UNCITRAL ARBITRATION

PCA CASE NO. 2014-10

DEUTSCHE TELEKOM AG

CLAIMANT

V.

THE REPUBLIC OF INDIA

RESPONDENT

RESPONDENT'S COUNTER-MEMORIAL ON JURISDICTION AND LIABILITY

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INTRODUCTION

1. This Counter-Memorial on Jurisdiction and Liability is submitted by Respondent, the Republic of India ("Respondent" or the "Government"), in response to the Memorial on Jurisdiction and Liability submitted by Claimant, Deutsche Telekom AG ("Claimant" or "DT"), in accordance with Procedural Order No. 1.

2. This is one of three arbitrations arising out of the same set of facts.

3. The first case is an ICC arbitration (the "Antrix Arbitration") instituted by Devas Multimedia Private Limited ("Devas"), an Indian company in which a DT subsidiary, Deutsche Telekom Asia Pte. Ltd. ("DT Asia"), is a shareholder, against Antrix Corporation Limited ("Antrix"), an Indian state-owned company.[1] In the Antrix Arbitration, Devas alleges breach by Antrix of a contract for the lease of space segment capacity on two satellites that were to be built and launched by the Indian Space Research Organisation ("ISRO").[2] The final hearing in that case, covering jurisdiction, the merits and quantum, was held during the period 15-19 December 2014. The parties are scheduled to file the first of two rounds of post-hearing briefs on 17 February 2015, with the second round scheduled for 23 March 2015.

4. The second case, like this one an UNCITRAL arbitration (the "Mauritius Shareholders Arbitration"), was initiated by three other shareholders of Devas, CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited (the "Mauritius Shareholders"), against the Government of

[1] *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK.

[2] **Ex. R-1**, Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft by Devas Multimedia Pvt. Ltd., 28 January 2005, as amended on 27 July 2006 (the "Devas Contract"). In parts of the Memorial, Claimant seeks to create the impression that Government agencies were parties to the Devas Contract. *See, e.g.,* Claimant's Memorial on Jurisdiction and Liability, 2 October 2014 ("Claimant's Memorial"), ¶¶ 27-29. That was not the case, as is evident from a simple reading of the Devas Contract and the rest of the record in this case. *See* ¶¶ 7, 17, 23, *infra*.

India, alleging claims under the Mauritius-India bilateral investment treaty ("BIT").[3] Now DT is alleging similar claims under the Germany-India BIT.[4]

5. All three cases are an abuse of the arbitral process, with claimants asking each tribunal to award surrealistic compensation for a satellite business that never got off the ground and spinning a story of hopes and dreams for a pan-India satellite-terrestrial system that ignores virtually all facts that are material to the legal issues before the respective tribunals. The material facts documented in the record of this case demonstrate that despite the tale told to this Tribunal by DT, DT Asia put money into Devas in a typical venture capital transaction, hoping that the business would obtain the approvals necessary to get off the ground but knowing full well that there was absolutely no assurance that that would be the case. In fact, as Claimant was fully aware when it decided to support Devas in the development of the Devas project, all parties not only fully understood the risks involved, but they also provided a comprehensive framework for determining exactly what would happen if for any reason the project was not launched. Although Claimant did not discuss its understanding of the terms and conditions governing the proposed Devas project as expressed in the

[3] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. The Republic of India*, PCA Case No. 2013-09 (UNCITRAL). That case was bifurcated, with the hearing on jurisdiction and the merits taking place during the period 1-5 September 2014 in The Hague. The transcript of that hearing is submitted herewith. *See* **Ex. R-2**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd. and Telcom Devas Mauritius Ltd. v. The Republic of India*, PCA Case No. 2013-09 (UNCITRAL), Hearing on Jurisdiction and Liability, 1 September 2014 – 5 September 2014 ("Mauritius Shareholders Arbitration Tr.").

[4] **Ex. C-1**, Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments, signed on 10 July 1995, entered into force on 13 July 1998 (the "German Treaty"). The reasons Claimant has brought a separate arbitration are unclear; its treaty claims, although based on a different treaty, are basically the same as those of the Mauritius Shareholders.

Devas Contract and as reflected in its negotiating history, those facts negate all of Claimant's substantive claims under the German Treaty.[5]

6. Two false factual premises underlie Claimant's treaty claims here, the same false factual premises on which the claimants in the other cases have based their claims. First, Claimant repeatedly argues that the Government's policy decision to deny orbital slot in S-band to Antrix for any commercial activities was a "contrived" *force majeure* designed purely and simply to extricate Antrix from the Devas Contract for political and commercial reasons, and that the Government acted arbitrarily because there were no national security reasons for the Government's decision. The documents submitted with this Counter-Memorial (of which Claimant strangely pretended not to be aware) leave no doubt that those allegations are divorced from reality.[6] The record shows that there have been competing demands for S-band capacity from the military and other security agencies since even before the Devas Contract was entered into. Those demands continued to escalate until they were crystallised in December 2009,[7] after extensive discussions among all governmental departments concerned demonstrating that, given the limited S-band spectrum available to India, there was no

[5] *See* ¶¶ 7, 16-32, *infra.*

[6] *See* ¶¶ 33-44, *infra*. Claimant says that it "has yet to see the 'extensive documentary record that will be submitted with the Statement of Defence' to justify an essential security interests defence." Claimant's Memorial, ¶ 13. *See also id.*, ¶ 339 ("While DT cannot of course anticipate what this extensive record might disclose . . . ."). Those documents were presented to the tribunals in both the Antrix Arbitration and the Mauritius Shareholders Arbitration. Mr. Viswanathan, Devas' CEO, and Mr. Parsons were witnesses in both of those arbitrations, and Mr. Larsen was a witness in the Antrix Arbitration. *See* ¶¶ 11-12, *infra*. In addition, it seems obvious from a review of Claimant's Memorial that Claimant is fully aware of the record in the other cases.

[7] Direct Testimony of A. Vijay Anand, Additional Secretary, Department of Space, Government of India, 12 February 2015 ("Anand Witness Statement"), **Annex 1**, App. VA-10, Minutes of Meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO, 25 January 2010.

way of satisfying the security needs of the nation if the Devas Contract were to proceed.[8] Once this basic point is understood, Claimant's entire case collapses.

7. The second false factual premise underlying both this Arbitration and the others is that Devas had some sort of acquired right to proceed with the Devas Contract uninterrupted by any governmental action.[9] A simple review of the Devas Contract, which is the asset that Claimant alleges was expropriated, shows that no such acquired right existed. The relevant features of the Devas Contract defining the scope of the rights Devas had are the following:

- The parties to the Devas Contract are clearly defined as Devas and Antrix.[10] Neither ISRO nor the Department of Space ("DOS"), the Department of Telecommunications ("DOT"), the Space Commission, the Prime Minister, the Cabinet Committee on Security (the committee of the Cabinet that took the decision to deny orbital slot to Antrix in S-band for commercial use and annul the Devas Contract) or any other governmental body is a party.
- Throughout the Devas Contract, the parties recognised the distinction between Antrix and the Government, acknowledging the role of the Government as regulator and not as party to the Devas Contract.[11] Neither the Devas Contract nor any other document contains any commitment whatsoever on the part of the Government to grant any approval necessary for the implementation of the Devas project.
- Antrix was responsible under the Devas Contract for obtaining governmental approvals relating to orbital slot and frequency

[8] *See* ¶¶ 33-44, *infra*.

[9] Claimant's Memorial evinces a fundamental misunderstanding of the meaning of the term "acquired right." It mistakenly equates "acquired rights" with expectations. Claimant's Memorial, ¶ 8. While there is no basis for a claim of breach of "expectations" in this case, expectations are not "acquired rights," which are created under municipal law and constitute "private rights of a patrimonial nature." *See* **Ex. RLA-1**, F.V. García Amador, *Fourth Report of the Special Rapporteur – Responsibility of the States for Injuries Caused in Its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights*, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1 (United Nations 1959), ¶ 6.

[10] **Ex. R-1**, Devas Contract, p. 1. *See* ¶¶ 17, 23, *infra*.

[11] *See* **Ex. R-1**, Devas Contract, Articles 3(c), 7(c), 12(b)(vii) and Annexure I, Definitions of "Governmental or Regulatory Authority" and "Regulatory Approval."

clearances for the satellites.[12] Devas was "solely responsible for securing and obtaining all licenses and approval[s] (Statutory or otherwise) for the delivery of Devas Services via satellite and terrestrial network."[13]

- The Devas Contract contained a comprehensive set of provisions outlining the rights and obligations of the parties in the event of termination, including termination due to the withholding of required governmental approvals or licences.[14] In all cases, Article 7 of the Devas Contract limited the consequences of such termination exclusively to either the retention or the refund of the Upfront Capacity Reservation Fees paid by Devas to Antrix.[15]

- Among the termination provisions was one expressly anticipating the possibility that Antrix might be denied the required orbital slot for the satellites.[16] In that circumstance, the provision called upon Antrix to refund any Upfront Capacity Reservation Fees already paid, which Antrix attempted to do, only to be rebuffed by Devas, which disputed the applicability of that provision and claimed breach.[17] But even under the provision addressing the consequences of material breach by Antrix, the exclusive remedy that Devas agreed to in the Devas Contract was the same refund of paid Upfront Capacity Reservation Fees.[18]

- The Devas Contract also contained a *force majeure* clause covering a wide range of situations, including "acts of or failure to act by any governmental authority acting in its sovereign capacity,"[19] which again shows that the parties were cognizant of the fact that the Government reserved the right to take sovereign decisions affecting the Devas Contract, including the denial of approvals and licences.[20] It is hard to imagine a more sovereign decision regarding S-band than the decision of the Cabinet Committee on Security in this case. Claimant's primary witness, Mr. Viswanathan, Devas' CEO, confirmed that point in his testimony in the Mauritius Shareholders Arbitration.[21]

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[12] **Ex. R-1**, Devas Contract, Article 3(c).

[13] *Id.*, Article 12(b)(vii).

[14] *Id.*, Article 7.

[15] *See* ¶¶ 20-21, 25-30, *infra*.

[16] **Ex. R-1**, Devas Contract, Article 7(c).

[17] *See* ¶¶ 20-21, 39, *infra*.

[18] **Ex. R-1**, Devas Contract, Article 7(b).

[19] *Id.*, Article 11(b)(v).

[20] *See* ¶ 31, *infra*.

[21] **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 289-290.

- The Devas Contract was governed by the laws of India, and under Indian law there is no doubt that Devas had no right to compensation in excess of a refund of paid Upfront Capacity Reservation Fees.[22]

8. Significantly, what the Devas Contract did not contain was any provision or indication whatsoever that the Government was restricted from taking policy decisions that could affect the Devas Contract or, indeed, that there was any other commitment on the part of the Government. That included any commitment on the use of S-band capacity or the manner in which the burgeoning strategic needs of the nation would be met.[23]

9. Thus, Claimant's case is based on an expropriation of an acquired right that never existed. Not satisfied with the refund of the Upfront Capacity Reservation Fees that Antrix tendered upon termination of the Devas Contract, which was the maximum compensation Devas (or its shareholders) could have expected under the provisions it had freely and heavily negotiated with Antrix,[24] Claimant now seeks to expand the rights of Devas by inventing an alternative basis for its surrealistic compensation claim. But if Devas itself did not have such expanded contract rights, Claimant cannot acquire greater rights by claiming expropriation or any of its other afterthoughts under the German Treaty.[25]

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[22] **Ex. R-1**, Devas Contract, Article 19. *See* **Ex. RLA-2**, *Sir Chunilal V. Mehta and Sons, Ltd. v. The Century Spinning and Manufacturing Co., Ltd.*, Supreme Court of India, AIR1962SC1314, Judgment, 5 March 1962, ¶¶ 16, 18; **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 1238-1242.

[23] *See* ¶¶ 33-37, *infra*. Claimant repeatedly argues that a 2004 commission (the "Shankara Committee") considered that the proposed use of S-band for the Devas Contract would be beneficial for the nation. Claimant's Memorial, ¶¶ 48-50. That was long before the security needs of the nation were crystallised. *See* ¶ 36, *infra*. In any event, there is no legal content to Claimant's argument. *See* ¶ 45, *infra*; **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 145-146. There was no commitment of any kind on the part of the Government that might be analogised to a stabilisation clause binding the Government not to adopt policies regarding national security that might affect the Devas Contract. The very statement of that proposition exposes its absurdity.

[24] *See* ¶¶ 25-30, *infra*.

[25] *See* ¶¶ 112-170, *infra*.

10. While it is clear that Claimant has no claim under the substantive provisions of the German Treaty, there are three threshold issues that preclude the claims asserted herein: the "essential security interests" provision in Article 12 of the German Treaty;[26] the fact that the German Treaty, like most other investment treaties, does not cover pre-investments;[27] and the fact that, by its terms, the German Treaty does not cover indirect investors or indirect investments,[28] and Claimant chose to acquire an interest in Devas through its subsidiary in Singapore, which has its own investment treaty with India.[29] There can be no genuine dispute as to the facts relevant to these issues, many of which are the same as the facts negating Claimant's substantive claims.

11. With respect to the "essential security interests" issue, it is difficult to fathom an argument that a policy decision taken at the highest levels of the Indian Government, after extensive consultation with the entire national security hierarchy, that the security interests of the nation required denial of authorisation to Antrix for any commercial use of S-band was somehow not a decision taken in the nation's essential security interests. Claimant has not seriously addressed this issue yet, preferring instead to feign ignorance of the extensive documentary record relevant to it. Claimant states the following:

> While DT has yet to see the "extensive documentary record that will be submitted with the Statement of Defence" to justify an essential security interests defence, the record to date is notable in its paucity of reference to any concrete

[26] **Ex. C-1**, German Treaty, Article 12. *See* ¶¶ 48-72, *infra.*

[27] *See* ¶¶ 73-95, *infra.*

[28] *See* ¶¶ 96-111, *infra.*

[29] *See* **Ex. RLA-3**, Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore, signed on 29 June 2005, entered into force on 1 August 2005.

> national security needs, let alone a serious and immediate threat to India's security justifying such a "policy decision."
>
> . . . .
>
> The record is similarly notable in the absence of "extensive consultation with the entire national security hierarchy" preceding the Government's change in policy in relation to the S-band. Prior to the decision to annul the Agreement that was taken by the Space Commission in July 2010, it appears that little consultation with MOD [Ministry of Defence] or any other national security organ of Government occurred. Any consultation that took place around the approval of this decision by the CCS [Cabinet Committee on Security] seven months later cannot be described as either extensive or timely.
>
> . . . .
>
> While DT cannot of course anticipate what this extensive record might disclose, it bears noting that, to date, in its communications with DT and Devas or otherwise, India has not identified any serious and immediate threat to India's security that could not be addressed other than by annulment of the Agreement.[30]

12. The foregoing statements are surprising given the fact that DT Asia is a major shareholder of Devas and Claimant presumably is fully aware of the record of both the Antrix Arbitration and the Mauritius Shareholders Arbitration, including the extensive documentary evidence of the military needs for S-band that were increasing over a period of years and led to the decision to deny orbital slot to Antrix in S-band for commercial activities and annul the Devas Contract. In any event, that record, which is now before this Tribunal, leaves no doubt as to the applicability of the essential security interests provision of the German Treaty.[31]

13. It is also clear that the German Treaty, as an "admission clause" model treaty, does not provide for pre-investment protection.[32] Claimant was fully aware that

[30] Claimant's Memorial, ¶¶ 13, 14, 339.

[31] *See* ¶¶ 48-72, *infra*.

[32] *See* ¶¶ 73-95, *infra.*

the project could not be implemented without, and was totally dependent upon, Government approvals and licences that both Devas and Antrix required. There is no dispute that the necessary orbital slot for the satellites was denied to Antrix, and there is no dispute that Devas never even reached the stage of applying for the operating licence from the Wireless Planning and Coordination Wing of the DOT (the "WPC Operating Licence") that it required to engage in the hybrid space/terrestrial services it proposed to provide.[33] Everything done prior to obtaining such approvals and licences falls within the category of "pre-investment" activity not covered by the German Treaty. In other words, even if the Government had no reason at all to deny the necessary approvals and licences, which the record shows is obviously not the case, there could be no claim here under the German Treaty.

14. With respect to indirect investors and indirect investments, there is no factual dispute as to the identity of the DT entity (DT Asia) that is the shareholder of Devas, and the language of the German Treaty, viewed in light of the language of other Indian and German treaties, militates against extending the coverage of the German Treaty to indirect investors and indirect investments.[34]

[33] Claimant's Memorial, ¶¶ 82, 319(c) ("From its due diligence, DT was aware that Devas would in due course need to obtain additional regulatory approvals, including a frequency authorisation and operating licence from the WPC to re-use the spectrum terrestrially. . . . DT does not assert that it had either a contractual right or a concrete assurance from India that the WPC licence would be granted."); Witness Statement of Oliver Tim Axmann, 2 October 2014 ("Axmann Witness Statement"), ¶ 31 ("We understood that in due course, among other licences and regulatory approvals, Devas would need to apply to the WPC for a frequency authorisation and operating licence to re-use the satellite spectrum terrestrially."). *See* ¶ 93 and n. 235, *infra.* As discussed later in this Counter-Memorial, Claimant tries to avoid the precedents on pre-investment by pointing to its investment in the shares of Devas, but that investment was never expropriated and is irrelevant to the pre-investment analysis in this case. *See* ¶¶ 73-95, *infra*.

[34] *See* ¶¶ 96-111, *infra*.

15. Apart from the foregoing threshold issues, each of which independently warrants dismissal of this case, Respondent will demonstrate herein that in any event none of the claims based on the expropriation,[35] fair and equitable treatment ("FET"),[36] and full protection and security[37] provisions of the German Treaty has any merit.

STATEMENT OF FACTS

A. The Devas Contract

16. The Devas Contract, which was executed on 28 January 2005, contemplated the rollout by Devas of hybrid satellite and terrestrial multimedia services (the "Devas Services") utilising transponders on two satellites: GSAT-6, referred to in the Devas Contract as Primary Satellite 1 or PS1,[38] and GSAT-6A, referred to in the Devas Contract as Primary Satellite 2, or PS2.[39] Implementation of the project was subject to Government approvals that were not obtained.[40]

17. The parties to the Devas Contract were Devas, an Indian start-up limited liability company with the minimum paid-up capital required by Indian law and no significant assets,[41] and Antrix, a company incorporated under the Indian Companies

[35] *See* ¶¶ 112-133, *infra.*

[36] *See* ¶¶ 134-166, *infra.*

[37] *See* ¶¶ 167-170, *infra.*

[38] **Ex. R-1**, Devas Contract, Articles 2-3.

[39] *Id.*, Recitals and Article 3(d).

[40] *See* ¶ 7, *supra*; ¶¶ 18, 91-94 and nn. 44, 234, *infra.*

[41] At the time of its formation on 10 December 2004, and at the time the Devas Contract was executed on 28 January 2005, Devas had a minimum authorised and paid-up share capital of INR 1,00,000 (Rupees). *See* **Ex. R-3**, Articles of Association of Devas Multimedia Private Limited, 10 December 2004, Articles 2-3; **Ex. R-4**, Memorandum of Association of Devas Multimedia Private Limited, 10 December 2004, Clause V. Thereafter, following its initial rounds of financing, pursuant to which Columbia Capital LLC and Telcom Ventures LLC, two U.S. companies that formed Mauritius entities through which the funds were channelled, Devas increased its authorised share capital. *See* **Ex. R-5**, Articles of Association of Devas Multimedia Private Limited, as amended 9 June 2007, Articles 4-5; **Ex. R-6**, Memorandum of

Act and wholly owned by the Government of India.[42] The role of the Government in connection with the Devas Contract, as is apparent from the Devas Contract terms themselves, was that of a regulator. That is why the Devas Contract refers to and defines "Governmental or Regulatory Authority" as "any Government state or Central, municipality, local authority, town, village, court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of India," and defines "Regulatory Approval" as "any and all approvals, licenses, or permissions from Governmental or Regulatory Authorities."[43]

18. As might be expected for a project of this nature, the activities contemplated by the Devas Contract were subject to a number of Regulatory Approvals to be obtained in part by Devas and in part by Antrix. Article 3(c) of the Devas Contract provided as follows:

> ANTRIX shall be responsible for obtaining all necessary Governmental and Regulatory Approvals relating to orbital slot and frequency clearances, and funding for the satellite to facilitate DEVAS services. Further, ANTRIX shall provide appropriate technical assistance to DEVAS on a best effort basis for obtaining required operating licenses and Regulatory Approvals from various ministries so as to deliver DEVAS services via satellite and terrestrial networks.

Association of Devas Multimedia Private Limited, as amended 9 June 2007, Clause V. Subsequently, changes were made to the Articles of Association and Memorandum of Association when DT Asia became a shareholder in 2008, upon the formation of Devas Employees Mauritius Private Limited (a vehicle through which the founders and employees would own shares of Devas), and a capital call that Devas made in July 2009. *See* **Ex. R-7**, Articles of Association of Devas Multimedia Private Limited, as amended 29 September 2009, Articles 4-5; **Ex. R-8**, Memorandum of Association of Devas Multimedia Private Limited, as amended 29 September 2009, Clause V.

[42] **Ex. R-9**, Antrix Corporation Limited, *Company Overview*.

[43] **Ex. R-1**, Devas Contract, Annexure I, Definitions of "Governmental or Regulatory Authority" and "Regulatory Approval."

> However the cost of obtaining such approvals shall be borne by DEVAS.[44]

19. Under the Devas Contract, Devas was to pay an "Upfront Capacity Reservation Fee" prior to the launch of each satellite and lease fees thereafter.[45] The Upfront Capacity Reservation Fee was to be US$20 million per satellite.

20. The Devas Contract contained a comprehensive set of provisions allocating risks and responsibilities in the event that the Regulatory Approvals required for full implementation of the project were denied. It also set forth the rights and obligations of the parties upon termination of the Devas Contract. Article 7 of the Devas Contract reads in its entirety as follows:

> Article 7. Termination
>
> a. Termination for convenience by DEVAS
>
> DEVAS may terminate this Agreement in the event DEVAS is unable to get and retain the Regulatory Approvals required to provide the Devas Services on or before the completion of the Pre Shipment Review of PS1. In the event of such termination, DEVAS shall forfeit the Upfront Capacity Reservation Fees made to ANTRIX and any service or other taxes paid by DEVAS and those outstanding to be paid to ANTRIX till such date. Upon such termination, neither Party shall have any further obligation to the other Party under this Agreement.

[44] *Id.*, Article 3(c). Claimant repeatedly argues that the 2 February 2006 letter from Antrix established that all Government approvals had been obtained by that date, even though Claimant's own documents show the contrary. **Ex. C-8**, Letter from Antrix to Devas, 2 February 2006; Claimant's Memorial, ¶¶ 7, 74-78. The 2 February 2006 letter refers to authorisation to build, launch and lease the satellite, not the orbital slot required to be obtained by Antrix or the WPC Operating Licence required to be obtained by Devas. **Ex. C-126**, Devas Multimedia Pvt. Ltd., *Presentation to K. Radhakrishnan, Chairman, ISRO & Antrix, Secretary, Department of Space,* 4 February 2010, slide 13; **Ex. R-10**, Devas Multimedia Pvt. Ltd., *Presentation to Director, SCNP, ISRO*, 21 April 2010, slide 31. *See* n. 234, *infra*. As for the indispensable WPC Operating Licence, Claimant acknowledges that it was required, that Claimant never even reached the stage of applying for it, and that Claimant had no "contractual right" or "concrete assurance" that it would be granted. Claimant's Memorial, ¶¶ 82, 319(c), 320.

[45] **Ex. R-1**, Devas Contract, Articles 3(b), 4(a) and Exhibit B, Articles 1.2.1, 1.2.2, 2.1.1, 2.1.2.A, 2.1.2.B.

b. Termination by DEVAS for fault of ANTRIX

DEVAS may terminate this Agreement at any time if ANTRIX is in material breach of any provisions of this Agreement and ANTRIX has failed to cure the breach within three months after receiving notice from DEVAS setting out the nature of breach and reasons for considering the same as material breach. In such event, ANTRIX shall immediately reimburse DEVAS all the Upfront Capacity Reservation Fees and corresponding taxes if applicable, received by ANTRIX till that date. Upon such termination, neither Party shall have any further obligation to the other Party under this Agreement nor be liable to pay any sum as compensation or damages (by whatever name called).

c. Termination for convenience by ANTRIX

ANTRIX may terminate this Agreement in the event ANTRIX is unable to obtain the necessary frequency and orbital slot coordination required for operating PS1 on or before the completion of the Pre Shipment Review of the PS1. In the event of such termination, ANTRIX shall immediately reimburse DEVAS all the Upfront Capacity Reservation Fees and corresponding service taxes received by ANTRIX till that date. Upon such termination, neither Party shall have any further obligation to the other Party under this Agreement nor be liable to pay any sum as compensation or damages (by whatever name called).

d. Termination by ANTRIX for fault of DEVAS

ANTRIX may terminate this Agreement at any time if:

i. DEVAS is in material breach of any provisions of this Agreement and DEVAS has failed to cure the breach within three months after receiving notice from ANTRIX regarding such breach or,

ii. Non payment of (a) the Lease Fees and other charges (such as spectrum monitoring charges) by DEVAS for a continued period of twelve (12) months, or if such accumulated delays from recurrent non payments exceed 60 (sixty) months, whichever occurs earlier or, (b) Upfront Capacity Reservation Fees, already due

iii. In the event that:

a. A liquidator trustee or a bankruptcy receiver or the like is appointed by a competent court and such appointment remains un-stayed or un-vacated for a period of 90 (ninety)

days after the date of such order by a competent court in respect of DEVAS, or

b. If a receiver or manager is appointed by a competent court in respect of all or a substantial part of the assets of DEVAS and such appointment remains un-stayed or un-vacated for a period of 90 (ninety) days after the date of such appointment, or

c. If all or a substantial part of the assets of DEVAS have been finally confiscated by action of any Governmental Authority, against which no appeal or judicial redress lies.

It is expressly agreed that ANTRIX shall have no right to terminate this Agreement if DEVAS enters into any scheme or arrangement with its creditors, a corporate re-organization or restructuring of its debt and liabilities as long as DEVAS continues to make the Annual Lease Payments to ANTRIX.

In the event of such termination, DEVAS shall forfeit the Upfront Capacity Reservation Fees made to ANTRIX and DEVAS shall be liable to pay any outstanding dues to be paid to ANTRIX by DEVAS. Upon such termination, neither Party shall have any further obligation to the other Party under this Agreement nor be liable to pay any sum as compensation or damages (by whatever name called).

e. Termination under Special Circumstances

In the event of two successive Launch Failures of PS1 by ANTRIX, DEVAS shall have the option, exercisable in its sole discretion, to (a) either terminate this Agreement, in which event ANTRIX agrees to immediately reimburse DEVAS all the Upfront Capacity Reservation Fees for PS1 received by ANTRIX till that date, and after that, neither Party shall have any further obligation to the other Party under this Agreement, or (b) forego the refund of the Upfront Capacity Reservation Fees and service taxes and request ANTRIX to launch a satellite within 24 months of the exercise of this option, based on mutually agreed-upon terms.

f. General Provisions

Termination of this Agreement for any reason whatsoever, shall not extinguish the rights and obligations of Parties under clauses related to Arbitration (Article 20), Confidentiality (Article 18) and obligations related to refund/payment of monies that have accrued before termination, and they shall survive termination and or expiry

> of this Agreement for a further period of 5 (five) years or fulfillment of these terms whichever is later.[46]

21. What is apparent from all of these provisions is that termination of the Devas Contract for any reason (other than the inapplicable Article 7(e)) would give rise to one, and only one, consequence, namely, either the retention or the refund of the Upfront Capacity Reservation Fees paid by Devas to Antrix. In the event of termination by Devas for failure on its part to obtain approvals or termination by Antrix for material breach by Devas, the Upfront Capacity Reservation Fees paid would be retained by Antrix. In the event of termination by Antrix for failure to obtain approvals or by Devas for material breach by Antrix, Antrix would have to refund to Devas the Upfront Capacity Reservation Fees paid.

22. The Devas Contract's detailed termination provisions, including the limitation of liability in the event of termination, were heavily negotiated. Indeed, it is quite remarkable that Claimant purported to provide a "Factual Background to the Dispute" setting forth a comprehensive history of this matter without any discussion of the clear negotiating and drafting history of the Devas Contract itself.[47] The reason is

[46] *Id.*, Article 7.

[47] Neither Mr. Viswanathan, Devas' CEO and chief negotiator, nor any of the other fact witnesses of the Mauritius Shareholders could deal with the negotiating history in the Mauritius Shareholders Arbitration. *See* **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 262, 270 (Viswanathan Testimony: "MR VISWANATHAN: I don't recollect the details of these exchanges. . . . I don't recollect the negotiating history."), 343 (Singh Testimony: "MR KAHALE: So you can't shed any light about those termination provisions? MR SINGH: I cannot shed any light. That is correct."), 369 (Gupta Testimony: "MR KAHALE: Do you have a recollection of reading article 7 before this afternoon? MR GUPTA: Yes, I do. MR KAHALE: And when was that? . . . MR GUPTA: I read it last night."), 449 (Babbio Testimony: "MR KAHALE: So you can't shed any light on those points? MR BABBIO: Not on the negotiating history I cannot. MR KAHALE: Is there anybody in Devas that can shed light on those points that you know of? MR BABBIO: I'm afraid you would have to ask those folks who were involved in those specific - MR KAHALE: We did."), 466 (Chandrasekhar Testimony: "MR PREZIOSI: Besides Mr Viswanathan, who else was involved from the Devas side in the negotiations? MR CHANDRASEKHAR: Primarily Ram Viswanathan is one I know."), 544 (Venugopal Testimony: "MR VENUGOPAL: I was not generally involved with the negotiation of the contract."). At the hearing in the Mauritius Shareholders Arbitration, counsel for the Mauritius Shareholders took pains to attempt to persuade the tribunal to ignore the negotiating history, presumably knowing full well that it eviscerated their position. *See id.*, pp. 105 (Claimants' Opening: "In fact, we must persuade the Tribunal not to look at any precontract documents."), 113-114, 1243-1253.

apparent from a review of the term sheets presented by Devas, which include provisions that Devas hoped to obtain but that are a far cry from what it actually obtained in the negotiations.[48]

23. The negotiating history shows that both parties went into the Devas Contract with eyes wide open, fully understanding the identity of their counterparty and fully understanding that implementation of the Devas project was subject to Government approvals which the Government had no commitment to provide. Devas originally requested that ISRO, which is an integral part of the DOS and therefore an integral part of the Government, be a party to the Devas Contract, but that request was denied and the Devas Contract was entered into with Antrix alone.[49]

24. The negotiating history of the Devas Contract also makes clear that Devas had originally sought to place upon ISRO (and subsequently Antrix, when Devas was informed that Antrix would be the contracting party) the burden of obtaining the critical WPC Operating Licence, but that request was also flatly rejected.[50] Antrix agreed to

[48] *Id.*, pp. 112-114.

[49] **Ex. R-11**, Draft of Binding Term Sheet received on or about 12 September 2004, Section 1.1; **Ex. R-12**, E-mail from ISRO to Devas, 14 September 2004, with attachment, Section 1.1.

[50] **Ex. R-11**, Draft of Binding Term Sheet received on or about 12 September 2004, Section 1.5.1(c); **Ex. R-13**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, with attachment, Section 1.5.1(c). While those term sheets recognised that Devas was to obtain the operating licence that would be required (**Ex. R-11**, Draft of Binding Term Sheet received on or about 12 September 2004, Section 1.5.1(d); **Ex. R-13**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, with attachment, Section 1.5.1(d)), they provided that the "frequency allocation," for which ISRO (subsequently Antrix) would be required to obtain clearances, licenses, and other such approvals under Section 1.5.1(c), was "inclusive of terrestrial augmentation." **Ex. R-11**, Draft of Binding Term Sheet received on or about 12 September 2004, Section 1.3.2; **Ex. R-13**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, with attachment, Section 1.3.2. Thus, under the provisions of the term sheets proposed by Devas, the risk of not obtaining a licence due to lack of governmental approval for the use of spectrum for space or terrestrial services fell on ISRO, not Devas, and was a risk for which ISRO would bear exposure to liquidated damages. That proposed allocation of responsibilities for obtaining licences and approvals was rejected.

provide "appropriate technical assistance" on "a best effort basis" to Devas, and it fulfilled that commitment.[51]

25. With respect to termination, the first "binding term sheet" proposed by Devas provided that "ISRO shall not be entitled to terminate this Binding Term Sheet or the Definitive Agreements, except for non-payment of fees by DEVAS,"[52] thereby precluding termination by ISRO for any other breach by Devas or the inability of ISRO to obtain the necessary orbital slot or frequency coordination for the satellites, or other governmental action that would prevent performance of the Devas Contract.[53] Devas then proposed a series of provisions that would have obligated ISRO to pay significant liquidated damages, in addition to refunding amounts that may have been paid by Devas to ISRO, in case of termination for any reason other than Devas' non-payment of fees. Section 2.7 of the term sheet provided as follows:

> 2. In the event that ISRO terminates the Definitive Agreement for any other reason following signature of Definitive Agreements and prior to DEVAS raising its institutional financing, ISRO shall refund to DEVAS all the amounts paid by DEVAS to ISRO for any reason whatsoever, plus liquidated damages of INR 460 million for investment in the business and related losses including but not limited to investments, capital raising costs, lost business opportunities, reputation loss, penalties, development costs, mobile receiver and terrestrial repeater development, infrastructure costs, severances, and vendor and dealer negotiation costs[.]
>
> 3. In the event that ISRO terminates the Definitive Agreement for any other reason following signature of Definitive Agreements and after DEVAS has raised its first institutional round of funding, ISRO shall refund to DEVAS

[51] **Ex. R-1**, Devas Contract, Article 3(c); **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 274-275, 477, 511-512.

[52] **Ex. R-11**, Draft of Binding Term Sheet received on or about 12 September 2004, Section 2.7.1.

[53] The term sheet contained no *force majeure* provision.

> all the amounts paid by DEVAS to ISRO for any reason whatsoever, plus liquidated damages of INR 6.9 billion for investment in the business and related losses including but not limited to investments, capital raising costs[,] lost business opportunities, reputation loss, penalties, development costs, mobile receiver and terrestrial repeater development, infrastructure costs, severances, and vendor and dealer negotiation costs.[54]

26. The term sheet also permitted Devas to terminate and recover liquidated damages in the amount of INR 6.9 billion in certain other circumstances, including the withdrawal by the Government of approvals and licences, which included "ITU (International Telecommunication Union) coordinated orbital slot, frequency allocation and related approvals."[55] Subparagraph 5 of Section 2.7 of the term sheet provided:

> DEVAS may terminate this binding Term Sheet or Definitive Agreements for cause, which shall include failure of ISRO to meet its obligations, or breach of Agreement, or withdrawal of approvals and licenses by ISRO or the Government of India. In the event of such termination, DEVAS shall be entitled to a refund of all the amounts paid by DEVAS to ISRO for any reason whatsoever plus liquidated damages of INR 6.9 billion for investment in the business and related losses, including but not limited to investments, capital raising costs, lost business opportunities, reputation loss, penalties, development costs, mobile receiver and terrestrial repeater development, infrastructure costs, severances, and vendor and dealer negotiation costs.[56]

27. Devas' proposed binding term sheet was rejected as being "extremely one sided and highly demanding."[57] But except for agreeing that ISRO would not be a party to the Devas Contract and that the counterparty would be exclusively Antrix, Devas

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[54] *Id.*, Sections 2.7.2-2.7.3 (emphasis added). At the prevailing exchange rate on 20 September 2004 of US$1 = INR 45.74, the liquidated damages figures amounted to approximately US$10 million (in subparagraph 2) and US$150 million (in subparagraph 3). **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 256-257, 1221. These amounts were on top of the refund of the fees paid by Devas.

[55] **Ex. R-11**, Draft of Binding Term Sheet received on or about 12 September 2004, Sections 1.5.1(c), 2.7.5.

[56] *Id.*, Section 2.7.5 (emphasis added).

[57] **Ex. R-14**, E-mail from ISRO to Devas, 20 September 2004, with attachment.

continued to insist on the onerous provisions regarding termination, together with the high liquidated damages clauses in its next proposed "binding term sheet."[58]

28. Neither term sheet was ever executed. Instead, the parties proceeded to the negotiation of the Devas Contract itself. The result was Article 7, which provided for a single remedy – either retention by Antrix of the Upfront Capacity Reservation Fees or their refund to Devas – in the event of termination for any reason, whether for breach by one or the other of the parties (Articles 7(b) and 7(d)) or due to non-approval by the Government of a matter for which one of the parties was responsible (Articles 7(a) and 7(c)) or otherwise (Article 7(f)). The liquidated damages that Devas sought to impose in its one-sided term sheet – to cover its "investment in the business and related losses including but not limited to investments, capital raising costs, lost business opportunities, reputation loss, penalties, development costs, mobile receiver and terrestrial repeater development, infrastructure costs, severances, and vendor and dealer negotiation costs"[59] – were substituted by the Upfront Capacity Reservation Fees.

29. The drafts of the Devas Contract immediately prior to the executed version are particularly telling in this regard. The draft proposed by Devas on 6 December 2004 contained a provision stating:

> In the case of material breach, in addition to termination and refund of fees, the terminating party reserves the customary rights and remedies provided by Indian law against the defaulting party.[60]

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[58] **Ex. R-13**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, with attachment.

[59] *Id.*, Sections 2.7.2-2.7.3.

[60] **Ex. R-15**, E-mail from Devas to Antrix and ISRO, 6 December 2004, with attachment, Draft Contract, Article 7(6).

30. Antrix reviewed the proposed draft and submitted a revised draft on 13 December 2004, in which the provision reserving the right of the terminating party to seek damages beyond the remedies specifically provided for in the termination clause was deleted.[61] In the end, after extensive negotiation, the parties agreed to the consequences of termination spelled out clearly in Article 7, namely, that with the exception of the retention or refund of the Upfront Capacity Reservation Fees, "neither Party shall have any further obligation to the other Party under this Agreement nor be liable to pay any sum as compensation or damages (by whatever name called)."[62]

31. Also in contrast to Devas' proposed binding term sheets, the Devas Contract contained a *force majeure* clause, which provided that neither party "shall be liable for any failure or delay in performance of its obligations hereunder if such failure or delay is due to Force Majeure as defined in this Article."[63] The clause defined "Force Majeure Event" to include "acts of or failure to act by any governmental authority acting in its sovereign capacity."[64] That included the Government of India, which had the power to take action to prevent the performance by either or both of the parties to the Devas Contract. In his testimony in the Mauritius Shareholders Arbitration, Mr. Viswanathan left no doubt that sovereign acts of the Government of India were encompassed within the scope of the *force majeure* clause of the Devas Contract.[65]

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[61] **Ex. R-16**, E-mail from Antrix to Forge Advisors, 13 December 2004, with attachment, Draft Contract, Article 7(6).

[62] **Ex. R-1**, Devas Contract, Article 7.

[63] *Id.*, Article 11(a).

[64] *Id.*, Article 11(b)(v).

[65] **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 209 ("MR KAHALE: Now, is there any dispute in this case that acts of a government include the Government of India? MR VISWANATHAN: I presume it includes the Government of India obviously."), 288-289.

32. With respect to the governing law, Article 19 of the Devas Contract provided: "This Agreement and the rights and responsibilities of the Parties hereunder, shall be subject to and construed in accordance with the Laws of India."[66]

B. The Strategic Requirements for S-band Capacity and the Decision of the Cabinet Committee on Security

33. The S-band is a scarce and highly desirable spectrum because its frequencies have low attenuation (*i.e.*, the signal does not fade). The signal can be sent and received by small units, such as mobile phones and laptop computers, without requiring the antenna on such units to be pointed directly at the satellite. In other words, the signal can be picked up with small omni-directional antennae.[67]

34. At the time the Devas Contract was entered into, India had been allocated a total of 190 MHz of capacity by the ITU in the portion of the S-band encompassing frequencies between 2500 MHz and 2690 MHz. Of that 190 MHz, 110 MHz (in frequencies 2500-2555 MHz for uplink, *i.e.*, earth-to-space transmissions, and 2635-2690 MHz for downlink, *i.e.*, space-to-earth transmissions) were allocated for mobile satellite services ("MSS"), which are services that permit two-way communications. India allocated the remainder, in frequencies 2555-2635 MHz, for downlink only, and only for broadcast satellite services ("BSS") (*i.e.*, the transmission of one-way signals, from the satellite to earth, to multiple recipients, all of which can receive the signals provided that they have the necessary antenna).

[66] **Ex. R-1**, Devas Contract, Article 19. Article 11 of the German Treaty also states: "All investments shall, subject to this agreement, be governed by the laws in force in the territory of the Contracting Party in which such investments are made." **Ex. C-1**, German Treaty, Article 11.

[67] The only potential substitute for the S-band is the L-band, which is not available to India.

35. In the early 2000s, years prior to the execution of the Devas Contract, 40 MHz of the S-MSS capacity (frequency ranges 2535-2555 MHz and 2635-2655 MHz) were assigned by the Government to the DOT for use in the terrestrial telecommunications industry, leaving the DOS with only 80 MHz of S-BSS and 70 MHz of S-MSS satellite capacity.[68] Devas intended to use 70 MHz of that capacity to deliver the Devas Services *via* satellite.

36. India's military and paramilitary agencies also had demands for satellite capacity in S-band for non-commercial purposes, starting around the time that the Devas Contract was executed but then growing substantially as the need for satellite capacity for defence and security purposes expanded with technological advances.[69] Unlike Claimant's position on this point, which consists of rank speculation and assumes that the national security issue in this case is "contrived," Respondent's position is based on a record of indisputable facts, including the following:

- In April 2004, naval headquarters ordered a satellite dedicated for naval use, stressing the importance of "reliable, secure, real time and uninterrupted tactical as well as strategic communications."[70] The requested satellite, using 8 MHZ, was finally launched in 2013.[71]
- On 7 January 2005, *The Times of India* reported the head of the India Air Force as stating: "Space is fast becoming vital in all military operations. Though space-based laser and other orbiting weapons still belong to the realm of cinematic fantasy, satellites are now increasingly being used for military communications, tracking enemy forces and precision guiding of 'smart bombs'."[72]

[68] Direct Testimony of K. Sethuraman, Director, Indian Space Research Organisation, dated 12 February 2015 ("Sethuraman Witness Statement"), **Annex 2**, ¶ 3.

[69] Anand Witness Statement, **Annex 1**, ¶¶ 5-6.

[70] *Id.*, App. VA-1, Directorate of Naval Signals, *Draft Naval Staff Qualitative Requirements for Naval Communications Satellite*, 5 April 2004, ¶ 11.

[71] Anand Witness Statement, **Annex 1**, ¶ 6 and n. 7.

[72] **Ex. R-17**, Rajat Pandit, *IAF Is Keen on Aerospace Command, Says New Chief*, TIMES OF INDIA, 7 January 2005.

- In October 2005, a Note by a senior military officer outlined the importance of relying on space technology for defence, particularly starting in 2008, when a new plan would enter in place:[73] "Space Systems are beginning to become an integral component of the total combat potential of many nations. It is but imperative that our Defence Forces do not lack in the exploitation of Space for War fighting. Till 2008 Indian Space capability and programmes have been defined and there is no alternative but to exploit available assets except for minor up gradations where feasible, during this time frame. However, beyond that period our Defence Forces should be able to examine and specify the needs to enable our technologists to support our requirements. Space capabilities are vital tools of the Information Revolution and critical to activities of the Defence Forces. Space is emerging as a centre of gravity for information dependent forces and it is highly probable that continued and assured access to Space will be a major determinant of national power."[74] This Note projected the bandwidth requirements of the Army, Navy and Air Force through 2010, 2015 and 2020. With respect to S-band, the projected needs were for 86 MHz by 2010, 151 MHz by 2015 and 208 MHz by 2020.[75]

- In February 2006, military leaders met with the DOS to address the projected S-band capacity required for the Defence Space Vision through 2020.[76] In his introductory remarks, the Chairman of the military task force "expressed a genuine concern at the rapid build up of Chinese Space Programme," noting that "[t]here is a need to take cognisance of this at the stage to identify & develop our Space programme to effectively combat this proliferation."[77] He also stated that "there is inescapable necessity for continue of S-band [*sic*]. The total BW contemplated for S-band would be 86 MHz – 151 MHz – 208 MHz for short, medium & long term respectively (extract from DSV-2020)."[78]

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[73] The Government of India's national planning is conducted for five-year periods. The tenth plan period ran from the end of 2002 through the end of 2007, the eleventh plan period thereafter, through 2012, and so on. Anand Witness Statement, **Annex 1**, n. 8.

[74] Anand Witness Statement, **Annex 1**, App. VA-2, HQ Integrated Defence Staff, Note, 14 October 2005, ¶ 1. The Note further referred to the development of a Defence Space Vision, which "would be the Base Document for formulating the Space Strategy and Space Doctrine for the Armed Forces." Anand Witness Statement, **Annex 1**, ¶ 4.

[75] Anand Witness Statement, **Annex 1**, App. VA-2, HQ Integrated Defence Staff, Note, 14 October 2005, Appendix H.

[76] Anand Witness Statement, **Annex 1**, App. VA-3, Minutes of Third Task Force Meeting with DOS held on 21 February 2006 at HQ IDS New Delhi, 6 March 2006.

[77] *Id.*, ¶ 4.

[78] *Id.*, ¶ 14 (emphasis added).

- In August 2006, another Note from a senior military officer advised the DOT to block bandwidth in several orbital slots, including S band: "Refer to the Bandwidth Projections of Service HQs for satellite communications given in DSV 2020 (. . . dated Oct 14 05), copy enclosed. It is requested that the matter be taken up Deptt of Telecommunications for blocking the bandwidth in S, C, Ku, Ka and UHF Bands for satellite communications by three services as per requirements envisaged in DSV 2020."[79]

- In March 2007, the MOD advised the DOS of the particularly critical S-band requirements of the Army, stating that 60 MHz would be needed by 2010, an additional 15 MHz would be required by 2015 and an additional 45 MHz would be required by 2020 and adding that "it is evident that the present series of INSAT and GSAT cannot meet Army's [futuristic] requirements of bandwidth."[80]

- In August 2007, India's military leaders constituted an expert committee on S-band to assure adequate access in the national interest as opposed to commercial usages.[81]

- In September 2007, a report issued by the Expert Committee on Spectrum and Satellite Uses of Frequency Band 2.5 to 2.69 GHz (S-band) by Defence Services stated: "Satellite services (MSS and BSS) in this band [S-band] cannot coexist with the terrestrial services and hence the spectrum cannot be shared with terrestrial services like IMT or WIMAX. If the spectrum is not safeguarded against the bid by the commercial operators in India, this spectrum will not be available for any future utilization for the military applications. If this spectrum (2.5 – 2.69 GHz) is lost to commercial operators, it would severely jeopardize

[79] Anand Witness Statement, **Annex 1**, App. VA-4, HQ Integrated Defence Staff Ops Branch/IW & IT Dte, Note, *Bandwidth Requirements – Satellite Commn*, 9 August 2006 (emphasis added). The "three services" were the Army, Navy and Air Force.

[80] Anand Witness Statement, **Annex 1**, App. VA-5, Minutes of the Integrated Space Cell Meeting held on 19 February 2007 at HQ IDS, 26 March 2007, ¶ 10. The spectrum requirements also encompassed other bandwidths in which the military was and would be operating.

[81] Anand Witness Statement, **Annex 1**, App. VA-6, HQ Integrated Defence Staff, Convening Order, *Constitution of Expert Committee on Spectrum and Satellite Uses of Frequency Band 2.5 GHz to 2.69 GHz (S-band) by Defence Services*, 30 August 2007. Among other things, this document addressed the upcoming ITU World Radiocommunication Conference (the "WRC") scheduled for October 2007, a conference where the representatives of the Government of India opposed limitations on the allowable power for satellites using S-band. Claimant's Memorial, n. 97; Witness Statement of Ramachandran Viswanathan, 2 October 2014 ("Viswanathan Witness Statement"), ¶¶ 42-43. Claimant finds significance in this fact, but India, along with a number of other nations that use S-band, has been opposing limitations on power for S-band satellites since the issue was first raised, prior to the time the Devas Contract was executed. India's intention was to protect its ability to continue using high-powered satellites to preserve the clarity of the signal for its strategic and societal needs. Sethuraman Witness Statement, **Annex 2**, ¶ 27.

the future Defence services plans of providing mobile SATCOM connectivity. . . . [I]t is strongly recommended that the 'S' band Spectrum be safeguarded from being poached by the commercial operators for meeting the future requirements of the Defence Services. . . . The non availability of the Spectrum could stymie the future operational plans of the Defence services."[82]

- In November 2008, a special meeting was held between senior military leaders and ISRO to address issues relating to satellite-based communication. The minutes of that meeting state: "The requirement of 'S' band carriers by the Army was spelt out by the Chairman. Dr. A Bhaskaranarayana stated that the scarce 'S' band spectrum should be optimally utilized. . . . He proposed that [the military] consolidate the requirement of 'S' band for various services, to enable optimal utilization by way of the dedicated 'S' band specific satellite."[83]

- In May 2009, a task team was established at ISRO to address the needs for dedicated military S-band satellites.[84]

- The requirements were in fact crystallised at a meeting between Integrated Space Cell, Integrated Defence Staff ("IDS"), the MOD and ISRO in December 2009.[85] At this meeting, the Armed Forces set forth their requirements for S-band as follows: "(i) To cater for requirements up to 2012 – 120 Carriers, 17.5 MHz. Out of which 50 Carriers are being used by the Armed Forces. (ii) Additional in 12th Plan – 40 MHz. (iii) Additional in 13th Plan – 50 MHz."[86]

- On 23 April 2010, the Integrated Defence Staff confirmed its requirements for S-band, stating "It is requested that the Satellite Bandwidth requirements of three Services may be factored while allocating/building capacity on existing Satellites/future Satellites."[87]

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[82] Anand Witness Statement, **Annex 1**, App. VA-7, Report of the Expert Committee on Spectrum and Satellite Uses of Frequency Band 2.5 to 2.69 GHz (S-band) by Defence Services, September 2007, ¶¶ 10-12 (emphasis added).

[83] Anand Witness Statement, **Annex 1**, App. VA-8, Minutes of the Special ISC Meeting between Reps of ISRO & Reps of Three Services to Address Satellite Based Communication Related Issues, 25 November 2008, p. 2.

[84] Anand Witness Statement, **Annex 1**, App. VA-9, Office Order from G. Madhavan Nair, Chairman, ISRO/Secretary, Department of Space, *Task Team for Configuring an S-band Communication Satellite for HQ IDS*, 20 May 2009.

[85] Anand Witness Statement, **Annex 1**, App. VA-10, Minutes of Meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO, 25 January 2010.

[86] *Id.*, p. 3.

[87] **Ex. R-18**, Letter from the Ministry of Defence to ISRO/Department of Space, with attachment, 23 April 2010, ¶ 3.

- On or around 7 June 2010, the Secretary of DOS received the Suresh Report, commissioned in late 2009, which warned that the Devas Contract would use up a large portion of available S-band capacity and leave little for strategic needs.[88] The Secretary of DOS immediately put the issue of the Contract on the agenda for the next meeting of the Space Commission, which was scheduled for 2 July 2010.[89] The Space Commission, which "formulates the policies and oversees the implementation of the Indian space programme to promote the development and application of space science and technology for the socio-economic benefit of the country,"[90] was then comprised of: (i) the Secretary of the DOS; (ii) the Minister of State, Prime Minister's Office; (iii) the Cabinet Secretary; (iv) the Principal Secretary to the Prime Minister; (v) the National Security Advisor; (vi) the Principal Scientific Advisor to the Government of India; (vii) the Secretary, Department of Economic Affairs; (viii) the Director, ISRO Satellite Centre; (ix) Finance Member, Space Commission; and (x) a Professor of Aerospace Engineering.[91]

- On 16 June 2010, the Secretary of DOS also consulted with the Ministry of Law and Justice[92] and the DOT[93] in accordance with the

[88] **Ex. R-19**, *Report on GSAT-6*, submitted by B.N. Suresh, Director, Indian Institute of Space and Technology, submitted to Chairman, ISRO / Secretary, Department of Space, May 2010 (the "Suresh Report"), ¶¶ 11 ("Only 10% of [the capacity] is expected to be available for ISRO. This would bring in certain limitations on the availability of spectrum for any essential demands in future."), 14(v) ("Only 10% of the capacity is available for use by ISRO. This would bring in limitations on spectrum availability for essential strategic and social sectors applications in future."), 15(i) ("The utilization of the S-band frequency spectrum allotted for satellite based services to ISRO/DOS for satellite communications is extremely important. Therefore this aspect has to be critically examined considering all usages including GSAT-6 and GSAT-6A by a competent technical team on high priority. The strategic and other essential needs of the country should also be considered."). Claimant finds comfort in the Suresh Report because the report did not accuse Devas of wrongdoing, which is irrelevant to the issues in this case. *See* ¶ 45, *infra*.

[89] **Ex. R-20**, Letter from B.N. Suresh, ISRO, to K. Radhakrishnan, ISRO, 7 June 2010 (handwritten instructions at bottom of letter). Claimant speculates that Dr. Radhakrishnan took steps to cancel the Devas Contract because of two newspaper articles on 31 May and 1 June 2010, which said that the spectrum should be put up for auction. **Ex. C-24**, Madhumathi D.S., *Devas gets preferential allocation of ISRO's spectrum*, THE HINDU BUSINESS LINE, 31 May 2010; *id.*, *Another spectrum sold on the quiet*, THE HINDU BUSINESS LINE, 1 June 2010; Claimant's Memorial, ¶¶ 145-147. But the evidence shows that he instructed that the Devas Contract be put on the Space Commission's agenda on 10 June 2010, immediately after receiving the Suresh Report on 7 June 2010, which warned that there was limited capacity available in S-band for strategic requirements and that such strategic requirements had to be considered. *See* **Ex. R-20**, Letter from B.N. Suresh, ISRO, to K. Radhakrishnan, ISRO, 7 June 2010 (handwritten instructions at bottom of letter); **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 1064 ("MR KAHALE: Did those articles have any impact on anything that you did in terms of decision making or participating in decisions at DOS? MR ANAND: It had no impact."), 1065-1067.

[90] **Ex. R-21**, Indian Space Research Organisation, *About ISRO*.

[91] Anand Witness Statement, **Annex 1**, ¶ 18.

[92] **Ex. R-22**, Memo from the Department of Space to the Ministry of Law and Justice, 16 June 2010.

[93] **Ex. R-23**, Memo from the Department of Space to the Department of Telecommunications, 16 June 2010.

Government's Transaction of Business Rules.[94] In an opinion dated 18 June 2010, the Ministry of Law and Justice stated: "The Central Government under its sovereign functions is duty bound to take care of its strategic needs in respect of various forces like BSF [Border Security Force], CISF [Central Industrial Security Force], CRPF [Central Reserve Police Force], RPF [Railway Protection Force] etc. any commercial activity can not override to [*sic*] sovereign function. The Central Government/ISRO is not duty bound to provide orbit slot to ANTRIX for commercial activities, especially when there is strategic requirements."[95] The DOT subsequently advised that the spectrum planned by DOS was dedicated for strategic use and "not to be shared with commercial applications."[96]

- On 30 June 2010, the Additional Secretary of DOS prepared a Note to the Space Commission, making reference to the December 2009 meeting between Integrated Space Cell, IDS, the MOD and ISRO to consolidate the defence needs and listing the strategic requirements for S-band.[97]

- At its 117th Meeting on 2 July 2010, the Space Commission considered the issue in detail.[98] The minutes of the meeting state:

[94] Anand Witness Statement, **Annex 1**, ¶ 14. *See* **Ex. R-24**, The Government of India (Transaction of Business) Rules, 14 January 1961, Complete Transaction of Business up to Amendment Series No. 64, as amended 10 June 2013, Article 4 ("Inter-Departmental Consultations.– When the subject of a case concerns more than one department, no decision be taken or order issued until all such departments have concurred, or, failing such concurrence, a decision thereon has been taken by or under the authority of the Cabinet. Explanation – Every case in which a decision, if taken in one Department, is likely to affect the transaction of business allotted to another department, shall be deemed to be a case the subject of which concerns more than one department."); **Ex. R-22**, Memo from the Department of Space to the Ministry of Law and Justice, 16 June 2010; **Ex. R-23**, Memo from the Department of Space to the Department of Telecommunications, 16 June 2010.

[95] Anand Witness Statement, **Annex 1**, App. VA-18, Note from T. K. Viswanathan, Advisor to the Minister for Law and Justice, Ministry of Law and Justice, to the Department of Space, 18 June 2010, ¶ 11. The Ministry of Law and Justice added that "the Central Government (Department of Space) in exercise of its sovereign power and function, if so desire and feel appropriate, may take a policy decision to the effect that due to the needs of strategic requirements, the Central Govt/ISRO would not be able to provide orbit slot in S band for operating PS1 to the ANTRIX for commercial activities. In that event, ANTRIX in terms of Article 7 (c) read with Article 11, of the agreement may terminate the agreement and inform M/s DEVAS accordingly. However on such termination ANTRIX shall be required to reimburse DEVAS all the Upfront Capacity Reservation Fees and corresponding service taxes received by ANTRIX till that date." *Id.*, ¶¶ 11-12.

[96] Anand Witness Statement, **Annex 1**, App. VA-19, Memorandum from P. J. Thomas, Secretary, WPC Wing, to Secretary, Department of Space, 6 July 2010, ¶ 2(i). It added that, in any event, any terrestrial use of spectrum would be subject to auction in accordance with the recommendations of the Telecom Regulatory Authority of India. *Id.*, ¶ 2(v), (vi).

[97] **Ex. R-25**, Department of Space, Note to the Space Commission, *GSAT-6/6A – Contract between M/s. Antrix Corporation Limited (ACL) and M/s. DEVAS Multimedia Pvt. Ltd.*, signed 2 July 2010, ¶¶ 8.1-8.4.

[98] *See id. See also* Anand Witness Statement, **Annex 1**, ¶¶ 18-20.

> "Focusing on the issue, Chairman stated that ISRO holds, in S band spectrum, 80 MHz in BSS and 70 MHz in MSS. The Antrix-Devas lease agreement on GSAT-6 and 6A would take away 70 MHz of the total S band spectrum available. Shri Shivshankar Menon, NSA [National Security Advisor] stated that S band spectrum is crucial for several strategic and societal services. The Integrated Space Cell of IDS, Ministry of Defence have projected a need for 17.5 MHz in S band for meeting the immediate requirements of Armed Forces, another 40 MHz during the 12th plan period and an additional 50 MHz during the 13th plan period. Armed Forces have also projected the need to build S band satellite capacity . . . for national security related mobile communications. There are further demands for S band transponders from internal security agencies viz., BSF, CISF, CRPF, Coast Guard and Police for meeting their secured communication needs. Indian Railways have also projected S band requirements for train-tracking. Commission noted that, in view of these emerging requirements, there is an imminent need to preserve the S band spectrum for vital strategic and societal applications. . . . It was noted that Space spectrum is a vital national resource and it is of utmost importance to preserve it for emerging national applications for Strategic uses and societal applications. Given the limited availability of S band spectrum, meeting the strategic and societal needs is of higher priority than commercial/entertainment sectors."[99]

- The Secretary of DOS was instructed by the Space Commission to consult with the Additional Solicitor General, who recommended that the matter be brought to the Cabinet. The Additional Solicitor General made clear that "S band spectrum is crucial for several strategic and societal services. . . . It is noticed that when the agreement was entered into between Antrix and Devas, way back in the year 2005, the circumstance was vastly different than what it is today. The governmental policies with regard to allocation of satellite spectrum ha[ve] undergone a sea change and there has been a tremendous demand for allocation of spectrum for national needs, including for the needs of the Defence, para-military forces, railways and other public utility services as well as for societal needs."[100]

- The Secretary of DOS then instructed that a Note be prepared on the matter for the Cabinet Committee on Security, the highest authority in India entrusted with national security matters.[101] The Cabinet

[99] **Ex. R-26**, Minutes of 117th Meeting of the Space Commission held at DOS Branch Secretariat, New Delhi, on 2 July 2010, signed 21 July 2010, ¶¶ 117.6.2-117.6.4, 117.6.6 (emphasis added). *See also* Anand Witness Statement, **Annex 1**, ¶¶ 18-20.

[100] **Ex. R-27**, Opinion of Mohan Parasaran, Additional Solicitor General of India, to Secretary, Department of Space, 12 July 2010, pp. 1, 4. *See also* Anand Witness Statement, **Annex 1**, ¶ 21.

[101] Anand Witness Statement, **Annex 1**, ¶ 22.

Committee on Security is comprised of the Prime Minister, the Minister of Defence, the Minister of Home Affairs, the Minister of External Affairs and the Minister of Finance, and is the appropriate governmental body to address a policy decision of this nature. The functions of the Cabinet Committee on Security include, *inter alia*: "(i) to deal with all Defence related issues; (ii) to deal with issues relating to law and order, and internal security; (iii) to deal with policy matters concerning foreign affairs that have internal or external security implications including cases relating to agreements with other countries on security related issues; (iv) to deal with economic and political issues impinging on national security."[102]

- The Note to the Cabinet Committee on Security reiterated the defence needs and concluded that "there is an imminent need to preserve the S band spectrum for vital strategic and societal applications."[103] It included the inputs from various concerned Ministries, including the MOD, the DOT, the Ministry of Finance, the Ministry of Law and Justice, the Ministry of Home Affairs and the Ministry of External Affairs, again in accordance with the Government's Transaction of Business Rules, and concluded that "[i]n view of these emerging requirements, there is an imminent need to preserve the S band spectrum for vital strategic and societal applications."[104]

- As mandated by the Space Commission in its decisions taken at its 2 July 2010 meeting, the Additional Secretary of the DOS, Mr. G. Balachandhran, was also asked to review the Suresh Report and provide comments thereon so that appropriate internal actions could be taken.[105] The Balachandhran Report, which was issued in January 2011, emphasised that the limited spectrum for use by ISRO that was mentioned in the Suresh Report was a "very important point" as it "has implications on . . . nation's strategic and societal requirement," and recommended that the "[s]trategic and other essential needs of the country should be the first priority."[106] The Balachandhran Report went on to confirm as follows: "5.3.2 S-band spectrum required for our

[102] **Ex. R-24**, The Government of India (Transaction of Business) Rules, 14 January 1961, Complete Transaction of Business up to Amendment Series No. 64, as amended 10 June 2013, First Schedule, Standing Committees of the Cabinet and their Functions, Cabinet Committee on Security, p. 10.

[103] **Ex. R-28**, Department of Space, Note to the Cabinet Committee on Security, *Annulling the "Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft by Devas Multimedia Pvt Ltd.*", 16 February 2011, with attachments, ¶ 34.

[104] *Id.* (emphasis added).

[105] **Ex. R-29**, *Report on Dr. Suresh Committee Report on ANTRIX-DEVAS Agreement & Issues Arising from Therein*, submitted by G. Balachandhran, Additional Secretary, Department of Space, 9 January 2011 (the "Balachandhran Report").

[106] *Id.*, pp. 10, 13-14.

> Defence: S-band spectrum required for our Defence and strategic use and the DEVAS agreement does not leave enough spectrum for ISRO/DOS use if required."[107]

- On 15 February 2011, the MOD commented on the Note to the Cabinet Committee on Security, stating that "[t]he Defence Services have extensive existing as well as planned usages in [S-band]." It concluded that "the bare minimum spectrum requirements" were 120 MHz, including the requirements of Strategic Forces Command.[108]

37. Against the foregoing background, all of which should be well known to Claimant in light of the record in the Antrix Arbitration and the Mauritius Shareholders Arbitration, the Cabinet Committee on Security took the following policy decision:

> Taking note of the fact that Government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix for commercial activities, including for those which are the subject matter of existing contractual obligations for S band.
>
> In the light of this policy of not providing orbit slot in S Band to Antrix for commercial activities, the "Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd." entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith.[109]

38. Claimant does not deny that the Cabinet Committee on Security made the decision to annul the Devas Contract. Rather, Claimant bases its case on the notion that the decision of the Cabinet Committee on Security was "contrived."[110] Claimant's

[107] *Id.*, p. 18 (emphasis added).

[108] **Ex. R-30**, Letter from the Ministry of Defence to the Department of Space, 15 February 2011, with attachments, ¶¶ 2-3 (emphasis added).

[109] **Ex. R-31**, Press Information Bureau, Government of India, *CCS Decides to Annul Antrix-Devas Deal*, 17 February 2011 (emphasis added) (also submitted by Claimant as **Ex. C-31**).

[110] Claimant's Memorial, ¶¶ 17, 259, 288(c), 304(b), 318.

thesis is that the Cabinet Committee on Security was manufacturing governmental concerns out of thin air. But the documents in the record clearly show that virtually the entire Government hierarchy responsible for national security was very concerned about the Devas Contract and was taking the action it considered necessary in the security interest of the nation to preserve valuable and scarce spectrum for non-commercial use by the MOD and other security agencies.[111] There is no basis for Claimant's irresponsible speculation that the members of the Cabinet Committee on Security were not properly carrying out their functions as members of the Cabinet entrusted with the primary responsibility for matters of national security.

39. Pursuant to the decision of the Cabinet Committee on Security, on 23 February 2011, the DOS directed Antrix to notify Devas of the Government's decision regarding the termination of the Devas Contract.[112] Antrix notified Devas on 25 February 2011 that the Devas Contract was terminated.[113] On 15 April 2011, Antrix tendered back to Devas the Upfront Capacity Reservation Fees, which was the exclusive remedy for termination established in Article 7 of the Devas Contract.[114] Rather than accept that tender, which was all that Devas and its shareholders could reasonably have expected to receive in light of the heavily negotiated termination

[111] Claimant says that "India attempts to paint a picture of a 'policy decision taken at the highest levels of the Indian Government, after extensive consultation with the entire national security hierarchy, that the interests of the nation required reservation of S-band for strategic, non-commercial purposes.'" *Id.*, ¶ 258. That is not a picture India attempts to paint; it is what the documents show. Claimant is the party that wants to paint pictures based on newspaper articles and speculation as to motives that are neither consistent with the record nor permissible under the applicable law. *See* ¶¶ 60-64, *infra*.

[112] **Ex. R-32**, Letter from the Department of Space to Antrix, 23 February 2011. *See also* Anand Witness Statement, **Annex 1**, ¶ 23.

[113] **Ex. R-33**, Letter from Antrix to Devas, 25 February 2011 ("The Central Government has communicated that it has taken a policy decision not to provide orbital slot in S-Band to our Company for commercial activities including those which are the subject matter of the existing agreements.").

[114] **Ex. C-34**, Letter from Antrix to Devas, 15 April 2011.

provisions of the Devas Contract,[115] Devas, the Mauritius Shareholders and Claimant decided to return the cheque and seek surrealistic compensation through multiple arbitration proceedings.[116]

C. What Happened to the Satellites

40. The final part of the relevant factual background of this case, not the tale spun in Claimant's Memorial and accompanying witness statements, is what has happened since the decision of the Cabinet Committee on Security. Claimant would have this Tribunal believe – because it is an indispensable part of its legal theory – that the decision was taken to "extricate" Antrix from a "bad deal" for political and commercial reasons under pressure from commercial operators to auction the spectrum.[117] That is a story fabricated to fit a legal theory, but it is not one borne out by the facts. The facts are that Antrix has not contracted, and in accordance with the decision of the Cabinet Committee on Security would not be permitted to contract, with any private party for commercial use of S-band capacity on any terms, regardless of how favourable they may be; nor has any of that satellite capacity been put up for auction.[118]

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[115] *See* ¶¶ 25-30, *supra*.

[116] Notice of Arbitration, 2 September 2013, ¶ 90; Claimant's Memorial, ¶ 210.

[117] Claimant's Memorial, ¶¶ 15, 147, 149-150, 197, 207, 268, 294, 325(b). *See also* Axmann Witness Statement, ¶ 69.

[118] **Ex. R-2**, Mauritius Shareholders Arbitration, Tr., p. 249 ("MR VISWANATHAN: I do not dispute the fact that [S-band is] not being used for commercial purposes."); Sethuraman Witness Statement, ¶ 3 and **Annex 3**, App. KS-14, Report of INSAT Coordination Committee (ICC) Sub-Committee on S-band Utilization Plan, 10 July 2013, p. 10 ("Cabinet Committee on Security (CCS) has acknowledged the need to preserve the S-band spectrum for vital strategic and societal applications."); Anand Witness Statement, ¶ 4 and **Annex 4**, Department of Space, *Report of INSAT Coordination Committee (ICC) Sub-Committee on S-band Utilization Plan*, 10 July 2013.

41. After the decision of the Cabinet Committee on Security, plans were immediately made to reconfigure the satellites for military use.[119] This is evident from the March 2011 meeting of the Space Commission, right after the decision of the Cabinet Committee on Security. The presentation to that Space Commission meeting details the "strategic users" for GSAT-6, including "Defense, Navy & CRPF," as well as the strategic usages of the S-band capacity.[120]

42. The strategic requirements for satellite capacity in S-band have only increased since the decision of the Cabinet Committee on Security.[121] In June 2013, the MOD estimated the total S-band requirements of strategic users at 310.2 MHz, as reflected in the following table:[122]

[119] Anand Witness Statement, ¶ 3; Sethuraman Witness Statement, ¶ 3. *See also* Sethuraman Witness Statement, **Annex 3**, App. KS-11, ISRO/Department of Space, *GSAT-6, Spacecraft Applications, 119th SC Meeting (Report to Agenda Item No. 8)*, March 2011; Sethuraman Witness Statement, **Annex 3**, App. KS-15, Department of Space, Note to Space Commission for the 128th Space Commission Meeting, 28 March 2014; Sethuraman Witness Statement, **Annex 3**, App. KS-17, Minutes of 128th Meeting of Space Commission held on 12 April, 2014 at DOS Branch Secretariat, New Delhi, 16 May 2014; **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 761, 766-767, 838-845.

[120] Sethuraman Witness Statement, **Annex 3**, App. KS-11, ISRO/Department of Space, *GSAT-6, Spacecraft Applications, 119th SC Meeting (Report to Agenda Item No. 8)*, March 2011, pp. 4, 19.

[121] Anand Witness Statement, ¶ 4.

[122] Sethuraman Witness Statement, **Annex 3**, App. KS-14, Report of INSAT Coordination Committee (ICC) Sub-Committee on S-band Utilization Plan, 10 July 2013, Annexure IV, ¶ 1.

a) Strategic Users Requirement

Sl. No.	Users	App	Band with demanded
1	Defence	MSS	140 MHz
2	Defence	BSS	95.2 MHz
3	Railway	BSS & MSS	30 MHz
4	Center Para Military Force	BSS & MSS	15 MHz
5	Fisheries, Disaster Management etc.	BSS & MSS	25 MHz
6	Research & Development, Misc	BSS & MSS	05 MHz
	Total		310.2 MHz

43. On 28 March 2014, in preparation for the 128th Space Commission Meeting, the DOS prepared a Note regarding the revised cost estimates and revised utilisation plan for the GSAT-6 and 6A satellites.[123] The Note stated that the Defence Research and Development Organisation, which works under the MOD, is responsible for the development of the hub station, the ground terminals (for receiving the signals) and the network management system and network resource management, including the associated costs.[124] The Space Commission approved the revised cost estimates and plan at its meeting on 12 April 2014.[125] GSAT-6 is now slated to be launched in the first semester of this year, and is dedicated to strategic use.[126]

[123] Sethuraman Witness Statement, **Annex 3**, ¶ 11.

[124] *Id.*, ¶ 11 and n. 23; Sethuraman Witness Statement, **Annex 3**, App. KS-15, Department of Space, Note to Space Commission for the 128th Space Commission Meeting, 28 March 2014.

[125] Sethuraman Witness Statement, **Annex 3**, App. KS-17, Minutes of 128th Meeting of Space Commission held on 12 April, 2014 at DOS Branch Secretariat, New Delhi, 16 May 2014, ¶ 128.6.

[126] **Ex. R-34**, Madhumathi D.S., *GSAT-6 Slated for March Launch*, THE HINDU, 30 October 2014 ("GSAT-6 . . . is slated for a March 2015 launch. . . . The [ISRO Satellite] Centre cancelled the contract with Devas in February 2011, reserved GSAT-6 for military use."); Anand Witness Statement, ¶ 4 and **Annex 1**, ¶ 24; Sethuraman Witness Statement, ¶ 3.

44. In sum, the entire basis of the claim in this case is belied by the record. The record shows that the Government, through the Cabinet Committee on Security, the body charged with overseeing India's security and defence needs, made a policy decision not to grant orbital slot to Antrix in S-band for any commercial use and to annul the Devas Contract and preserve that capacity for the needs of the MOD and other security agencies. Claimant's labelling of the decision as a "contrivance" does not alter the fact that it was a decision made in the exercise of the Government's sovereign prerogative to address national security concerns.[127]

D. The Irrelevant Facts on Which Claimant Bases Its Claims

45. Unable to deal with the relevant facts outlined above, all of which are established by documents in the record, Claimant has tried to build a treaty claim on the basis of speculation and a series of irrelevancies which do not support a legal claim and actually reinforce Respondent's position on the main issues in this case.[128] Those include the following:

- Claimant says that the report issued by the Shankara Committee in 2004, before the Contract was entered into, found the Devas proposal "attractive."[129] But whether the Shankara Committee in 2004 thought that the proposed Devas project was a good idea has no relevance in this case. The Shankara Committee was not responsible for granting the orbital slot for the satellites to Antrix; nor was it in charge of

[127] Claimant seems to think that the fact that the satellites were not immediately launched has some legal significance. Claimant's Memorial, ¶ 15. But the decision to reserve the S-band capacity and reconfigure the satellites for military use was necessary for national security not just now, but for the foreseeable future. As the documents Claimant has pretended not to know show, the defence needs were broken down into 5-year periods commencing immediately and continuing through 2020. Allowing 70 MHz of S-band to be tied up on a long-term basis by the Devas Contract would severely compromise national security. What was necessary was to prevent that from occurring and to proceed to reconfigure the satellites and put them to military use, which is what has happened.

[128] The Mauritius Shareholders did exactly the same in the Mauritius Shareholders Arbitration. *See* **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 139-146.

[129] Claimant's Memorial, ¶ 49.

national security matters then or at any subsequent time. Whatever the Shankara Committee may have thought about the attractiveness of the proposed Devas Services in 2004 does not change the decision made by the Cabinet Committee on Security in February 2011 in light of the circumstances that had evolved.[130]

- Claimant also takes comfort in the fact that the Suresh Report did not find wrongdoing on the part of Devas.[131] But the fact that the Suresh Report did not indict Devas is not relevant in this case, which is not about criminal liability. The only part of the Suresh Report that is relevant is the part which warns that the Devas Contract "would bring in certain limitations on the availability of spectrum for any essential demands in future" and that it was essential to consider "[t]he strategic and other essential needs of the country."[132] Upon receipt of the Suresh Report, the Secretary of DOS instructed that the Devas Contract be put on the agenda for the upcoming meeting of the Space Commission.[133]

- Claimant notes that both the Shankara Committee and the Suresh Report found that Devas had a technically sound idea.[134] But the governmental authorisations in this case were not denied due to Devas' technical incompetence or inability to deliver services; they were denied because of a policy decision made at the highest levels of the Government to deny orbital slot in S-band to Antrix for any commercial use. That is a matter that has nothing to do with the competence or capacity – technical, financial or otherwise – of Devas and the team its promoters had assembled in preparation for implementation of the Devas project.

- Mr. Viswanathan alleges here, as he did in the Mauritius Shareholders Arbitration and the Antrix Arbitration, that "the Devas team would come to include individuals with over 450 combined years of experience in the satellite industry."[135] But the combined years of experience of the team assembled by Devas are irrelevant to the legal issues in any of

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[130] **Ex. C-59**, *Report of the ISRO/Antrix Committee on Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft to Devas Multimedia Pvt. Ltd. for Delivery of Video, Multimedia and Information Services to Mobile Receivers in Vehicles and Mobile Phones*, 14 May 2004 (the "Shankara Committee Report"), p. 6.

[131] Claimant's Memorial, ¶ 153.

[132] **Ex. R-19**, Suresh Report, ¶¶ 11, 15(i). *See* **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 144-145.

[133] **Ex. R-20**, Letter from B.N. Suresh, ISRO, to K. Radhakrishnan, ISRO, 7 June 2010 (handwritten instructions on bottom of letter); ¶ 36, *supra*.

[134] Claimant's Memorial, ¶ 153.

[135] Viswanathan Witness Statement, ¶ 36.

the three cases, whether it be 450 years or even greater. Once again, the Devas Contract was not annulled because of the lack of experience of Devas, but because of the policy decision taken by the highest body of the Government entrusted with matters of national security, the Cabinet Committee on Security.[136]

- Claimant refers to "the significant benefits that Devas could have brought to India in terms of pan-Indian communication, which the nation still lacks today," and "[t]he public benefit the Devas System would have had in connecting rural communities in India."[137] But the relevant issue is not whether the proposed Devas Services could have brought benefits to India. It is whether the Government was entitled to take its policy decision in the interests of national security, and whether Claimant's view of what would be beneficial for India should prevail over the Government's view.

- Claimant points out that India's space authorities showed "enthusiasm" during a meeting, and even provides photographs taken by one of its witnesses at a dinner party.[138] However, friendly and polite gestures on the part of various Government officials do not override the authority of the appropriate policy-making bodies to take sovereign decisions; nor do they constitute legal commitments to refrain from exercising sovereign authority. Dinner parties are not the equivalent of binding concession agreements or stabilisation clauses.

- Claimant notes that at the end of 2009 Devas had "secured all key licences required to date including an ISP Licence and an IPTV licence from DOT."[139] Like many of the other irrelevant facts dwelled upon by Claimant, that is true, but neither of those service licences authorised the rollout of the Devas Services via satellite.[140] What Devas did not have, had no assurance of getting and never even reached the stage of applying for was the critical WPC Operating Licence necessary for it to roll out the Devas Services. As Claimant itself admits: "DT does not

[136] **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 154-155.

[137] Claimant's Memorial, ¶¶ 15, 145. *See also* Axmann Witness Statement, ¶¶ 68, 70.

[138] Claimant's Memorial, ¶ 83; **Ex. C-73**, Kim Larsen's photographs of meetings with the Space Authorities.

[139] Claimant's Memorial, ¶ 127(c).

[140] **Ex. C-83**, ISP Licence, Section 36.6; **Ex. R-39**, Government of India, A Policy Framework for Satellite Communication in India, 1999, p. 1; **Ex. R-40**, Government of India, Norms, Guidelines and Procedures for Implementation of the Policy Frame-work for Satellite Communications in India, 2000, Article 2.5.7; **Ex. R-41**, Certificate of Technical Statement from R.B. Prasad, Joint Wireless Advisor, Department of Telecommunications 24 November 2014.

assert that it had either a contractual right or a concrete assurance from India that the WPC licence would be granted."[141]

- Claimant also says that Devas, "with the sponsorship of IRSO/Antrix," obtained "experimental approvals and clearances from the WPC" to conduct field tests of Devas' hybrid satellite and terrestrial system in Bangalore and that the trials were "successful."[142] What these allegations underscore is that Devas only reached the experimental stage and had no authorisation or commitment whatsoever from the Government to allow Devas to proceed to the implementation phase. That undisputed fact appears on the face of the experimental licence itself, which makes clear that the experimental licence was "[p]urely temporary and may be withdrawn any time without any notice" and that "[n]o claim for regular use/assignment of these frequencies" may be made.[143]

46. Apart from the irrelevant facts upon which Claimant relies, Claimant has nothing but rampant speculation and irresponsible allegations of illicit motives on the part of the entire Indian hierarchy responsible for allocating S-band spectrum. Claimant goes back to the early 2000s to show that there were no firm plans for using S-band at that time.[144] It then points to the fact that by 2008 there was demand by terrestrial cellular operators for more spectrum, including in S-band, and states that in May 2010, after spectrum auctions in India, two newspaper articles called into question the Devas Contract and called for the auctioning of the spectrum.[145] From there, Claimant surmises that all responsible officials in the Government conspired in bad faith to damage Devas and its shareholders by denying the authorisations necessary for the

[141] Claimant's Memorial, ¶ 319(c).

[142] *Id.*, ¶¶ 121, 127(d).

[143] **Ex. R-35**, Letters from the Department of Telecommunications regarding Devas' Experimental Licence dated 7 May 2009; **Ex. R-36**, Licence No. EXP-020(R)-RLO(SR) to Establish, Maintain and Work an Experimental Wireless Telegraph Station in India under the Indian Telegraph Act, 1885, granted to M/s Devas Multimedia Pvt. Ltd., 7 May 2009, p. 2 ("No claim for regular user/assignment.").

[144] Claimant's Memorial, ¶¶ 37, 42.

[145] *Id.*, ¶¶ 146-147, 149.

Devas Contract to be implemented and annulling the contract, without any legitimate reason.

47. In doing so, Claimant ignores (i) the extensive documentary record presented by Respondent showing the competing demands for spectrum from the military and security agencies,[146] (ii) the fact that the Space Commission, at the instance of the National Security Advisor, recommended the reservation of S-band capacity for non-commercial, strategic use,[147] (iii) the Cabinet Committee on Security's policy decision to act on that recommendation and deny orbital slot to Antrix in S-band for any commercial use,[148] (iv) the fact that there has been no such commercial use for the four years since that policy decision,[149] (v) the fact that GSAT-6 has been reconfigured for military use and is scheduled to be launched in the first semester of this year, dedicated to military use,[150] and (vi) the fact that the new Government that took office last May as a result of an election, including a new Prime Minister, new National Security Advisor and new Space Commission, has continued the policy announced by the Cabinet Committee on Security in 2011.[151]

[146] *See* ¶ 36, *supra*.

[147] *See* ¶ 36, *supra*.

[148] *See* ¶ 37, *supra*.

[149] *See* ¶ 40, *supra*.

[150] *See* ¶¶ 41-43, *supra*.

[151] **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 120-121, 759-760, 1075, 1301-1302.

LEGAL ARGUMENTS

POINT I.

THE "ESSENTIAL SECURITY INTERESTS" PROVISION OF THE GERMAN TREATY BARS THE CLAIMS IN THIS CASE

48. Although Claimant feigns ignorance as to what Respondent's argument is on "essential security interests,"[152] it no doubt is fully aware of Respondent's position as a result of the Mauritius Shareholders Arbitration.[153] Article 12 of the German Treaty provides:

> Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests.[154]

By virtue of this provision, the host State is entitled to take measures necessary for the protection of its essential security interests without incurring responsibility under any substantive provision of the German Treaty otherwise providing protection to investors.

49. While there may be cases in which the determination of what constitutes a nation's "essential security interests" is complex, this is not one of them. This is not a case involving an economic crisis, as was presented in previous decisions involving "essential security interests" clauses under bilateral investment treaties;[155] the measure

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[152] Claimant's Memorial, ¶¶ 336-339.

[153] **Ex. R-2**, Mauritius Shareholders Arbitration, Tr., pp. 150-167, 1301-1308.

[154] **Ex. C-1**, German Treaty, Article 12.

[155] The prior decisions arose out of the economic crisis in Argentina. *See* **Ex. RLA-4**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007 ("*CMS Annulment*"); **Ex. RLA-5**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Annulment Proceeding), Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010 ("*Sempra Annulment*"); **Ex. RLA-6**, *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic* (Annulment Proceeding), ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010.

taken here is directly related to matters of defense and national security, and it is universally recognised that a nation's defence and security needs are an integral part of its essential security interests.[156]

50. Likewise, it is universally recognised that in national security matters, substantial deference is paid to the determinations of the appropriate national authorities entrusted with the security of the nation. As the European Court of Human Rights held:

> [I]t falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.[157]

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[156] The military interests of the host State present a quintessential illustration of its essential security interests. *See* **Ex. RLA-7**, Peter T. Muchlinski, *Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate – The Issue of National Security*, YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008-2009 35 (2009), p. 54 ("As regards the traditional meaning of the term, it is clear that most states will place military and strategic security at the heart of their approach."). *See also* **Ex. RLA-8**, UNCTAD, THE PROTECTION OF NATIONAL SECURITY IN IIAS: UNCTAD SERIES ON INTERNATIONAL INVESTMENT POLICIES FOR DEVELOPMENT (United Nations 2009), Executive Summary ("While national security concerns in relation to foreign investment are nothing new and must be an issue even for the most liberal country, cases have become more frequent in recent years where foreign investors have been rejected for national security reasons or subjected to other restrictive measures after establishment. Most often, security concerns have been invoked in relation to planned investments in so-called strategic industries and critical infrastructure. Thus, the issue has implications that go far beyond the defence-related activities for which the national security exception was initially designed.").

[157] **Ex. RLA-9**, *Brannigan and McBride v. The United Kingdom*, European Court of Human Rights, Application Nos. 14553/89; 14554/89, Judgment, 25 May 1993, ¶ 43. *See also* **Ex. RLA-10**, *Ireland v. The United Kingdom*, European Court of Human Rights, Application No. 5310/71, Judgment, 18 January 1978, ¶ 207. In both cases the European Court of Human Rights held that the derogation from Article 5 (right to liberty and security) of the European Convention on Human Rights decided by the United Kingdom in the fight against terrorism based upon the derogation clause of the Convention was not in breach of the Convention.

51. In light of the foregoing, it is hardly surprising that the justiciability of national security measures has been questioned by tribunals and commentators alike, highlighting that the very nature of security interests requires that a wide measure of deference be granted to security determinations made by national authorities. Robert Jennings stated as follows:

> National security is a matter of which the government is sole trustee. It is eminently a matter on which an international court can have no useful opinion and is probably not entitled to an opinion.[158]

52. Lord Diplock similarly called into question the possibility of judicial scrutiny of national security measures in the *GCHQ* case decided by the House of Lords:

> National security is the responsibility of the executive government; what action is needed to protect its interests is . . . a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.[159]

53. National security determinations are also granted special deference in the case law of international human rights bodies. For example, the United Nations Human

[158] **Ex. RLA-11**, R. Y. Jennings, *Recent Cases on "Automatic" Reservations to the Optional Clause*, 7 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 349 (1958), p. 362.

[159] **Ex. RLA-12**, *Council of Civil Service Unions and Others v. Minister for the Civil Service*, House of Lords (England), [1985] 1 A.C. 374, 22 November 1984, p. 412. At issue in that case was the government's decision that employees of the Government Communications Headquarters would not be allowed to join national trade unions for national security reasons. The appeal challenging the decision failed on national security grounds. In a later part of his opinion, Lord Diplock went on to say as follows: "[T]he crucial point of law in this case is whether procedural propriety must give way to national security when there is conflict between (1) on the one hand, the prima facie rule of 'procedural propriety' in public law, applicable to a case of legitimate expectations that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has theretofore enjoyed that benefit and that person has been given an opportunity to comment on the reason, and (2) on the other hand, action that is needed to be taken in the interests of national security, for which the executive government bears the responsibility and alone has access to sources of information that qualify it to judge what the necessary action is. To that there can, in my opinion, be only one sensible answer. That answer is 'Yes'." *Id.*, pp. 412-413.

Rights Committee has held that "[i]t is not for the Committee to test a sovereign State's evaluation of an alien's security rating"[160] and that "the assessment of whether a case presents national security considerations bringing the exception contained in Article 13 into play allows the State party very wide discretion."[161]

54. This same approach is taken in the Explanatory Report to Article 1 of Protocol No. 7 to the European Convention on Human Rights,[162] which states:

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[160] **Ex. RLA-13**, *J.R.C. v. Costa Rica*, United Nations Human Rights Committee, Communication No. 296/1988, Decision on Admissibility, 30 March 1989, 3 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 73 (United Nations 2002), ¶ 8.4 (detention pending deportation on national security grounds of a person of undetermined nationality held consistent with the International Covenant on Civil and Political Rights); **Ex. RLA-14**, *V.M.R.B. v. Canada*, United Nations Human Rights Committee, Communication No. 236/1987, Decision on Admissibility, 18 July 1988, 3 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 73 (United Nations 2002), ¶ 6.3 (proceedings relating to the deportation of an alien on national security grounds held consistent with the Covenant).

[161] **Ex. RLA-15**, *Mohammed Alzery v. Sweden*, United Nations Human Rights Committee, Communication No. 1416/2005, Views, 25 October 2006, ¶ 11.10. Article 13 of the Covenant reads as follows: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." In *Alzery v. Sweden*, the applicant had been deported from Sweden on national security grounds because of his past involvement in an Islamist opposition movement in Egypt. The applicant complained of the violation of his right to have his case reviewed under Article 13 of the Covenant. The Committee stated as follows:

> The Committee notes that in the assessment of whether a case presents national security considerations bringing the exception contained in article 13 into play allows the State party very wide discretion. In the present case, the Committee is satisfied that the State party had at least plausible grounds for considering, at the time, the case in question to present national security concerns. In consequence, the Committee does not find a violation of article 13 of the Covenant for the author's failure to be allowed to submit reasons against his expulsion and have the case reviewed by a competent authority.

Id., ¶ 11.10.

[162] Article 1 of the Protocol reads as follows:

> 1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> a. to submit reasons against his expulsion,
>
> b. to have his case reviewed, and

> The State relying on public order to expel an alien before the exercise of the aforementioned rights must be able to show that this exceptional measure was necessary in the particular case or category of cases. On the other hand, if expulsion is for reasons of national security, this in itself should be accepted as sufficient justification.[163]

55. The UNCTAD Study on the protection of national security in international investment agreements shows that this analysis is also applicable in the specific context of international investment law:

> Undoubtedly, it is the sovereign right of host countries to regulate foreign investment, and this includes the option to impose restrictions for national security reasons. It is also up to host countries to decide how they define "national security", and under what circumstances they consider this interest to be at risk. This gives them huge discretion in deciding whether a particular foreign investment threatens their national security or not, and how to respond.
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> . . . .
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> By its very nature, the concept of national security cannot be interpreted in complete isolation from the domestic constituency. The concept would lose its meaning and purpose if a third party had the power to impose on a State that felt threatened its own view about whether such a threat actually exists and what measures, if any, that State is allowed to take in response.[164]

56. The foregoing authorities make clear that international tribunals should not second-guess national security determinations made by national authorities, as the latter are uniquely positioned to determine what constitutes a State's essential security

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> c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Ex. RLA-16, Council of Europe, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11*, 1 November 1998, Article 1.

[163] *Id.*, ¶ 15.

[164] **Ex. RLA-8**, UNCTAD, THE PROTECTION OF NATIONAL SECURITY IN IIAS: UNCTAD SERIES ON INTERNATIONAL INVESTMENT POLICIES FOR DEVELOPMENT (United Nations 2009), pp. 3, 41.

interests in any particular circumstance and what measures should be adopted to safeguard those interests.

57. In this case, the Cabinet Committee on Security, the highest authority in India for matters of internal and external security and defence, made a sovereign determination that Antrix would not be granted orbital slot in S-band for any commercial use considering the growing demands of India's military and security agencies, which undoubtedly form part of India's essential security interests. Moreover, the record shows that the decision was taken on the basis of extensive discussion and deliberation by the entire national security hierarchy of the Government.[165]

58. Despite feigning ignorance as to the basis for Respondent's position, Claimant does advance on a preliminary basis the outline of its argument against application of the "essential security interests" provision of the German Treaty.

59. Claimant's first two points are that the provision only applies if the measure taken was "the only way to achieve the stated aim," and that the measure must be "strictly proportional to the stated end."[166] The problem with that argument is twofold. First, as all authorities on the subject have recognised, it is not for an international tribunal to second-guess the appropriate national authorities as to the means necessary to protect the nation's security interests.[167] For example, it would make no sense for an international tribunal to determine the appropriateness of troop movements, the placement of military bases, the development of new defence systems or even the denial of visas. That is not to say that it is impossible to imagine a case of

[165] *See* ¶ 36, *supra*.

[166] Claimant's Memorial, ¶¶ 338(a), 338(b).

[167] *See* ¶¶ 50-56, *supra*.

improper assertion of an "essential security interests" defence, but it is to say that where the decision on its face is obviously related to issues of defence and national security, the "essential security interests" provision clearly applies. Second, the facts of this case show that the strategic requirements for S-band capacity far exceeded the capacity available.[168] While Claimant may believe that Devas could have accommodated the strategic requirements of India, the appropriate governmental bodies in India entrusted with national security came to the opposite conclusion, as they were entitled to do.

60. In this context, Claimant can only repeat its argument that "the factual record outlined above contradicts the contention that any strategic or societal requirement (whether grave and imminent or otherwise) – rather than political and commercial expediency – was the primary motive for India's annulment of the Agreement."[169] This argument of bad faith, or lack of good faith, is repeated in Claimant's FET discussion and underlies Claimant's entire case, which again is exactly the same position as that taken by the Mauritius Shareholders in the Mauritius Shareholders Arbitration.[170] What Claimant is asking this Tribunal to do is to disregard the documentary record and ignore what the Cabinet Committee on Security did, and announced that it had done, together with the reasons given, and infer bad faith on its part and on the part of the Cabinet members and all other Indian Government officials involved in the decision to deny orbital slot to Antrix in S-band for commercial use. That inference would be flatly inconsistent with all Indian and international authority.

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[168] *See* ¶¶ 36, 42, *supra*. **Ex. R-2**, Mauritius Shareholders Arbitration Tr., p. 1079.

[169] Claimant's Memorial, ¶ 339.

[170] **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 155-161, 1303-1308.

61. Under Article 11 of the German Treaty: "All investments shall, subject to this Agreement, be governed by the laws in force in the territory of the Contracting Party in which such investments are made."[171] Indian law is quite clear that good faith of government officials is to be presumed. In the *Ajit Kumar Nag* case, the Supreme Court of India stated:

> It is well-settled that the burden of proving *mala fide* is on the person making the allegations and the burden is "very heavy". . . . There is every presumption in favour of the administration that the power has been exercised *bona fide* and in good faith. It is to be remembered that the allegations of *mala fide* are often more easily made than made out and the very seriousness of such allegations demands proof of a high [degree] of credibility. As Krishna Iyer, J. stated in *Gulam Mustafa and Ors. v. State of Maharashtra and Ors.*[:] "It (*Mala fide*) is the last refuge of a losing litigant".[172]

62. While Indian law is clear on this point, this Tribunal need not be concerned about any conflict with international principles. For example, in the *Lake Lanoux* arbitration, the tribunal observed that "there is a general and well-established principle of law according to which bad faith is not presumed."[173] Judge Tanaka, in his separate opinion in the *Barcelona Traction* case, stated: "It is not an easy matter to prove the existence of bad faith, because it is concerned with a matter belonging to the inner psychological process, particularly in a case concerning a decision by a State organ. Bad faith cannot be presumed."[174] In *Tacna-Arica*, the tribunal warned against drawing

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[171] **Ex. C-1**, German Treaty, Article 11.

[172] **Ex. RLA-17**, *Ajit Kumar Nag v. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia and Ors.*, Supreme Court of India, AIR2005SC4217, Judgment, 19 September 2005, ¶ 44.

[173] **Ex. RLA-18**, *Lake Lanoux Arbitration (France v. Spain)*, Award, 16 November 1957, INTERNATIONAL LAW REPORTS 1957 101 (1961), p. 126.

[174] **Ex. RLA-19**, *Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, International Court of Justice, Separate Opinion of Judge Tanaka, 5 February 1970, *Reports of Judgements, Advisory Opinions and Orders*, I.C.J. REPORTS 114 (1970), p. 160.

inferences of bad faith: "A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion."[175] The tribunal in *Bayindir v. Pakistan* stated that "the standard for proving bad faith is a demanding one, in particular if bad faith is to be established on the basis of circumstantial evidence."[176] And in *Chemtura v. Canada*, another investor-state arbitration, the tribunal echoed that "the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one."[177]

63. The commentary on the subject is to the same effect. For example, one author writes that "[t]his presumption [of good faith] has often been employed by international tribunals, either in the negative, as in bad faith is not to be presumed, or in the positive form, that good faith is to be presumed. It is sometimes expressed as a prohibition on presuming an intention to abuse a right. . . . [B]ad faith manifests itself as a complex psychological fact comprised of malicious intent, intent to cause harm, and motives too terrible to admit."[178] Another, commenting on the International Court of Justice, states that "the Court will be slow to accuse a State in its judgment of bad

[175] **Ex. RLA-20**, *Tacna-Arica Question (Chile, Peru)*, Opinion and Award, 4 March 1925, 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 921 (2006), p. 930.

[176] **Ex. RLA-21**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 ("*Bayindir*"), ¶ 143.

[177] **Ex. RLA-22**, *Chemtura Corporation v. Government of Canada*, NAFTA/UNCITRAL, Award, 2 August 2010, ¶ 137.

[178] **Ex. RLA-23**, Robert Kolb, GOOD FAITH IN PUBLIC INTERNATIONAL LAW (*LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC*) (Presses Universitaires de France 2000), pp. 125, 127.

faith."[179] In a treatise on investment treaties, yet another comments that "proving a state's bad faith can be an extremely difficult task."[180]

64. Given the unanimous authority establishing the extraordinary burden on a party alleging bad faith on the part of a government and the extensive record in this case concerning India's strategic needs, Claimant's position that this Tribunal should find that the decision of the Cabinet Committee on Security was taken in bad faith for no legitimate reason cannot be sustained.

65. Next, Claimant signals that it may rely on the same argument made by the claimants in the Argentine cases, namely, that the "essential security interests" provision of the German Treaty merely encompasses the "state of necessity" defence under customary international law.[181] Claimant states: "Indeed, an analogy may be drawn to customary international law concepts of necessity, where the relevant security interest must rise to the level of 'grave and imminent peril'."[182] However, as the decisions of the annulment committees in those cases make clear, the "essential security interests" provisions of bilateral investment treaties are not merely embodiments of the "state of necessity" defence under customary international law. Rather, they are separate provisions specifically negotiated in investment treaties to provide additional, broader protection to states when dealing with matters relating to

[179] **Ex. RLA-24**, Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989: Part Three*, 62 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1 (1991), p. 18.

[180] **Ex. RLA-25**, Jeswald W. Salacuse, THE LAW OF INVESTMENT TREATIES (Oxford University Press 2010), p. 243.

[181] *See* n. 188, *infra*.

[182] Claimant's Memorial, ¶ 338(d), referring to **Ex. CLA-86**, *Responsibility of States for Internationally Wrongful Acts*, adopted by the U.N. International Law Commission at its Fifty-Third Session in 2001 as reproduced in G.A. Resolution No. 56/83, 12 December 2001, Article 25(1)(a).

their essential security interests, as is unquestionably the case here. As the annulment committee in *CMS v. Argentina* explained:

> The Committee observes first that there is some analogy in the language used in Article XI of the BIT and in Article 25 of the ILC's [International Law Commission] Articles on State Responsibility. The first text mentions "necessary" measures and the second relates to the "state of necessity". However Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.
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> Furthermore Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. It requires for instance that the action taken "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole", a condition which is foreign to Article XI. In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25, as the Parties in fact recognized during the hearing before the Committee. On that point, the Tribunal made a manifest error of law.
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> Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.
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> In doing so the Tribunal made another error of law. One could wonder whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility. But in any case, the excuse based on

> customary international law could only be subsidiary to the exclusion based on Article XI.[183]

66. Similarly, the *Sempra v. Argentina* annulment committee stated the following:

> Article 25 is concerned with the invocation by a State Party of necessity "as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State". Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore "wrongful". Article XI, on the other hand, provides that "This Treaty shall not preclude" certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore "wrongful". Article 25 and Article XI therefore deal with quite different situations. Article 25 cannot therefore be assumed to "define necessity and the conditions for its operation" for the purpose of interpreting Article XI, still less to do so as a mandatory norm of international law.[184]

Thus, the "customary international law concepts of necessity, where the relevant security interest must rise to the level of 'grave and imminent peril'," are irrelevant to this case.

67. Claimant also indicates in a footnote that it intends to rely on Article 13(1) of the German Treaty, which provides that if international law grants Claimant more favourable treatment than that provided for by the German Treaty, international law would govern.[185] From that simple "preservation of rights" provision, Claimant apparently concludes that the "essential security interests" provision of the German Treaty could not apply if it is more liberal than the "state of necessity" defence under

[183] **Ex. RLA-4**, *CMS Annulment*, ¶¶ 129-132.

[184] **Ex. RLA-5**, *Sempra Annulment*, ¶ 200.

[185] Claimant's Memorial, n. 489.

customary international law as reflected in Article 25 of the ILC Articles on State Responsibility.[186]

68. Article 13(1) of the German Treaty simply provides that the German Treaty is not designed to take away substantive protections offered by international law. That is the very nature of a "preservation of rights" provision.[187] It has nothing to do with the "state of necessity" defence incorporated in Article 25 of the ILC Articles, which does not confer benefits on private investors, but rather outlines a defence available to states under customary international law.[188]

69. Moreover, the text of Article 12 of the German Treaty is quite clear in saying that "Nothing in this Agreement shall prevent either Contracting Party from

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[186] **Ex. RLA-26**, *Responsibility of States for Internationally Wrongful Acts*, adopted by the U.N. International Law Commission at its Fifty-Third Session in 2001 as reproduced in G.A. Resolution No. 56/83, 12 December 2001, corrected by Document No. A/56/49(Vol. I)/Corr.4 (United Nations 2005), Article 25.

[187] *See* **Ex. RLA-27**, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶ 114 ("[The 'preservation of rights' provision] deals with the relation between commitments under the BIT and distinct commitments under host State law or under other rules of international law. It does not appear to impose any additional obligation on the host State in the framework of the BIT."); **Ex. RLA-28**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 20044, ¶ 130 ("[The 'preservation of rights' provision] could not have the effect of incorporating the commitments it mentions into the BIT."). *See also* **Ex. RLA-29**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (Oxford University Press 2009), p. 740 ("The preservation of rights provision, of course, does not impose any affirmative obligation on host states to provide covered investment with rights beyond those in the BITs. It simply precludes any argument that a BIT resulted in the reduction or elimination of rights otherwise in existence.").

[188] Claimant's footnote on this point goes on to hint that it believes that the ILC Articles would preclude application of the "essential security interests" provision of the German Treaty where the State contributes to its own necessity, which Claimant says "India without question did here, by leasing the S-band spectrum to Devas in the first place." Claimant's Memorial, n. 489. That argument is frivolous for several reasons: first, India did not lease anything, and was not even a party to the Devas Contract, as the record demonstrates beyond dispute (*see* ¶¶ 17, 23, *supra*); second, as discussed above, the "essential security interests" provision is not the same as the "state of necessity" defence under Article 25 of the ILC Articles on State Responsibility (*see* ¶¶ 65-66, *supra*); and third, it is nonsensical to say that Antrix's entering into the Devas Contract precluded the Government from taking a national security decision based on subsequent developments demonstrating the need to preserve S-band capacity for strategic use (*see* ¶ 36, *supra*).

applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests."[189] No exception is made for Article 13(1) or any other provision of the German Treaty, meaning that if the circumstances contemplated by Article 12 exist, the applicability of that provision cannot be negated by Article 13(1).

70. Finally, Claimant also indicates in the same footnote that it intends to invoke the most favoured nation ("MFN") clause of the German Treaty to overcome the "essential security interests" provision.[190] It points to allegedly more restrictive language on essential security interests in the India-Spain investment treaty. Even assuming that Claimant is right in its conclusion as to which "essential security interests" provision is more favourable to it, its argument exhibits a fundamental misunderstanding of the operation of such provisions. As pointed out by one commentator:

> MFN clauses cannot override clauses included in the basic treaty which absolve a party of the obligations under the treaty as a whole. . . . These clauses not only restrict the scope of application of specific substantive provisions, but directly limit, within their scope of application, the application of the entire BIT, including the treaty's MFN clause. Such exceptions therefore cannot be bypassed despite more favorable treatment accorded to investor[s] from third-party States.
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> . . . .
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> [E]xceptions to the scope of application of a BIT as a whole cannot be overridden by the operation of an MFN clause in the same treaty.[191]

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[189] **Ex. C-1**, German Treaty, Article 12 (emphasis added).

[190] Claimant's Memorial, n. 489.

[191] **Ex. RLA-30**, Stephan W. Schill, *Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses*, 27(2) BERKELEY JOURNAL OF INTERNATIONAL LAW 496 (2009), pp. 521-522. *See also* **Ex. RLA-4**, *CMS Annulment*, ¶ 129 ("Article XI [of the US-Argentina BIT] is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply."); **Ex. RLA-31**, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 164 ("The ordinary meaning of the language used, together with the object and purpose of the provision (as here highlighted and interpreted under Article 31 of the Vienna Convention on the Law of Treaties) clearly indicates that either party would not be in breach of its BIT obligations if any measure has been properly taken because

71. In other words, even assuming that "essential security interests" provisions of other investment treaties entered into by India would be more favourable to Claimant, the MFN clause of the German Treaty cannot be used to bypass its "essential security interests" provision.

72. In sum, the claims presented by Claimant herein should be dismissed as they are all barred by the essential security interests clause of the German Treaty.

POINT II.

THIS CASE ONLY INVOLVES "PRE-INVESTMENTS"

73. In spite of Claimant's repeated references to its "investments," this case only involves what is known as pre-investment activity that is outside the scope of protection afforded by the German Treaty.[192]

74. Claimant does not appear to dispute that the German Treaty is an "admission clause" model treaty.[193] The salient features of an "admission clause" model treaty are widely recognised in the writings on the subject, as indicated by the following:

- *Dolzer and Stevens*: "Admission clauses are important because they determine the degree of control that a State party has retained over the

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it was necessary, as far as relevant here, either 'for the maintenance of the public order' or for 'the protection of essential security interests' of the party adopting such measures. The consequence would be that, under Art. XI, such measures would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision. A private investor of the other party could therefore not succeed in its claim for responsibility and damages in such an instance, because the respondent party would not have acted against its BIT obligations since these would not be applicable, provided of course that the conditions for the application of Art. XI are met."); **Ex. RLA-5**, *Sempra Annulment*, ¶ 187 ("Where the treaty permits or excuses conduct adverse to the investor in specific circumstances enunciated in the treaty, it follows that the terms of the treaty itself exclude the protection to the investor that the treaty would otherwise have provided.").

[192] **Ex. C-1**, German Treaty, Articles 1(b), 2.

[193] Claimant's Memorial, ¶¶ 250-257.

conditions on the basis of which investments are allowed into the host State."[194]

- *Dugan, Wallace, Rubins and Sabahi*: "Most investment treaties, including bilateral agreements based on the OECD [Organisation for Economic Co-operation and Development] model, extend protection only to investments (however defined) once established, leaving host states free to promulgate whatever rules they deem appropriate with regard to admission or entry or establishment of foreign capital."[195]

- *Gómez-Palacio and Muchlinski*: The "admission of investments and the 'right of establishment' concern each country's sovereign right to regulate the entry of foreign direct investment (FDI). This right is based on the state's control of its territory, which carries the attendant right to exclude aliens from that territory. That right is absolute and can only be restricted by international agreement. Thus, this is an area of law in which positive investor rights of entry and establishment arise by way of an exception to the general rule of international law. As a result, states have a wide discretion over whether and how far to admit investors into the national economy and market. . . . The majority of BITs follow a 'controlled entry' approach."[196]

- *Newcombe and Paradell*: "Since most [international investment agreements] do not provide a general right of admission or establishment, the host state's foreign investment regime generally governs not only whether foreign investment is permitted to operate, but also the conditions applying to the entry of foreign investments."[197]

- *Salacuse*: "Consequently, the admission clause allows the host state to retain control over the entry of foreign capital, to screen investments to ensure their compatibility with the state's national security, economic development, and public policy goals, and to determine the conditions under which foreign investments will be permitted, if at all."[198]

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[194] **Ex. RLA-32**, Rudolf Dolzer and Margrete Stevens, BILATERAL INVESTMENT TREATIES (Martinus Nijhoff Publishers 1995), p. 51.

[195] **Ex. RLA-33**, Christopher F. Dugan, Don Wallace Jr., Noah Rubins and Borzu Sabahi, INVESTOR-STATE ARBITRATION (Oxford University Press 2008), p. 285.

[196] **Ex. RLA-34**, Ignacio Gómez-Palacio and Peter T. Muchlinski, *Admission and Establishment*, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 227 (P.T. Muchlinski *et al.* eds., Oxford University Press 2008), pp. 2, 8.

[197] **Ex. RLA-35**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), p. 133.

[198] **Ex. RLA-25**, Jeswald W. Salacuse, THE LAW OF INVESTMENT TREATIES (Oxford University Press 2010), p. 197.

- *UNCTAD*: "Another implication of the admission clause is that, regardless of whether the host country maintains any admission and screening mechanism for foreign investment – and unless the BIT states otherwise – there is no obligation on the part of the host country to eliminate discriminatory legislation affecting the establishment of foreign investment."[199]

75. The adoption of the "admission clause" model is a common feature of Indian BITs. As one commentator has noted, Indian BITs "apply only once a protected investor has established a qualifying investment" and "do not apply to the acquisition or establishment of the investment."[200] The same author stresses that "[p]re-investment activities are outside the purview" of Indian BITs.[201]

76. Thus, there can be no doubt that, wholly apart from the "essential security interests" provision, this claim would have to be dismissed if it involves "pre-investment" activity rather than investments within the meaning of the German Treaty. In addition, as discussed below,[202] Claimant must show that there is a relevant investment, not, as Claimant argues, the acquisition by DT Asia of its shares in Devas, which remain the property of Claimant's subsidiary today.

77. Although it recognises that pre-investment activity is not covered by the German Treaty, Claimant argues that the precedents support its view that this case involves relevant "investments." In this regard, Claimant has anticipated Respondent's

[199] **Ex. RLA-36**, UNCTAD, BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING, UNCTAD SERIES ON DIVISION ON INVESTMENT, TECHNOLOGY AND ENTERPRISE DEVELOPMENT (United Nations 2007), p. 22.

[200] **Ex. RLA-37**, Devashish Krishan, *India and International Investment Laws*, in 2 INDIA AND INTERNATIONAL LAW 277 (B. N. Patel ed., Martinus Nijhoff Publishers 2008), p. 301.

[201] *Id.*

[202] *See* ¶¶ 89-94, *infra*.

argument on this issue and cited all four cases that Respondent relied upon in the Mauritius Shareholders Arbitration.[203]

78. The relevant arbitral decisions begin with *Mihaly v. Sri Lanka*.[204] There the claimant, Mihaly International Corporation ("Mihaly"), obtained the exclusive right to enter into a letter of intent establishing milestones the company had to meet in order to obtain final approval to begin work on the construction and operation of a power plant. Mihaly incurred significant expenses in obtaining financing, negotiating project documents and engaging consultants for feasibility analysis. When the Government refused to go ahead with the project agreement, Mihaly initiated an ICSID arbitration under the U.S.-Sri Lanka BIT to recover the costs it incurred. The tribunal dismissed the claim, holding that Sri Lanka had undertaken no binding obligation with respect to the implementation of the project:

> The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States, let alone that of developing countries or Sri Lanka for that matter, to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as "investment" in the absence of the consent of the host State to the implementation of the project. . . . The Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment.[205]

79. Claimant suggests that this case is distinguishable from *Mihaly* because the tribunal there found that there was only a non-binding "letter of intent."[206] But that is

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[203] Claimant's Memorial, ¶ 257. **Ex. R-2**, Mauritius Shareholders Arbitration Tr., ¶¶ 167-173.

[204] **Ex. RLA-38**, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 ("*Mihaly*").

[205] *Id*., ¶¶ 60-61.

[206] Claimant's Memorial, ¶ 257.

not a substantive distinction from a case such as this one, where the agreement that was executed could not be implemented without governmental approvals and contained no binding commitment on the part of the Government to grant such approvals. There is no substantive distinction between a non-binding letter of intent coupled with a hope that the letter of intent would ripen into a binding commitment to proceed with the project and a contract subject to a condition of governmental approval which the private party hopes to, but never does, obtain.

80. It is also incorrect to say that the claimant in *Mihaly* had no binding commitment of any kind on the part of Sri Lanka. While Sri Lanka, like the Government in this case, was not obligated to proceed with the project or to allow it to proceed, the "Letter of Intent" in *Mihaly* expressly provided that "the Government shall use its best efforts to take, or cause to be taken, all action and to do, or cause to be done, all things necessary or proper or advisable under applicable laws and regulations [in Sri Lanka] to consummate the transactions contemplated hereby as promptly as practicable."[207] Thus, unlike this case, where the Government entered into no commitment of any kind, Sri Lanka had undertaken a "best efforts" commitment to consummate the transactions. And in *Mihaly*, Sri Lanka was clearly encouraging the claimant, as it issued a "Letter of Agreement" stating that "we are pleased to confirm that we are satisfied with the degree of progress that has been made in completing the requirements set forth in the Letter of Intent" and going on to record certain agreements reached on a number of issues relating to the proposed project.[208]

[207] **Ex. RLA-38**, *Mihaly*, ¶ 41.

[208] *Id.*, ¶ 44.

81. The tribunal in *Nagel v. Czech Republic* also declined jurisdiction in a case involving pre-investment expenditures.[209] *Nagel* is a good illustration of the point made above, which is that whether the document in question is a letter of intent or a contract subject to approval or further action is immaterial. In *Nagel*, the claimant did enter into a legally binding contract.[210] As in this case, the contract was with a wholly-owned state enterprise and another private operator whereby the parties agreed to jointly seek the licences necessary to establish and operate a global system for mobile communications ("GSM") network. The Czech government subsequently issued a resolution stating that two GSM licences would be issued, one to Eurotel and the other to the state-owned enterprise and a foreign partner to be selected through a competitive tender. The claimant argued that the Czech government had deprived him of his rights under the contract, but the tribunal rejected this claim, holding that although the contract was legally binding, the agreement of the parties to work together for the purpose of obtaining the licences was not equivalent to a guarantee that the licences would be obtained:

> [T]he basic undertaking in the Cooperation Agreement was that the parties should work together for the purpose of obtaining a GSM licence. There was not, and could not be, a guarantee that a licence would in fact be obtained. That would depend on the Government, and the Government had made no undertaking in this regard. Mr Nagel could do no more than hope that his cooperation with the State-owned Czech company SRa would increase his chances to become involved in the operation of GSM in the Czech Republic, but he could not be certain of getting a licence. Although he may have been encouraged by various remarks from Ministers or Government officials or by the general interest they demonstrated in his plans, this was not sufficient, in the

[209] **Ex. RLA-39**, *Mr. William Nagel v. The Czech Republic (Ministry of Transportation and Telecommunications)*, SCC Case No. 049/2002, Final Award, 9 September 2003 ("*Nagel*").

[210] *Id.*, ¶ 320 ("For these reasons, the Arbitral Tribunal must conclude that the Cooperation Agreement was, at least as regards its general contents, a contract which under Czech law created legal obligations for the parties to the Agreement.").

> Arbitral Tribunal's view, to raise his prospects based on the Cooperation Agreement to the level of a "legitimate expectation" with a financial value.
>
> . . . .
>
> While the Agreement was an important basis for further work, the Arbitral Tribunal considers that it was only of a preparatory nature and cannot find that the rights derived from it had a financial value.[211]

82. Claimant tries to draw a distinction between "a vague 'Cooperation Agreement'" and the Contract at issue in this case.[212] But such distinction is meaningless. As in this case, the contract in *Nagel* contemplated a future, necessary governmental licence that was not in any sense guaranteed. As the tribunal expressly stated: "That [the necessary licence] would depend on the Government, and the Government had made no undertaking in this regard,"[213] notwithstanding the encouragement Mr. Nagel received from "Ministers or Government officials." Although *Nagel* involved a binding contract, the condition of ultimate governmental approval meant that it was substantially indistinguishable from the letter of intent in *Mihaly* and gave rise only to unprotected pre-investment.

83. *Petrobart v. Kyrgyz Republic* involved a contract for delivery of 200,000 tons of gas condensate over twelve months and an agreement to agree on additional supplies at a later stage.[214] The tribunal held that the firm commitment for the 200,000 tons of gas condensate did give rise to a cognisable claim because it did involve an investment, but the tribunal rejected the second claim, stating that "whatever discussions

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[211] *Id.*, ¶¶ 326, 328 (emphasis added).

[212] Claimant's Memorial, ¶ 257.

[213] **Ex. RLA-39**, *Nagel*, ¶ 326.

[214] **Ex. RLA-40**, *Petrobart Limited. v. The Kyrgyz Republic*, SCC Case 126/2003, Arbitral Award, 29 March 2005.

may have taken place between the parties about further business relations, they did not result in any binding undertakings in the Contract."[215] In other words, since the government was not bound to the second phase of the contract, that phase only involved a "pre-investment" beyond the scope of the treaty.

84. Claimant argues that, as opposed to this case, *Petrobart* only involved "mere 'discussions' about 'further business relations' that did not result in any binding undertaking."[216] But in *Petrobart* there was a contract and an agreement to agree on additional supplies. There are no material differences between *Petrobart* and this case, in which governmental approvals required to implement the project were never obtained, and in the case of the WPC Operating Licence required for Devas to roll out the Devas Services, never even applied for.

85. Likewise, in *Zhinvali v. Georgia*, the tribunal rejected jurisdiction over a claim involving pre-investment expenditures by an Irish company.[217] In that case, negotiations between the claimant and Georgia for the rehabilitation of a hydroelectric power plant ultimately failed after Georgia received pressure from the World Bank to organise a competitive and transparent bidding process for the project. Relying on *Mihaly*, the tribunal stated that "the Claimant's 'investment' case then rises or falls depending on whether the category of 'development costs' in failed transaction is eligible for 'investment' treatment under the 1996 Georgia Investment Law."[218] In the absence of Georgia's express consent to the treatment of claimant's development costs

[215] *Id.*, p. 69.

[216] Claimant's Memorial, ¶ 257.

[217] **Ex. RLA-41**, *Zhinvali Development Limited v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, 10 ICSID REPORTS 3 (2006) ("*Zhinvali*").

[218] *Id.*, ¶ 388.

as an investment, the tribunal concluded that the upfront costs did not qualify as an "investment."[219]

86. Claimant mistakenly suggests that *Zhinvali* is distinguishable from this case because it involved only a "Memorandum of Understanding."[220] Not surprisingly, the actual facts of *Zhinvali* show much more. The promoters of the claimant had entered into a Memorandum of Understanding with a Georgian limited liability company, which at that time was holding a lease on a power plant, with a view to creating a joint venture company to rehabilitate the plant. The Memorandum of Understanding was subsequently supplemented with an instrument labelled "Heads of Agreement," providing for an exclusivity period during which each party agreed not to enter into any agreement regarding the project without the consent of the other. The parties also agreed to cooperate in the preparation of a detailed project report and arrange for the financing of the project.

87. As a follow-up to the Memorandum of Understanding, the claimant submitted to the government a proposal for the purchase or long-term lease of the project. After several discussions with the government on the need for the technical documentation and a feasibility study to support the claimant's proposal, the claimant wrote to the government to seek a letter of support expressing the government's commitment and support for the project on the grounds that it could not be implemented "without first expending a tremendous amount of time, money and resources."[221] The government provided the written support sought by the claimant, specifying that the

[219] *Id.*, ¶ 417.

[220] Claimant's Memorial, ¶ 257.

[221] **Ex. RLA-41**, *Zhinvali*, ¶ 99.

claimant "can expect support from the Government" in a number of areas, including the issuance of a licence by a regulatory commission.[222] The claimant also sought an exclusivity period to complete all the necessary work for the implementation of the project and obtained from the government a nine-month exclusivity period during which the government committed not to contract with any third party regarding the project.[223] During this period, the claimant pursued a feasibility study and performed a civil engineering inspection. The work carried out by the claimant was approved by a presidential decree, which ordered the relevant governmental bodies to guarantee the execution of the concession agreement with the claimant within one month.[224] The project ultimately did not proceed because Georgia received pressure from the World Bank to organise a competitive and transparent bidding process.

88. What all these cases show is that bilateral investment treaties that follow the "admission clause" model do not provide protection for pre-investment activities and expenditures. In this case, the Devas Contract itself made clear that the business Devas and Claimant hoped to engage in could not be commenced without certain essential governmental licences and approvals.[225] Those included the orbital slot for the satellites and the WPC Operating Licence that Devas was required to obtain in order to roll out the Devas Services.[226] Without those licences and approvals, there was no business, and everything Devas and its shareholders did in anticipation of

[222] *Id.*, ¶ 101.

[223] *Id.*, ¶¶ 104, 107-109.

[224] *Id.*, ¶ 121.

[225] **Ex. R-1**, Devas Contract, Articles 3(c), 12(a)(ii), 12(b)(vii). As Claimant admits in its Memorial: "DT does not assert that it had either a contractual right or a concrete assurance from India that the WPC licence would be granted." Claimant's Memorial, ¶ 319(c).

[226] *See* ¶¶ 7, 18, *supra*.

obtaining those licences and approvals, including all of their development expenditures made in anticipation of the rollout of the Devas Services, constituted "pre-investment" not covered by the German Treaty.

89. Claimant argues that all these points are "immaterial" and that investments were "undoubtedly 'effected' and admitted into India."[227] In that regard, it points to three "investments," none of which is at issue except for the question of whether Devas, and derivatively its shareholders, had an acquired right to proceed with the Devas project. Claimant identifies the "investments" as follows: (i) Claimants' respective shareholding interests in Devas; (ii) partial indirect ownership of Devas' "then-existing and enforceable rights" under the Devas Contract; and (iii) "investments in kind of DT know-how, expertise, effort and industry."[228]

90. With respect to the first "investment," DT Asia's shareholding in Devas, Claimant argues that it had a completed investment in shares, in two tranches, which was approved by the Government through the Foreign Investment Promotion Board ("FIPB").[229] That is irrelevant to the pre-investment issue in this case. As pointed out earlier, in order to determine the pre-investment issue, it is necessary first to identify precisely the investment in question. It does not assist Claimant to point to the fact that its subsidiary invested in Devas if that investment was not taken by action of the Government. The Government has not expropriated the Devas shares or otherwise prevented the Devas shareholders from managing their company. Nor has the Government taken any of the funds that DT Asia invested in Devas, all of which should be

[227] Claimant's Memorial, ¶¶ 252-256.

[228] *Id.*, ¶ 256.

[229] *Id.*, ¶ 256(a).

available to Devas and its shareholders, except to the extent spent on salaries, legal and consultants' fees and other development activities or paid to Antrix in the Upfront Capacity Reservation Fees that Antrix tendered back to Devas upon cancellation of the Devas Contract. In short, the shares in Devas are not the relevant investment here and, if they are not the relevant investment, Claimant cannot use them to bootstrap its entire case, which is based upon an alleged right to roll out the Devas Services.[230]

91. As Claimant admits, "Devas has been unable to proceed to implement the Devas System (or any aspect of it) or otherwise operate its business in India."[231] Claimant blames this on an alleged repudiation of the Devas Contract by Antrix, but the undisputed fact is that Antrix could not proceed with the Devas Contract and Devas could not roll out the Devas Services after the decision of the Cabinet Committee on Security.[232] What is relevant here is that all the activity of Devas and its shareholders to get ready "to proceed to implement the Devas System (or any aspect of it) or otherwise operate its business in India" constitutes "pre-investment" activity not covered by the German Treaty.[233]

[230] *See* **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 139-140, 142-143, 1288-1290. Claimant also alleges that DT's "know-how, expertise, effort and industry" were also "investments." Claimant's Memorial, ¶ 256(c). But those "investments" are irrelevant to the "pre-investment" analysis since they were neither taken nor in any way affected by any governmental measure at issue in this case.

[231] Claimant's Memorial, ¶ 267.

[232] The issue of whether Antrix repudiated the Devas Contract is the subject of the Antrix Arbitration, not this case.

[233] Claimant's Memorial, ¶ 267. Throughout its Memorial, Claimant makes clear that its activity was to get ready to launch the Devas Services. *See, e.g.*, *id.*, ¶¶ 252(b) ("Devas was ready to take the final steps to roll out its business, including applying for WPC approval of terrestrial re-use of satellite spectrum, as soon as India confirmed launch of the first satellite"), 256(c) (referring to DT's activity that "helped bring Devas from a start-up with a good concept and spectrum allocation to a business that was ready to launch as soon as the satellites were").

92. To further illustrate this point, one should assume for purposes of the analysis that Devas, as a corporate vehicle for implementing the project, did not exist, and that the Devas shareholders planned to implement the Devas project directly upon obtaining the necessary governmental approvals (or to form the single-purpose vehicle upon obtaining all the requisite approvals). Presumably, under those circumstances, no one would seriously dispute that all activity prior to receiving the necessary governmental approvals would constitute "pre-investment" beyond the scope of the German Treaty. The result can be no different when the individual shareholders decide to form a company in advance to seek those same approvals and get ready to implement the project if and when they were obtained. The formation of the company may be a separate investment, but vis-à-vis the project, it is only another step in the pre-investment activity.

93. That is why the real issue on "pre-investment" is whether Devas, and derivatively its shareholders, had an acquired right to proceed with the Devas project by virtue of the Devas Contract. Here, again, Claimant is necessarily imprecise in its analysis. All it can do is allege that (i) the Devas Agreement was entered into upon the recommendation of the Shankara Committee and was signed by Antrix, a state-owned company, after approval by its board; and (ii) the Devas Contract was brought into effect only after further governmental approvals from the Space Commission and the Indian Cabinet.[234] The gaping hole in Claimant's analysis is any reference to an acquired right

[234] *Id.*, ¶ 256(b). Neither the Shankara Committee nor the approvals referred to in the 2 February 2006 letter from Antrix to Devas had anything to do with the orbital slot for the satellites, either on the international level or the national level, and neither had anything to do with the indispensable WPC Operating Licence for Devas to roll out the Devas Services. **Ex. C-8**, Letter from Antrix to Devas, 2 February 2006; **Ex. C-59**, Shankara Committee Report, p. 6 ("Devas will at its cost procure all required licenses and approvals to operate and deliver the service to end consumers in India including any necessary licenses and approvals to operate the terrestrial networks."). Under the Devas Contract, Antrix needed to obtain "clearances from National and International agencies (WPC, ITU, etc.) for use of the orbital slot and frequency resources." **Ex. R-1**, Devas Contract, Article 12(a)(ii). *See also id.*, Article 3(c). Contrary to Claimant's assertions, those clearances had not been obtained at the time that Antrix wrote

to implement or proceed with the Devas project. No such right exists. Indeed, Claimant's own papers concede that Devas had absolutely no right to proceed without the WPC Operating Licence that it never obtained and never could obtain after the decision of the Cabinet Committee on Security. In a frank admission that should itself dispose of the pre-investment issue – as well as its substantive claims – Claimant states the following: "DT does not assert that it had either a contractual right or a concrete assurance from India that the WPC licence would be granted."[235]

94. It does not matter whether the Shankara Committee in 2004 thought that the proposed Devas project was a good idea. Nor does it matter whether DT Asia and the Mauritius Shareholders were hopeful enough to make an equity investment in Devas in anticipation of the possibility that the necessary approvals to implement the project would be obtained. What matters for purposes of the pre-investment issue is that the approvals were not obtained, that without them the project could not proceed, and that Devas had no contractual right to obtain those approvals. Under those facts,

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the 2 February 2006 letter. Devas' own 2010 presentations reflect the fact that the coordination at the international level had not been completed even then. For example, the 4 February 2010 presentation to Dr. Radhakrishnan identifies as one of the "critical issues" "[p]reserving ITU coordinated priority orbit/spectrum tied to satellite launch." **Ex. C-126**, Devas Multimedia Pvt. Ltd., *Presentation to K. Radhakrishnan, Chairman, ISRO & Antrix, Secretary, Department of Space,* 4 February 2010, slide 13. *See also* **Ex. R-10**, Devas Multimedia Pvt. Ltd., *Presentation to Director, SCNP, ISRO*, 21 April 2010, slide 31. *See* n. 44, *supra*.

[235] Claimant's Memorial, ¶ 319(c). *See also* **Ex. C-76**, DT Briefing of the "Meeting with Devas-Shareholders on 19 Feb. 2008" and "Board Meeting on 19 Feb. 2008", p. 2 (This internal document introduced by Claimant was presented to DT's Board. It states that DT's representatives met and spoke with a WPC representative but did not obtain any commitment as to the issuance of the WPC Operating Licence. The document goes on to state: "Accordingly, DT requested to eliminate any uncertainties by way of confirmatory letter either from WPC directly or from ISRO/DoS, explicitly confirming either the approval from, or the non-responsibility of WPC. This has not been obtained so far and Devas has indicated that, at least at this stage, it is reluctant to approach the authorities with the request for a formal clarification." There is no dispute that the "confirmatory letter" Claimant was seeking was never obtained.); Axmann Witness Statement, ¶ 32.

which are not in dispute, all of Claimant's and Devas' activities constitute pre-investment beyond the scope of the German Treaty.

95. Therefore, while Claimant has no substantive claim under the German Treaty in any event, the fact that the German Treaty does not cover pre-investments would itself require dismissal of the claims herein.

POINT III.

THE GERMAN TREATY DOES NOT COVER EITHER INDIRECT INVESTMENTS OR INDIRECT INVESTORS

96. Even if the "essential security interests" provision did not apply and even if Claimant's activities did not constitute "pre-investment," its claims would still have to be dismissed as the German Treaty does not protect indirect investments. In addition, since it was DT Asia, not DT itself, which held the shares of Devas and allegedly effected an investment "in the territory" of India, the claims would in any event have to be dismissed for lack of jurisdiction *ratione personae* because indirect investors are not protected under the German Treaty.

97. There is no dispute as to the indirect nature of the claimed investments in this case. Claimant states that it "structured its investment in Devas through its wholly owned Singaporean subsidiary DT Asia."[236] Thus, Claimant's only direct investment is its shares in a Singaporean company, not an investment in the territory of India.

98. The language of the German Treaty supports the view that only direct investments are protected. Article 1(b) of the German Treaty defines the term "investment" as "every kind of asset invested in accordance with the national laws of the

[236] Claimant's Memorial, ¶ 94.

Contracting Party where the investment is made."[237] The scope of the German Treaty is defined in Article 2, which provides that "[t]his Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the coming into force of this Agreement."[238]

99. Unlike other bilateral investment treaties concluded by India and Germany, the German Treaty does not provide that the agreement applies to "indirect" investments in the territory of the host State, and it does not contain a definition of "investment" encompassing assets owned or controlled "directly or indirectly" by a national of the other Contracting State. The record shows that when India intended to grant treaty protection to indirect investments or investors, it did so expressly in the relevant instrument. For instance, the Netherlands-India BIT provides:

> This Agreement shall apply to any investment made by investors of either Contracting Party in the territory of the other Contracting Party including an indirect investment made through another company, wherever located, which is fully owned by such investors, whether made before or after the coming into force of this Agreement.[239]

100. Likewise, the France-India BIT provides in relevant part:

> This Agreement shall apply to any investment made by investors of either Contracting Party in the area of the other Contracting Party, including an indirect investment made through another company, wherever located, which is owned

[237] **Ex. C-1**, German Treaty, Article 1(b) (emphasis added). Claimant argues that the definition of "investment" in the German Treaty is "broad" because it encompasses "every kind of asset." Claimant's Memorial, ¶ 233. The type of asset encompassed by the definition is not the issue here; what is at issue is whether this Claimant held any of the assets that fit within that "broad" definition.

[238] **Ex. C-1**, Germany Treaty, Article 2 (emphasis added).

[239] **Ex. RLA-42**, Agreement between the Republic of India and the Kingdom of the Netherlands for the Promotion and Protection of Investments, signed 6 November 1995, entered into force 1 December 1996, Article 2 (emphasis added).

> to an extent of at least 51 per cent by such investors, whether made before or after the coming into force of this Agreement.[240]

101. A further example is the scope of application of the Spain-India BIT:

> This Agreement shall apply to any investments made by investors of either Contracting Party in the territory of the other Contracting Party, in accordance with its laws and regulations, including an indirect investment made through another company, whenever [*sic*] located, which is fully owned by such investors, whether made before or after the coming into force of this Agreement.[241]

102. The Kuwait-India BIT includes in its definition of the term "investment" a specific reference to assets owned or controlled directly or indirectly:

> "[I]nvestment" means every kind of asset, owned or controlled directly or indirectly by an investor of one Contracting State and invested in the territory of' . . . the other Contracting State in accordance with the laws of the Contracting State.[242]

103. The same is true for German investment treaties. For instance, the Kuwait-Germany BIT expressly states:

> The term "investment" shall mean every kind of asset owned or controlled by an investor of a Contracting State and invested or channelled directly or indirectly in the territory of the other Contracting State in accordance with the legislation of that State.[243]

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[240] **Ex. RLA-43**, Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments, signed 2 September 1997, entered into force 17 May 2000, Article 2(1) (emphasis added).

[241] **Ex. RLA-44**, Agreement on the Promotion and the Reciprocal Protection of Investments between the Republic of India and the Kingdom of Spain, signed 30 September 1997, entered into force 15 December 1998, Article 2 (emphasis added).

[242] **Ex. RLA-45**, Agreement between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment, signed 27 November 2001, entered into force 28 June 2003, Article 1(2) (emphasis added).

[243] **Ex. RLA-46**, Agreement between the Federal Republic of Germany and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, signed 30 March 1994, entered into force 15 November 1997, Article 1(1) (emphasis added).

104. Similarly, the Mexico-Germany BIT provides:

> The term "investments" means every kind of asset acquired or used directly or indirectly in order to achieve an economic objective or other management objectives.[244]

105. Another example is the China-Germany BIT, which provides:

> the term "investment" means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party.[245]

106. The distinction between treaties that expressly cover indirect investments and those that do not should be given effect, as explained in *Berschader v. Russia*:

> This provision makes no reference to indirect investments and it is noteworthy that this definition is not particularly broad. Definitions in certain other BITs expressly provide for protection of investments "owned or controlled directly or indirectly" by the party concerned (see e.g. Argentina–United States BIT). Such is not the case under the present Treaty.
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> . . . .
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> [S]uch contrasting approaches do render it unlikely that, in the absence of specific evidence to the contrary, both Contracting Parties intended that the Treaty would encompass the kind of indirect investments relied upon [by] the Claimants. It would seem likely that if the Contracting

[244] **Ex. RLA-47**, Agreement between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments, signed 25 August 1998, entered into force 23 February 2001 (Kluwer Law International 2015), Article 1(1).

[245] **Ex. RLA-48**, Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, signed 1 December 2003, entered into force 11 November 2005, Article 1(1). *See also* **Ex. RLA-49**, Agreement between the Federal Republic of Germany and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investments, signed 17 August 2002, entered into force 23 June 2005 (Kluwer Law International 2015), Article 1(1) ("The term 'investment' refers to every kind of asset, invested directly and/or indirectly by the investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party."); **Ex. RLA-50**, Agreement between the Federal Republic of Germany and the Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments, signed 6 August 2001, entered into force 12 April 2008, Article 1(1), 1(1)(b) ("The term 'investments' shall comprise every category of asset invested by an investor of one Contracting State in the territory of the other Contracting State in accordance with the laws and regulations in effect of the latter Contracting State, in particular . . . . rights of participation in companies and all other types of participation in companies, including minority or indirect participations as well as the bonds or other similar securities of a company.").

> Parties had so intended, they would have expressly provided protection for such indirect investments in the terms of the Treaty.[246]

107. A well-known treatise on investment arbitration also points out that the distinction between investment treaties that expressly cover indirect investments and those that are silent on the question is meaningful and should be taken into account:

> Investment treaties generally either permit the claimant to exercise control over its investment directly or indirectly, or are silent on the question. The principle *verba aliquid operari debent* as a canon of treaty interpretation requires that effect be given to the expansive terms 'directly or indirectly' so that treaties with this stipulation can be meaningfully distinguished from treaties without it. The reference to 'direct or indirect control' extends the tribunal's *ratione personae* jurisdiction to claimants who exercise indirect control by holding their investment through intermediate companies, with or without the nationality of the claimant and thus the relevant contracting state party. . . . In contrast, a great number of investment treaties do not contain a provision of the type under consideration and hence there must be a concomitant limitation upon the tribunal's jurisdiction *ratione personae*: the claimant must exercise effective control *directly* over the investment.[247]

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[246] **Ex. RLA-51**, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, ¶¶ 137, 147. Claimant cites a number of arbitral decisions rejecting the notion that indirect investments are not protected by the investment treaties at issue in those cases. Claimant's Memorial, ¶¶ 240-241. Respondent is aware that, based on the decision in *Siemens v. Argentina*, which held that indirect investments were covered by the Germany–Argentina BIT notwithstanding the absence of specific language in the treaty, several other tribunals have found jurisdiction under those circumstances. *See, e.g.,* **Ex. CLA-63**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction, 3 August 2004, ¶ 137; **Ex. CLA-37**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, ¶¶ 123-124; **Ex. CLA-43**, *Mobil Corporation and Ors. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 165; **Ex. CLA-21**, *ConocoPhillips Petrozuata B.V. and Ors. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, ¶¶ 282-285. Respondent respectfully submits that those decisions, if applied here, would unduly expand the scope of application and the meaning of the term "investment" of the German Treaty and ignore the requirement that the investor needs to have an investment "in the territory" of the host State, as well as other indications that indirect investments are not covered by these Treaties. *See* **Ex. C-1**, German Treaty, Article 5(3); ¶¶ 109-110, *infra*.

[247] **Ex. RLA-52**, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge University Press 2009), ¶¶ 578, 580 (emphasis added).

108. Apart from the fact that there is no reference to direct or indirect investors or investments in the German Treaty, the language defining the scope of the German Treaty indicates that it is exclusively applicable to, and only protects, investments made by an investor "in the territory" of the host state.[248] In this case, Claimant does not have an investment "in the territory" of India since its only purported investments are indirect shareholdings in Devas, which would not qualify as investments in the territory of India.

109. Significantly, the German Treaty contains a special provision designed to make clear that the shareholder of an Indian company whose assets are expropriated has standing to bring an expropriation claim. Article 5(3) of the German Treaty provides:

> Where a Contracting Party expropriates the assets of a company in its own territory, in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraphs 1 and 2 of this Article are applied in the same manner to provide compensation in respect of the Investment of such investors of the other Contracting Party who are owners of those shares.[249]

That provision drives home the point that indirect investments are not covered by the German Treaty, as it grants standing only to the investors of the other Contracting Party who "own shares." Such a provision would not have been necessary if, as Claimant argues, indirect investors are covered by the German Treaty.

110. Claimant itself points to Article 5(3) of the German Treaty in its expropriation argument, stating that "the plain terms of Article 5(3) put beyond doubt that DT has standing, as an indirect investor, to claim in respect of the expropriation of

[248] **Ex. C-1**, German Treaty, Article 2.

[249] *Id.*, Article 5(3) (emphasis added).

assets held by the company in which it holds shares."[250] However, Article 5(3) shows exactly the opposite. It does grant standing to the company that "owns" the shares in the Indian company, but that owner is DT Asia, not DT.

111. In sum, given the language of the German Treaty and the comparison of that language with other treaties entered into by the same contracting parties, all of which indicate that the intention of India and Germany was not to grant treaty protection to indirect investments and indirect investors, the claim here would have to be dismissed for lack of jurisdiction even if the "essential security interests" provision of the German Treaty did not apply and even if this case did not involve "pre-investments."

POINT IV.

CLAIMANT'S EXPROPRIATION CLAIM IS WITHOUT MERIT

A. This Case Does Not Involve an Expropriation

112. The main substantive claim asserted by Claimant is expropriation.[251] The crux of the claim is that Claimant's "investments" were expropriated when the Devas Contract was annulled. The fundamental problem with that position is that nothing was expropriated in this case. Without an identifiable right or asset that was expropriated, there can be no expropriation claim.

113. The first step in the analysis of any expropriation claim is to identify the expropriated investment. Here Claimant alleges that its investment consists of the following:

[250] Claimant's Memorial, n. 403.

[251] *Id.*, ¶ 260.

> (a) a completed ("effected") investment in shares, in two tranches, both of which were approved by the Government through the FIPB;
>
> (b) DT's interest in Devas's then-existing and enforceable rights under the Agreement . . . .;
>
> (c) further significant investments in kind of DT "know-how, expertise, effort and industry" that had helped bring Devas from a start-up with a good concept and spectrum allocation to a business that was ready to launch as soon as the satellites were.[252]

114. From a review of this list, two points are crystal clear: (i) no right or asset of any kind of Claimant itself was expropriated and (ii) the claims in this case are completely dependent upon the notion that Devas had acquired rights under the Devas Contract that could not be affected by governmental action, a manifestly untenable proposition.

115. With respect to the first point, there is no dispute in this case that neither Claimant's indirect shareholding interest nor DT Asia's direct shareholding interest in Devas was expropriated. It is undisputed that DT Asia retains all of its shares in Devas and, presumably together with the Mauritius Shareholders, is in full control of the company.[253]

116. The real issue here is the "investment" listed in subparagraph (b) above, as the items listed in subparagraph (c) – "DT know-how, expertise, effort and industry that had helped bring Devas from a start-up with a good concept and spectrum allocation to a business that was ready to launch as soon as the satellites were" – were

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[252] *Id.*, ¶ 256.

[253] It is also undisputed that no bank accounts or other assets of Devas were expropriated, and that virtually all of the funds that DT Asia put into Devas were either paid in salaries, legal or consultants' fees and transactions with affiliates or remain in financial instruments that were unaffected by any governmental action. *See* **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 139-142, 167-168.

not items of property that were or could be expropriated. They constitute nothing more than pre-investment activity beyond the scope of the German Treaty.[254]

117. The purported investment in subparagraph (b) is entirely dependent upon Devas' rights under the Devas Contract.[255] Claimant's theory of the case is that Devas had an acquired right under the Devas Contract to proceed to "launch" its business and roll out the Devas Services,[256] but a simple reading of the Devas Contract as well as a

[254] The language "helped bring Devas from a start-up with a good concept and spectrum allocation to a business that was ready to launch" describes perfectly what classic pre-investment activity consists of. *See* ¶ 91 and n. 233, *supra*.

[255] Although Claimant at times seems to acknowledge this basic point, it realises that the terms of the Devas Contract are not favourable to it and therefore invokes the well-known treaty/contract distinction, arguing that the terms of the very contract it relies on to establish an acquired right are irrelevant to its expropriation claim. Claimant's Memorial, ¶ 287. But an investment treaty does not create or expand property rights; it provides protection, under defined circumstances, to a right that already exists. As stated by Professor Douglas: "[An investment treaty] does not create new plots of land in the international stratosphere any more than it creates a new set of international rights *in rem* over immovable property. Any dispute concerning the existence or extent of the rights *in rem* alleged to constitute an investment that arises in an investment treaty arbitration must be decided in accordance with the municipal law of the host state for this is not a dispute about evidence (facts) but a dispute about legal entitlements." **Ex. RLA-52**, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge University Press 2009), p. 70, ¶ 115. *See also id.*, p. 52, ¶ 102 ("Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property."); **Ex. RLA-35**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), p. 95 ("The role of domestic law in defining and regulating the investor's acquired rights is entirely logical. IIAs [International Investment Agreements] and general international law do not purport to regulate the complex problems of proprietary and contractual rights, or the legal nature of state measures. Further, the investment rights and state conduct at issue in IIA disputes arise in the context of legal relationships governed by domestic law. Hence the IIA and international law leave these questions to be decided, in principle, by the law of the host state."); **Ex. RLA-53**, *George W. Cook (U.S.A.) v. United Mexican States*, Mexico–U.S. General Claims Commission, Opinions of the Commissioners, 3 June 1927, 4 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 213 (1951), ¶ 7 ("When questions are raised before an international tribunal . . . with respect to the application of the proper law in the determination of rights grounded on contractual obligations, it is necessary to have clearly in mind the particular law applicable to the different aspects of the case. The nature of such contractual rights or rights with respect to tangible property, real or personal, which a claimant asserts have been invaded in a given case is determined by the local law that governs the legal effects of the contract or other form of instrument creating such rights."); **Ex. RLA-54**, UNCTAD, EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (United Nations 2012), p. 22 ("The existence, nature and validity of rights or interests that are alleged to have been expropriated must be assessed in light of the laws and regulations of the host country of the investment."); n. 9, *supra*.

[256] Claimant's Memorial, ¶ 278 (Claimant argues that the annulment of the Contract "directly expropriated the rights to performance under the Agreement.").

review of the negotiating history and the rest of the record in this case leave no doubt that no such acquired right existed.[257] While Claimant argues this case as if it had a long-term concession from the Government with full stabilisation guarantees, the indisputable facts are that (i) the Devas Contract was with Antrix, not the Government,[258] (ii) implementation of the Devas Contract was subject to governmental approvals as to which Devas had absolutely no guarantee of any kind,[259] (iii) the Devas Contract expressly contemplated the possibility of interruption by reason of "sovereign" acts of the Government,[260] and (iv) after extensive negotiation, Devas accepted the exclusive remedy of a refund of paid Upfront Capacity Reservation Fees in the event of termination for failure of Antrix to obtain the necessary orbital slot for the satellites.[261]

118. A review of the case precedents and international commentary confirms that no expropriation claim could exist on the facts of this case inasmuch as no acquired rights were expropriated:

- *Bayindir v. Pakistan*: "The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated. . . . Bayindir's contractual rights are defined by the terms of the Contract."[262]
- *Generation Ukraine v. Ukraine*: "Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred. . . . The Claimant has persistently asserted that this omission on the part of the Kyiv City

[257] *See* ¶¶ 18-24, 93 and n. 235, *supra*.

[258] **Ex. R-11**, Draft of Binding Term Sheet received on or about 12 September 2004, Section 1.1; **Ex. R-12**, E-mail from ISRO to Devas, 14 September 2004, with attachment. *See* ¶¶ 17, 23, *supra*.

[259] Claimant's Memorial, ¶ 319(c) ("DT does not assert that it had either a contractual right or a concrete assurance from India that the WPC licence would be granted.").

[260] **Ex. R-1**, Devas Contract, Article 11(b)(v).

[261] *See* ¶¶ 22-30, *supra*; **Ex. R-2**, Mauritius Shareholders Arbitration Tr., pp. 138, 1220-1227.

[262] **Ex. RLA-21**, *Bayindir*, ¶¶ 442, 460.

State Administration constitutes the final and irreparable destruction of the Parkview Project. . . . The truth of the matter is that, as of 31 October 1997, the Claimant had a very limited bundle of rights arising under the Order on Land Allocation, Lease Agreements, Foundation Agreement and Construction Permit."[263]

- *Merrill & Ring v. Canada:* "The question is then to establish from where the rights the Investor claims for arise. . . . The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the *Feldman* tribunal's conclusion that an investor cannot recover damages for the expropriation of a right it never had."[264]

- *International Thunderbird v. Mexico*: "[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."[265]

- *Newcombe and Paradell*: "Conceptually, property can only be expropriated if it exists. If a right was never acquired or has been otherwise extinguished under local law, it cannot be expropriated."[266]

- *Dugan, Wallace, Rubins and Sabahi*: "A threshold determination as to whether an expropriation has occurred is to identify the foreign investor's investment or property rights in question."[267]

- *Kjos*: "[A]n expropriation presupposes and depends on the existence of an investment in the form of proprietary rights."[268]

- *Douglas*: "At the first stage, the treaty tribunal must decide, if it is a matter of contention, whether particular rights *in rem* constituting the

[263] **Ex. RLA-55**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶¶ 6.2, 20.7-20.8, 20.30.

[264] **Ex. RLA-56**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, NAFTA/UNCITRAL, Award, 31 March 2010 ("*Merrill & Ring*"), ¶¶ 140, 142, 149.

[265] **Ex. RLA-57**, *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA/UNCITRAL, Arbitral Award, 26 January 2006 ("*International Thunderbird*"), ¶ 208.

[266] **Ex. RLA-35**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), p. 351. *See also* **Ex. RLA-58**, Campbell McLachlan, Laurence Shore and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (Oxford University Press 2007), ¶¶ 6.67-6.70.

[267] **Ex. RLA-33**, Christopher F. Dugan, Don Wallace Jr., Noah Rubins and Borzu Sabahi, INVESTOR-STATE ARBITRATION (Oxford University Press 2008), p. 438.

[268] **Ex. RLA-59**, Hege Elisabeth Kjos, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW (Oxford University Press 2013), p. 242.

> alleged investment exist, the scope of those rights, and in whom they vest."[269]

119. The fundamental principles reflected in the above cases and commentary have been reaffirmed in the most recent international arbitral decision on this issue, *Emmis v. Hungary*.[270] In *Emmis*, the claimants were shareholders of a company that held a broadcasting right that expired and expected a renewal. When renewal was denied and the licence was put up to bid, the claimants alleged expropriation. In its final award, the tribunal rejected the expropriation claim, finding that the claimants had no "property right" capable of expropriation.[271] The tribunal explained:

> Claimants must have held a property right of which they have been deprived. This follows from the ordinary meaning of the term ["expropriate"].
>
> . . . .
>
> It also follows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress. This has been recognised by many tribunals [citing *Feldman*, *Generation Ukraine*, *Bayindir*, *Merrill & Ring*, *Chemtura*, *Apotex* and *Swisslion*].
>
> . . . .
>
> [B]oth Parties accept that Claimants had an investment by way of its shares in Sláger Rádió for 12 years from 1997 until 18 November 2009, which qualified for protection under the Treaties. The issue in the present case is a more specific one: what proprietary rights, if any, did Claimants acquire thereby in respect of any period after 18 November 2009?
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> . . . .

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[269] **Ex. RLA-60**, Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 2003 151 (2004), p. 211.

[270] **Ex. RLA-61**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V. and Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014.

[271] *Id.*, ¶ 255.

> In the final analysis, the Tribunal is satisfied that the only proprietary right that Claimants had, capable of protection from expropriation, was the Broadcasting Right it acquired in 1997. That right was a right of limited duration. It expired on 18 November 2009. None of the ways in [which] Claimants have sought to plead their case on the injustices that they allege were perpetrated upon them in the 2009 Tender meet the basic requirement of a property right. . . . Accordingly this Tribunal has no option but to dismiss Claimants' claims of expropriation as presently maintained in this arbitration for lack of jurisdiction.[272]

120. Claimant's expropriation claim suffers from the same deficiency. It seeks compensation for rights it never had, in effect asking this Tribunal to convert the Devas Contract with Antrix, which expressly subjected implementation of the project to Government approvals and licences, into a binding, long-term concession agreement with the Government. No precedent or authority of any kind exists to support such a far-reaching proposition.

121. Instead of addressing this fundamental requirement, Claimant focuses its analysis on a series of expropriation cases designed to prove propositions that are not at issue in this case, including that intangible rights may be the subject of expropriation

[272] *Id.*, ¶¶ 159, 168, 194, 255. The same principles are illustrated by cases dealing with compensable "takings" in the United States. Those cases consistently stress that the first step in the analysis of whether a compensable taking exists is the identification of the property taken, and each makes clear that absent an identifiable property interest, no compensation could be due for the governmental action. *See* **Ex. RLA-62**, *Acceptance Insurance Companies, Inc. v. United States*, U.S. Court of Appeals for the Federal Circuit, 583 F.3d 849, Decision, 1 October 2009, p. 4 ("When evaluating whether governmental action constitutes a taking without just compensation, a court employs a two-part test. First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.'"); **Ex. RLA-63**, *Colvin Cattle Company, Inc. v. United States*, U.S. Court of Appeals for the Federal Circuit, 468 F.3d 803, Decision, 1 November 2006, p. 2 ("[T]he threshold inquiry is 'whether a claimant has established a 'property interest' for purposes of the Fifth Amendment'."); **Ex. RLA-64**, *American Pelagic Fishing Company, L.P. v. United States*, U.S. Court of Appeals for the Federal Circuit, 379 F.3d 1363, Decision, 16 August 2004, p. 6 ("We have developed a two-part test to determine whether a taking has in fact occurred. First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment.").

and that a government's cancellation of long-term contracts in violation of stabilisation clauses constitutes an expropriation,[273] but that is not what occurred here.

122. The first case relied upon by Claimant in its exposition of irrelevant expropriation principles is *Deutsche Bank v. Sri Lanka*.[274] Claimant contends that the *Deutsche Bank* tribunal found that the government's action preventing the investor from receiving the sum of money due under an agreement amounted to an expropriation.[275] The case concerned a Hedging Agreement between Deutsche Bank and Ceylon Petroleum Corporation ("CPC"). In an interim order that the Chief Justice of Sri Lanka acknowledged in public statements was issued for political reasons,[276] the Supreme Court of Sri Lanka suspended all payments due by CPC to Deutsche Bank under the Hedging Agreement on the grounds that CPC did not have the authority to enter into the Hedging Agreement and that the Agreement was structured in such a way as to benefit Deutsche Bank. The Court also ordered the Monetary Board of the Central Bank to investigate the relevant transactions. The interim order was later vacated by the Supreme Court, but the Central Bank decided that the suspension of the payments to Deutsche Bank would remain in force.[277] The arbitral tribunal found that the claimant's investment had been expropriated because the decisions of the Supreme Court and the Central Bank had prevented the claimant from receiving the payment due under the Hedging Agreement.[278] It is difficult to see how that case could have any bearing on

[273] Claimant's Memorial, ¶¶ 275-276.

[274] **Ex. CLA-23**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012 ("*Deutsche Bank*").

[275] Claimant's Memorial, ¶ 279.

[276] **Ex. CLA-23**, *Deutsche Bank*, ¶ 479.

[277] *Id.*, ¶ 521.

[278] *Id.*, ¶ 520.

this case, which does not involve the taking of any monies due or anything remotely resembling what happened in *Deutsche Bank*. Unlike in *Deutsche Bank*, where Deutsche Bank's claim to money under the Hedging Agreement was indisputable, here Claimant had no acquired right to proceed with the Devas project.

123. The second case relied upon by Claimant is *Occidental v. Ecuador*.[279] Incredibly, Claimant argues that its claim here "mirrors" the claim in *Occidental* because the decision in that case shows that the termination of a contract can be considered an expropriation.[280] However, the facts of *Occidental* obviously do not "mirror" the facts here. *Occidental* involved a termination by the Government of Ecuador of a long-term oil production sharing agreement and the seizure of all of the claimants' local assets, including wells, drilling rigs, storage facilities and other oil exploration and production assets.[281] Unlike this case, in which essential governmental approvals required to commence operations were not obtained, at issue in *Occidental* was the termination of a business already in operation and producing over 100,000 barrels of oil per day. In other words, Occidental had acquired rights that were terminated. That is a far cry from this case, in which Devas had absolutely no acquired right to roll out the Devas Services.

124. In a footnote to its discussion of *Occidental*, Claimant refers to *Kardassopoulos v. Georgia*.[282] As might be expected, that case is as far removed from this one as is *Occidental*. In *Kardassopoulos*, the claimant had a joint venture

[279] **Ex. CLA-51**, *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012 ("*Occidental*").

[280] Claimant's Memorial, ¶ 280.

[281] **Ex. CLA-51**, *Occidental*, ¶¶ 199-200.

[282] Claimant's Memorial, n. 415; **Ex. CLA-38**, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010.

agreement and deed of concession with the government, including full stabilisation clause protection. The government cancelled the contract in breach of the stabilisation clause. It is baffling that Claimant finds *Kardassopoulos* to be of any assistance to it here, where no one even alleges that a stabilisation clause or any other clause binding the Government exists and where the governmental action taken was perfectly within the Government's sovereign prerogative.

125. The next case cited by Claimant is *Vivendi v. Argentina II*.[283] Claimant quotes *Vivendi II* for the proposition that sovereign acts taken by the Government in its official capacity cannot qualify as commercial acts under a contract, a proposition of no relevance here.[284] In any event, Claimant again ignores the fact that, unlike this case, *Vivendi II* involved a concession agreement with the provincial government under which the claimants were operating after having secured all the necessary approvals.

126. Claimant also argues that its claim is "analogous to the successful claim by CME against the Czech Republic," where the tribunal found that the revocation of the claimant's rights under a broadcasting licence constituted indirect expropriation.[285] In *CME v. Czech Republic*,[286] the tribunal found that the Czech Republic, acting with the claimant's business partner, forced the claimant to give up the exclusivity of the use of a broadcasting licence originally secured by the claimant. The tribunal held that the

[283] **Ex. CLA-20**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/03, Award, 20 August 2007.

[284] The only relevance of the sovereign/commercial distinction here is to reinforce Respondent's position that under the Devas Contract, which is the basis for Claimant's expropriation claim, all parties understood that if the Government prevented performance through "sovereign" action, Devas would have no claim. **Ex. R-1**, Devas Contract, Article 11(b)(v). *See* ¶ 31, *supra.*

[285] Claimant's Memorial, ¶ 285.

[286] **Ex. CLA-17**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001.

action of the government was expropriatory because it forced the claimant "to give up substantial accrued legal rights."[287] What is different in this case and what Claimant continues to ignore is the basic fact that Devas had no "accrued legal right" to proceed with the Devas project since the latter was subject to governmental approvals that were never obtained.

127. In sum, unlike all of the cases relied upon by Claimant, this case involves no expropriation of property rights, which is the first indispensable element of any expropriation claim. The fact that Devas was not able to roll out the Devas Services as a result of the decision of the Cabinet Committee on Security does not mean that Devas, or indirectly this Claimant, had any "acquired rights" that were taken. Therefore, Claimant's expropriation claim would have to be dismissed wholly apart from the "essential security interests" provision of the German Treaty and the jurisdictional issues discussed above.

B. Claimant's Argument on Unlawful Expropriation

128. Claimant's final argument on expropriation is that this case involves an "unlawful" expropriation.[288] There is no reason to engage in a lengthy analysis of the requirements for lawful expropriation here since Claimant's argument is pointless in the absence of an expropriation. Nevertheless, Claimant's analysis of the requirements of a lawful expropriation is a further indication of the bankrupt nature of its entire case.

129. Claimant says that there was no "public interest" or "public purpose" for the decision of the Cabinet Committee on Security.[289] But that is obviously wrong, as

[287] *Id.*, ¶ 520.

[288] Claimant's Memorial, ¶¶ 289-301.

[289] *Id.*, ¶ 296.

the official report of the Cabinet Committee on Security's decision makes clear: "Taking note of the fact that Government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix for commercial activities."[290] Claimant of course cannot cite any authority that would support the view that such a decision does not meet the "public interest" requirement.[291] It has nothing other than the same irresponsible allegations that the decision was taken for "commercially and politically motivated" reasons, implying bad faith on the part of the entire national security hierarchy of the Government.[292]

130. Claimant says that "due process" was violated because it was not consulted on matters of national security,[293] but due process does not require admission

[290] **Ex. R-31**, Press Information Bureau, Government of India, *CCS Decides to Annul Antrix-Devas Deal*, 17 February 2011 (emphasis added). *See* ¶ 36, *supra*.

[291] *See* **Ex. RLA-35**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), pp. 371, 373 (stating that "states have been afforded a wide margin of appreciation in determining whether an expropriation serves a public purpose" and that "tribunals should exercise caution in asserting that state measures do not meet the public purpose requirement"); **Ex. RLA-54**, UNCTAD, EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (United Nations 2012), pp. 31-32, 34 ("The concept of public purpose is somewhat broad and abstract. International law has traditionally left it to each sovereign . . . . The specific motives are not considered important under international law, and international tribunals and courts have traditionally given strong deference to States as to whether an expropriation has been motivated by a public purpose. . . . Countries are the best judges of their own needs, values and circumstances, and tribunals should defer to their judgement unless there is evidence that the expropriation is manifestly without public purpose.")

[292] Claimant's Memorial, ¶ 297. *See* ¶¶ 60-64, *supra*.

[293] Claimant's Memorial, ¶¶ 298-299.

of Claimant or any other private party to the highly sensitive and confidential security deliberations of the Space Commission or the Cabinet Committee on Security.[294]

131. Next, Claimant alleges that the annulment of the Devas Contract was discriminatory.[295] Without delving into the extensive precedents on the international law concept of discrimination, there is not even an allegation by Claimant that it has been discriminated against on the ground of nationality.[296] The Cabinet Committee on Security obviously did not deny orbital slot to Antrix for commercial activities because it

[294] *See* ¶¶ 50-57 and n. 159, *supra*.

[295] Claimant's Memorial, ¶¶ 292-294.

[296] *See* **Ex. RLA-68**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 261 ("Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be 'discriminatory and expose[s] the claimant to sectional or racial prejudice'; or a measure must 'target[ed] Claimant's investments specifically as foreign investments'."); **Ex. RLA-69**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 180 ("The Tribunal now turns to the question of whether the proceedings were discriminatory. . . . [T]he Claimant has to demonstrate that a certain measure was directed specifically against a certain investor by reason of his, her or its nationality."). *See also* **Ex. RLA-70**, August Reinisch, *Legality of Expropriations*, in STANDARDS OF INVESTMENT PROTECTION 171 (A. Reinisch ed., Oxford University Press 2008), p. 190 ("Any expropriation – short of a general nationalization – will target specific groups of property owners or investors . . . . The fact that there may be only one affected entity, and that this one entity may be a foreign investor, is usually not enough to constitute a discriminatory taking which singles out particular persons without a reasonable basis. The fact that only foreigners are affected by an expropriatory measure as such may be incidental. Illegal discrimination usually requires the targeting of foreign investors as a result of unreasonable policies or motives such as racism or political retaliation against nationals of certain States."). Discrimination also does not apply where the party affected is not "similarly situated" or "in like circumstances." *See*, *e.g.*, **Ex. RLA-65**, Meg N. Kinnear, Andrea K. Bjorklund and John F.G. Hannaford, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (Kluwer Law International 2009), p. 1102.51 ("A claimant must meet its burden of proof that it is in like circumstances with the more favorably treated entity or class of entities."); **Ex. RLA-66**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL (NAFTA), Award on the Merits of Phase 2, 10 April 2001, ¶¶ 73-81 (analytical model for discrimination claim requires identifying comparable investors and investments, determining whether they received more favorable treatment, and determining whether there was a "reasonable relationship" between the treatment and rational, legitimate government policies); **Ex. RLA-67**, *United Parcel Service of America Inc v. Government of Canada*, UNCITRAL (NAFTA), Award on the Merits, 24 May 2007, ¶ 83 (discrimination analysis includes identifying the treatment received and determining whether it was more favorable; determining whether the investors were in "like circumstances," and considering whether there are public policy justifications for differential treatment); **Ex. RLA-56**, *Merrill & Ring*, ¶ 89 (U.S. company engaged in log production in British Columbia was not in like circumstances with log producers in other areas subject to different federal or provincial regulations regarding log exports; "the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority.").

wanted to reserve S-band for commercial use of Indians or because it wanted to discriminate against Singaporean or German nationals.

132. Claimant says that Respondent "has neither paid nor offered adequate compensation for these takings."[297] But there is nothing unlawful about not calculating compensation in a case that involves no expropriation. Moreover, Devas was tendered by Antrix exactly what Devas had agreed would be the amount it would receive in the event of termination of the Devas Contract.[298] Claimant is not satisfied with that amount, so it seeks to expand the rights of Devas by claiming additional compensation from the State. That is not possible since the claims of this Claimant are totally dependent upon the Devas Contract.

133. In sum, Claimant's expropriation claim is wholly without merit.

POINT V.

THIS CASE INVOLVES NO FET STANDARD VIOLATION

134. The FET provision of the German Treaty requires that each Contracting Party "shall accord to investments as well as to investors in respect of such investments at all times fair and equitable treatment."[299] In making its FET claim, Claimant assumes that the FET standard of the German Treaty goes beyond the minimum standard of treatment required by customary international law.[300] It does not, but even if it did, Claimant's FET claims would have to be dismissed because, apart from being precluded by the "essential security interests" provision of the German Treaty and the

[297] Claimant's Memorial, p. 104.

[298] **Ex. R-1**, Devas Contract, Article 7(c); *See* ¶¶ 20-30, *supra*.

[299] **Ex. C-1**, German Treaty, Article 3(2).

[300] Claimant's Memorial, ¶¶ 302-304.

jurisdictional issues discussed above,[301] the claims do not pass muster either under the minimum standard of treatment under customary international law or the more expansive FET standard advocated by Claimant here.

A. The Minimum Standard of Treatment Under Customary International Law Applies to FET Claims under the German Treaty

135. Claimant understandably wants this Tribunal to disregard the minimum standard of treatment under customary international law, which it does not even discuss in its Memorial, and assumes without any basis that the FET provision of the German Treaty is an "open-textured standard."[302] However, there is no indication either in the language of the German Treaty or in its *travaux préparatoires* that the FET provision incorporates anything beyond the minimum standard of treatment under customary international law. Quite the contrary, there is evidence that the FET provision was only intended to protect investors against measures that violated that standard, as that is the case of India's bilateral investment treaties generally.

136. The FET clause of Indian investment treaties was inspired by the OECD Draft Convention on the Protection of Foreign Property.[303] The comment to the FET clause contained in the OECD Draft Convention explains the meaning of that provision:

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[301] *See* ¶¶ 48-111, *supra*.

[302] Claimant's Memorial, ¶ 303.

[303] *See, e.g.,* **Ex. R-37**, Fax from Embassy of India in Moscow to Ministry of Finance of India, 15 November 1994. This is true for all Indian BITs. *See also* **Ex. RLA-71**, Surya P. Subedi, *India's New Bilateral Investment Promotion and Protection Treaty with Nepal: A New Trend in State Practice*, 28(2) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 384 (Fall 2013), p. 393 ("Since the India-Nepal BIPPA [Bilateral Investment Promotion and Protection and Agreement] does not define the term 'fair and equitable', it might be inferred that the parties intended to accept the traditionally generally agreed definition of this term under the customary international law principle of the international minimum standard of treatment available to foreign investors. There are no indications to suggest that the contracting parties intended to qualify this principle or accord a meaning that may vary from its meaning under the customary international law principle of minimum standard of treatment. Therefore, it is

> The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. . . . The standard required conforms in effect to the "minimum standard" which forms part of customary international law.[304]

137. As two well-known commentators have pointed out:

> There is some state practice amongst major capital exporting states suggesting that fair and equitable treatment was viewed as reflecting, and as synonymous with, the minimum standard of treatment. For example, some elements of US, UK, Swiss and Canadian treaty practice suggest that these states considered that fair and equitable treatment reflected the minimum standard of treatment. . . . This view [of the 1967 Draft OECD Convention on the Protection of Foreign Property] was reconfirmed by the OECD's Committee on International Investment and Multinational Enterprises in 1984. Accordingly, it is arguable that when incorporating the fair and equitable treatment standard into their BITs, OECD states were guided by the meaning ascribed to that language by the intergovernmental organization (IGO) of which they were members.[305]

138. Absent evidence of intent of the Contracting Parties to do so, expanding the FET concept beyond the minimum standard of treatment provided by customary international law has been severely criticised by many commentators and arbitrators, as indicated by the following excerpts:

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submitted that the meaning and scope of the principle of fair and equitable treatment in the India-Nepal BIPPA should be no different from the meaning and scope of the term generally understood in general international law.").

[304] **Ex. RLA-72**, *Resolution of the Council of the OECD on the Draft Convention on the Protection of Foreign Property*, adopted 12 October 1967, 7 INTERNATIONAL LEGAL MATERIALS 117 (1968), Article 1 and Notes and Comments to Article 1, ¶ 4(a).

[305] **Ex. RLA-35**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), pp. 268-269. *See also* **Ex. RLA-73**, *Opinions of the Public International Law Directorate of the Federal Political Department* (*Mémoire de la Direction du Droit International Public du Département Politique Fédéral*), in Lucius Caflisch, *La Pratique Suisse en Matière de Droit International Public 1979*, 36 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT / ANNUAIRE SUISSE DE DROIT INTERNATIONAL 139 (1980), p. 178 ("What is referred to is thus the classic principle of international law according to which states must provide to foreigners on their territory and their property the benefit of the international 'minimum standard', that is to grant them a minimum of personal, procedural and economic rights.").

- "Commentators have voiced considerable concern about the broad-reaching interpretations given to the [FET] standard by recent tribunal awards."[306]
- "The 'fair and equitable' language, if viewed as an independent standard, is extremely dangerous to good governance."[307]
- Expansive interpretations of FET have been "nothing short of adventurous" and transform "the international law [minimum] standard from a bulwark against flagrant mistreatment of foreign nationals into an all-encompassing guarantee of highly flexible notions of fairness, equity, and due process."[308]
- The expansive interpretation of FET "does not accord with the case-law or State practice, which suggest that fair and equitable treatment should be equivalent to the minimum standard and provide protection for procedural fairness and duly diligent consideration of the effects of a proposed government policy on foreign investors."[309]
- "Generally, little justification has been provided in arbitral awards to account for the use of legitimate expectations in the context of the fair and equitable treatment standard. This may seem quite surprising considering that the concept has no explicit anchoring in the text of the applicable investment treaties. . . . The technique that has been used by most tribunals to buttress the application of the legitimate expectations principle is to simply refer to previous arbitral awards which have endorsed such concept, in a sort of cascade effect."[310]
- "The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor

[306] **Ex. RLA-74**, J. Roman Picherack, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, 9(4) THE JOURNAL OF WORLD INVESTMENT & TRADE 255 (August 2008), p. 272.

[307] **Ex. RLA-75**, Marcos Orellana, *International Law on Investment: The Minimum Standard of Treatment (MST)*, 1(3) TRANSNATIONAL DISPUTE MANAGEMENT (July 2004), p. 7.

[308] **Ex. RLA-76**, Gus Van Harten, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press 2007), p. 89.

[309] **Ex. RLA-77**, Graham Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, 41(2) JOURNAL OF WORLD TRADE 273 (2007), pp. 274-275.

[310] **Ex. RLA-78**, Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 88 (2013), p. 90.

> . . . does not correspond, in any language, to the ordinary meaning to be given to the terms 'fair and equitable.'"[311]

- "The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly."[312]
- "Although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations."[313]

139. In a well-publicised declaration in 2010 on the international investment regime, a number of professors stated:

> Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. . . . This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf they act.[314]

140. States and supra-national organisations have also voiced their discontent with unjustifiably expansive interpretations of the FET standard, most notably:

- The United States of America: As the United States made clear in adopting its 2004 model BIT, it had never intended an expansive view of FET beyond the minimum standard of treatment under customary

[311] **Ex. RLA-79**, *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales de Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, ¶ 3.

[312] **Ex. RLA-80**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7 (Annulment Proceeding), Decision on Annulment, 21 March 2007, ¶ 67.

[313] **Ex. RLA-4**, *CMS Annulment*, ¶ 89.

[314] **Ex. RLA-81**, *Public Statement on the International Investment Regime*, 31 August 2010, ¶ 5 (emphasis added).

international law, even in its old BITs.[315] In the 2004 model, the United States was not taking any chances. To remove any doubt on the subject, the 2004 model explicitly provided: "For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."[316] This provision was carried over into the 2012 U.S. Model BIT.[317]

- Canada: Like the U.S. Model BIT, Canada's model investment treaty provides: "1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[318]

- The European Union: The European Parliament has adopted a resolution on investment policy that restricts the FET standard to the customary international law level of protection, following the example of the United States and Canada. The resolution states: "[F]uture investment agreements concluded by the EU should be based on the best practices drawn from Member State experiences and include the following standards: . . . fair and equitable treatment, defined on the

[315] The 2004 Model BIT made explicit what was the United States' intention all along. Although the text of the 1994 U.S. Model BIT did not include this clarifying language, the U.S. State Department's official description of that model stated that the "fair and equitable treatment" provision was intended as the "minimum standard of treatment based on customary international law." **Ex. RLA-82**, Description of the U.S. Model Bilateral Investment Treaty (BIT), submitted by the State Department, 30 July 1992, Hearing before the Committee on Foreign Relations, United States Senate, 102nd Congress, 2nd Session, 4 August 1992, S. HRG 102-795, p. 62 ("This paragraph [on fair and equitable treatment] sets out a minimum standard of treatment based on customary international law."); **Ex. RLA-83**, 1994 U.S. Model Bilateral Investment Treaty, INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM VOL. III, REGIONAL INTEGRATION, BILATERAL AND NON-GOVERNMENTAL INSTRUMENTS 195 (United Nations 1996), Article II (3)(a). *See also* **Ex. RLA-84**, J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 21 (Spring 2002), pp. 49-50 and n. 78 (noting that both before and after the entry into force of the North American Free Trade Agreement ("NAFTA"), the U.S. Department of State transmitted a series of bilateral investment treaties to the Senate for approval in which it stated that the obligation to provide "fair and equitable treatment" set out "a minimum standard of treatment based on customary international law.").

[316] **Ex. RLA-85**, 2004 U.S. Model Bilateral Investment Treaty, Article 5(2) and Annex A.

[317] **Ex. RLA-86**, 2012 U.S. Model Bilateral Investment Treaty, Article 5(2) and Annex A.

[318] **Ex. RLA-87**, 2004 Canada Model Bilateral Investment Treaty, Article 5.

basis of the level of treatment established by international customary law."[319] The report setting forth the resolution explains the motivation for the restriction of the FET standard: "The USA and Canada, which were among the first states to suffer as a result of excessively vague wording in the NAFTA agreement, have adapted their BIT model in order to restrict the breadth of interpretation by the judiciary and ensure better protection of their public intervention domain. The EU should therefore include in all its future agreements a specific clause laying down the right of the EU and [Member States] to regulate . . . . Moreover, standards of protection should be strictly defined, in order to avoid abusive interpretations by international investors. In particular . . . fair and equitable treatment must be defined on the basis of the level of treatment established by international customary law."[320]

- EU-Canada Free Trade Agreement: In order to "avoid too wide interpretations and provide clear guidelines to tribunals," the draft EU–Canada Free Trade Agreement specifies that "a breach of the fair and equitable treatment obligation arises only in the following cases: Denial of justice in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; Manifest arbitrariness; Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; Abusive treatment of investors, such as coercion, duress and harassment."[321]

141. The content of the minimum standard of treatment under customary international law was expressed in *Neer v. Mexico*, in which the tribunal held that in order to violate the standard, the treatment of an alien "should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[322] There is ample support for the proposition that despite

[319] **Ex. RLA-88**, European Parliament, *Resolution on the Future European International Investment Policy (2010/2203(INI))*, 6 April 2011, ¶ 19.

[320] **Ex. RLA-89**, European Parliament, Committee on International Trade, *Report on the Future European International Investment Policy (2010/2203(INI))*, Report No. A7-0070/2011, 22 March 2011, Explanatory Statement, pp. 11-12.

[321] **Ex. RLA-90**, European Commission, *Investment Provisions in the EU–Canada Free Trade Agreement (CETA)*, 3 December 2013.

[322] **Ex. RLA-91**, *L.F.H. Neer and Pauline E. Neer v. Mexico*, Mexico–U.S. General Claims Commission, Docket No. 136, Opinion, 15 October 1926, 21 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 555 (1927), p. 556.

the passage of time since the *Neer* decision, in order to find a violation of the minimum standard of treatment under customary international law "the threshold is extremely high," and "outrageous or egregious conduct is required before a violation is established."[323] For example:

- In *Genin v. Estonia*, the tribunal stated: "Under international law, this [fair and equitable treatment] requirement is generally understood to 'provide a basic and general standard which is detached from the host State's domestic law.' While the exact content of this standard is not clear, the Tribunal understands it to require an 'international minimum standard' that is separate from domestic law, but that is, indeed, a *minimum* standard. Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[324]

- In *International Thunderbird v. Mexico*, the tribunal stated: "Notwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[325]

- In *Glamis Gold v. United States of America,* the holding was as follows: "The Tribunal holds that Claimant has not established that the individual measures taken by the federal and California state

[323] **Ex. RLA-92**, Patrick G. Foy and Robert J.C. Deane, *Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement*, 16(2) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 299 (Fall 2001), p. 314. *See also id.*, p. 313 ("A State's conduct has been held to fall below this standard where its treatment of non-nationals is egregious and amounts to an outrage, to wilful neglect of duty or to an insufficiency of governmental action that every reasonable and impartial person would recognize as insufficient. A State's conduct will also fall below the minimum standard when it is determined that there has been a denial, unwarranted delay or obstruction of access to courts; gross deficiency in the administration of judicial or remedial processes; or a failure to provide guarantees which are generally considered indispensable to the proper administration of justice.").

[324] **Ex. RLA-93**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 ("*Genin*"), ¶ 367 (emphasis in original).

[325] **Ex. RLA-57**, *International Thunderbird*, ¶ 194.

governments fall below the customary international law minimum standard of treatment and constitute a breach of Article 1105 in that they are not egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[326]

- And in *Cargill v. United Mexican States*, the tribunal stated: "Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained. . . . If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or willful neglect of duty, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment."[327]

142. Claimant does not make any argument that India violated the minimum standard of treatment under customary international law. On the facts of this case, no such argument can be made. Indeed, the record shows that no FET violation could be found even under the most expansive standard discussed below. *A fortiori*, the actions of the Government did not violate the minimum standard of treatment under customary international law.

B. No FET Violation Would Exist Even Under the Expansive FET Standard

143. Claimant's FET claims would have no merit even under its own overly broad interpretation of the FET provision of the German Treaty. Claimant argues that when it invested in India, it "legitimately expected" that:

> (a) during the lifetime of the Agreement, the Government would not take steps directly to interfere with the Agreement, still less to annul it;

[326] **Ex. RLA-94**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award, 8 June 2009, ¶ 824.

[327] **Ex. RLA-95**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)05/02 (NAFTA), Award, 18 September 2009, ¶¶ 284, 286.

> (b) during the lifetime of the Agreement, the Government would not withdraw or revoke the allocation of S-band spectrum to Devas pursuant to the Agreement; and
>
> (c) during the lifetime of the Agreement, the Government would not change its policy with respect to private commercial utilisation of the S-band at least as it applied to Devas's use of S-band under the Agreement.[328]

144. However, a wealth of precedent and writings of international practitioners and scholars make clear that: (i) an FET obligation cannot, absent a specific commitment by the state, deprive the state of its inherent right to take sovereign decisions affecting the conduct of business within its borders; (ii) the mere existence of a BIT is no substitute for such a commitment; (iii) absent such a specific commitment, an investor cannot assume that there will be no adverse changes in law or policy; and (iv) hopes and dreams are not legitimate expectations. The following are illustrative of these basic principles:

- *Saluka v. Czech Republic*: "[The FET provision] does not set out totally subjective standards which would allow the Tribunal to substitute, with regard to the Czech Republic's conduct to be assessed in the present case, its judgment on the choice of solutions for the Czech Republic's. As the tribunal in *S.D. Myers* has said, the 'fair and equitable treatment' standard does not create an 'open-ended mandate to second-guess government decision-making'. . . . No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. As the *S.D. Myers* tribunal has stated, the determination of a breach of the obligation of 'fair and equitable treatment' by the host State 'must be made in the light of the high measure of deference that international law generally extends to the

[328] Claimant's Memorial, ¶ 316.

right of domestic authorities to regulate matters within their own borders.'"[329]

- *AWG v. Argentina*: "[I]t is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare."[330]

- *Total v. Argentina*: "In the absence of some 'promise' by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a 'guarantee' of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor. The expectation of the investor is undoubtedly 'legitimate', and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law. . . . [S]ignatories of BITs do not thereby relinquish their regulatory powers nor limit their prerogative to amend legislation in order to adapt it to change, new emerging needs and requests of their people in the normal exercise of their prerogatives and duties."[331]

- *El Paso v. Argentina*: "FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilisation clauses specifically granted to foreign investors with whom the State has signed investment agreements. . . . The State has to be able to make the reasonable changes called for by the circumstances and cannot be considered to have accepted a freeze on the evolution of its legal system."[332]

- *Parkerings v. Lithuania*: "It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the rights to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment

[329] **Ex. CLA-60**, *Saluka Investments BV (the Netherlands) v. The Czech Republic*, *Ad Hoc*/UNCITRAL, Partial Award, 17 March 2006, ¶¶ 284, 305. *See also* **Ex. RLA-96**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000, ¶¶ 264, 305.

[330] **Ex. RLA-97**, *AWG Group v. The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, ¶ 139.

[331] **Ex. CLA-74**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶¶ 117, 309(b).

[332] **Ex. CLA-25**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 368, 371.

> brought to the regulatory framework existing at the time an investor made its investment. . . . It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law."[333]

- *Paushok v. Mongolia*: "In many instances, [foreign investors] will obtain the appropriate guarantees in that regard in the form of, for example, stability agreements which limit or prohibit the possibility of tax increases. . . . In the absence of such a stability agreement . . . Claimants have not succeeded in establishing that they had legitimate expectations that they would not be exposed to significant tax increases in the future."[334]

- *Feldman v. Mexico*: "Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue."[335]

- *Newcombe and Paradell*: "All investors must reasonably assume that the regulatory environment, like the business environment, is subject to change (absent a specially negotiated stabilization clause)."[336]

- *Vandevelde*: "Tribunals have made clear that the [FET] standard does not impose on host states a general obligation always to act consistently over time. Host states generally have the discretion to change policies."[337]

- *Crawford*: "Reference to a general and vague standard of legitimate expectations is no substitute for contractual rights. The relevance of

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[333] **Ex. RLA-98**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 ("*Parkerings*"), ¶¶ 332, 344 (emphasis in original).

[334] **Ex. RLA-99**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, *Ad Hoc*/UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶ 302.

[335] **Ex. RLA-100**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 (NAFTA), Award, 16 December 2002, ¶ 112.

[336] **Ex. RLA-35**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), p. 282.

[337] **Ex. RLA-101**, Kenneth J. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION (Oxford University Press 2010), p. 234.

> legitimate expectations is not a licence to arbitral tribunals to rewrite the freely negotiated terms of investment contracts."[338]

- *Dolzer and Schreuer*: "Legitimate expectations are not subjective hopes and perceptions; rather, they must be based on objectively verifiable facts."[339]

145. It should be recalled that the Devas Contract was expressly governed by Indian law,[340] and under Indian law there is no doubt that denial of a licence as a result of a policy decision such as that taken by the Cabinet Committee on Security cannot violate any notion of "legitimate expectations." The two leading cases on the subject in India are *India v. Hindustan Development Corporation*[341] and *P.T.R. Exports v. India*.[342] In the first case, the Supreme Court drew a clear distinction between legitimate expectation and "a wish, a desire or a hope," stating:

> For legal purposes, the expectation can not be the same as anticipation. It is different from a wish, a desire or a hope nor [does] it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves can not amount to an [assertable] expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation can not amount to a legitimate expectation.[343]

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[338] **Ex. RLA-102**, James Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) ARBITRATION INTERNATIONAL 351 (Kluwer Law International 2008), p. 373.

[339] **Ex. RLA-103**, Rudolph Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2nd ed., Oxford University Press 2012), p. 148.

[340] **Ex. R-1**, Devas Contract, Article 19. The German Treaty also provides: "Except as otherwise provided in this Agreement, all investments shall, be governed by the laws in force in the territory of the Contracting Party in which such investments are made." *See* **Ex. C-1**, German Treaty, Article 11.

[341] **Ex. RLA-104**, *Union of India and Others v. Hindustan Development Corpn. and Others*, Supreme Court of India, AIR1994SC998, Order,15 April 1993 ("*Hindustan Development*").

[342] **Ex. RLA-105**, *P.T.R. Exports (Madras) Pvt. Ltd. and Others v. Union of India and Others*, Supreme Court of India, AIR1996SC3461, Order, 9 May 1996 ("*P.T.R. Exports*").

[343] **Ex. RLA-104**, *Hindustan Development*, ¶ 29.

The Court went on to hold that no claim for violation of legitimate expectations could be made where the Government's decision was a matter of policy, "unless in a given case, the decision or action taken amounts to an abuse of power."[344]

146. In *P.T.R. Exports*, the Supreme Court elaborated on the doctrine of legitimate expectations as follows:

> The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The Court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is a settled law that the Court gives the large leeway to the executive and the legislature. Granting licences for import or export is by executive or legislative policy. Government would take diverse factors for formulating the policy for import or export of the goods granting relatively greater priorities to various items in the overall larger interest of the economy of the country. It is, therefore, by exercise of the power given to the executive or as the case may be, the legislature is at liberty to evolve such policies.
>
> An applicant has no vested right to have export or import licences in terms of the policies in force at the date of his making application. For obvious reasons, granting of licences depends upon the policy prevailing on the date of the grant of the licence or permit. The authority concerned may be in a better position to have the overall picture of diverse factors to grant permit or refuse to grant permission to import or export goods. The decision, therefore, would be taken from diverse economic perspectives which the executive is in a better informed position unless, as we have stated earlier, the refusal is mala fide or is an abuse of power in which event it is for the applicant to plead and prove to the satisfaction of the Court that the refusal was vitiated by the above factors. . . . A prior decision would not bind the Government for all times to come. When the Government are [*sic*] satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The Court, therefore, would prefer to allow free play to the Government to evolve

[344] *Id.*, ¶ 36.

> fiscal policy in the public interest and to act upon the same.[345]

147. The Supreme Court recently affirmed the foregoing principles in *Monnet Ispat v. India*, stating:

> (iii) Where the decision of an authority is founded in public interest as per executive policy or law, the court would be reluctant to interfere with such decision by invoking doctrine of legitimate expectation. The legitimate expectation doctrine cannot be invoked to fetter changes in administrative policy if it is in the public interest to do so.
>
> (iv) The legitimate expectation is different from anticipation and an anticipation cannot amount to an assertible expectation.[346]

148. Thus, whether under the international or the Indian precedents, no claim can be made based on a theory of "legitimate expectations" on the facts of this case. Claimant had no right of any kind to insist on receiving the Government approvals necessary for implementation of the project, and the Government undertook no commitment of any kind to grant such approvals. As discussed earlier, those facts are evident from every part of the record in this case, including Claimant's frank acknowledgement that it did not have "either a contractual right or a concrete assurance from India that the WPC licence would be granted,"[347] its own Board presentations and briefings evincing its understanding that there was no assurance that indispensable authorisations would be obtained,[348] its desperate reliance upon a dinner party and other polite gestures and warm receptions from various Indian officials to fill the gap in

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[345] **Ex. RLA-105**, *P.T.R. Exports,* ¶¶ 3-5.

[346] **Ex. RLA-106**, *Monnet Ispat and Energy Ltd. v. Union of India (UOI) and Ors.*, Supreme Court of India, JT2012(7)SC50, Judgment, 26 July 2012, ¶ 153.

[347] Claimant's Memorial ¶ 319(c).

[348] **Ex. C-76**, DT Briefing of the "Meeting with Devas-Shareholders on 19 Feb. 2008" and "Board Meeting on 19 Feb. 2008", p. 2.

its case,[349] and the terms and conditions of the Devas Contract itself and its negotiating history.[350]

149. Claimant wants this Tribunal to ignore the record and treat this case as if the Government had guaranteed that all necessary approvals and licences for the project would be issued and the project implemented without any governmental interference, whether for national security purposes or otherwise, and that notwithstanding the comprehensive structure negotiated by Antrix and Devas to deal with termination, Devas and Claimant were entitled to disregard the provisions of the Devas Contract making crystal clear that any compensation to be paid as a result of failure to obtain approvals, or even breach by Antrix, would be limited to a refund of the paid Upfront Capacity Reservation Fees, with no further obligation to pay "any sum as compensation or damages (by whatever name called)."[351]

150. Claimant also argues that the Government engaged in "unjustified, unreasonable, arbitrary, disproportionate" conduct.[352] But despite Claimant's disagreement with the Government's policy decision in this case, there was nothing unjustified or arbitrary about it. On the contrary, the record shows not only sound grounds for the decision, but an extensive deliberation process conducted in accordance with the Government's "Transaction of Business Rules."[353] All relevant government agencies, including the defence forces, were involved in the decision-making process, and the decision was taken by the Government's highest authority on

[349] **Ex. C-73**, Kim Larsen's photographs of meetings with the Space Authorities.

[350] *See* ¶¶ 16-31, *supra*.

[351] **Ex. R-1**, Devas Contract, Article 7.

[352] Claimant's Memorial, p. 116.

[353] *See* ¶ 36 and n. 94, *supra*; **Ex. R-28**, Note for the Cabinet Committee on Security, ¶¶ 44.1-44.7.

national security matters, the Cabinet Committee on Security.[354] What Claimant apparently is complaining about is that it was not involved in the national security deliberations. That is no basis for an FET claim.

151. Nothing in this case suggests anything remotely resembling "unreasonableness" or "arbitrariness."[355] The standard definition of arbitrariness was proposed by the International Court of Justice in the *ELSI* case as a "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[356] Arbitral tribunals have adopted similar formulations. For example, in *Genin*, the tribunal held that the withdrawal of a licence was not an arbitrary act violating a "sense of juridical propriety" since that standard would require a showing of "bad faith, a wilful disregard of due process of law or an extreme insufficiency of action."[357]

152. In the present case, the Cabinet Committee on Security took its decision denying orbital slot to Antrix in S-band for commercial use and annulling the Devas Contract in light of the nation's burgeoning security needs.[358] There was nothing

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[354] **Ex. R-28**, Note for the Cabinet Committee on Security, ¶¶ 44.1-44.7. *See* ¶¶ 36-37, *supra*.

[355] It is commonly recognised that the terms "unreasonable" and "arbitrary" are interchangeable. *See* **Ex. RLA-107**, *National Grid p.l.c. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 197 ("It is the view of the Tribunal that the plain meaning of the terms 'unreasonable' and 'arbitrary' is substantially the same in the sense of something done capriciously, without reason."); **Ex. RLA-108**, Ursula Kriebaum, *Arbitrary/Unreasonable or Discriminatory Measures*, SOCIAL SCIENCE RESEARCH NETWORK, 11 November 2012 (forthcoming publication in INTERNATIONAL INVESTMENT LAW (M. Bungenberg *et al.* eds., Hart Publishing 2015)), pp. 2-3 ("Treaties contain three different wordings as far as the 'arbitrary' element is concerned: 'arbitrary', 'unreasonable' and 'unjustifiable'. Tribunals seem to use these terms synonymously.").

[356] **Ex. RLA-109**, *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, International Court of Justice, Judgment, 20 July 1989, I.C.J. REPORTS 15 (1989), ¶ 128.

[357] **Ex. RLA-93**, *Genin*, ¶ 371. *See also* **Ex. RLA-110**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 281; **Ex. RLA-35**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), p. 302.

[358] *See* ¶¶ 36-37, *supra*; Anand Witness Statement, **Annex 1**, ¶¶ 5-6.

improper or shocking in the decision adopted by the Government; instead, it was the result of a considered and deliberative process. Arbitral tribunals have also confirmed that a measure is reasonable when there is a rational policy to which the measure in question is reasonably related. As the *AES v. Hungary* tribunal noted:

> There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.
>
> A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.[359]

There can be no serious dispute that the decision of the Cabinet Committee on Security meets these requirements.[360]

153. In sum, none of Claimant's arguments on FET withstands scrutiny on the facts of this case. Claimant is asking this Tribunal to stretch the FET concept beyond recognition, as no case has ever found an FET violation in circumstances remotely similar to this case. Apart from the impact of the "essential security interests" provision of the German Treaty and the jurisdictional issues discussed above, that is a request that in any event should be denied.

C. Claimant's Loose Allegations of Attribution Add Nothing to Its FET Claim

154. Claimant's loose and unfocused allegations that Antrix did not have separate existence and was merely acting on behalf of the Government add nothing to its FET claim,[361] and in fact only underscore its propensity to disregard facts in its drive

[359] **Ex. RLA-111**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 ("*AES*"), ¶¶ 10.3.7-10.3.8.

[360] *See* ¶¶ 36-37, *supra*.

[361] Claimant's Memorial, ¶¶ 268-269.

to manufacture a treaty claim. Claimant apparently wants this Tribunal to consider Antrix as one and the same with the State so that the Devas Contract can be viewed as a contract with the State itself. That frivolous allegation is flatly contradicted by the documentary record in this case.

155. The Devas Contract is quite clear as to the identity of the parties. Indeed, its entire structure distinguishes between Antrix as a party and the Government as regulator, including: (i) the definitions in the Devas Contract of "Governmental or Regulatory Authority" and of "Regulatory Approval";[362] (ii) the provisions of the Devas Contract referring to the requirement of governmental approvals and licences;[363] and (iii) the *force majeure* clause, which specifies that acts of a government in a sovereign capacity constitute *force majeure*.[364] None of those provisions would make sense if Antrix were entering into the Devas Contract on behalf of the Government rather than in its own capacity as a separate legal person under Indian law.[365]

156. This Tribunal will also note that Claimant introduced no Indian legal authority to support its allegations regarding the alleged inseparability of Antrix and the Government. There is in fact a wealth of Indian authority on the subject of the legal

[362] **Ex. R-1**, Devas Contract, Annexure 1, Definition of "Governmental or Regulatory Authority" and Definition of "Regulatory Approval."

[363] *Id.*, Articles 3(c), 7(c), 12(b)(vii).

[364] *Id.*, Article 11(b)(v).

[365] In the original term sheet for the Devas Contract drafted by Devas, the party to the proposed contract was identified as ISRO. This was immediately corrected to make clear that Antrix would be the party to the contract. *See* ¶ 23 and n. 49, *supra*; **Ex. R-11**, Draft of Binding Term Sheet received on or about 12 September 2004, Section 1.1; **Ex. R-12**, E-mail from ISRO to Devas, 14 September 2004, with attachment, Section 1.1. This is another example of Claimant's flagrant disregard for both the provisions of the Devas Contract and its negotiating history.

status of Indian state corporations that Claimant presumably was aware of when its subsidiary acquired shares in Devas.[366]

157. Antrix's constitutive documents make clear that it is a "private company limited by shares" within the meaning of Section 3(1)(iii) of the Indian Companies Act.[367] A unanimous line of Indian authority leaves no doubt as to the legal status of such companies under Indian law, even where owned by the State.

158. In *Electronics Corporation of India*, the Supreme Court of India held that "[a] clear distinction must be drawn between a company and its shareholder, even though that shareholder may be only one and that the Central or a State Government. In the eye of the law, a company registered under the Companies Act is a distinct legal entity other than the legal entity or entities that hold its shares."[368] Similarly, in *Western Coalfields*, in which state companies sought a tax exemption because they were wholly owned by the Government, the Supreme Court affirmed that "[t]he companies, which are incorporated under the Companies Act, have a corporate personality of their own, distinct from that of the Government of India. The lands and buildings are vested in and owned by the companies: the Government of India only owns the share capital."[369] In *Steel Authority of India*, the Supreme Court set aside the judgment of the Gujarat High Court in which the High Court had held that the Steel Authority of India was a

[366] As the International Court of Justice held in *Ahmadou Sadio Diallo*: "In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law." **Ex. RLA-112**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, Judgment (Preliminary Objects), 24 May 2007, *Reports of Judgements, Advisory Opinions and Orders*, I.C.J. REPORTS 582 (2007), ¶ 61.

[367] **Ex. RLA-113**, Indian Companies Act, 1956 [Act No. 1 of 1956], Section 3(1)(iii).

[368] **Ex. RLA-114**, *Electronics Corporation of India Ltd. and Ors. v. Secretary, Revenue Department, Govt. of Andhra Pradesh and Ors.*, Supreme Court of India, AIR1999SC1734, Judgment, 5 May 1999, ¶ 15.

[369] **Ex. RLA-115**, *Western Coalfields Limited v. Special Area Development Authority, Korba and Anr.*, Supreme Court of India, AIR1982SC697, Judgment, 26 November 1981, ¶ 21.

department of the Union of India, and confirmed the separate personality of the Steel Authority of India.[370] And in *Agarwal*, the Supreme Court held that an employee of a state-owned corporation did not qualify as a person employed in a civil capacity under the Union or a State within the meaning of Article 311 of the Indian Constitution, stating that "the corporation which is Hindustan Steel Limited in this case is not a department of the Government nor are the servants of it holding posts under the State. It has its independent existence and by law relating to Corporations it is distinct even from its members."[371]

159. That a state company, not acting on behalf of the Government exercising sovereign authority but entering into a commercial contract, cannot be deemed to be an agent of the Government is made clear by the Indian Supreme Court's decision in *State Trading Corporation of India*. There the Court held:

> The State Trading Corporation was, on the date of the petition, functioning under the direct supervision of the Government of India, the shareholding was in the names of the President and two Secretaries to the Government and its entire subscribed capital was contributed by the Government of India. But it is a commercial body, incorporated as the Memorandum of Association indicates to organise and undertake trade generally with State Trading countries as well as other countries in commodities entrusted to it for such purpose by the Union Government from time to time and to undertake purchase, sale and transport of such commodities in India or any where else in the world and to do various acts for that purpose. The Articles of Association make minute provisions for sale and transfer of shares, calling of general meetings, procedure for the general meetings, voting by members, Board of Directors and their powers, the issue of dividend, maintenance of accounts and capitalisation of profits. The State Trading Corporation has

[370] **Ex. RLA-116**, *Steel Authority of India Ltd. v. Shri Ambica Mills Ltd. and Ors.*, Supreme Court of India, AIR1998SC418, Judgment, 17 October 1997, ¶¶ 16-18.

[371] **Ex. RLA-117**, *Dr. S.L. Agarwal v. The General Manager, Hindustan Steel Ltd.*, Supreme Court of India, AIR1970SC1150, Judgment, 19 December 1969, ¶ 10.

> been constituted not by any special statute or charter but under the Indian Companies Act as a Private Limited Company. It may be wound up by order of a competent Court. Though it functions under the supervision of the Government of India and its Directors; it is not concerned with performance of any governmental functions. Its functions being commercial, it cannot be regarded as either a department or an organ of the Government of India. It is a circumstance of accident that on the date of its incorporation and thereafter its entire share-holding was held by the President and the two Secretaries to the Government of India.
>
> . . . .
>
> The question whether the corporation either sole or aggregate is an agent or servant of the State must depend upon the facts of each case. In the absence of any statutory provision a commercial corporation acting on its own behalf, even if it is controlled wholly or partially by a Government Department, will be presumed not to be a servant or an agent of the State. The fact that a Minister appoints the members of the Corporation and is entitled to call for information and to supervise the conduct of the business, does not make the Corporation an agent of the Government. Where, however, the Corporation is performing in substance governmental, and not commercial functions an inference that it is an agent of the Government may readily be made.[372]

160. In *Heavy Engineering*, the Supreme Court of India explained these basic principles in terms that flatly contradict Claimant's argument that Antrix can be equated with, or deemed to be the agent of, the Government.[373] In that case, the appellant company argued that the appropriate government within the meaning of the Industrial Disputes Act of 1947 to refer its disputes with its employees to the Industrial Tribunal was the Central Government, not the State Government. The Supreme Court started its

[372] **Ex. RLA-118**, *The State Trading Corporation of India Ltd. and Ors. v. The Commercial Tax Officer, Visakhapatnam and Ors.*, Supreme Court of India, AIR1963SC1811, Judgment, 26 July 1963, ¶¶ 152, 154.

[373] **Ex. RLA-119**, *Heavy Engineering Mazdoor Union v. State of Bihar and Ors.*, Supreme Court of India, AIR1970SC82, Judgment, 12 March 1969.

analysis by recalling that under Section 2(a) of the Industrial Disputes Act the "appropriate Government" meant the Central Government in relation to any industrial dispute involving an industry carried on by or under the authority of the Central Government. The Supreme Court then proceeded to reject the line of analysis according to which, because the appellant company was wholly owned by the Central Government, it was an industry carried on under the authority of the Central Government:

> It is an undisputed fact that the company was incorporated under the Companies Act and it is the company so incorporated which carries on the undertaking. The undertaking, therefore, is not one carried on directly by the Central Government or by any one of its departments as in the case of posts and telegraphs or the railways. . . . An incorporated company, as is well known, has a separate existence and the law recognises it as a juristic person, separate and distinct from its members. This new personality emerges from the moment of its incorporation and from that date the persons subscribing to its memorandum of association and others joining it as members are regarded as a body incorporate or a corporation aggregate and the new person begins to function as an entity. . . . Its rights and obligations are different from those of its shareholders. Action taken against it does not directly affect its shareholders. The company in holding its property and carrying on its business is not the agent of its shareholders. An infringement of its rights does not give a cause of action to its shareholders. Consequently, it has been said that if a man trusts a corporation he trusts that legal persona and must look to its assets for payment; he can call upon the individual shareholders to contribute only if the Act or charter creating the corporation so provides. The liability of an individual member is not increased by the fact that he is the sole person beneficially interested in the property of the corporation and that the other members have become members merely for the purpose of enabling the corporation to become incorporated and possess only a nominal interest in its property or hold it in trust for him. . . . The company so incorporated derives its powers and functions from and by virtue of its memorandum of association and its articles of association. Therefore, the mere fact that the entire share capital of the respondent-

> company was contributed by the Central Government and the fact that all its shares are held by the President and certain officers of the Central Government does not make any difference. The company and the shareholders being, as aforesaid, distinct entitles the fact that the President of India and certain officers hold all its shares does not make the company an agent either of the President or the Central Government. A notice to the President of India and the said officers of the Central Government, who hold between them all the shares of the company, would not be a notice to the company; nor can a suit maintainable by and in the name of the company be sustained by or in the name of the President and the said officers.[374]

161. The foregoing principles are summarised in a treatise on Indian administrative law as follows:

> A Government company or a statutory corporation is regarded as a distinct or separate entity from the government. Though a Government company is owned by the government; its directors are nominated or removed by it, and the company has to give effect to the directives issued by the Government, nevertheless, in the eye of the law, the company or the corporation is regarded as a distinct personality having an existence and a juristic personality of its own, separate from the concerned government. In the eye of the law, the company is its own master and it cannot be regarded as an agent of the Government any more than a company can be regarded as an agent of the shareholders.[375]

162. Indian law on this issue is perfectly consistent with international authorities, which also reject conflation of the legal personalities of state-owned companies and governments establishing them under circumstances such as those of this case. The following cases and commentaries are illustrative:

- *Amoco v. Iran*: "The Preamble clearly identifies the parties between which the Khemco Agreement is concluded as NPC [National Petroleum Company] and Amoco, and makes reference, several times, to them as 'both parties.' While NPC is controlled by Iran and was

[374] *Id.*, ¶ 4.

[375] **Ex. RLA-120**, M.P. Jain and S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW (6th ed., LexisNexis 2013), pp. 1018-1019.

established pursuant to a State law, it has a legal personality distinct from that of the State and NPC contracted only for itself. . . . It is true that the development of petrochemical industries was considered by the Iranian Government as an important goal of the development policy of the country, and was promoted by the enactment in 1965 of an Act authorizing NPC to enter into joint ventures with foreign companies to this effect, and providing for tax exemptions and other privileges beneficial to such joint ventures. Such legislation, however, clearly shows that the State had no intention itself to engage in such industrial and commercial endeavors and left NPC to take the financial and commercial risks associated with them. . . . [T]he obligations embodied in the Khemco Agreement are obligations only as between the parties, namely NPC and Amoco, and as between the parties and Khemco . . . . Since only the rights of the parties in their mutual relationship . . . are at stake in the present Case, such rights can in no way be construed as creating obligations on the State."[376]

- *Amto v. Ukraine*: The State entity's contractual undertakings were not undertakings of the State, as "the contractual obligations have been undertaken by a separate legal entity."[377]
- *Nagel v. Czech Republic*: "Although SRa was a fully owned State enterprise, it was a separate legal person whose legal undertakings did not as such engage the responsibility of the Czech Republic."[378]
- *Hamester v. Ghana*: "The JVA [Joint-Venture Agreement] was signed by Hamester and Cocobod, with no implication of the ROG [Republic of Ghana]. The ROG was not named as a party, and did not sign the contract. There has been no suggestion that the ROG was intended to be a party thereto."[379]
- *Feit*: "[T]he conclusion of a contract by a state-owned entity cannot be attributed to the state, even if the state-owned entity was empowered with governmental authority."[380]

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[376] **Ex. RLA-121**, *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran et al.*, Iran – U.S. Claims Tribunal, Case No. 56, Partial Award No. 310-56-3, 14 July 1987, 15 IRAN-U.S.C.T.R. 189 (1987), ¶¶ 161-162, 164.

[377] **Ex. RLA-122**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (ECT), Final Award, 26 March 2008, Section 110.

[378] **Ex. RLA-39**, *Nagel*, ¶ 321.

[379] **Ex. RLA-123**, *Gustav F W Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 347.

[380] **Ex. RLA-124**, Michael Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28(1) BERKELEY JOURNAL OF INTERNATIONAL LAW 142 (2010), p. 154.

- *Happ*: "[I]t is not possible to attribute a contract concluded by a sub-division or state entity to the state by using the rules on state responsibility. The rules of attribution have been developed in the context of attributing acts to the state in order to determine whether those acts are in breach of international law. They cannot be applied *mutatis mutandis*."[381]

163. The ILC Articles on State Responsibility make clear that the acts of a corporate entity such as Antrix may not be attributable to the State unless the entity is "empowered by the law of that State to exercise elements of the governmental authority" and the entity "is acting in that capacity in the particular instance."[382] As stated in the ILC's commentary to the Articles on State Responsibility:

> The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority.[383]

164. Nothing in Antrix's constitutive documents empowers it to exercise governmental authority.[384] Nor did it exercise any governmental authority in the present case. The record shows that it was the Government itself, acting in its sovereign

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[381] **Ex. RLA-125**, Richard Happ, *The Nykomb Case in the Light of Recent ICSID Jurisprudence*, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 315 (C. Ribeiro ed., JurisNet, LLC 2006), p. 324.

[382] **Ex. RLA-26**, *Responsibility of States for Internationally Wrongful Acts*, adopted by the U.N. International Law Commission at its Fifty-Third Session in 2001 as reproduced in G.A. Resolution No. 56/83, 12 December 2001, corrected by Document No. A/56/49(Vol. I)/Corr.4 (United Nations 2005), Article 5.

[383] **Ex. RLA-126**, Report of the Commission to the General Assembly on the work of its Fifty-Third Session, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 2001, VOL. II, PART TWO (United Nations 2007), p. 48.

[384] **Ex. R-38**, Memorandum and Articles of Association of Antrix Corporation Limited, 28 September 1992.

capacity, that exercised its governmental authority to take the decision to deny orbital slot to Antrix in S-band for commercial activities and annul the Devas Contract.

165. Moreover, the entire discussion of legal personality and attribution is irrelevant in this case. As noted earlier, in addition to the lack of legal content in Claimant's allegations, none of those allegations in any way alters the basic facts that Devas and its shareholders knew full well that the Government reserved its right to take action affecting the Devas Contract in its sovereign capacity, that there was no stabilisation or similar clause guaranteeing Devas or its shareholders that the necessary licences or approvals would be issued, and that the entire structure of the Devas Contract and its negotiating history, including the comprehensive set of provisions expressly addressing the possibility that Government approvals or licences would not be issued, reflects the exact opposite of such a guarantee.

166. Claimant's entire "attribution" discussion adds nothing to the substantive claims in this case.

POINT VI.

FULL PROTECTION AND SECURITY

167. Finally, Claimant also alleges that India "failed to accord DT and its investments full protection and security in breach of Article 3(2) of the Treaty."[385] However, It is widely recognised that the full protection and security clause only protects the physical integrity of foreign investments. This is reflected in the following arbitral decisions:

- *Saluka v. Czech Republic*: "The 'full protection and security' standard applies essentially when the foreign investment has been affected by

[385] Claimant's Memorial, ¶ 334.

civil strife and physical violence. . . . Accordingly, the standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners. The practice of arbitral tribunals seems to indicate, however, that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."[386]

- *Noble Venture v Romania*: "With regard to the Claimant's argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the 'Investment shall . . . enjoy full protection and security', the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State."[387]

- *Parkerings v. Lithuania*: "A violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury. The injury could be committed either by the host State, or by its agencies or by an individual."[388]

- *El Paso v. Argentina:* "The BIT requires that Argentina provide 'full protection and security' to El Paso's investment. The Tribunal considers that the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law and that it is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party. The case-law and commentators generally agree that this standard imposes an obligation of vigilance and due diligence upon the government. . . . The minimum standard of vigilance and care set by international law comprises a duty of prevention and a duty of repression. A well-established aspect of the international standard of treatment is that States must use 'due diligence' to prevent wrongful injuries to the person or property of aliens caused by third parties within their territory, and, if they did not succeed, exercise at least 'due diligence' to punish such injuries. If a State fails to exercise due diligence to prevent or punish such injuries, it is responsible for this omission and is liable for the ensuing damage.

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[386] **Ex. CLA-60**, *Saluka Investments BV (the Netherlands) v. The Czech Republic*, *Ad Hoc*/UNCITRAL, Partial Award, 17 March 2006, ¶¶ 483-484.

[387] **Ex. RLA-69**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 164.

[388] **Ex. RLA-98**, *Parkerings*, ¶ 355.

> It should be emphasised that the obligation to show 'due diligence' does not mean that the State has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury."[389]

168. Claimant does not and cannot argue that the physical integrity of its alleged investment was harmed by any action of India. The full protection and security claim is instead entirely based on the notion that the obligation under the full protection and security clause "is not limited to physical security" and prevents the state from affecting the protected investment by changing the legal framework applicable to it.[390] But it is well established that the full protection and security clause does not operate as a legal stabilisation clause. As the *AES* tribunal noted:

> [W]hile [the duty to provide most constant protection and security] can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals.
>
> In the words of Brownlie, the duty is no more than to provide "a reasonable measure of prevention which a well-administered government could be expected to exercise under similar circumstances."
>
> . . . .
>
> To conclude that the right to constant protection and security implies that no change in law that affects the investor's rights could take place, would be practically the same as to recognizing the existence of a non-existent stability agreement as a consequence of the full protection and security standard.

[389] **Ex. CLA-25**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 522-523.

[390] Claimant's Memorial, ¶ 333.

> The Tribunal finds that there can have been no breach of the obligation to provide constant protection and security as a result of Hungary's reintroduction of regulated pricing in 2006-2007, such reintroduction being based on rational public policy grounds.[391]

169. What makes Claimant's full protection and security claim even more frivolous is that the claim could not succeed even if Claimant's broad interpretation of the full protection and security clause were to be followed. There is no dispute that: (i) this case involves no stabilisation clause and no agreement of the State of any kind compromising in any way its sovereign right to take national security measures; (ii) implementation of the Devas Contract was subject to governmental approvals and neither Devas nor Claimant had any guarantee of any kind that they would be granted; and (iii) the Devas Contract expressly contemplated the possibility that performance under the Contract could be interrupted by reason of acts of the Government acting in its "sovereign" capacity.[392]

170. Thus, there would be no violation of the full protection and security clause of the German Treaty under any understanding of that provision.

CONCLUSION

171. For the reasons stated above, all claims asserted herein should be dismissed and all costs of this proceeding should be assessed against Claimant.

[391] **Ex. RLA-111**, *AES*, ¶¶ 13.3.2-13.3.3, 13.3.5-13.3.6 (emphasis added).

[392] *See* ¶¶ 17-20, 31, 93, *supra*.

RESERVATION OF RIGHTS

172. Respondent hereby reserves the right to submit such additional evidence and arguments as it may deem appropriate to supplement this Counter-Memorial and to respond to any evidence or arguments submitted by Claimant in this Arbitration.

Dated: 13 February 2015

Respectfully submitted,

CURTIS, MALLET-PREVOST,
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By: _____
George Kahale, III