IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)

Between:

CC/DEVAS (MAURITIUS) LTD.
DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED and
TELCOM DEVAS MAURITIUS LIMITED

Claimants,

and

THE REPUBLIC OF INDIA

Respondent.

NOTICE OF ARBITRATION

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited (collectively, "**Claimants**"), through their undersigned legal representatives, hereby submit this Notice of Arbitration against the Republic of India (the "**Respondent**") pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (1976) ("**UNCITRAL Rules (1976)**") and Article 8 of the September 4, 1998 Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments, entered into force June 20, 2000 (the "**Treaty**").[1] In accordance with Article 3(3)(a) of the UNCITRAL Rules (1976), Claimants demand that the disputes set forth herein be referred to arbitration.

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[1] A true and complete copy of the Treaty is annexed hereto as Exhibit 1.

I.
OVERVIEW OF CLAIM

1. Claimants, each duly incorporated in Mauritius, bring this arbitration to remedy Respondent's numerous violations of the Treaty in connection with their investments in India made through an Indian company, Devas Multimedia Private Limited ("**Devas**"). As further detailed below, at all material times Claimants have held significant equity positions in Devas, amounting (as at 2011) to an aggregate of 37.6% of the voting capital of Devas, thus giving them indirect partial ownership of the various assets and rights of Devas, notably including the rights and other assets acquired pursuant to a 2005 contract (the "**Devas Agreement**") between Devas and an Indian government entity, Antrix Corporation Limited ("**Antrix**"). Antrix is the marketing arm of the Indian Space Research Organization ("**ISRO**"), an Indian government entity under the Indian Department of Space ("**DOS**") (a portfolio responsibility of the Indian Prime Minister), and affiliated with the Indian Space Commission (an inter-ministerial body of the Government of India).

2. Devas was created in 2004 for the purpose of delivering video, multimedia, data subscription, and interactive services across India that would include video/audio programming and interactive information in a mobile environment. Devas's business was premised upon a strategic relationship with DOS/ISRO/Antrix. Among other things, the Devas Agreement conferred on Devas the right to lease space segment capacity on two satellites designed to operate in a portion of the "S-Band," a part of the electromagnetic spectrum that the Government of India had assigned to DOS. Devas thus was able to develop a proprietary integrated satellite/terrestrial system (including high-powered satellites broadcasting in the S-Band) to deliver multimedia services across India to mobile users. Devas's integrated satellite system also provided a cost-effective means of servicing rural areas within India. There was no

other application on the Indian market providing a comparable portfolio of services at the time the Devas Agreement was made.

3. From its very inception, the strategic relationship between DOS/ISRO/Antrix and Devas (including the lease of space segment capacity in the S-band to Devas) had the full and vociferous backing of senior officials of the Government of India and the Indian space establishment. Such governmental backing continued, indeed increased, as the Claimants injected capital into Devas in March 2006, a cash infusion that enabled Devas to make its upfront capacity reservation fee payments to Antrix under the Devas Agreement and was followed by significant contribution of telecommunications know-how and expertise.

4. The government's unequivocal expressions of support continued until early 2011. In secret, however, from late 2009 onwards, Indian government officials began a covert effort to destroy the Devas Agreement, strip Devas of a key strategic asset and thus deprive Claimants of the value of their investments in India – all because it became inconvenient for the Government of India to be seen as supportive of the Devas Agreement. In taking these steps, Indian officials were pressured by scandals associated with the (completely unrelated) grant of "2G" cellular phone spectrum rights and other scandals – issues that have nothing to do with Devas or Claimants.

5. Although Indian officials were keen to find ways of ending the Devas Agreement, it proved difficult, because no bona fide basis existed for Antrix to terminate the Devas Agreement in accordance with its terms. Indeed, on February 11, 2011, the *Hindu* newspaper reported that the Additional Solicitor General for India had concluded that it was not possible for Antrix to invoke the contractual termination clause. The Additional Solicitor General reportedly recommended that the Government of India make a "policy" decision that

should have the "seal and approval" of the Cabinet, in which the Government reserved the S-Band for "national needs." The Additional Solicitor General stated that DOS should then instruct Antrix to comply with this purported "policy," thereby attempting to create for Antrix a manufactured *force majeure* claim and suspend performance of the Devas Agreement, while sidestepping the fact that there was no valid means of terminating the contract according to its terms.

6. This is precisely what transpired. On February 17, 2011, following the script already set for it by the Additional Solicitor General, the Government of India, through the Union Cabinet, made a pre-textual "policy decision" to make the orbital slot in S-band suddenly unavailable to Antrix/ISRO for commercial activities. Then, playing its role in the orchestrated destruction of Devas's business, on February 25, 2011, Antrix declared a spurious "*force majeure*" based on the so-called "policy decision." The purported nullification of Devas's rights under the Devas Agreement, in turn, radically impaired the value of Claimants' investments in India.

7. Not content simply to destroy the Devas Agreement, the Government of India then took steps to block Devas from seeking arbitration proceedings under that agreement. Even though Devas had the right to, and did, commence an International Chamber of Commerce ("ICC") arbitration against Antrix pursuant to the terms of the Devas Agreement, the Government of India refused to recognize that right and, instead, caused Antrix to boycott and subvert the ICC arbitration. Those tactics have been successful: upon receiving notice of the ICC arbitration in June 2011, Antrix announced that it would refuse to recognize Devas's right to bring ICC proceedings or, for that matter, the ICC Court of Arbitration's right to administer the case. Instead, in August 2011, Antrix commenced litigation in the courts of

India to enjoin the ICC arbitration, based on the absurd premise that the Indian courts, and not the ICC, have power to administer the case and appoint the arbitration tribunal. This strategy has succeeded in halting the ICC arbitration: at present, the ICC arbitration stands enjoined (at Antrix's urging) by the Supreme Court of India.[2] At the same time, the Government of India has subjected Devas to a campaign of regulatory harassment through the Ministry of Company Affairs, Registrar of Companies, Enforcement Directorate, Income Tax Department, and Service Tax Department, in obvious retaliation for Devas having dared to exercise its contractual rights.

8. These various actions of the Indian state – including without limitation the actions of the Union Cabinet, the Space Commission, DOS, ISRO and Antrix – constitute (1) unlawful expropriation of Claimants' investments in violation of Articles 6 and 7 of the Treaty; (2) "unreasonable or discriminatory measures" against Claimants in violation of Article 4(1) of the Treaty; (3) unfair and inequitable treatment in breach of Article 4(1)'s guarantee of "fair and equitable treatment"; and (4) a denial of most favored nation treatment in violation of Articles 4(2) and 4(3) of the Treaty. For these numerous wrongful acts, and as further detailed below,

[2] The ICC Tribunal comprised: V.V. Veeder, Q.C. (appointed by Devas), former Chief Justice of India, Dr. Justice A.S. Anand (appointed on Antrix's behalf by the ICC following Antrix's refusal to nominate an arbitrator itself) and Professor Michael Pryles (appointed by the ICC). The Supreme Court of India injunction was issued on 9 April 2011, only 3 days prior to the scheduled final merits hearing in the ICC arbitration in New Delhi of Devas's claims against Antrix – a hearing that Antrix had indicated it was going to boycott in any event. In furtherance of its plan to obstruct the ICC proceedings, in August 2011 Antrix also purported to commence an UNCITRAL arbitration under the Devas Agreement, and then requested the Indian Supreme Court to appoint a majority of arbitrators to the supposed UNCITRAL tribunal – all this despite the fact that (1) the ICC arbitration had already been validly commenced; and (2) although Article 20 of the Devas Agreement grants the parties a choice of contractual arbitration procedures (i.e., ICC or UNCITRAL Rules – a choice that had already been exercised in favour of ICC arbitration), there is absolutely no contractual or other basis for the Indian courts to appoint arbitrators. On the contrary, it is an essential feature of any international arbitration procedure, whether ICC or UNCITRAL, that the appointing authority be a neutral international body. By its actions, the Indian Government has refused to recognize this fundamental right.

Claimants are entitled to reparation in the form of financial compensation reflecting the full extent of their injuries, plus costs and interest.

II.
THE PARTIES

9. The names and addresses of Claimants (each of which is incorporated in Mauritius) are:

(a) CC/Devas (Mauritius) Ltd., 608 St James Court St Denis Street, Port Louis, Mauritius;

(b) Devas Employees Mauritius Private Limited, 608 St James Court St Denis Street, Port Louis, Mauritius; and

(c) Telcom Devas Mauritius Limited, 608 St James Court St Denis Street, Port Louis, Mauritius.

10. Claimants are represented in this arbitration by:

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11. Respondent in this arbitration is the Republic of India.

12. This Notice of Arbitration is being delivered to His Excellency Dr. Manmohan Singh, Prime Minister of India, South Block, Raisina Hill, New Delhi, India-110101, with a copy to:

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Minister for Law & Justice
4th Floor, A-Wing, Shastri Bhawan
New Delhi-110001

III.
BASIS FOR ARBITRATION

13. In accordance with Articles 3(3)(c) and (d) of the UNCITRAL Rules (1976), Claimants advise that this claim is submitted to arbitration in accordance with Article 8 of the Treaty, in which Respondent expressly consents to arbitrate disputes with Claimants pursuant to the UNCITRAL Rules (1976). Article 8 states:

> *(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.*
>
> *(2) If such dispute cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request for settlement, the investor may submit the dispute to:*
>
> > *(a) arbitration in accordance to the law of the Contracting Party; or*
> >
> > *(b) if the Contracting Party of the investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other states, of March 18, 1965 and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes, such a dispute shall be referred to the Centre; or*
> >
> > *(c) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law; or*
> >
> > *(d) to an* ad hoc *arbitral tribunal set up in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:*
> >
> > > *(i) The appointing authority under Article 7 of the Arbitration Rules shall be the President, the Vice-President or the next senior judge of the International Court of Justice, who is*

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not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.

(ii) The parties shall appoint their respective arbitrators within two months.

(iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding on the parties to the dispute.

(iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

(3) Where a dispute has been submitted for resolution under paragraph 2(a), 2(b), 2(c) or 2(d) above, the choice so exercised shall not be changed except with the consent of the Contracting Party which is party to the dispute.

(4) Notwithstanding anything contained in paragraph (2) above, the Contracting Party which is a party to the dispute shall have the option to submit the dispute for resolution to international arbitration in accordance with procedure set out in paragraph 2(d) above.

14. Claimants have attempted to resolve the disputes that are the subject of this claim on an amicable basis, in conformity with Article 8(1) of the Treaty. Specifically:

(a) By letter dated December 12, 2011, addressed to the Prime Minister of India (and faxed to his office on December 13, 2011), the First Claimant CC/Devas (Mauritius) Ltd. informed the Republic of India of the existence of the disputes that are the subject of the present Notice of Arbitration, and invited the Republic of India to engage in settlement discussions.

(b) By letter dated December 12, 2011, addressed to the Prime Minister of India (and faxed to his office on December 13, 2011), the Second Claimant Devas Employees Mauritius Private Limited informed the Republic of India of the existence of the disputes that are the subject of the present Notice of Arbitration, and invited the Republic of India to engage in settlement discussions.

(c) By letter dated December 13, 2011, addressed to the Prime Minister of India (and faxed to his office on December 14, 2011), the Third Claimant Telcom Devas Mauritius Limited informed the Republic of India of the existence of the disputes that are the subject of the present Notice of

Arbitration, and invited the Republic of India to engage in settlement discussions.

15. Respondent did not acknowledge, much less substantively respond to, these communications, and no amicable resolution of the dispute has occurred.

16. The 6-month period for negotiation provided for in the first paragraph of Article 8(2) having expired without any resolution of the subject dispute, each Claimant is entitled to, and hereby does, elect pursuant to sub-paragraph (d) of Article 8(2) of the Treaty to submit this matter for final resolution by arbitration in accordance with the UNCITRAL Rules (1976) (as modified by such sub-paragraph).

17. The situs and administrative arrangements governing this Arbitration remain to be determined by the Tribunal pursuant to Article 16 of the UNCITRAL Rules (1976), having regard to the circumstances of the case, as well as the UNCITRAL Notes on Organizing Arbitral Proceedings. Without prejudice to their submissions on these issues, Claimants give notice that they will propose that the Tribunal, once constituted, utilize the administrative services of the Permanent Court of Arbitration in The Hague. Claimants propose English as the language of the Arbitration.

IV.
NATURE OF THE CLAIM

18. The following indication of the general nature of the claim and the amount involved is supplied in accordance with Article 3(3)(e) of the UNCITRAL Rules (1976). Claimants reserve the right to supplement or modify their claims and to submit pleadings and memorials and evidence in accordance with the procedural order that will be fixed by the Tribunal (once constituted).

A. **Claimants and their Investment**

19. Article 2 of the Treaty provides that the Treaty applies to "all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations, whether made before or after the coming into force of this Agreement."

20. Each of CC/Devas (Mauritius) Ltd. ("**CC/Devas**"), Devas Employees Mauritius Private Limited ("**DEMPL**") and Telcom Devas Mauritius Limited ("**Telcom Devas**") is a company organized and existing under the laws of Mauritius. Each Claimant is thus an "Investor" of a "Contracting Party" for purposes of Articles 1(b)(ii) and 2 of the Treaty and is thus entitled to the protections set forth therein.

21. Article 1(1)(a) of the Treaty states that for purposes of the Treaty:

> *"investment" means every kind of asset established or acquired under the relevant laws and regulations of the Contracting Party in whose territory the investment is made, and in particular, though not exclusively, includes:*
>
> *(i) movable and immovable property as well as other rights* in rem *such as mortgages, liens or pledges;*
>
> *(ii) shares, debentures and any other form of participation in a company;*
>
> *(iii) claims to money, or to any performance under contract having an economic value;*
>
> *(iv) intellectual property rights, goodwill, technical processes, know-how, copyrights, trade-marks, trade-names and patents in accordance with the relevant laws of the respective Contracting Parties;*
>
> *(v) business concessions conferred by law or under contract, including any concessions to search for extract or exploit natural resources[.]*

22. The subject "investments" in this case consist of Claimants' investments in India, made principally through their equity investment in an Indian company, Devas.[3]

23. Claimants' respective shareholdings in Devas are as follows:

(a) CC/Devas holds 15,730 Class A Equity Shares, 11,978 Class B Equity Shares, 525 Class C Equity Shares and 3,116 Class D Equity Shares in Devas, currently representing 17.06% of voting shares;

(b) DEMPL holds 6,402 Class D Equity Shares in Devas, currently representing 3.48% of voting shares; and

(c) Telcom Devas holds 15,730 Class A Equity Shares, 11,978 Class B Equity Shares, 525 Class C Equity Shares and 3,116 Class D Equity Shares in Devas, currently representing 17.06% of voting shares.

24. CC/Devas and Telcom Devas acquired the above stakes beginning in 2006 and DEMPL beginning in 2009. Each of these investments was duly approved by the Foreign Investment Promotion Board of India. The cash infusions from CC/Devas and Telcom Devas enabled Devas to make its upfront capacity reservation fee payments to Antrix under the Devas Agreement and were accompanied by significant contribution of telecommunications know-how and expertise.

25. In addition, through their respective equity interests in Devas, Claimants are the partial indirect owners of:

(d) rights and claims to performance held by Devas pursuant to the Devas Agreement (defined above);

(e) the right, pursuant to the Devas Agreement, to provide communications services to all of India through the utilization of a portion of the "S-Band,"

[3] Devas was incorporated in Karnataka, Bangalore, India on December 17, 2004 and has its registered office at 2nd Floor, Prema Gardenia, 357/6, 1st Cross, I Block, Jayanagar, Bangalore, India.

(a part of the electromagnetic spectrum) that was previously allocated by the Government of India to DOS;

(f) the right, pursuant to the Devas Agreement, to broadcast from the 83°E orbital slot and other slots allocated to India by the International Telecommunications Union ("**ITU**") in the S-band;

(g) the business developed by Devas, and described further below, to harness the S-Band as part of an integrated hybrid satellite and terrestrial telecommunications system to provide multimedia services across India, including audio/video and broadband wireless internet communications;

(h) intellectual property rights, goodwill, technical processes, know-how and other forms of expertise committed by Devas towards the fulfilment of the Devas Agreement and the development of the Devas integrated system; and

(i) working capital, regulatory approvals and other assets of Devas.

B. <u>The Devas Agreement</u>

26. Devas was created in 2004 for the purpose of delivering video, multimedia, data subscription, and interactive services across India to a mobile platform. Devas's business was premised upon a strategic relationship with DOS, ISRO and Antrix.

27. After negotiations from 2003 through late 2004, on January 28, 2005, Antrix and Devas signed the Devas Agreement in which Antrix agreed to lease to Devas S-band space segment capacity ("**Leased Capacity**") on two Indian satellites ("**PS1**" or "**GSAT-6**" and "**PS2**" or "**GSAT-6A**").

28. Access to leased satellite capacity in the S-band as provided for in the Devas Agreement, was a critical component of Devas's business. Through this right, and utilizing its unique access to proprietary communications and satellite technology, Devas developed a business plan to deliver an array of communications services to end-users throughout India by

means of a hybrid satellite and terrestrial communications system which would utilize the S-band spectrum.

29. Devas executed the Devas Agreement relying upon Antrix's express and unequivocal representations and warranties including, *inter alia*, that Antrix, through ISRO and DOS, had the ability to "make/build, manufacture, launch and operate the [s]atellites, and provide the [l]eased [c]apacity," and further that Antrix, "through ISRO/DOS, [would] be responsible for obtaining clearances from [n]ational and [i]nternational agencies" such as the Wireless Planning & Coordination Wing ("**WPC**") and ITU "for use of the orbital slot and frequency resources." (Devas Agreement, Art. 12(a)(iii) & 12(a)(ii)). Antrix, a company wholly-owned by the Government of India, was itself a vehicle to promote the commercial exploitation of India's space program. Indeed, all representatives of the Government of India portrayed Antrix as acting as an agency of the Government of India authorized to make promises and commitments on behalf of the Government of India. Antrix was at all times represented by DOS to be its commercial marketing arm.

30. Apart from and without prejudice to the above, Devas understood and was given to understand that the Devas Agreement was made known to the highest officials of the Government of India, reflecting Antrix's role as a Government of India company whose board of directors included, both in late 2004 when the Devas deal was approved and in 2005 when the Devas Agreement was signed, Dr. Madhavan Nair (Secretary, DOS) and Mr. S.K. Das (Financial Adviser and Ex-Officio Secretary to the Government of India). The Devas Agreement, and the strategic partnership with Devas, had the imprimatur of the entire Indian space hierarchy, the Prime Minister's Office, DOS and the ISRO. Evidently, therefore, the

Devas Agreement was within the knowledge of the concerned departments of the Government of India.

31. The Devas integrated satellite and terrestrial communications system was thus in a position to deliver multimedia communications services throughout India, thereby meeting the growing untapped demand for mobile media, entertainment, interactive, and data services in India. No other application on the Indian market provided a comparable portfolio of services with the same geographic reach at the time the Devas Agreement was signed. Among other things, the Devas integrated system was capable of providing the following services:

(a) Audio/Video service: This would provide television and cable programming to users in a mobile environment, using both the "C-Band" and the "S-Band" (the latter being transmitted in part via the leased satellite transponder capacity); and

(b) Broadband Wireless Access service: This would provide broadband internet access to homes and nomadic users (*i.e.*, internet access for PCs, laptops, tablets, and mobile devices) primarily in urban areas.

32. The Devas integrated system also was capable of delivering applications for e-governance, disaster warning and emergency communications, remote connectivity, and strategic services across India. In addition, it provided a cost-effective means of servicing rural areas within India, without the inclusion of significant government subsidies.

C. <u>Endorsement at Cabinet Level</u>

33. In furtherance of the partnership they had developed, once the Devas Agreement was signed, the Government of India and Devas worked together closely to bring the Devas integrated system to market via a DOS/ISRO-built satellite. Representatives of Devas met with representatives of the Government of India on a continuous basis from January 2005 right through to the beginning of 2011.

34. Throughout this process, senior Indian space officials, including Dr. Madhavan Nair, who simultaneously served as (i) Chairman of the Space Commission, (ii) Secretary of DOS, (iii) Chairman of ISRO, and (iv) Chairman of Antrix, and his successor, Dr. K. Radhakrishnan (who also simultaneously held all four posts until shortly after the contractual dispute emerged between Devas and Antrix in mid-2011), made repeated and express affirmations of their own and their departments' commitment to the Devas Agreement. Such affirmations were significant in that they were used to support Devas's (successful) efforts to secure financing in anticipation of the launch of its services and the scaling up of its operations. These actions also reaffirmed the prior representations of senior Government of India officials to Devas management that Antrix was a vehicle used by the Government of India for the exploitation of the space program's commercially viable resources, and was acting not only on behalf of the Government of India, but also on its directions.

35. In late November 2005, DOS briefed the full Union Cabinet on its proposal to design, develop, and launch GSAT-6/INSAT4-E, a multi-media mobile satellite system that would be "parked" in the orbital slot 83° E.

36. On December 1, 2005, the Union Cabinet announced that it had given its approval to undertake the design, development and launch of GSAT-6/INSAT4-E. The specifications of GSAT-6/INSAT4-E mirrored those of "PS1", the very satellite that the Government of India had contracted to build and then lease capacity on to Devas as set forth in the Devas Agreement.

37. On February 2, 2006, Antrix communicated to Devas in writing that it had obtained the necessary approval for building, launching and leasing the capacity of S-band satellite (*i.e.*, GSAT-6), and thus was in a position to go ahead with the Devas Agreement. As

of that date, therefore, the Devas Agreement became fully effective, as confirmed by Antrix to Devas. The decisions of the Union Cabinet and the actions of the Government of India and Antrix induced Devas to assume that Antrix and its principal, the Government of India, would perform their obligations under the Devas Agreement.

38. It was on this faith and belief that Devas thereafter paid all necessary upfront capacity reservation fees for both GSAT-6 and the next satellite GSAT-6A, and committed the numerous other expenditures necessary under the Devas Agreement to enable Devas to build a business to provide multimedia services across India upon the timely launch of GSAT-6 and GSAT-6A. Devas also conducted experimental field trials of its hybrid system in 2009 and 2010, demonstrating its effectiveness to the satisfaction of senior officials of the Government of India. The experimental field trials also provided Devas, in partnership with pre-eminent telecommunications vendors Alcatel Lucent, Elektrobit, Quantum, and Dibcom, amongst others, with the opportunity to successfully develop and demonstrate the complete ecosystem necessary for the delivery of the Devas multimedia platform throughout India.

39. Each of these steps required the commitment of considerable capital, goodwill, know-how and other resources by Devas and its shareholders, including Claimants.

D. Actions by the Indian Government to Undermine the Devas Agreement

40. It transpired that, unbeknownst to Devas or Claimants, the Government of India had begun to take steps to undermine the Devas Agreement as early as late 2009.

41. In this regard, it now has come to light that shortly after he took over from Dr. Madhavan Nair as Chairman of DOS/ISRO/Antrix in November 2009, Dr. Radhakrishnan commissioned an investigation into how the Devas Agreement came about, following unspecified "complaints" about the Devas Agreement. The investigation was chaired by B.N.

Suresh. Although this investigation resulted in a report to the Government of India, the Suresh report did not find any wrongdoing by Devas.

42. Furthermore, even before the results of the Suresh investigation were known, DOS sought the advice of the Additional Solicitor General of India into how Antrix might annul the Devas Agreement. This matter was somehow leaked to the media, including the fact that the Additional Solicitor General provided his written opinion in July 2010 and suggested that because the contractual termination provision was not available, the Government of India should manufacture a *force majeure* event in order to terminate the Devas Agreement.

43. By late 2010 and early 2011, the Government of India was under pressure in connection with its handling of the grant of 2G terrestrial licences, and other issues. While Devas had nothing to do with the 2G matters, the recurring theme at the time – as publicized in media commentary – was that national assets were being dealt with corruptly at a huge cost to the taxpayer. In this atmosphere, certain segments of the media misrepresented the Devas Agreement and portrayed Devas in a false and negative light. Unfair comparisons were made to the 2G license scandals, even though the Devas Agreement had no connection with them and involved no wrongdoing of any kind.

44. In February 2011, the Indian Prime Minister constituted another committee under the chairmanship of B.K. Chaturvedi to again investigate the Devas Agreement. Although this committee produced a report, parts of which have not been made public, no wrongdoing on Devas's part was found by the Chaturvedi Committee.

E. Based on a February 17, 2011 Cabinet "Policy Decision," the Devas Agreement is Purportedly Annulled

45. On February 25, 2011, Antrix delivered a purported notice of cancellation of the Devas Agreement to Devas. The February 2011 letter refers to a purported Government of

India "policy decision" of February 17, 2011 by the Indian Cabinet Committee on Security ("CCS") to deny Antrix the use of orbital slot in S-Band for "commercial activities" on the basis that the S-band was supposedly needed for defence, para-military forces, railways and/or public utility services. On the basis of this alleged "policy decision," Antrix purported to terminate the Devas Agreement "for convenience" pursuant to Article 7(c) of the Devas Agreement, or, in the alternative, to declare an indefinite *force majeure* pursuant to Article 11(b)(v) of the Devas Agreement.

46. Following Antrix's purported termination, two further investigative committees, chaired by K.M. Chandrasekhar and Pratyush Sinha, respectively, were constituted to investigate the Devas Agreement. Although these committees produced reports that, according to the media, identified unspecified "procedural lapses" *on behalf of DOS* in the negotiation of the Devas Agreement, no wrongdoing on Devas's part has been publicly reported, nor has any been notified to Devas or Claimants. It is, therefore, evident that no wrongdoing on Devas's part was found by these committees either.

47. In reality, the claimed grounds for termination and *force majeure* were and are wholly contrived and the culmination of a previously undisclosed and improper effort by the Government of India to try to extricate itself from the Devas Agreement for collateral political and economic purposes.

48. The contrived nature of the self-created purported *force majeure* event is evident, *inter alia*, from the failure of the Government of India to take any steps of any kind to try to mitigate the impact of the alleged *force majeure* event (*i.e.*, the supposed needs, if any, of the defence, para-military forces, railways and/or public utility services to use the S-band spectrum). The Government of India never consulted with Devas about the supposed needs of

the relevant government departments to see if they could be accommodated within the Devas Agreement. As the engineers at DOS/ISRO are well aware, such accommodations could have been made. For example, Devas and the Government of India could have agreed to re-allocate some of the S-band spectrum allocated to Devas to meet the requirements of these user ministries (as is, in fact, contemplated in the Devas Agreement and traditionally provided to governments by their commercial satellite service providers) and/or could have found other solutions to the supposed needs of the military and railways to use the S-band spectrum. Further, DOS controlled 10% of the capacity on the satellite and thus could have offered that capacity to these governmental ministries.

49. More recently, the Government of India has asserted that unspecified "procedural lapses" in the original approval of the Devas Agreement in 2004 warranted its cancellation. Specifically, the Government of India has claimed that the Dr. Madhavan Nair (who was Chairman of the Space Commission and Secretary of DOS at the time the Devas Agreement was signed, and for more than four years thereafter), and other senior space officials, did not make the Government of India fully aware of the Devas Agreement, and that the Government would not have allocated the S-band spectrum to Devas had it been informed of the Devas Agreement. Besides the fact that Devas cannot properly be held responsible for internal governmental affairs, this claim is simply not true – it is contradicted by the chronology of events both preceding and following the Devas Agreement's execution, which definitively indicates that members of the Space Commission (an inter-governmental agency) and DOS (headed by the Indian Prime Minister) were kept fully aware of Antrix's (and Devas's) activities at all material times. The unitary leadership structure of the Indian space hierarchy, which placed the top leadership positions of the Space Commission, DOS, ISRO, and Antrix in

one person, provided a fail-safe method for making certain all parts of the Indian space hierarchy were apprised of all critical events.

50. Indeed, a recent interview given to the press by Dr. Madhavan Nair exposes the falsity of the *ex post facto* justifications proffered by the Government of India for its decision to terminate the Devas Agreement. In addition, in an interview, Dr. Radhakrishnan affirmed the transparent nature in which DOS/ISRO functions.

F. Deliberately Defeating Devas's Ability to Pursue Contractual Remedies

51. Faced with this improper cancellation, Devas commenced proceedings before the International Court of Arbitration of the ICC, seeking, *inter alia*, a declaration from the Arbitral Tribunal: (1) that the Devas Agreement remained fully extant and binding; (2) that Antrix's purported invocation of Article 7(c) of the Devas Agreement as a basis for terminating the Devas Agreement was improper and invalid, as was its purported invocation of *force majeure*; and (3) that Antrix was obligated to perform its obligations under the Devas Agreement, including by causing GSAT-6 to be launched by no later than October 15, 2012. Devas appointed V.V. Veeder Q.C. as its party-appointed arbitrator.

52. In August 2011, Antrix denied that Devas had the right to institute ICC arbitral proceedings and refused to accept the legitimacy of any ICC arbitral tribunal (or indeed of the ICC Court's power to administer the arbitration or appoint arbitrators). On August 5, 2011, Antrix initiated proceedings in the Supreme Court of India with the intent to delay and frustrate the ICC arbitration (seeking, among other things, an injunction blocking the ICC arbitration instituted by Devas against Antrix), and continued to refuse to participate in the arbitration.[4]

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[4] Absurdly, and without any regard for the explicit right to pursue arbitration under the ICC Rules enshrined in the Devas Agreement, Antrix maintained that the Indian Supreme Court (and not the ICC Court of Arbitration) *(cont'd)*

53. Moreover, ever since Devas commenced the ICC arbitration, Devas has been subjected to a continuous pattern of regulatory harassment from numerous departments and representatives of the Government of India (including the Ministry of Company Affairs, Registrar of Companies, Enforcement Directorate, Income Tax Department and Service Tax Department).

54. On November 10, 2011, an ICC arbitral tribunal was constituted, consisting of V.V. Veeder Q.C., a British national (appointed by Devas), former Chief Justice of India (Dr. A.S. Anand) (nominated on behalf of Antrix by the ICC Court as appointing authority, following Antrix's refusal to nominate an arbitrator itself), and Michael S. Pryles, an Australian national (appointed by the ICC Court).

55. At all times, Claimants' rights under the Treaty (including their respective rights to investor-state arbitration under Article 8(2) thereof) are independent of, and without prejudice to, Devas's rights in connection with the ICC arbitration. In all events, the ICC arbitration has not proceeded, because on April 9, 2012, three days prior to the scheduled commencement of the final uncontested ICC evidentiary hearing in New Delhi,[5] Antrix obtained a temporary injunction from the Supreme Court of India restraining the ICC Tribunal from hearing the case, pending a full hearing of Antrix's application to permanently enjoin the

(cont'd from previous page)

had the right to appoint arbitrators, and that arbitrators hand-picked by the Indian courts would then have the right to determine what rules applied to the arbitration.

[5] Antrix boycotted the ICC arbitration, electing instead to seek to enjoin the ICC arbitral proceedings in the Indian courts. In August 2011, Antrix also purported to commence a parallel UNCITRAL arbitration against Devas concerning the contractual issues, on the flawed premise that the prior ICC proceedings commenced by Devas were invalid. In fact, the Devas Agreement permitted arbitration to be commenced either under ICC or UNCITRAL rules, and Devas validly elected to bring its claims under the ICC rules. Antrix also claimed that the Indian courts should appoint the members of any contractual arbitration, an argument that is wholly unsupported by the Devas Agreement and is totally inconsistent with Antrix's submission to international arbitration.

ICC arbitration. That injunction has since been continued and remains in place at the present date.

* * *

56. The above-described conduct represents a violation of numerous articles of the Treaty, as briefly summarized below. Claimants will quantify their claim for financial reparation in due course according to the timetable established by the Tribunal (once constituted), but give notice that the amount of losses suffered by Devas is well in excess of US $1 billion.

G. Violations of the Treaty and General International Law

1. The Measures Constituted Unlawful Expropriation

57. The facts outlined above indicate that Claimants' investments in India have been subject to measures that are tantamount to nationalization and/or expropriation, in that they have substantially deprived Claimants of their investment rights in Devas. Such actions constituted unlawful expropriation in violation of Articles 6 and 7 of the Treaty as well as in violation of general international law.

58. Article 6 of the Treaty provides:

> *(1) Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation except for public purposes under due process of law, on a nondiscriminatory basis and against fair and equitable compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until the date of payment, shall be made without unreasonable delay and shall be effectively realizable and be freely transferable.*
>
> *(2) The investor affected by the expropriation shall have right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the*

valuation of his or its investment in accordance with the principles set out in this paragraph.

(3) Where a Contracting Party expropriates, nationalises or takes measures having effect equivalent to nationalisation or expropriation against the assets of a company which is incorporated or constituted under the laws in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation as specified therein to such investors of the other Contracting Party who are owners of those shares.

59. Article 7 of the Treaty further provides that "any compensation paid pursuant to Articles 5 or 6" be "freely transferred,without unreasonable delay and on a non-discriminatory basis", and that such "transfers shall be effected without unreasonable delay in any freely convertible currency at the market rate of exchange prevailing on the date of transfer."

60. Respondent's expropriatory measures were unlawful and in violation of Articles 6 and 7 of the Treaty because, *inter alia*,

(a) they were "discriminatory" for purposes of Article 6(1) of the Treaty (among other things, because they singled out Devas, and were motivated in part by the fact that Devas was foreign-owned);

(b) they were not for "public purposes" as required by Article 6(1) of the Treaty (among other things, because they were in fact contrived in order to allow a state-owned enterprise to escape a binding contract);

(c) they were not accompanied by due process of law as required by Article 6(1) of the Treaty (among other things, because the measures were carried out in secret, without prior notice and with no possibility of review or appeal);

(d) Respondent failed to honor the requirements of Article 6(2) of the Treaty; and

(e) Respondent failed to honor the requirements of Articles 6(1), 6(3) and 7 of the Treaty requiring payment to the investor of "fair and equitable compensation," payable "without unreasonable delay", equaling "the

> market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier" and made in freely convertible currency.

61. The Respondent, having engaged in unlawful expropriation, is liable to make reparation that wipes out the consequences of its unlawful actions, including relief that restores Claimants to the position which they would have occupied had no unlawful action occurred, and, to the extent such relief has a monetary component, bearing interest at a compound rate that fully compensates Claimants for the loss of use of their funds.

62. Without limiting their entitlement according to customary international law as well as Article 11(1) of the Treaty (which confirms Claimants' right to invoke any "obligations under international law" that may entitle Claimants to "treatment more favourable than that provided for by the [Treaty]"), Claimants are entitled to claim the benefits of Articles 4(2) and 4(3) of the Treaty, which provide:

> *(2) Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State.*
>
> *(3) In addition, each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third state.*

63. In this respect, and without limiting any entitlement to damages for unlawful expropriation according to the standards of compensation set forth in customary international law, Claimants give notice that they will rely upon the relevant provisions of other investment treaties entered into by the Republic of India and/or general international law, including without limitation:

(a) those treaties that confirm that, where applicable, the payment of compensation for expropriated investments shall include, at a minimum, a compound interest rate at the prevailing market rate, including:

(i) the Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment, entered into force June 28, 2003 ("**Kuwait-India BIT**"), requiring, *inter alia*, (in Article 7(1)(b) thereof) that the payment of compensation for expropriated investments shall include "interest at the prevailing commercial market rate";

(ii) the Agreement Between the Government of the Republic of India and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments, entered into force December 15, 1999, requiring, *inter alia*, (in Article 5(2) thereof) that that the payment of compensation for expropriated investments shall include "interest at a fair and equitable rate."

(b) those treaties that address the meaning of "expropriation," including the Kuwait-India BIT, providing (in Article 7(4) thereof) that "[t]he term 'expropriation' shall also apply to interventions or regulatory measures by a Contracting State . . . that have a de facto confiscatory or expropriatory effect in that their effect results in depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of his investment."

(c) the rules of general international law concerning the protection of investments and the liability of states to pay compensation for expropriation of investments.

64. Claimants' reliance upon the above-referenced provisions of the bilateral investment promotion and protection agreements is without prejudice to their right to claim equal or greater protection under the Treaty as well as customary international law.

2. <u>Failure to Accord "Fair and Equitable Treatment" in Violation of the Treaty</u>

65. Article 4(1) of the Treaty provides:

Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or

discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party.

66. The obligation to afford fair and equitable treatment requires Respondent, among other things, to refrain from undermining Claimants' legitimate expectations in respect of the investment and from acting in an arbitrary or unreasonable manner with respect to the investment, to conduct itself transparently with respect to the investment, to refrain from engaging in discriminatory conduct with respect to the investment, to furnish a stable and predictable legal framework for the investment, and to refrain from steps that constitute unjust enrichment with respect to the investment.

67. Respondent's actions constitute unfair and inequitable treatment in violation of Article 4(1) of the Treaty, and thus entitle Claimants to seek relief for the breach thereof.

3. Unreasonable and Discriminatory Measures

68. By virtue of Article 4(1), quoted above, India is also required to refrain from "impair[ing] by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party." Respondent's actions also constituted a violation of this guarantee.

4. Failure to Encourage, Create and Promote Favourable Conditions for Investors and their Investments

69. Article 3(1) of the Treaty provides that India "shall encourage the making of investments in its territory by investors of the other Contracting Party." Respondent's actions, also constituted a violation of this guarantee.

70. Moreover, in further reliance upon Articles 4(2), 4(3) and 11(1) of the Treaty, Claimants intend to rely upon:

(a) those treaties that provide that India shall "encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory," including:

(i) the Agreement Between the Government of the Republic of India and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments, entered into force on August 12, 2002, providing (in Article 3(1) thereof) that India shall "encourage and create favourable conditions for investors of the other Contracting Party to make investments"; and

(ii) the Agreement Between the Government of the Republic of India and the Government of the Republic of Macedonia for the Promotion and Reciprocal Protection of Investments, entered into force October 17, 2008, providing (in Article 3(1) thereof) that India shall "encourage and create favourable conditions for investors of the other Contracting Party to make investments";

(b) those treaties that provide that India shall promote favourable conditions for investors or promote the investments of investors, including:

(i) the Agreement Between Government of the Republic of India and the Government of Australia on the Promotion and Protection of Investments, entered into force May 4, 2000, providing (in Article 3(1) thereof) that India shall "encourage and promote favourable conditions for investors of the other Contracting Party to make investments in its territory";

(ii) the Agreement Between the Government of the Republic of India and the Government of the Republic of Austria for the Promotion and Protection of Investments, entered into force March, 1 2001, providing (in Article 2(1) thereof) that India shall "in its territory promote, as far as possible, investments of investors of the other Contracting Party";

(iii) the Agreement Between the Republic of India and the Kingdom of the Netherlands for the Promotion and Protection of Investments, entered into force December 1, 1996, providing (in Article 3 thereof) that India shall "encourage and promote favourable conditions for investors of the other Contracting Party to make investments in its territory in accordance with its laws and policy"; and

(iv) the Agreement Between the Government of the Republic of India and the Government of the Kingdom of Saudi Arabia Concerning the Encouragement and Reciprocal Protection of Investments, entered into force May 20, 2008, providing (in Article 2(1) thereof) that India shall "as far as possible promote investments by investors of the other Contracting Party in its territory."

(c) those treaties that provide that India shall admit, encourage, create and/or promote investors, investments and/or favourable conditions for investors or investments throughout the life of the investment, including:

(i) the 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, entered into force May 17, 2000, providing (in Article 3(1) thereof) that India shall "admit and encourage on its territory and in its maritime area, in accordance with its laws and with the provisions of this Agreement, investments made by investors of the other Contracting Party"; and

(ii) the Agreement Between the Republic of India and the Federal Republic of Germany for the Promotion and Protection of Investments, entered into force July 13, 1998, providing (in Article 3(1) thereof) that India shall "encourage and create favourable conditions for investors of the other Contracting Party."

71. Respondent's actions, as set forth above, have violated the above-described obligations to encourage, promote and/or create favorable conditions for investments.

5. Failure to Render Assistance for Obtaining Required Clearances and Permissions

72. Article 3(2) of the Treaty provides that India shall "in accordance with its laws render assistance to the investors of the other Contracting Party, whose investments were admitted in its territory, for obtaining the required clearances and permissions." Respondent's actions described above, including its manufacturing of a *force majeure* claim as described in paragraphs 4 to 6 and 19 through 56 above and its deliberate campaign to destroy the Devas Agreement and render Devas's business inoperative, have violated this protection.

6. Further Protections Conferred by MFN and General International Law Obligations

73. As indicated in paragraphs 62 and 70 above, Articles 4(2) and 4(3) of the Treaty guarantee that investors under the Treaty shall be provided with treatment no less favorable than investors of third states, and Article 11(1) preserves India's obligations to investors under general international law.

74. Claimants intend to rely upon all treaties and rules of international law incorporated by the most-favored nation clause set out in Articles 4(2) and 4(3) of the Treaty and the provisions of Article 11(1), including customary international law rules protecting investments of investors in Indian territory. Each of the actions of India set forth above represents a violation of its customary law obligations regarding the treatment of investors in Indian territory.

75. Claimants rely, *inter alia*, on Article 3(2) of the Agreement Between the Government of the Republic of India and the Federal Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion and Protection of Investments, entered into force February 24, 2009, which provides that "[i]nvestments and returns of investors . . . shall enjoy full legal protection and security." In this respect, the actions of India detailed above, including the Cabinet's so-called policy decisions actually made in order to frustrate valid contractual rights of Devas and to defeat Claimants' legitimate expectations as investors, constitute a denial of full legal protection and security to Claimants' investment.

76. Finally, Respondent is obligated, by virtue of Article 4(5) of the Kuwait-India BIT, *inter alia*, to "provide effective means of asserting claims and enforcing rights with respect to investments." The steps described in paragraphs 6 and 51-56 above, each of which

was taken in order to frustrate and prevent Devas from exercising its contractual remedies, represent a violation of this obligation.

V.
RELIEF AND REMEDIES SOUGHT

77. In accordance with Article 3(3)(f) of the UNCITRAL Rules (1976), Claimants give notice that they will respectfully request the following relief and remedies:

(a) An award declaring that Respondent is in breach of its obligations under, among other provisions, Articles 4(1), 4(2), 4(3), 6, 7 and 11(1) of the Treaty and general international law;

(b) An order that Respondent make full reparation to each of the Claimants for the injury or loss to their respective investments arising out of Respondent's violations of the Treaty and applicable rules of international law, including restitution to Claimants in a form sufficient to wipe out the consequences of all of Respondent's unlawful acts, with any damages component thereof in a freely convertible currency in an amount to be determined, including, where applicable, interest thereon at a compound rate sufficient fully to compensate Claimants for the loss of use of funds;

(c) An order that Respondent pay all costs of and associated with this arbitration, including Claimants' legal fees, experts' fees, administrative fees as well as those of Claimants' own representatives and the fees and expenses of the Arbitral Tribunal plus interest thereon at a reasonable commercial rate to be determined by the Tribunal;

(d) Post-award interest on any monetary component of relief; and

(e) Such other and further relief as the Arbitral Tribunal deems just and proper.

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VI.
APPOINTMENT OF ARBITRATOR

78. In accordance with Articles 3(4)(b) and 7(1) of the UNCITRAL Rules (1976) and Article 8(2)(d)(ii) of the Treaty, Claimants hereby appoint as their party-appointed arbitrator:

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