 2022 NOA
[148] These orders are exhibited at Tab 44 of **IR-4**

120. On 31 May 2016, not long before the tribunal in the Mauritius BIT Arbitration rendered the Mauritius BIT Interim Award, the issuance of which the tribunal had informed the parties to expect,[149] the ED filed a complaint under s 16(3) of FEMA against Devas, its current and former directors (including DT Asia's former nominees to the Devas Board) and foreign investors (including DT Asia).

121. According to the complaint, the "*[Antrix-Devas Agreement] became operative*" on 21 June 2016 when "*the first installment of the UCRF [Upfront Capacity Reservation Fee] for the first satellite was paid by [Devas]*", but "*the activity of [Devas] became related to the Sectoral activity of ISP Services without Gateway, as declared by [Devas] in its application dated 02/02/2006 made to the [FIPB]*", and that the foreign investments (including that of DT Asia's) into Devas did not comply with the conditions for approval stipulated by FEMA.[150]

122. On 6 June 2016, the ED issued a show-cause notice against Devas and its current and former directors (including DT Asia's former nominees to the Devas Board) and foreign investors (including DT Asia) for alleged breaches of FEMA on the basis that (*i*) foreign direct investments in the "*Telecom Sector*" for a certain size was subject to approval by the FIPB, (*ii*) "*from the enclosed Complaint & documents relied upon (including the Share Subscription Agreements) it appears that [Devas] which had*

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[149] [48] of Mauritius 2022 NOA: "*In mid-2016, the BIT Tribunal informed the parties to expect the Jurisdiction and Merits Award in the [Mauritius BIT Arbitration]. As if on cue, on 6 June 2016, the ED issued a "show cause" notice against Devas and 20 of its current and former directors and foreign investors…*"

[150] See FEMA Complaint at [2.1.4], [2.1.5], [5.1.12]-[5.1.17], [5.5.1]-[5.5.6], Annexure to Complaint (Exhibited at Tab 45 of **IR-4)**

*reported to engage themselves in Development of Software relating to multi-media services, were actually engaged in Telecommunication related Services, a Sector requiring FIPB approval for Foreign Direct Investment and have not followed the conditions prescribed in the approval given by the Foreign Investment Promotion Board and also not followed the FIPB guidelines and thereby the Foreign Direct Investments totalling US$131,422,033.00 equivalent to Rs. 578, 53, 63,207/- is without the valid approval of the Government of India*", (*iii*) the "*Foreign investors [including DT Asia], have* "*purchased shares of [Devas] an Indian Company without valid approval of the Government of India*",[151] and (*iv*) the foreign investors (including DT Asia) having receiving INR 5,717,280,617 (from an investment of INR 5,785,363,207) in dividends which "*assured returns are not the nature of an equity instrument*".[152]

123. On 30 January 2019, the ED, without hearing from any of the foreign investors (including DT Asia), issued a penalty order to the accused entities amounting to INR 1585.08 crores (INR 15,850,000,000 or over USD 200 million), of which one-third was levied on DT Asia, on the basis of the above charges.[153]

124. On 9 November 2020, <u>5 days following the US Court entering judgment for Devas for the amount of almost USD 1.3 billion in relation to the ICC Award,</u>[154] the ROC responded by filing an "*urgent application*" before the Delhi High Court to have an

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[151] [20] of Show Cause Notice dated 6 June 2016 (Exhibited at Tab 46 of **IR-4)**

[152] [13], [19] – [22] of Show Cause Notice dated 6 June 2016

[153] [9.3] of Adjudication Order issued by the ED in relation to the FEMA Complaint (Exhibited at Tab 47 of **IR-4)**

[154] See [62] above

expedited hearing challenging the High Court's 2011 and 2012 orders enjoining the ROC's investigation against Devas. The Delhi High Court dismissed the application on 18 November 2020 noting that "*[n]o ground is made out to take up this writ petition for hearing out of turn. The application is accordingly dismissed*". On 27 November 2020, the ROC filed another "*urgent application*," listing several additional grounds urging urgency, including the CBI, ED, and ROC investigations, the fact of the outstanding arbitral awards and ongoing enforcement efforts.[155]

***(2) Investigations by the CBI***

125. In parallel, the CBI had also been conducting a suite of investigations against Devas, Antrix, and certain officials in the ISRO and DOS. Notably, DT, DT Asia and its former nominees to the Board of Devas were not implicated in these investigations.

126. On 1 May 2014, the CBI registered a preliminary enquiry ("**Preliminary Enquiry**") "*alleging that certain Government Officials from Antrix had cheated the Government by abusing their financial position to cause favour to 'Devas'*".[156]

127. On **16 March 2015**, Mr Sushil Dewan, Inspector of Police of CBI filed the FIR against the officials of Devas, Antrix, and certain unknown public servants of ISRO and DOS for offences under ss 120B and 420 of the Indian Penal Code, read with ss 13(1)(d)

[155] [67] of Mauritius 2022 NOA (Exhibited at Tab 21 of **IR-4**)

[156] See NCLAT Order dated 8 September 2021, p 18 at [39] (Exhibited at Mr Krishnan's 1st Affidavit at **MSK-30**)

and 13(2) of the Prevention of Corruption Act, which I understand are offences of cheating and dishonestly inducing delivery of property.[157]

128. In the FIR, the purported findings of the CBI over the course of the Preliminary Enquiry were set out:

> 7. Thereafter, on January 28, 2005 agreement between ANTRIX and M/s Devas Multimedia Pvt. Ltd. got entered into for the lease of 10 S-band Transponders for delivery of Video, Multimedia and information Services to Mobile Receivers in Vehicles and Mobile Phones via S-band satellite and terrestrial systems. On behalf of Antrix, Sh.K.R. Sridhara Murthi, the then ED signed the said agreement. As per the agreement, "ANTRIX shall provide appropriate technical assistance to DEVAS on a best effort basis for obtaining required licenses and Regulatory Approvals from various ministries". It shows that the officials of ANTRIX were more than willing to help DEVAS by going out of way.
>
> …
>
> 9. When a proposal seeking budgetary support of Rs. 269 crores for approving design, manufacture and launch of GSAT-6/ INSAT-4E (PS1) was placed in the 104th meeting of the Space Commission on May 26, 2005, **<u>it was not informed that the agreement has already taken place with M/s Devas Multimedia Pvt. Ltd. for leasing out the S-Band</u>**. Thus approval of Space-Commission was obtained by keeping it in dark.
>
> 10. On November 17, 2005, a note for the Cabinet was submitted for building the GSAT-6 satellite as earlier approved by the Space Commission. Information regarding the agreement between ANTRIX and DEVAS was suppressed from the Cabinet and the following wrong information regarding utilization of satellite capacity was given to the Cabinet with respect to multiple expressions of interest:
>
> > "*ISRO is already in receipt of several firm expressions of interest by service providers for utilization of this Satellite capacity on commercial terms. Part of the capacity will also be utilized by ISRO for experimentation and demonstration of new satellite based mobile communication techniques and technologies.*"
>
> 11. The proposal was approved by the Cabinet in December 2005. On February 2, 2006, ANTRIX informed M/s Devas Multimedia Pvt. Ltd. of receipt of approvals on the satellite and frequency coordination. The Agreement, thus, became effective from this date. Thus, as per the terms of agreement, M/s Devas Multimedia Pvt. Ltd. Paid Rs.29,18,67,000.00 as

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[157] A copy of the FIR and the relevant statutory provisions are exhibited at Tabs 48 of **IR-4**

> 1/3rd of the Upfront Capacity Reservation Fee (1/3rd of US$2.0 Million) on June 27, 2006. As per agreement dated 28.01.2005, M/s Devas Multimedia Pvt. Ltd. Asked ISRO to build a P52. Accordingly payment of Upfront Capacity Reservation Fee (UCRF).of Rs.29,18,67,000.00. was taken on 18.06.2007 from M/s Devas Multimedia Pvt. Ltd. By ANTRIX for PS2 without the prior approval of budgetary support of Rs.147 Crores from the Space Commission which was subsequently taken in October 2009 by again hiding the fact that the rights of capacity of PS2 had already been given to M/s Devas Multimedia Pvt. Ltd. Thus, the government of India through ANTRIX had given the rights to M/s Devas Multimedia Pvt. Ltd. for using the capacity of PSI & PS2 and delivering the aforementioned services in India. **Thus the regulatory bodies were being used merely as rubber stamps to regularize the decisions already taken.**
>
> 12. *During the process of entering into the [Devas-Antrix Agreement], **officials of ISRO / DOS & Antrix committed many omissions and commissions intentionally which facilitated the accused persons [including Devas] to commit the above mentioned offences*** …
>
> …
>
> 14. It has also been revealed that [**Devas] submitted false, wrong and incorrect information** claiming that it had the technology and was fully capable of delivering the S-DMB services to get the rights of delivering [the] same in India through PS1 and PS2" and as a consequence, "**Devas got the wrongful gain of more than Rs 578 Crores from various investors from USA, Mauritius, Singapore etc**.
>
> 15. Enquiry further revealed that [Devas], with the intent to siphon off the amount from its bank accounts in India, got a subsidiary namely M/s Devas USA incorporated in USA and a substantial part of the investment was remitted to M/s Devas USA on the pretext of services, salaries, etc. No details in respect of the same were provided by [Devas]. It is suspected that the illegal gratification was paid to the accused public servants from the amount remitted from India as motive or reward for taking the aforementioned favour
>
> 16. … **[Devas] also misrepresented in the agreement** that they were **fully capable of having Intellectual Property Rights (IPR) over the technology for the purpose of cheating**.

129. On 31 July 2015, the CBI filed an Enforcement Case Information Report ("**ECIR**") against Devas with the Enforcement Directorate, Bangalore Zonal Office based on the FIR.[158]

[158] See NCLAT Order dated 8 September 2021 at [39] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-31**)

130. It bears mention that as at 31 July 2015, India had yet to file its Rejoinder on Jurisdiction and Liability in the Arbitration; India did so about 10 weeks later on 9 October 2015. India therefore had every chance to include the various allegations concerning Devas' allegedly fraudulent conduct, including the purported findings of the CBI set out in the FIR in respect of the Devas-Antrix Agreement, suppression of information to the Cabinet, and improper use of the foreign investments which had been approved by the FIPB, in the Arbitration. India chose not to do so.

131. On 11 August 2016, the CBI Charge Sheet was filed against Devas.[159] The CBI Charge Sheet expanded on CBI's findings as set out in the FIR and reveal what India knew at that time:

> 16(20) … Since INSAT Transponders are entrusted to DoS/ ISRO for its effective utilisation as per the provisions of SATCOM Policy, managed by ICC/TAG, M/s Antrix Corporation Limited merely a commercial entity was not authorized to enter into direct MoU/Agreements with the users of INSAT/GSAT capacity directly.
>
> …
>
> 16(118) Investigation revealed that immediately after receiving the intimation regarding approval of GSAT-6 Project by Government from Sri Sridhara Murthi, the then Executive Director M/s Antrix Corporation Ltd, **M/s Devas Multimedia Pvt. Ltd. submitted a proposal to the Chairman, Foreign Investment Promotion Board (FIPB), Department of Economic Affairs, New Delhi, on 02.02.2006 seeking approval for Foreign Direct Investment (FDI) by the foreign investors**, for development of software and to conduct requisite research & developmental activities in the area of multimedia content creation, multimedia terminals and associated equipments for receiving multimedia content from different media including Internet, satellite and terrestrial broadcasting development. **M/s Devas Multimedia Pvt. Ltd submitted that all technologies for providing the services were developed indigenously in India and that the technologies were contemporary and would compete with the state of the art services**

[159] A copy of the Charge Sheet is exhibited to Mr Krishnan's 1st Affidavit at **MSK-28**

**in the world. They mentioned that their main flow would be for the payment of satellite and terrestrial bandwidth lease charges and in creation of necessary technologies and infrastructure. The fact remains that M/s Devas Multimedia Pvt. Ltd did not have any technology to provide 'Multimedia Media Services' as proposed by them**.

…

16(123) Though [Sri Sridhara Murthi A-1) as Executive Director of M/s Antrix Corporation ltd from 2001-2008 and Managing Director from 2009-201] was authorised by the board of M/s Antrix Corporation Ltd to take further steps and sign the requisite documents; **he being aware of all the facets of IV proposal and its processing, did not ascertain the fact whether M/s Devas Multimedia Pvt. Ltd. enjoyed the ownership and right to use the technology proposed to be used in delivering the multimedia services. The fact remains that M/s Devas Multimedia Pvt. Ltd. did not have any such technology. He deliberately did not seek approval of ISRO and Department of Space before signing the agreement. The Lease Agreement for INSAT transponders was to be signed by ISRO/DoS as per policy. M/s Antrix Corporation Ltd was not authorised for it. He neither brought these facts to the notice of Board of M/s Antrix Corporation Ltd**

…

16(126) Investigation revealed that Sri Ramachandran Viswanathan (A-2) is a major beneficiary of the criminal conspiracy. He is the person who signed the MoU dated 28.07.2003 and moved a JV proposal dated 15.04.2004 for providing multimedia services through GSAT 6 satellite. **He projected M/s Forge Advisors LLC, USA to have intellectual property rights of the technology, even though he did not have any technology to develop the ground receivers for further transmitting the signals received from GSAT 6 satellite. He gave presentation of JV proposal before Shankara Committee. He was instrumental in submitting draft agreement before the Shankara Committee, which was the basis of the agreement executed between M/s Antrix Corporation Ltd and M/s Devas Multimedia Pvt, Ltd. As CEO of M/s Forge Advisors, he did not incorporate M/s Devas Multimedia Pvt. Ltd as a subsidiary of M/s Forge Advisors in India to avoid any financial risks. He moved in as a major share holder of M/s Devas Multimedia Pvt. Ltd only after the agreement was signed between M/s Antrix Corporation Ltd and M/s Devas Multimedia Pvt. Ltd. He became Director of M/s Devas Multimedia Pvt. Ltd. on 25.06.2005 and became its President & CEO. Over a period of time, he became the major shareholder of the company and took control over the affairs of the company. He in conspiracy with Sri M. G. Chandrasekhar (A-3), Sri D. Venugopal (A-8) and other accused public servants was instrumental in incorporation of M/s Devas Multimedia America Inc., USA and diverting funds of M/s Devas Multimedia Pvt. Ltd to USA and other countries**”

…

16(128) Investigation revealed that Sri M. G. Chandrasekhar (A-3) conspired with Sri Ramachandran Viswanathan (A-2) and Sri D. Venugopal (A-8) and others and in furtherance of the said criminal conspiracy, **he joined M/s Devas Multimedia Pvt. Ltd. on 25.06.2005 as Additional Director and after that he participated in the affairs of M/s Devas Multimedia Pvt. Ltd. He became the major beneficiary as he got shares of M/s Devas Multimedia Pvt. Ltd at the minimum cost and as on March, 2010, he owned about 20% shares of M/s Devas Multimedia Pvt. Ltd. He in conspiracy with Sri Ramachandran Viswanathan (A-2) was instrumental in incorporation of M/s Devas Multimedia America Inc., USA and diverting funds of M/s Devas Multimedia Pvt. Ltd to USA and other countries**.

16(119) **Investigation revealed that M/s Devas Multimedia Pvt. Ltd (A-4) is a company registered under Companies Act and was incorporated with a paid up share capital of Rs.1,00,000/-, on 17.12.2004. It did not possess any ownership and intellectual property rights over the technology proposed to be used for delivering the multimedia services, however, in furtherance of the criminal conspiracy it made a contrary claim in the agreement and secured INSAT Transponders in a fraudulent manner**. After execution of agreement with M/s Antrix Corporation Ltd, paid up share capital of the company was increased and company received FDI to the tune of Rs.579 crores and **in violation of its declared objectives of developing indigenous technology and related components, the company diverted major portion of the FDI to foreign accounts**. Sri D Venugopal (A-8), who is one of the birectors and used to look after day to day affairs of the company till execution of agreement dated 28.01.2005, is one of the accused in this case. **Similarly, Sri Ramachandran Viswanathan (A-2), who is one of the Directors and President & CEO of M/s Devas Multimedia Pvt. Ltd is also an accused in this case. This company is the main beneficiary of the agreement with M/s 'Antrix Corporation Ltd**.

…

16(131) He accepted the unsigned report of Shankara Committee. Subsequently, in 57th Board Meeting of Antrix Corporation Ltd., which was chaired by him, the recommendations of Shankara Committee were discussed. **In the said Board Meeting, the Executive Director of M/s Antrix Corporation Ltd was authorized to sign necessary documents for leasing of transponders to M/s Devas Multimedia Pvt. Ltd, in violation of SATCOM policy. The authorisation by the Board of M/s Antrix Corporation Ltd to the Executive Director to sign agreement was against SATCOM Policy as lease of INSAT transponders was to be signed only by ISRO/DoS as being its owner. Further, since M/s Devas Multimedia Pvt. Ltd was to use these transponders for services which were in the domain of DoT and MIB, prior consultation with these authorities was**

> **required before signing of any agreement**. The paras 16(18) & 16(19) of the charge sheet are relevant to it.
>
> …
>
> 16(133) **Further, the information about the agreement between M/s Antrix Corporation Ltd and M/s Devas Multimedia Pvt. Ltd for leasing of satellite capacity was concealed from Space Commission, Union Finance Minister, Prime Minister of India and the Union Cabinet. The approval of Space Commission and Union Cabinet in respect of GSAT 6 satellite was obtained by concealment of facts.**
>
> …
>
> 16(139) Investigation revealed that Sri A. Bhaskaranarayana (A-7) being Director, SCPO during the relevant period was fully aware of the fact that **as per the provisions of SATCOM policy, leasing / assigning of INSAT capacity was in the exclusive domain of ICC. However, he abused his official position and deliberately did not object for leasing the satellite capacity to a private party i.e. M/s Devas Multimedia Pvt. Ltd., even though, being a Member of the Shankara Committee he had the opportunity to raise such objection. He deliberately did not point out that the agreement for leasing of INSAT transponders should be signed by ISRO/DoS and not by M/s Antrix Corporation Ltd**.

132. The Tribunal rightly rejected India's belated and untimely, and also half-hearted, attempt to refer to the false allegations contained in the FIR, the CBI Charge Sheet and the FEMA Complaint (i.e. the Fraud and Illegality Allegation and FIPB Allegation). Likewise, the Swiss Federal Supreme Court rejected India's application to set aside the Interim Award on the basis of those same spurious allegations. India now seeks to have a third bite of the proverbial cherry by raising these *same* false allegations in these proceedings as a purported basis to resist enforcement of the Final Award.

133. For completeness, on 8 January 2019, the CBI issued a Supplementary Charge Sheet, the purported findings under which were similar to those set out in the FIR and Charge Sheet.[160]

134. To date, I understand that none of the persons charged by the CBI (which to be clear, do not include DT, DT Asia and its nominees to the Devas Board) have been convicted of any of the alleged offences.[161]

***(3) Enforcement and setting aside proceedings concerning the ICC Award and India's self-serving amendment of its International Arbitration Act***

135. On 25 September 2015, Devas filed an application under s 9 of the (Indian) Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**") to secure the sum awarded to Devas in the ICC Award before the Delhi High Court ("**Devas Enforcement Application**").[162]

136. On 19 November 2015, Antrix filed a petition in the City Civil Court of Bangalore to set aside the ICC Award ("**Antrix Setting Aside Application**") under s 34 of the Indian Arbitration Act. Among other things, Antrix sought to set aside the award on the basis that (*i*) the ICC Tribunal gave primacy to English law rather than Indian precedents in violation of Indian law,[163] (*ii*) the award is contrary to public policy, India's interests and

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[160] A copy of the Supplementary Charge Sheet is exhibited at **MSK-32** of Mr Krishnan's 1st Affidavit.

[161] See Indian Supreme Court Decision dated 17 January 2022 (Exhibited to Mr Krishnan's 2nd Affidavit at **MSK-52**) at [13.3]: "*Yet another contention raised on behalf of [Devas and DEMPL] is that the criminal complaint filed for the offences punishable under Section 420 read with Section 120B IPC, has not yet been taken to its logical end*".

[162] See page 2 of Indian Supreme Court Order dated 4 November 2020 (Exhibited at Tab 49 of **IR-4)**

[163] [251] of Antrix Setting Aside Application (Exhibited at Tab 49 of **IR-4)**

illegal because Antrix played "*an important role in furthering national interest and terminated the [Devas-Antrix Agreement] on account of national interest and national security*", because "*[Devas] has got an award in excess of USD 560 million even though it has spent virtually nothing on the execution of the [Devas-Antrix Agreement]*", and because "*Indian laws were not applied to the facts of the case and if applied, were applied incorrectly*",[164] and (*iii*) the ICC Tribunal was constituted contrary to law because "*the ICC knowing fully well that the purported arbitration between the parties is governed by Indian law, proceeded with the appointment of a Chairman of the [ICC Tribunal] … who admitted has no knowledge or expertise in Indian Law*".[165] Notably, in its petition, Antrix did not make any allegations of fraud, despite pending investigations by the ED and CBI.[166]

137. On 28 February 2017, a Single Judge of the Delhi High Court (Justice S Muralidhar) decided that the Antrix Setting Aside Application was not maintainable before the Bangalore Civil City High Court, as the Devas Enforcement Application had been commenced earlier.[167]

138. On 30 May 2018, the Delhi High Court set aside Justice S Muralidhar's decision.[168] Thereafter, Devas filed a special leave petition before the Indian Supreme Court to appeal

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[164] [253] to [258] of Antrix Setting Aside Application
[165] [259] of Antrix Setting Aside Application
[166] A copy of this petition is exhibited at Tab 49 of **IR-4**; See above Sections (I)(F)(1) and (2)
[167] A copy of this decision is exhibited at Tab 49 of **IR-4**
[168] [62] of Delhi High Court's Judgment dated 30 May 2018 (Exhibited at Tab 49 of **IR-4)**

against the decision of the Delhi High Court. On 19 November 2018, the Indian Supreme Court stayed the Antrix Setting Aside Application.[169]

139. On 4 November 2020, not long after the Civil Court for the Republic and Canton of Geneva confirmed the Final Award in the Arbitration (on 20 August 2020)[170] and the very day that the US Court entered judgment for Devas for the amount of almost USD 1.3 billion for the ICC Award,[171] the President of India promulgated an ordinance under the Constitution of India to amend the Indian Arbitration Act.[172] The Arbitration and Conciliation (Amendment) Ordinance, 2020 ("**2020 Arbitration Ordinance**") amended s 36 of the Indian Arbitration Act to allow for, **with retrospective effect**, a stay of an arbitration award if a court is satisfied that such award was induced or effected by fraud or corruption. The amended s 36 of the Indian Arbitration Act provides *inter alia* as follows:

> Provided further that where the Court is satisfied that a *prima facie* case is made out,—
>
> (a) that the arbitration agreement or contract which is the basis of the award; or
>
> (b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.
>
> Explanation.— For the removal of doubts, **it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015**

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[169] Page 1 of Indian Supreme Court Order dated 4 November 2020 (Exhibited at Tab 49 of **IR-4)**

[170] See above at [103]

[171] See above at [62]

[172] A copy of the 2020 Arbitration Ordinance is exhibited at Tab 50 of **IR-4**.

140. I understand that s 36 of the Indian Arbitration Act deals with enforcement of awards and this amendment empowered the Indian courts to unconditionally stay enforcement of an arbitration award when there is a *prima facie* case of fraud or corruption in the underlying arbitration agreement or contract, unlike the typical order where a stay application has to be accompanied with furnishing an appropriate amount of security. The ordinance came into effect immediately.

141. On the very same day as the promulgation of the 2020 Arbitration Ordinance, the Indian Supreme Court, in an interlocutory application for directions relating to the Devas Enforcement Application and Antrix's Setting Aside Application, ordered that the ICC Award be kept in abeyance pending the determination of Antrix's Setting Aside Application. In its order, the Indian Supreme Court noted the Attorney General for India's submission that "*the Union of India has discovered a serious fraud in the entire series of transactions leading up to the disputes including the arbitration agreement.*" The Indian Supreme Court held that "*pending decision in the present special leave petition, it would be highly iniquitous to permit the petitioner - Devas Multimedia Private Limited to obtain the fruits of the Award by execution under any law or convention*".[173]

142. On 12 January 2021, Antrix sought to amend its Setting Aside Application (which was pending) to include charges of fraud against Devas and its shareholders. Antrix based its charges on documents allegedly "*unearthed which reveal a fraud of a criminal nature that vitiate the entire [Devas-Antrix Agreement], including the arbitration agreement*

[173] A copy of this order is exhibited at Tab 49 of **IR-4**.

*between the parties*." These supposedly recently "*unearthed*" documents were the allegations in the FIR and the CBI Charge Sheet as well as the investigations by the ED relating to the FEMA Complaint. In reality, these documents had been available to Antrix for many years as early as 2014/2015, but Antrix chose not to make any reference to these documents in the Devas Enforcement Application or the Antrix Setting Aside Application, until belatedly in January 2021, after the promulgation of the 2020 Arbitration Ordinance.[174]

143. The self-serving nature and duplicitous conduct of India and the Government of India, through its various agencies and machineries, is even more apparent from the Winding-up Proceedings commenced by Antrix against Devas, which took place in highly questionable circumstances. Effectively, Antrix has managed to wind up its award creditor, Devas, and Devas – now under control of a liquidator, an employee of the Government of India – is thwarting the enforcement of the ICC Award against Antrix. This is nothing more than a bad faith attempt by India (and Antrix, a wholly state-owned entity) to circumvent the rule of law and fabricate, retroactively, reasons to avoid their payment obligations to investors, including DT, in clear breach of its obligations under international law. The Winding-up Proceedings and the Indian Decisions must therefore be viewed with circumspection, and in the proper context.

[174] [68] of the Mauritius 2022 NOA (Exhibited at Tab 21 of **IR-4)**

### *(4) Winding-up Proceedings against Devas in India*

144. On 14 January 2021, two days after Antrix applied to amend its Setting Aside Application to include the fraud allegations based on documents which have been available to Antrix for years, Antrix made a request to the Indian Ministry of Corporate Affairs seeking authorisation to commence proceedings to wind up Devas under s 271(c) of the Indian Companies Act, which provides:

> **271. Circumstances in which company may be wound up by Tribunal**-- A company may, on a petition under section 272, be wound up by the Tribunal,—
> …
> (c) 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

145. On 18 January 2021, authorisation was given to Antrix to file the winding-up petition against Devas,[175] which was done by Antrix on the very *same* day under ss 271 and 272 of the Indian Companies Act, 2013.[176]

146. The very next day, on 19 January 2021, Antrix's winding-up petition was heard by the NCLT, without giving Devas any opportunity to be heard. On the very *same* day, the NCLT appointed a provisional liquidator — an employee of the Government of India — to take over the affairs of Devas.[177] DEMPL which holds 3.48% of the issued equity share

[175] [4(1)] and [28] of the NCLT Order dated 25 May 2021 (Exhibited at Mr Krishnan's 1st Affidavit at **MSK-30**)

[176] [9(5)] of the NCLT Order dated 25 May 2021

[177] [14(2)] of the NCLT Interim Order (Exhibited at Tab 51 of **IR-4**); [4(1)] of the NCLT Order dated 25 May 2021

capital of Antrix, sought to appeal this order in its capacity as a shareholder, but the NCLAT dismissed DEMPL's appeal on 11 February 2021.[178]

147. Thereafter, on 2 March 2021, DEMPL filed an application to implead itself in the proceedings before the NCLT ("**Impleadment Application**"). The NCLT dismissed the Impleadment Application holding *inter alia* that "***rights of [DEMPL] as minority shareholders are not in jeopardy***"[179] and that it has "***no locus standi to file the instant Application***".

148. On 25 May 2021, the NCLT issued its decision ("**NCLT Decision**") and ordered Devas to be wound up, making official the appointment of the provisional liquidator, an employee of the Government of India. Devas — an award creditor of Antrix, a state-owned company of India — who has spent years seeking to enforce the ICC Award obtained on 14 September 2015, is now under the control of India. The NCLT's purported basis for making such order was that "*[t]he incorporation of Devas itself was with fraudulent motive and unlawful object to collude and connive with then officials of Antrix and to misuse/abuse process of law, to bring money into India and to divert it under dubious methods to foreign Countries*" and "*Devas hardly has any other business except to grab PS 1 and PS2 from Antrix in terms of Agreement and to carry out its illegal object to divert money.*"[180].

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[178] [10.10] of Indian Supreme Court Decision dated 17 January 2022 (Exhibited at Mr Krishnan's 2nd Affidavit at **MSK-52**)

[179] [11] of NCLT Impleadment Order dated 25 May 2021 (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-30**, at p 1702)

[180] [32] and [34] of NCLT Order dated 25 May 2021 (Exhibited at Mr Krishnan's 2nd Affidavit at **MSK-30**)

149. In determining whether the ground for winding up pursuant to s 271(c) of the Companies Act were made out, the NCLT made purported findings of fact which merely echoed the purported findings in the FIR and the CBI Charge Sheet over the course of CBI's investigations.

150. It bears emphasis that in the Winding-up Proceedings, (i) Devas's application for cross-examination of Antrix's officials was flatly rejected by the NCLT, and shockingly (ii) the NCLT rejected Devas's request to adduce evidence, holding that "*the facts and circumstances leading to the filing of the instant Company Petition … **do not require any evidence to be adduced***",[181] and (curiously) deciding that Devas' application for cross-examination was an "***untenable contention***".[182]

151. It is also pertinent to note that while the NCLT has observed that the "*Devas Agreement in question would become void ab initio and it would not create any legal rights, much civil rights to Devas*", it also recognised that ultimately, "***the validity of the Agreement in question is not the subject matter in the instant case***".[183]

152. Devas and DEMPL both appealed the decisions of the NCLT to the NCLAT. On 8 September 2021, the NCLAT rendered its decision and upheld the NCLT Decision as well as the NCLT's dismissal of the Impleadment Application.[184]

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[181] [19(12)] of the NCLT Order dated 25 May 2021
[182] [34] of the NCLT Order dated 25 May 2021
[183] [31] of the NCLT Order dated 25 May 2021
[184] A copy of the NCLAT Order dated 8 September 2021is exhibited to Mr Krishnan's 1st Affidavit **at MSK-31**

153. Even though DT and DT Asia were not parties to and did not participate in the Winding-up Proceedings, the NCLAT nonetheless went on to make sweeping statements against all of Devas' investors / shareholders (including DT and DT Asia), wrongfully implicating them in the purported fraud committed by Devas in circumstances where the statements were not relevant to the issue that was to be determined — whether Devas should be wound up under s 271(c) of the Indian Companies Act.

154. Notably the NCLAT "*rendered its findings based purely on the documents submitted before [them]*", as the "*documents on the face of record have convinced [the NCLAT] that there has been massive large scale fraudulent activities committed by Devas and its investors/shareholders*".[185] In particular the NCLAT set out a series of documents which it relied on, **all of which were available to India during the Arbitration and formed part of the Arbitration record**:[186]

> 239. This Tribunal deems it fit to elaborate further in the following manner:
>
> a) For violation under the SATCOM Policy, this **Tribunal had to interpret the Articles of the SATCOM Policy**, and Devas did not disputed the policy. Devas only argued it does not apply to them, which submission we rejected.

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[185] [237] of the NCLAT Order

[186] Policy framework for satellite communications in India dated 1997, Arbitration Exhibit C-4 and SATCOM Policy, Arbitration Exhibit C-54 (Exhibited at Tabs 2 and 3 of **IR-4**); Devas-Antrix Agreement (Mr Krishnan's 1st Affidavit at **MSK-10**); Note to the Space Commission drafted by the DOS, signed on 2 July 2010 at [15.1] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-5**); Note by the DOS (Secretary Radhakrishnan) for the Cabinet Committee on Security dated 16 February 2011 (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-22**; WPC experimental license to Devas, 7 May 2009, Arbitration Exhibit C-105 (Exhibited at Tab 52 of **IR-4**); License from DOT to Devas for Provision of Internet Services, 2 May 2008, Arbitration Exhibit C-83 (Exhibited at Tab 53 of **IR-4**), FIPB Applications (see above at [21]-[25]); Share Subscription Agreement dated 16 March 2006 (see above at [22]); Minutes of the 104th Meeting of the Space Commission Held at New Delhi dated 26 May 2005 (Arbitration Exhibit C-209) (Exhibited at Tab 54 of **IR-4**)

b) For misrepresentations under the agreement dated 28.01.2005, this **Tribunal had to interpret the agreement**, which Devas cannot and did not dispute as it is a signatory to the agreement.

c) To arrive at a finding that the Cabinet approval was obtained fraudulently, this Tribunal had to **peruse the notes prepared by DoS and ISRO, which Devas did not dispute**. On the contrary, Devas relied on the same cabinet note prepared by DoS and offered a counter interpretation, which we rejected.

d) To arrive at a finding that Devas could not have successfully tested their technology, **this Tribunal had to interpret the experimental license dated 07.05.2009**. Devas could not have disputed this document as it placed heavy reliance on the same to argue that it successfully experimented with Devas Technology, which we rejected.

e) To arrive at a finding that the ISP license dated 02.05.2008 permitted only ISP services and not Devas Services, and they are not the same, this Tribunal had to **interpret the ISP license**. Devas could not have disputed the same, as they offered a counter interpretation relying on the same license, which we rejected.

f) To arrive at a finding on the purpose of investments into Devas, we had to **interpret the FIPB applications filed by Devas**. Devas could not have disputed the same as it placed heavy reliance on the same to state its investments had the necessary approvals.

g) To arrive at a finding that the shareholders of Devas were also indulging in fraudulent activities, we had to **interpret the shareholding structure of Devas and the share subscription agreement dated 16.03.2006**. Devas could not have disputed and did not dispute the same as it is in their documents.

h) **Other than the above-mentioned list of documents, Devas and Antrix relied on official minutes of meetings**, which neither party before us denied but offered opposite contentions for the consideration of this Tribunal.

155. Devas and DEMPL filed appeals against the decision of the NCLAT to the Indian Supreme Court. On 17 January 2022, the Indian Supreme Court dismissed the appeals.[187]

156. Similar to the NCLAT, the Indian Supreme Court also made sweeping statements against all of Devas' investors / shareholders (including DT and DT Asia), wrongfully

[187] Indian Supreme Court Decision dated 17 January 2022 (exhibited at Mr Krishnan's 2nd Affidavit at **MSK-52** and Mr Sarkar's 2nd Affidavit at Annex 2)

implicating them in the purported fraud committed by Devas. This was even though DT and DT Asia were not parties to and did not participate in the proceedings and the statements by the Court were not relevant to the issue of whether Devas should be wound up under s 271(c) of the Indian Companies Act.

157. It also bears noting that the Indian Supreme Court's decision was premised on the purported "*undisputed facts [which] emerge[d] from the documents placed before the Tribunal*",[188] which are simply repeats of the CBI's findings in the FIR, Charge Sheet and FEMA Complaint and Show Cause Notice,[189] and "undisputed" only because Devas was denied the right to dispute them.

158. I will leave it to the Indian law expert to elaborate further on these proceedings as a matter of Indian law (insofar as they may be relevant, which I am advised and believe they are not) as well as on the effect of the findings made by the NCLT, NCLAT and the Indian Supreme Court.

159. While Mr Krishnan at paragraphs 75 to 95 of his 1st Affidavit and paragraphs 14 to 38 of his 2nd Affidavit has referred to these Indian Decisions as the basis for his allegation that "*[r]ecent investigations and litigation in India have uncovered that Devas, in collusion with certain former officials of Antrix, obtained the Agreement by fraud and without the approval and knowledge of the Government of India*", his allegations are unfounded. As shown above at [116]-[134], it is apparent that the findings of the NCLT,

[188] [12.8] of the Indian Supreme Court Decision

[189] See above at [120]-[122], [127]-[128], [131]

NCLAT and the Supreme Court were based on matters that have been known to India since as early as 2014/2015, considering that CBI investigations commenced as early as 1 May 2014, the FIR was issued on 16 March 2015, followed by the CBI Charge Sheet on 11 August 2016, and the FEMA Complaint was issued on 31 May 2016, followed by the FEMA Show Cause Notice on 6 June 2016. The SATCOM policy, the Devas-Antrix Agreement, the notes prepared by the DOS and ISRO, the experimental license, ISP license, FIPB approvals, Share Subscription Agreements, and minutes of meetings which India relied on before the NCLT, NCLAT and Supreme Court were also all available to and known to India during the Arbitration, and formed part of the Arbitration record. I also disagree with Mr Krishnan's characterisation of the findings in the Indian Decisions. I am further advised and believe that India is not entitled to rely on the findings in the Indian Decisions as the basis to resist enforcement of the Final Award in these proceedings.

160. It is also of significance that the FIR, CBI Charge Sheet, FEMA Complaint and Show Cause Notice, and the series of documents mentioned above, have already been placed before the Tribunal and the Swiss Federal Supreme Court, who after having considered them, dismissed India's Fraud and Illegality and FIPB Allegations. To this date, the CBI investigations are still pending, and no one has been convicted. The Indian Decisions, which are based on the FIR, CBI Charge Sheet, FEMA Complaint and Show Cause Notice, as well as the series of documents mentioned above, make no difference to that analysis.

### *(5) Indian Finance Minister's Press Conference on 18 January 2022 after the Indian Supreme Court Judgement*

161. On 18 January 2022, the day after the Indian Supreme Court Judgment, India's Finance Minister, Ms Nirmala Sitharaman, in a press conference hailed the Indian Supreme Court decision upholding the winding up of Devas.[190]

162. In the press conference, India's Finance Minister:[191]

(a) conveniently accused the Congress-led UPA government — the previous ruling political party and a political opponent of the current ruling party — of misusing power to give away S-Band spectrum, which is only used largely for defence purposes, for the Antrix-Devas deal; and

(b) said that the government is now fighting to save the taxpayers' money which otherwise would have gone to pay for the "scandalous" Antrix-Devas deal.

163. Ms Sitharaman's statements demonstrate that India is making a concerted effort to ensure that the awards resulting from arbitrations relating to the Devas-Antrix Agreement are not enforced under any circumstance. This is also evidenced by the multitude of civil and criminal proceedings at India's behest, as well as legislative intervention through the promulgation of the 2020 Arbitration Ordinance.

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[190] See e.g.: *Times of India* article titled "*FM: Govt will target assets owned by Devas promoters*" dated 19 January 2022 and *The Hindustan Times* article titled "*Finance minister Nirmala Sitharaman targets Congress after SC's ruling on Devas*" dated 19 January 2022 (Exhibited at Tab 55 of **IR-4**)

[191] *Supra*

164. I believe that the matters set out above are clear indications of India's intention to deploy all means at its disposal to frustrate enforcement of the Final Award. I will leave it to the Indian legal expert to elaborate further on this and for DT's counsel to make the necessary submissions at the appropriate juncture.

## II. THE LEAVE ORDER SHOULD NOT BE SET ASIDE

### A. <u>India is not entitled to state immunity</u>

165. It is apparent from the chronology of background facts above that India's arguments to resist the enforcement of the Final Award are not new. They have been argued, vigorously litigated, and ultimately dismissed by not only the Tribunal but also the Swiss Federal Supreme Court. It is apparent that India's application to set aside the Leave Order is premised on (a) an attempt to re-litigate issues that have already been fully considered by and conclusively determined by the Tribunal and the Swiss Federal Supreme Court, being the seat court of the Arbitration, and (b) an attempt to raise issues that it deliberately chose not to raise before the Tribunal and Swiss Federal Supreme Court, and which it chose, presumably for tactical reasons, to keep in reserve in order to raise them in subsequent proceedings to stifle the enforcement of the Final Award.

166. In this regard, I am advised and believe that India is estopped and/or precluded from putting forward arguments that it had already put forward and were conclusively decided not only in the Arbitration, but also before the Swiss Federal Supreme Court, which is the seat court of the Arbitration. I am further advised and believe that the seat court has primacy and judicial supervision over the arbitral award, and the enforcement court should respect the finality of the determinations on challenges to arbitral awards made by

the seat court, and accord deference to the seat court; this is also consistent with the policy of upholding the finality and binding nature of arbitral awards under the New York Convention.

167. I am also advised and believe that India is estopped and/or precluded from putting forward arguments which it had ample opportunity to, and should have raised, in the Arbitration and the Swiss Setting Aside Proceedings, but instead chose not to raise.

168. Further, India in choosing not to raise certain jurisdictional objections in the Arbitration when it could and should have, has waived its right to raise such objections belatedly in these proceedings to resist enforcement of the Final Award.

169. Insofar as India is relying on the purported findings of the NCLT, NCLAT and the Indian Supreme Court to usurp the findings of the Tribunal and the Swiss Federal Supreme Court, the Indian Decisions do not actually affect and/or change the analysis, as they are premised on the *same* factual bases which were in existence and placed before the Tribunal and the Swiss Federal Supreme Court. Besides, India cannot rely on the purported findings of its own domestic tribunals and courts to escape its international law obligations. I am advised that this is clear even from the legal authorities relied on by India in the Arbitration.[192] In any case, the purported findings of the NCLT, NCLAT and the Indian Supreme Court have no legal effect in Singapore.

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[192] See India's Rejoinder on Jurisdiction and Liability dated 9 October 2015 at [178] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-37**) citing the decision of *Inceysa Vallisoletana, S.L. v. Republic of El Salvador* ICSID Case No. ARB/03/26 (see [213]) (Exhibited at Tab 56 of **IR-4**)

***(1) The Pre-Investment Allegation is unsustainable***

170. In these proceedings, India seeks to re-litigate matters and raise the **exact same arguments** that have already been dismissed by the Tribunal and the Swiss Federal Supreme Court. India does not dispute that these were the same arguments that were canvassed before the Tribunal,[193] but omits to mention that it has also canvassed the exact same arguments before the Swiss Federal Supreme Court.[194]

171. The Tribunal rejected the Pre-Investment Allegation, and held that:

(a) Article 3(1) of the BIT is not a permissive clause authorising the host state not to admit investments; it stipulates an obligation of admission subject to the law and policy of the host state.[195]

(b) India chose not to elaborate on the submission that Devas lacked the intellectual property rights that it represented it had in the Devas-Antrix Agreement, and in that respect, did not raise illegality as a separate defence. And even if it were established that Devas misinformed Antrix with respect to one of the contractual conditions, this would not make DT's investment illegal. India's argument that DT's investment was illegal was therefore dismissed.[196]

(c) In any case, "*the record shows that [FIPB] and the DOT approved DT's indirect equity participation in Devas*".[197]

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[193] [55]-[58] of Mr Krishnan's 1st Affidavit
[194] *Cf* [74] of Mr Krishnan's 1st Affidavit
[195] [175] of Interim Award (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-2)**
[196] [176]-[177] of Interim Award
[197] [178] of Interim Award

(d) The Tribunal accepted DT's contention that "*the shares in Devas should not necessarily be viewed as an investment in isolation of the activities carried out by the company*". DT contributed substantial financial resources i.e. over USD 97 million to obtain its shares in Devas, which are protected investments under the 1995 BIT.[198]

(e) While Devas has not obtained the WPC License, "*the Treaty's definition of 'investment' is not restricted to going concerns holding all the relevant authorizations to carry out their business*," and that "*[s]uch restrictive interpretation would not be warranted in light of the text and the object and purpose of the Treaty.*" The Tribunal further noted that "*The absence of the WPC License may have made DT's investment less valuable and may thus have an impact on quantum. It does not, however, affect jurisdiction.*"[199]

172. India repeated the same arguments before the Swiss Federal Supreme Court, who roundly rejected them:[200]

> **the Appellant ignores the very definition of investment given by the treaty in question and, in particular, that Art. 1(b)(ii) of the BIT expressly includes the "shares in ... a company..." in the assets it enumerates in a non-exhaustive manner** …
> …
> In light of these precedents, **the Appellant's attempt to confine the role played by the Respondent in this case to that of an investor having made only preparatory acts not going beyond 'pre-investment' in the mere hope that the planned project would be executed, is doomed to failure**. Far from being comparable to a pension fund whose sole purpose would have been to diversify its investments by acquiring shares in an Indian company at the market price through a subsidiary, the Respondent did not just settle for making a portfolio investment (on this notion, see, among others: McLachlan, op. cit., no. 6.155 et seq.), but rather was fully invested in an undertaking within its sphere of competence, whose success was not immediately ensured.

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[198] [178] of Interim Award

[199] [179] of the Interim Award

[200] [3.2.2.2] of Swiss Setting-Aside Decision (Exhibited at Tab 40 of **IR-4**)

It must be borne in mind that, **when the German company entered the picture, indirectly acquiring the shares of [Devas] in 2008, the latter and another Indian company owned by the State (B.) [Antrix] had already concluded, on January 28, 2005, the Contract A., which had entered into force in early February 2006 after [Antrix] had received the necessary Indian Government approval for the construction and launch of the first satellite as well as for the rental of the S-band transponder capacity** (see A.(a), last paragraph, above). In the present case, **the Respondent's expenses in carrying out this project were therefore incurred while the Indian company whose shares formed the subject of the investment at issue was already benefiting from a contract in force – as in the aforementioned PSEG case – and was to remain so until terminated by [Antrix] on February 25, 2011, six years after its conclusion. That the Respondent has made a substantial sacrifice to secure its participation in [Devas] is also not questionable, as it cost it USD 97 million. Moreover, the contribution of the German company to the implementation of the project provided for in the Contract did not stop there, but took on other forms such as the provision to [Devas] by that company of its knowhow and its expertise as well as about twenty engineers and other specialists in the development of the terrestrial telecommunications network, to name but a few examples (see ICC Award, No. 81). It goes without saying that this contribution, in all its forms, had an undeniable financial value and that it went well beyond the stage of a simple pre-investment made with a view to the future conclusion of a contract** …

…

In any event, **the Appellant's argument concerning the WPC license is unfounded,** at least from the point of view of jurisdiction, as the Arbitral Tribunal quite rightly pointed out (Award, no. 180), not to mention that the good faith of its author is questionable. In fact, while it is a company owned by it that terminated Contract A., thus **preventing the Respondent from ever obtaining a WPC license**, it is still it who intends to take advantage of this unilateral act to dismiss the possibility of granting such a license to the Respondent. This question of good faith aside, it is clear from the foregoing explanations that **the Respondent did indeed engage in various investment acts that have intrinsic economic value regardless of the issue of granting the WPC license**. In this respect, the Appellant's argument that all activities carried out by an investor for years would not go beyond the pre investment stage if the host State ultimately refused to grant a license essential for the proposed exploitation, is untenable. With the Arbitral Tribunal, it must be admitted rather that the latter circumstance does not affect jurisdiction but may have an impact on the quantum of reparation required (ibid.). Therefore, if the BIT had been classified as an admission-clause type treaty, contrary to what case was, the Appellant's objection to the question of pre-investment would nevertheless have been rejected, too.

173. It is apparent that there is no merit to India's Pre-Investment Allegation, for, amongst other things, the reasons cited by the Tribunal and the Swiss Federal Supreme Court, which I will leave DT's counsel to make submissions on.

***(2) The Indirect Investment Allegation is unsustainable***

174. Yet again, in these proceedings, India seeks to re-litigate matters and raise the **exact same arguments** that have already been dismissed by the Tribunal and the Swiss Federal Supreme Court. India does not dispute that it had already canvassed before the Tribunal that it did not have jurisdiction *ratione materiae* and *ratione personae* by virtue of the indirectness of DT's investment,[201] but omits to mention that it has also canvassed the exact same arguments before the Swiss Federal Supreme Court.[202]

175. The Tribunal found that Article 1(b) of the 1995 BIT which defines "*investment*" as "*every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made*" contains a "*broad definition of investment*", which does not have a requirement of direct ownership, taking into account the ordinary meaning, context and object and purpose of the 1995 BIT, in accordance with Art 31(1) of the VCLT.[203] The Tribunal did not find comparative treaty practice useful, as these are but supplementary means of interpretation.[204]

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[201] [59]-[61] of Mr Krishnan's 1st Affidavit
[202] *Cf* [74] of Mr Krishnan's 1st Affidavit.
[203] [138]-[145] of Interim Award (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-2)**
[204] [146] of Interim Award

176. Likewise, the Tribunal reached the same conclusion on the definition of "*investor*" in Article 1(c) of the 1995 BIT, which defined "*investor*" broadly to include as "*companies of a Contracting Party who have effected or are effecting investments in the territory of the other Contracting Party*." Devas is a company incorporated and existing in India i.e. it "*suffices that the assets invested be situated in India.*" Further, the 1995 BIT did not impose any requirement that the "*the assets be owned directly by DT in order for the latter to qualify as an investor*."[205]

177. These contentions were wholly repeated by India in the Swiss Setting Aside Proceedings, and rejected by the Swiss Federal Supreme Court:[206]

> The text of this provision and the preamble of the Treaty, both of which constitute elements of the context (see Art. 31(2) VCLT), contain nothing restrictive but rather illustrate the common will of the contracting parties to promote and stimulate, as far as possible, reciprocal investments. **The illustrative list of investments to be taken into account is broad and nothing in the text of the BIT gives the impression that the contracting parties sought to restrict in any way the scope of the notion of investment, except from the incorrect assumption, suggested by the Appellant, that this notion does not embrace indirect investments in the absence of a clause that would expressly include them. In this respect, this Court agrees with the Arbitral Tribunal that the conclusive result achieved by this method of primary interpretation renders superfluous the use of secondary interpretative methods and, in particular, the practice of comparative contracts, which appears quite random, depending on the often specific circumstances that led to the conclusion of other bilateral treaties by the contracting parties with third States**.
> …
> In particular, it is not credible, to say the least, when it claims that it could not have discovered this preparatory work earlier. **Formulated by a signatory party to the treaty to which they are a party, such an excuse is not persuasive. In any event, the evidence requested by the Appellant was intended for the implementation of the comparative method. It was thus to be used in applying this supplementary means of interpretation, which was not necessary in this case, as has just been stated**. For the delay in

[205] [153] of Interim Award

[206] [3.2.1.2.5] of Swiss Setting-Aside Decision (Exhibited at Tab 40 of **IR-4**)

> relying on evidence which was not decisive in the case in issue, the Appellant argues without good reason that there was a breach of its right to be heard.
>
> The Arbitral Tribunal did not breach the applicable rules by refusing to exclude indirect investments from the scope of the BIT. It therefore rightly admitted that the Respondent could be considered an investor even though the shares of [Devas] forming the object of the investment at issue were not held directly by it.

178. It is apparent that there is no merit to India's Indirect Investment Allegation, for, amongst other things, the reasons cited by the Tribunal and the Swiss Federal Supreme Court, which I will leave DT's counsel to make submissions on.

***(3) India's Security Interest Allegation was relied upon as a substantive defence in the Tribunal, and India is not entitled to challenge the merits of the Tribunal's decision in the enforcement proceedings***

179. In the first place, India had relied on the Security Interest Allegation as a substantive defence and not as a question of jurisdiction before the Tribunal, contrary to [62] of Mr Krishan's 1st Affidavit. India is thus not entitled to raise the Security Interest Allegation as a jurisdictional objection when it failed to do so before the Tribunal, and has thereby waived its right to do so. Having relied on the Security Interest Allegation as a substantive defence in the Arbitration, it is not open to India to challenge the merits of the Tribunal's decision in the enforcement proceedings.

180. In the Arbitration, India had argued that Article 12 of the BIT which provides that "*[n]othing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants*"

operated to "*exclude[e] the application of the BIT standards to measures in furtherance of the host state's essential security interests*", and therefore that "*[DT] is precluded from challenging this measure under the BIT*".[207] In other words, India was arguing that Article 12 of the BIT operated as a **substantive defence to DT's claims under the 1995 BIT**.

181. The Tribunal found that there was a variety of reasons that led to the annulment of the Devas-Antrix Agreement, and only some of those can, on an objective analysis, be said to relate to "*essential security interests*" within the meaning of Article 12 of the 1995 BIT.[208] The Tribunal further found that the CCS decision in February 2011 was not necessary to protect those "*essential security interests*", as it was directed at taking away the relevant S-band spectrum leased to Devas, and yet, the S-band spectrum was not subsequently reserved for "*essential security interests*".[209] In this regard, the Tribunal considered and disagreed with the finding reached by the Mauritius Tribunal in the Mauritius BIT Interim Award that there was a 60/40 apportionment of spectrum between essential security interests and other concerns, further observing that the treaty language in the Mauritius-India BIT was not one of necessity but "*directed at the protection*" of such interests.[210]

182. Thus, the Tribunal concluded as follows:[211]

> In conclusion, the Tribunal finds that India has not established that its measure to take back the S-band spectrum from Antrix-Devas, which in turn triggered the annulment of the Agreement, was necessary for the protection of its

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[207] India's Counter-Memorial on Jurisdiction and Liability dated 13 February 2015 at [69] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-26)**
[208] [282]-[285] of the Interim Award (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-2)**
[209] [286]-[287] of the Interim Award
[210] [288] of the Interim Award
[211] [291] of Interim Award

essential security interests. **As a consequence, the BIT's substantive standards apply to DT's investment**.

183. In the Swiss Setting Aside Proceedings, India, knowing that it was not entitled to challenge the Tribunal's dismissal of its substantive defence based on the Security Interest Allegation, sought to re-characterise what it had put forward "*as a defence on the merits throughout the arbitration proceedings, as a condition for the competence of the arbitral tribunal*" that affected the "*jurisdiction of the arbitral tribunal*".[212] India is obviously changing its case as it goes along, just like how it has cherry-picked and relied on parts of the Mauritius BIT Interim Award, while trying to disavow the rest of those proceedings insofar as they are not favourable to India, and keeping entirely silent on the findings of the Swiss Federal Supreme Court, which is the seat court of the Arbitration.

184. In brief, India's arguments in the Swiss Setting Aside Proceedings (which are being repeated in these proceedings[213]) were as follows:

(a) "*Article 12 of the [BIT] establishes a condition regarding the jurisdiction of the [Tribunal]. Indeed, when a tribunal finds that the Host State can validly invoke the "essential security interests" clause, this means that the tribunal lacks jurisdiction ratione materiae*."[214]

(b) "*The [Tribunal] incorrectly interpreted Article 12 of the [BIT] for the following reasons: (i) it conducted a de novo examination of India's essential security*

[212] See DT's Response to India's Setting-Aside Application dated 15 March 201 at [127]-[128] (Exhibited at Tab 39 of **IR-4**)

[213] Mr Krishan's 1st Affidavit at [157]-[171]

[214] [164] of India's Setting-Aside Application (Exhibited at Tab 37 of **IR-4**); [161]-[163] of Mr Krishan's 1st Affidavit

*interests and did not recognise India's discretionary power in matters of national security and (ii) although it correctly established that the cancellation decision had been made in part on the basis of military requirements, it wrongfully found that the test for essential security interests required the absence of any other reason"*[215].

(c) "*The cancellation of the [Devas-Antrix Agreement] was indeed necessary under Article 12 of the [BIT]",* and the Tribunal *"therefore erroneously applied the term "necessary" and wrongly rejected [India's] objection concerning jurisdiction based on its essential security interests*".[216]

185. India's arguments, however, were (rightly) dismissed by the Swiss Federal Supreme Court who held that India cannot raise the issue of Article 12 of the BIT as a jurisdictional issue when it had always argued the matter as a substantive defence on the merits of the claim:[217]

> **It must first be noted with the Respondent that the Appellant never argued once before the Arbitral Tribunal that Art. 12 of the BIT concerned the jurisdiction of the Tribunal**. Indeed, under no. 147 of its response to the appeal, the Respondent, without being contradicted by its opponent, cites five examples, four taken from passages of the Appellant's briefs in the arbitration file and, the fifth from the opening arguments of the latter, in order to show that the Appellant has supported, from the beginning to the end of the arbitration proceedings conducted so far, that the objection inferred from the BIT clause relating to the question of the essential security interests of the host State **constituted a defense on the merits which, if admitted, would preclude the application of the substantive provisions of the treaty in question.**
>
> Anyone involved in the proceedings must comply with the rules of good faith (see Art. 52 CPC; RS 272). The principle of good faith, laid down for ordinary civil proceedings, is of general application, so that it also governs arbitral proceedings, both in the field of domestic arbitration and in international

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[215] [182] of India's Setting-Aside Application; [166]-[169] of Mr Krishnan's 1st Affidavit
[216] [189] of India's Setting-Aside Application; [170]-[171] of Mr Krishnan's 1st Affidavit
[217] [3.2.3.3.1] of the Swiss Setting-Aside Decision (Exhibited at Tab 40 of **IR-4**)

> arbitration. By virtue of this principle, it is not permissible to reserve procedural grievances which could have been corrected immediately in order to raise them only in the event of an adverse outcome of the arbitral proceedings (judgment 4A_247/2017 of April 18, 2018, at 5.1.2 and the case-law cited). With regard to jurisdiction, the PILA contains, in addition, a specific provision – Art. 186(2) – based on the same principle, according to which "the objection to lack of jurisdiction must be raised prior to any defense on the merits". **From this angle also, it seems difficult to admit that a party having several objections of lack of jurisdiction up its sleeve, as is the case of the Appellant, should not raise them all in the arbitral proceedings but keep one aside, only to raise it in case of an appeal against the award that has rejected the objections that were relied upon**. Moreover, as early as 2002, the Federal Tribunal pointed out that, when the objection of lack of jurisdiction is raised, it must be fully reasoned, as a party may not keep arguments in reserve, for it is not for the arbitrators to seek ex officio whether circumstances exist unrelated to those relied on in support of an argument of lack of jurisdiction might require them to decline jurisdiction …
>
> It follows from these considerations that **the Appellant is precluded from raising, before the Federal Tribunal, the arguments of lack of jurisdiction of the Arbitral Tribunal in connection with Art. 12 of the BIT**. The explanations which follow, therefore, are superfluous.

186. In any case, the Swiss Federal Supreme Court independently considered that the issue of essential security interests under Article 12 of the BIT was not one of jurisdiction but a substantive defence to DT's claim under the BIT, and dismissed India's challenge.[218]

187. As mentioned above, in the present proceedings, India has simply rehashed the same arguments that were rejected by the Swiss Federal Supreme Court in the Swiss Setting Aside Proceedings. In so doing, India has entirely ignored the findings of the Swiss Federal Supreme Court. Besides, having relied on Article 12 of the BIT as a substantive defence in the Arbitration, India should not be allowed to challenge the merits of the Interim Award before the enforcement court under the guise of a jurisdictional

[218] [3.2.3.4] of the Swiss Setting-Aside Decision

objection (which right to raise the jurisdictional objection has long been waived by India). In any case, it is apparent that there is no merit to India's Security Interest Allegation, for, amongst other things, the reasons cited by the Tribunal and the Swiss Federal Supreme Court, which I will leave DT's counsel to make submissions on.

***(4) The Fraud and Illegality Allegation and the FIPB Allegation have no merit***

188. In the first place, it is worth noting the convenient position India is in — it fabricates allegations through its agencies, organs and machineries, and then attempts to use those fabricated and unproven allegations to avoid its international law obligation to comply with the Final Award and pay compensation to DT. India has known of, and controlled the narrative regarding the factual bases for the Fraud and Illegality and FIPB Allegations for years, and had also unsuccessfully sought to raise them before the Tribunal and Swiss Federal Supreme Court. India is therefore precluded and/or estopped from yet again raising these same arguments (i.e. the Fraud and Illegality Allegation and FIPB Allegation) to resist enforcement of the Final Award.

189. The purported factual bases in support of the Fraud and Illegality Allegation and the FIPB Allegation and upon which the NCLT, NCLAT and the Supreme Court made purported findings of fraud[219] were known to India many years before the Indian Decisions — in particular, India already had knowledge of these facts since as early as 2014/2015, considering that investigations by the CBI commenced as early as 1 May 2014, the FIR was issued on 16 March 2015, followed by the CBI Charge Sheet on 11

[219] [110] of Krishnan's 1st Affidavit; [22] of Krishnan's 2nd Affidavit

August 2016, and the FEMA Complaint was issued on 31 May 2016, followed by FEMA Show Cause Notice on 6 June 2016. Further, the SATCOM policy, the Devas-Antrix Agreement, the notes prepared by the DOS and ISRO, the experimental license, ISP license, the various FIPB approvals, Share Subscription Agreements, and minutes of meetings which India relied on before the NCLT, NCLAT and Supreme Court were also all known to India during the Arbitration and formed part of the Arbitration record.

190. In spite of this, India did not raise timely arguments on these issues before the Tribunal in the Arbitration. As mentioned above at [130], this was even though India only filed its final memorial on jurisdiction and liability in the Arbitration on 9 October 2015, and could therefore have raised its full arguments on the Fraud and Illegality Allegation and the FIPB Allegation in its final memorial. India chose not to do so.

191. Instead, India decided to sit on its hands until well after the hearing on jurisdiction and liability had taken place in April 2016, and at the eleventh hour (*i.e.* 24 October 2016), wrote to the Tribunal with a poorly-substantiated request, to ask to suspend the Arbitration pending the conclusion of the criminal investigations by CBI. The Tribunal's decision on this is worth noting:[220]

> 118 The Tribunal first notes that it is not clear whether, **in its letter of 24 October 2016**, the Respondent sought to raise a new jurisdictional or admissibility objection based on an **alleged illegality in the making of the investment**. To the extent that this was the case, the Tribunal finds that **such objection is untimely and contrary to the procedural calendar established in this arbitration**. Indeed, such purported objection was raised well after the Parties' written submissions and the Hearing. The Tribunal likewise denies the introduction of new evidence into the record, as untimely and not in accordance with the procedural rules, which require prior leave.

[220] [112] of Interim Award

> 119 In any event, **even if the illegality objection were deemed timely, the Tribunal would deny it on its merits**. Indeed, the Respondent has not sufficiently substantiated its objection, if it was one. It only devoted a few sentences in its letter of 24 October 2016 arguing that, if upheld, the criminal charges in question would be grounds for dismissal of the claims, as the investment would not have been made in conformity with Indian law. Second, and more importantly, the **CBI Charge Sheet on which the Respondent relies was issued in the context of an investigation commenced by the CBI in March 2015 and contains mere allegations that have not yet been tried, let alone upheld, in court.** Third, **none of the allegations contained in the CBI Charge Sheet relate to actions or conduct of DT. The Respondent has not explained how, as a result of the CBI Charge Sheet, DT's investment (made through the acquisition of shares in Devas) would have been contrary to Indian law.** For all of these reasons, **the Tribunal cannot follow the Respondent's argument that the claims should be dismissed for reasons of illegality.**

192. Thus, India is no longer entitled to rely on the Fraud and Illegality Allegation and the FIPB Allegation to challenge the jurisdiction of the Tribunal in these proceedings. Indeed, it was not even clear to the Tribunal from India's 24 October 2016 letter whether India was raising "*a new jurisdictional or admissibility objection based on [the] alleged illegality in the making of the investment*". India has therefore waived its right to raise a jurisdictional objection based on the Fraud and Illegality Allegation and the FIPB Allegation because it chose not to do so when it could (and should) have.

193. Further, contrary to India's suggestion that the Tribunal has simply refused to stay the Arbitration,[221] the Tribunal proceeded to consider the merits of the Fraud and Illegality Allegation and the FIPB Allegation, and dismissed them. In particular, the Tribunal noted that "***none of the allegations contained in the CBI Charge Sheet relate to actions or***

[221] Mr Krishnan's 1st Affidavit at [69]-[70]

***conduct of DT***" and could not see how "*DT's investment (made through the acquisition of shares in Devas) would have been contrary to Indian law*".

194. It also bears noting that allegations of impropriety in relation to the Devas-Antrix Agreement had arisen from as early as 8 November 2009, when Mr Anand (Joint Secretary of the DOS) received an anonymous complaint — *albeit* later deemed unfounded[222] — that the Devas-Antrix Agreement was allegedly entered into on corrupt practices, and arrests were made as early as 2011; this was also noted by the Swiss Federal Supreme Court:[223]

> This Court is not persuaded by this assertion. It should be noted that, according to the findings of the Arbitral Tribunal, on November 8, 2009, [Mr Anand], one of the secretaries of the DOS, apparently received an anonymous report that the spectrum of the S-band had been leased to [Devas] on the basis of corruption, a complaint which was followed by discussions among the representatives of the Indian space authorities, then the constitution of the so-called [Suresh Committee] named after its sole member, the director of the Indian Institute of Space and Technology, which published its report on June 6, 2010. The Indian media had also been interested in [the Devas-Antrix Agreement] claiming that the lease was too advantageous for this company, and they called on the government to cancel the contract. This was followed by a series of reports and memoranda in the Indian administration.
>
> Some senior officials of this administration had been arrested in early February 2011, before [Devas] saw its contract with [Antrix] terminated, on the 25th of the same month, for an alleged case of force majeure. Therefore, **it is difficult to understand why the Appellant did not mention these circumstances – which were revealing, at least, of suspicions of commission of criminal offenses – in its submissions in the arbitration, or during the hearing of April 2016, or in its post-hearing brief of June 10,**

[222] Paragraph 93 of DT's Reply on Jurisdiction and Liability in the Arbitration (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-37**) , citing the Report by the Chaturvedi Committee titled "*Report of the High Powered Review Committee on Various Aspects of the Agreement between Antrix & Devas Multimedia*" dated 12 March 2011 ("**Chaturvedi Report**") (Arbitration Exhibit C-190) at p iii, at [8], which states: "***Concerns on cheap selling of spectrum to Devas have no basis whatsoever***. *Space spectrum is not comparable to terrestrial spectrum. Devas was also required to obtain licenses from DoT/18(8 for providing services to customers and would have to pay, apart from Transponder leasing charges, other charges which would be determined by Telecom Regulatory Authority of India (TRAI) based on their consultation mechanism*".

[223] [4.4.2] of the Swiss Setting-Aside Decision (Exhibited at Tab 40 of **IR-4**)

> **2016, preferring instead to wait until October 24, 2016, to inform the Arbitral Tribunal. This is all the less understandable that the CBI had already sent its Charge Sheet to whom it may have concerned on August 11, 2016**.

195. The Swiss Federal Supreme Court further confirmed the correctness of the Tribunal's decision in refusing to admit India's letter of 24 October 2016 and in determining in the alternative that, even if it did, it would have denied it on the merits, observing that:

(a) India failed to raise arguments that the Devas-Antrix Agreement was purportedly unlawful and that DT's investment was purportedly not made in accordance with Indian law in a timely manner when it could have.[224]

(b) The contents of India's 24 October 2016 letter was unclear as to its stated intent, in that "*the reading of the letter that [India] sent on October 24, 2016, to the Arbitral Tribunal confirms that the content of this document was so excessively ethical that the recipient was unable to draw clear conclusions as to the desire expressed in general and imprecise terms by the author of the missive*"[225]

(c) Given the "*vague accusations, it was also necessary to take into account the interests of the investor in ensuring that the settlement of the dispute with the host State took place within an acceptable period of time and was not postponed for several years because of a suspension of arbitral proceedings until the criminal law was* decided".

(d) Further, it was questionable whether "*the existence of a pending criminal investigation was such as to affect the Arbitral Tribunal's jurisdiction over Arts 1.(b) and*

[224] [4.4.2] of the Swiss Setting-Aside Decision (Exhibited at Tab 40 of **IR-4**)

[225] [4.4.3] of the Swiss Setting-Aside Decision

*3(1) of the BIT*" given that "*the arbitral tribunal, as an international forum, is not bound by any prior assessments made by national courts under such relevant national law; rather it is required to make its own legal determination*".[226]

(e) The **matters set out in the FIR and CBI Charge Sheet did not pertain to DT** — "*it is not self-evident, a priori, that by indirectly acquiring part of the shares in an Indian company, without its opponent finding anything to challenge, the Respondent, as an investor, must allow itself to be blamed for the fact that, by alleged misconduct by its organs, this company located in the territory of the host State obtained from a company controlled by the same State advantages qualified as unlawful by the latter.*"[227]

196. Insofar as India is trying to rely on the alleged misrepresentation by Devas that it had the intellectual property right, but it did not, this argument was considered and rejected by the Tribunal:[228]

> The Respondent does not raise illegality as a separate defense. It states, however, that "Devas lacked the intellectual property rights that it represented it had in the Devas Agreement, and […] DT was fully aware of that fact". India relies on the response of the Devas group to the due diligence questionnaire from 29 December 2007, which shows that the group answered "N/A" (not applicable) to the questions on intellectual property. **The Tribunal cannot infer from this evidence that Devas did not hold the intellectual property rights at stake. The Respondent did not further elaborate its allegation made for the first time in the Rejoinder and chose not to address this issue at the Hearing**.
>
> **Even if it were established that Devas misinformed Antrix with respect to one of the contractual conditions (*quod non*), it is doubtful that this would make DT's investment illegal or could be a ground for invalidity of the Devas Agreement. In any event, it is telling that Antrix did not raise the invalidity of the Agreement in the ICC Arbitration on this**

[226] [4.4.3] of the Swiss Setting-Aside Decision
[227] [4.4.3] of the Swiss Setting-Aside Decision
[228] [176]-[177] of the Interim Award

**basis. In these circumstances, the Tribunal cannot but dismiss India's argument that DT's investment was illegal**.

197. Given the manner in which India chose to raise the Fraud and Illegality Allegation and the FIPB Allegation before the Tribunal — at the very last minute after the hearing on jurisdiction and liability, despite knowing about these matters for years, presumably for tactical reasons, to keep them in reserve in order to raise them in subsequent proceedings to stifle the enforcement of the Final Award — one can understand why the Tribunal decided not to stay the Arbitration. In any case, the Tribunal proceeded to consider and dismiss those arguments.

198. As matters turned out, India yet again sought to raise the Fraud and Illegality Allegation and the FIPB Allegation in subsequent proceedings, first in the Swiss Setting Aside Proceedings, which were rightly dismissed by the Swiss Federal Supreme Court, and now in these proceedings (and also the US enforcement proceedings), which should also be dismissed.

199. Specific to the FIPB Allegation, it is of note that India did not previously seriously dispute that the requisite 2006 FIPB approval, 2008 FIPB Approval for DT's investment and 2009 FIPB Approval for DT's investment were duly obtained. In fact, India's initial position in the Arbitration (before its letter to the Tribunal on 24 October 2016) was that "*the FIPB approval does not even relate to the Devas Contract. It relates only to the investment in Devas shares, which is not a relevant investment in this case, as those shares remain the property of DT Asia*". This is in stark contrast to the position India adopted in its letter dated 24 October 2016, and now, by attempting to rely on the decision

of the NCLAT to claim that "*the foreign investments made by Devas's shareholders, including DT, were invested on a false premise, i.e. that they would be channelled towards ISP services, when they were meant to be and in fact channelled towards the Devas Services*"[229] and that accordingly "*the legal consequence of this is that DT's acquisitions of shares in Devas and/or its consequential acquisition of rights in the Agreement were illegal under Indian law*".[230]

200. Contrary to [31] and [124] of Mr Krishnan's 1st Affidavit, it is incorrect to state that the 2006 FIPB Application "*did not mention the Devas Services*" (as defined under the Devas-Antrix Agreement as "*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*"), and that the 2006 FIPB Approval was granted on the basis that "*Devas would provide ISP services **only***".

201. It was specifically stated as part of the 2006 FIPB Application that Devas "***was incorporated in December 2004, with the objective of developing technology and software for delivering multimedia services through various systems. The company objectives were further extended to deliver multimedia and information services (ISP) via landline, satellite and terrestrial wireless systems to a variety of fixed, portable, and mobile terminals***", and that Devas was pursuing "*the technology development and*

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[229] [126] of Mr Krishnan's 1st Affidavit
[230] [128] of Mr Krishnan's 1st Affidavit

*commercialization of state-of-the-art services which include multimedia terminals and associated transmit equipments for* ***delivering multimedia information, and Internet content and interactive services from different media sources via landline, satellite and terrestrial wireless systems*** *to a variety of fixed portable and mobile terminals*".[231]

202. As part of the 2006 FIPB Approval, the services included "***development of software and conduct requisite research and development activities in the areas of multimedia content creation, multimedia terminals, and associated transmit equipments for receiving multimedia content from different media including internet, satellite, and terrestrial broadcasting***".[232]

203. Contrary to [37], [125] and [126] of Mr Krishnan's 1st Affidavit, the 2008 FIPB Approval was also not only on "*condition that Devas would provide ISP services*". It was specifically stated as part of the 2008 FIPB Application that Devas "*is engaged in the business of development of software and is conducting research and development activities in the areas of multimedia content creation, end user terminals and associated transmission equipment for* ***delivering multimedia content and services from different media including intern, satellite and terrestrial broadcasting systems***" and that "*Devas will provide various service packages from basic internet services to* ***value-add services such as audio, video and data services***".[233] The 2008 FIPB Approval was not granted on

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[231] 2006 FIPB Application (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-11**)
[232] 2006 FIPB Approval (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-13**)
[233] 2008 FIPB Application (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-15**)

the basis that Devas would *only* provide ISP services, but also other services, including the Devas Services.[234]

204. Similar to the 2006 FIPB Approval and 2008 FIPB Approval, the 2009 FIPB Approval was, contrary to Mr Krishnan's 1st Affidavit at [39], not granted on "*the condition that Devas would provide ISP services only*".[235]

205. I am advised and believe that insofar as the Swiss Federal Supreme Court, being the seat court of the Arbitration as agreed between India and DT, (*i*) made a finding on a procedural issue, (*ii*) refused to set aside the Interim Award, (*iii*) conclusively determined the issues raised in India's complaints in favour of upholding the Interim Award, the enforcement court should respect the finality of determinations on challenges to the Interim Award made by the seat court, which has primacy and judicial supervision over the same, and accord deference to the seat court. I will leave it to DT's counsel to make further submissions on this.

206. That India now relies on various purported findings from the Indian Decisions which were premised on the same factual bases and documents India had known about all along and which were placed before the Tribunal and the Swiss Federal Supreme Court, does not change the analysis. Indeed, this is a blatant and bad faith attempt by India to usurp the findings of the Tribunal and the Swiss Federal Supreme Court, by reference to subsequent findings made by its own domestic tribunals and courts in questionable

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[234] 2008 FIPB Approval (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-16**)
[235] 2009 FIPB Approval (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-18**)

circumstances. Besides, this fails to recognise that the question of whether an investor has made an investment in accordance with Article 1(b) of the 1995 BIT is one of international law, and not domestic law.

207. I am further advised that the Indian Decisions are not relevant to the issue of whether enforcement of the Final Award should be refused on the grounds listed in ss 31(2)(*b*), 31(2)(*d*), and 31(4)(*b*) of the International Arbitration Act, which India is relying on.

208. Moreover, I am advised and I believe that Indian cannot rely on the Indian Decisions as evidence of whether the asset is "*invested in accordance with the national laws of India*" because India is precluded from relying on self-serving evidence that occurred after DT's issuance of the Notice of Arbitration against India on 2 September 2013 (i.e. the critical date) pursuant to the critical date doctrine under international law. This is especially since the factual bases and the documents which the NCLT, NCLAT and the Indian Supreme Court considered to arrive at their respective decisions relate to alleged events that took place years before the Notice of Arbitration was issued and had previously been the subject of investigation by India. This evidence therefore relates to facts that, if true, either were or should have been known to India before the critical date.

209. At the very least, such post-critical date evidence should be given little weight. The Indian Decisions are clearly evidence that occurred *after* the critical date, as the NCLT Decision was issued on 25 May 2021, the NCLAT Decision was issued on 8 September 2021, and the Indian Supreme Court decision was issued on 17 January 2022.

210. In any event, I am advised and believe that the Indian Decisions have no legal effect in Singapore, as, amongst other things, they do not fulfil the requirements for the recognition of foreign judgments under Singapore private international law.

211. First, the Indian Decisions concern a winding-up petition filed by Antrix against Devas. At no point in time was DT or DT Asia a party to the Winding-up Proceedings. I am advised that for the findings in the Indian Decisions to be applicable here, the parties in the Singapore proceedings must be the same parties as those in the Winding-up Proceedings.

212. Second, the Indian Decisions concerned issues which are different than the issues in the present proceedings. The issues before the NCLT, NCLAT and the Indian Supreme Court were not in respect of international law, (Singapore's) public policy, or the enforcement of the Final Award. Moreover, the purported findings in the Indian Decisions which India are relying on in support of the Fraud and Illegality Allegation and the FIPB Allegation are collateral and/or incidental to the sole and central issue in the Winding-up Proceedings, which is whether Devas should be wound up pursuant to s 271(c) of the Indian Companies Act, 2013. I am advised that such findings therefore have no effect nor any relevance in these proceedings.

213. Third, the Indian Decisions were arrived at in breach of natural justice and due process because: (1) the NCLT had pre-judged the winding-up petition filed by Antrix in ordering that a provisional liquidator be appointed by simply accepting the unilateral

averments of Antrix – an entity wholly owned by India which is liable to Devas under an arbitral award for an amount in excess of USD 1 billion – without affording Devas an opportunity to be heard; and (2) Devas was prevented from conducting cross-examination of Antrix's witnesses even though spurious allegations of fraud were being made against Devas.

214. Fourth, the questionable circumstances in which the Indian Decisions came about suggest that the Indian Decisions are part of a wider political effort on the part of India to undermine the enforcement of the ICC Award, the Final Award and the Mauritius BIT Award that had been issued against Antrix and India, with the self-serving and improper assistance of its domestic tribunals and courts.

215. Fifth, even if one were to consider the self-serving findings of the Indian Decisions (which DT does not accept should be considered), the alleged fraud that took place in 2005/2006 pre-dates DT's investment in 2008, and does not in any way implicate DT (or DT Asia), especially since DT (and DT Asia) does not have any knowledge of the fraud.

216. In view of the above, I am advised and believe that the Indian legal expert opinions of Mr Sudipto Sarkar SA, as set out in Mr Sarkar's 1st and 2nd Affidavits, are not relevant to these proceedings and should be struck out.

217. Accordingly, the Fraud and Illegality Allegation and the FIPB Allegation as set out in Mr Krishnan's 1st Affidavit at paragraphs 110 to 128 and Mr Krishnan's 2nd

Affidavit at 14 to 38 which is a blatant attempt by India to impermissibly revisit the findings made by the Tribunal and the Swiss Federal Supreme Court on the merits, and based entirely on the findings of the NCLT, NCLAT and SC, as well as the opinions of Mr Sarkar, must therefore also be disregarded.

218. Without prejudice to DT's position on this, DT has also filed the expert opinion of Mr Harish Salve, QC, SA.

219. In the premises, I am advised and believe that India is not entitled to state immunity and the exception to state immunity provided for under s 11(1) of the State Immunity Act applies against India.

220. I will leave it to DT's counsel to elaborate further on the above points at the appropriate juncture.

**B. <u>The Final Award is within the scope of the arbitration agreement</u>**

221. India relies on the same arguments it raises to contend that it is entitled to state immunity to argue that the "*DT alleged investment falls outside the scope of the BIT, DT was not a protected investor, and India had not agreed to arbitrate the subject matter of the Arbitration*", and that pursuant to ss 31(2)(*b*) and (*d*) of the International Arbitration Act, the "*Leave Order should be set aside because the arbitration agreement was not valid and/or because the Final Award deals with a difference not contemplated by, or not*

*falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration*".[236]

222. For the reasons set out above, I am advised and believe that India's contention is wrong and should be rejected. I will leave it to DT's counsel to elaborate further on this at the appropriate juncture.

## C. The enforcement of the Final Award is not contrary to Singapore's public policy

223. In essence, India is relying on the purported findings in the Indian Decisions to argue that "*given that the basis of DT's claim in damages under the Final Award (i.e., the Agreement) is tainted by fraud, and in light of the finding by the NCLAT that the shareholders of Devas (which include DT Asia) also bear responsibility for the fraud, I believe that the Singapore court should exercise its discretion under section 31(4)(b) of the IAA to set aside the Leave Order, on the basis that enforcement of the Final Award would be contrary to the public policy of Singapore*".

224. For the reasons set out above, I am advised and believe that India cannot rely on the purported findings in the Indian Decisions in these proceedings.

225. In addition, I am advised and believe that the decisions of foreign courts, including the NCLT, NCLAT and Indian Supreme Court, are not relevant to Singapore's public

[236] [175]-[176] of Mr Krishnan's 1st Affidavit

policy, which is entirely an issue to be determined by the Singapore Courts. There is even less reason to do think so in this case, especially when, as explained by the Indian legal expert, the Indian Decisions are tainted by political interference and were made in breach of natural justice and due process.

226. On the contrary, it would not be consistent with Singapore's public policy (and its international law obligations under the New York Convention) to refuse to uphold the primacy and finality of the decisions made by arbitral tribunals and/or courts of the seat of the arbitration. That is what India is contending for in this instance, and should be rejected.

227. Indeed, it would be contrary to Singapore's policy to credit India's bad faith, relentless and extreme efforts and political manoeuvres to avoid its obligations under international law to comply with 3 valid and binding arbitral awards, and reward a recalcitrant and delinquent debtor like India.

**D. There was no lack of full and frank disclosure in DT's obtaining of the *ex parte* Leave Order**

228. Finally, it is incorrect for India to allege that the *ex parte* Leave Order was obtained with a lack of full and frank disclosure by DT.

229. I am advised and believe that the duty to make full and frank disclosure does not require a party to disclose every conceivable material fact or anticipate and pre-empt every conceivable legal argument. This duty extends only to potential defences it can

reasonably ascertain and reasonably anticipate, and such reasonably ascertainable and reasonably anticipatable facts and defences are limited only to those which the Court would consider material, not what India would consider material.

230. I am also advised and believe that to the extent any non-disclosure is not material, *i.e*. where it is technical or inconsequential, an *ex parte* order would not be set aside, especially where there is no prejudice suffered by the party seeking to set aside the order.

231. As mentioned, it is apparent that India's defences against enforcement of the Final Award are largely premised on attempting to re-litigate matters which have already been conclusively determined by both the Tribunal and the Swiss Federal Supreme Court (being the seat court of the Arbitration), or to raise issues that it chose not to raise timeously before the Tribunal and the Swiss Federal Supreme Court and was therefore precluded and/or estopped from raising. These defences are an abuse of process. The mere fact that India has now chosen to raise these arguments as purported defences against enforcement of the Final Award does not mean that these arguments should even have been raised in the first place. At the very least, it is unreasonable to expect that DT place arguments which are frivolous, vexatious and an abuse of process before the Court at the *ex parte* stage.

232. In respect of India's complaint that DT did not "*disclose India's potential immunity arguments even though India had already claimed immunity in parallel*

*enforcement proceedings in the United States*",[237] it bears emphasis that there was only a passing reference to this in the Joint Motion; India simply made a short statement without any elaboration to say that it "*expressly preserve[d] all privileges, immunities, and jurisdictional defenses*".[238] It would defy logic to suggest that this passing remark by India necessitates that DT raise potential defences on behalf of India that were not even substantiated in the slightest.

233. In respect of India's claim that DT failed to disclose the findings of the NCLT, as explained above, the NCLT Decision which was released on 25 May 2021 had **no** bearing on the underlying dispute. It must be emphasised that **neither DT nor DT Asia were parties** to the Winding-up Proceedings before the NCLT. DT Asia does not have any representative on the Board of Devas since 30 November 2019. In any case, the NCLT expressly stated that "***the validity of the Agreement in question is not the subject matter in the instant case***".[239] Besides, as at the time of DT's *ex-parte* application for the Leave Order, India did not articulate its potential immunity arguments and had not relied on the NCLT Decision in the US enforcement proceedings

## III. CONCLUSION

234. I will leave it to DT's counsel to make the necessary legal arguments at the appropriate juncture.

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[237] [182] of Mr Krishnan's 1st Affidavit
[238] Joint Motion at [7] (Exhibited to Mr Krishnan's 1st Affidavit at **MSK-51**)
[239] [31] of the NCLT Order dated 25 May 2021 (Exhibited at Mr Krishnan's 2nd Affidavit at **MSK-30**)

235. In the circumstances, DT respectfully asks that SUM 155 be dismissed with costs.

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| AFFIRMED by the abovenamed | ) |
| **DR INA ROTH** | ) |
| In GERMANY | ) |
| On this day of 2022 | ) |

Before me

**A NOTARY PUBLIC**

This affidavit is filed on behalf of the Plaintiff.

THIS IS THE EXHIBIT MARKED “**IR-4**”

REFERRED TO IN THE AFFIDAVIT OF

**DR INA ROTH**

AFFIRMED BEFORE ME

ON THIS DAY OF 2022

IN GERMANY

BEFORE ME

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**A NOTARY PUBLIC**