PCA CASE Nº 2013-09

IN THE MATTER OF AN ARBITRATION ARISING UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS AND THE GOVERNMENT OF THE REPUBLIC OF INDIA FOR THE PROMOTION AND THE PROTECTION OF INVESTMENTS ENTERING INTO FORCE JUNE 20, 2000 AND 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.

CLAIMANTS' STATEMENT OF CLAIM

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
John L. Gardiner
Timothy G. Nelson
Elizabeth A. Hellmann
Four Times Square
New York, New York 10036-6522
U.S.A.
Phone: 1 (212) 735-3000
Fax: 1 (212) 735-2000

SKADDEN, ARPS, SLATE
MEAGHER & FLOM (UK) LLP
David Kavanagh
40 Bank Street
Canary Wharf
London, E14 5DS, England
Tel: +44.20.7519.7000
Fax: +44.20.7519.7070

Claimants' legal representatives

July 1, 2013

TABLE OF CONTENTS

Pursuant to the agreed procedural timetable and Article 18 of the Arbitration Rules of the United Nations Commission on International Trade Law (1976) ("UNCITRAL Rules 1976"), Claimants CC/Devas (Mauritius) Ltd. ("CC/Devas"), Devas Employees Mauritius Private Limited ("DEMPL") and Telcom Devas Mauritius Limited ("Telcom Devas") (collectively, "Claimants") submit this Statement of Claim on Jurisdiction and Liability against the Republic of India ("Respondent" or "India") for breach 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 ("Mauritius-India BIT" or "Treaty").[1]

I.
INTRODUCTION

1. This arbitration results from the Indian government's expropriation of Claimants' investments in India, which occurred in February 2011 and was not accompanied by payment of fair and equitable compensation, as the Treaty requires.

2. Claimants' investments in India were made through an Indian company, Devas Multimedia Private Limited ("Devas"), in which Claimants hold shares. In January 2005, Devas had secured access to 70 MHz of S-band spectrum through a lease agreement that Devas had entered into with Antrix Corporation Limited ("Antrix"), a corporation wholly owned by the Indian government and operating under the

---

[1] (Ex. C-1.) This Memorial also refers to the accompanying: (1) exhibits ("Ex. C-_") and legal authorities ("Ex. CL-_"); (2) Witness Statements of Lawrence Babbio ("Babbio ¶ _"), Arun Gupta ("Gupta ¶ _"), Gary Parsons ("Parsons ¶ _"), Rajendra Singh ("Singh ¶ _") and Ramachandran Viswanathan ("Viswanathan ¶ _"); and (3) Expert Report of John Lewis ("Lewis ¶ _"). Per the agreed schedule, this Memorial addresses only jurisdiction and liability; quantum is expressly reserved.

administrative control of the Indian Space Research Organization ("ISRO") and the Department of Space ("DOS").

3. Pursuant to the lease agreement (hereafter, the "Devas Agreement"), Antrix had agreed to lease to Devas space segment capacity in the "S-band" (2500-2690 MHz), a part of the electromagnetic spectrum that India had coordinated with other nations at the International Telecommunications Union ("ITU"), the United Nations specialized agency responsible for coordinating the use of spectrum internationally. In India, the S-band had been assigned to DOS to be used for the development of satellite communications networks.

4. When it was entered into in 2005, the Devas Agreement was seen by the Indian government and by Devas as a win-win for all parties. DOS secured a productive use for the S-band spectrum that had been allocated to it by the Indian government but which had lain fallow for years while DOS struggled to find a use for it; ISRO and Antrix were able to partner with a private operator to develop India's space program and capabilities, as was their stated mission; and Devas obtained the space segment capacity necessary for delivery of the Devas services throughout India. In this regard, Devas planned to offer two main services to customers in India: broadband wireless access ("BWA") and audio-video ("AV") services (together, "Devas Services"). The Devas integrated satellite system also provided a cost-effective means of servicing rural areas within India.[2]

[2] There was and still is no other application on the Indian market capable of providing a comparable portfolio of services.

5. Over the course of the next five years, Devas assembled a world class team of experts in the satellite-terrestrial communications industry, raised over $130 million in capital, including approximately $100 million from Deutsche Telekom, a leader in terrestrial communications networks, and validated its proprietary integrated satellite-terrestrial communications system architecture, described more fully below (the "Devas System"), through experimental trials conducted in India, Germany and China. As a report commissioned by the Indian Government (the Chaturvedi Report, described below) would later recognize, Devas was "a state-of-the-art communication infrastructure" that would enable Devas to provide Devas Services throughout India (*see infra* ¶ 32).

6. During that same five year period, the Government of India gave its vociferous backing to Devas and to the Devas Agreement. Among other things, in 2007, the Indian government secured an exemption at the ITU enabling the satellites to operate at a higher power flux density than was otherwise permissible for satellite communications systems operating around the world. And DOS fully supported Antrix/ISRO and Devas's combined efforts to bring the Devas system into being, including by arranging for experimental trials in India in September 2009 that validated the functionality of the system. As a result of the success of those trials and the other accomplishments referred to herein, Devas was poised to become a major force in the Indian BWA and AV markets as soon as the satellites were launched and brought into operation.

7. The spirit of cooperation (which had been the hallmark of the Devas project from its inception) came to an end, however, when, in October 2009, Dr. K.R.

Radhakrishnan succeeded Dr. Madhavan Nair as Chairman of ISRO, Antrix and the Space Commission[3] and Secretary of DOS. Although outwardly, in meetings with Devas, Dr. Radhakrishnan pretended that it was business as usual and that the only reason the satellites had not been launched was due to technical issues, it has since come to light that – for reasons that have never been explained to Claimants – Dr. Radhakrishnan secretly began to target the Devas Agreement almost immediately upon his succession to the post of Chairman Antrix/ISRO/Space Commission and Secretary of DOS. These targeted actions culminated in the cancellation of the Devas Agreement in February 2011.

8. It has now been revealed that, as one of his first actions as the new Secretary of DOS and Chairman Antrix/ISRO, on December 8, 2009, Dr. Radhakrishnan secretly commissioned Dr. B.N. Suresh – Director of the Indian Institute of Space and Technology – to "review" all aspects of the Devas Agreement. Neither Devas nor Claimants were notified of this comprehensive "review" nor were their views or understandings solicited by the Suresh Committee.

9. When the Suresh Committee reported in June 2010, it found no wrongdoing by Devas and did not recommend termination of the Devas Agreement.[4] Nonetheless, in July 2010, Dr. Radhakrishnan sought and obtained a decision by the Indian Space Commission authorizing the annulment of the Devas Agreement. Neither

---

[3] The Space Commission is an inter-ministerial body of the Indian Government that includes representatives of the Prime Minister.

[4] Pursuant to a request under India's Right to Information Act 2005, in June 2012, ISRO provided Devas with a partial copy of Dr. B.N. Suresh's "Report on GSAT-6" (dated May 2010) (the "Suresh Rep."). The copy provided to Devas has substantial redactions that the government claims "as per Section 10(1) of RTI Act . . . [are] strategic in nature and the disclosure of the same is exempted under Section 8(1)(a) of [the] RTI Act 2005." (Suresh Rep. at 2 (Ex. C-94).)

Devas nor Claimants were notified by DOS/ISRO/Antrix or any other governmental department of this July 2010 decision by the Space Commission, nor were their views or understandings solicited by the Space Commission prior to it secretly authorizing the annulment of the Devas Agreement.

10. Dr. Radhakrishnan then obtained the opinion of the Additional Solicitor-General of India, Mr. Mohan Parasaran, as to how, with minimal damage and embarrassment to India, the Devas Agreement "[could] be annulled by invoking any of [its] provisions. . . ."[5] According to the Additional Solicitor-General's opinion, which was later made public by *The Hindu* newspaper on February 11, 2011, the purpose of the proposed annulment was in order "to (i) preserve precious S band spectrum for strategic requirements of the nation, and (ii) to ensure a level playing field for other service providers using terrestrial spectrum."[6]

11. In July 2010, the Additional Solicitor-General advised that the Devas Agreement *was valid and binding and that it was* ***not*** *possible for Antrix to terminate the contract according to its termination provisions*. The Additional Solicitor-General, however, suggested a possible pathway for Antrix to suspend performance under the Devas Agreement based upon an engineered "*force majeure*" event.

12. Specifically, the Additional Solicitor-General suggested that if the government were to make a "policy" decision, with the "seal and approval" of the Cabinet,

---

[5] Opinion of Additional Solicitor-General Mohan Parasaran (July 12, 2010) *in* The Hindu, *Additional Solicitor-General's opinion on Antrix-Devas deal* (Feb. 11, 2011) (emphasis omitted) (Ex. C-131) ("ASG Opinion").

[6] *Id.*

reserving the S-band for "national needs,"[7] then based on this policy decision, Antrix could cancel the Devas Agreement relying on the agreement's *force majeure* provisions. In turn, this would leave Devas with no satellites, no S-band spectrum in which to operate its integrated satellite system, and hence, among other things, no BWA or AV business.

13. At the time that these clandestine reviews and opinions were being undertaken by DOS in the summer of 2010, Devas also had become a victim of a series of negative and highly erroneous reports in the Indian press that tried to link the Devas Agreement to other scandals that were then besetting the government.[8] Although the Devas Agreement bore no relationship whatsoever to these other scandals, the media frenzy created political pressure on the Indian government to extricate itself from its commitments to Devas.

14. That pressure reached a boiling point in early 2011 and on February 8, 2011, Dr. Radhakrishnan hastily convened a press conference (televised on multiple channels, including CNN-IBN) to announce that the government had already decided to terminate the Devas Agreement. At the press conference, Dr. Radhakrishnan revealed for the first time the Space Commission's decision in July 2010 to cancel the Devas Agreement and explained what had happened inside the Indian government after that decision had been taken. Dr. Radhakrishnan said:

---

[7] During the initial conference, Respondent's counsel indicated that it would be relying on what it described as the "essential security" provision of the Treaty as a defense to liability. *See* Mauritius-India BIT, art. 11(3) (Ex. C-1). Respondent's counsel did not, however, articulate a basis upon which Article 11(3) might excuse Respondent's conduct in this case – and the facts as related herein readily dispel any notion that the decision to annul the Devas Agreement, and the resulting expropriation of Claimants' investment, was *bona fide*, much less that it could fall within Article 11(3)'s ambit.

[8] Viswanathan ¶ 165; *see infra* ¶ 86.

> Subsequent to the decisions taken by the Space Commission [in July 2010], . . . we started necessary actions for terminating the contract which required extensive consultations with the concerned agencies in the government. Department of Telecommunication, Department of Law and Justice, all included. The idea is to ensure that a ___ contract that has been entered into has to be now terminated without causing much of embarrassment and damage and financial loss to the government.[9]

15. Two days after this press conference, on February 10, 2011, an article appeared on ISRO's website predicting that Antrix soon would be able to announce a *force majeure* event enabling it to exit the Devas Agreement:

> the Government in exercise of its sovereign power and function may take a policy decision to the effect that due to strategic requirements, it would not be able to provide orbit slot in S-band for operating PS-1 to ANTRIX for commercial activities. In that event, ANTRIX in terms of Article 7(c) read with Article 11 dealing [sic] with Force Majeure may terminate the Agreement and inform Devas accordingly.[10]

16. Seven days later, on February 17, 2011, the Indian Cabinet Committee on Security ("CCS") announced that it had taken a "policy decision" to revoke the orbital slot in S-band previously assigned to DOS for commercial activities and that, as a direct consequence, the Devas Agreement should be annulled.

17. Right on cue, on February 25, 2011, Antrix issued a notice to Devas terminating the Devas Agreement on grounds of "*force majeure*" based on the CCS's so-called "policy decision."[11] This series of events followed almost verbatim the recommendations of the Additional Solicitor-General written back in July 2010.

---

[9] Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 4 (Feb. 8, 2011) (Ex. C-125).

[10] Background Note on Agreement between M/s. ANTRIX Corporation and M/s. DEVAS Multimedia Pvt. Ltd. regarding lease of space segment capacity in S-Band spectrum on ISRO's satellites GSAT-6 and GSAT-6A (Feb. 10, 2011) (Ex. C-193).

[11] Remarkably, Antrix also invoked section 7(c) of the Devas Agreement as a grounds for termination even though the Additional Solicitor-General had expressly *(cont'd)*

18. Adding insult to injury, even though the Additional Solicitor-General had expressly advised that Section 7(c) was ***not*** available to terminate the Agreement, on April 15, 2011, Antrix, purporting to act pursuant to Section 7(c), tendered USD $13 million to Devas as a termination fee.[12] Devas returned that check and warned Antrix that it was in clear breach of the Devas Agreement.[13]

19. In response, Antrix failed to engage in senior management discussions and then frustrated Devas's effort to resolve its dispute through arbitration. In an obviously coordinated fashion, the Indian government also began to harass Devas through various bogus state actions, including (i) threatening Devas personnel with investigation by the Indian Enforcement Directorate, (ii) threatening to cancel Devas's corporate charter, and (iii) seeking to levy exorbitant and wholly unjustified taxes on Devas.

20. As a direct result of the Indian government's annulment of the Devas Agreement, Devas's business has been destroyed and with it the value of Claimants' investments.

21. Because Respondent has failed to provide compensation to Claimants at fair market value as required by Articles 6 and 7 of the Treaty, and because the

---

(cont'd from previous page)
advised that such provision could ***not*** be used to terminate the agreement. Of course, it was precisely because of the unavailability of section 7(c)'s "Termination for Convenience" provision that the Additional Solicitor-General recommended the concoction of a *force majeure* event in the first place. If section 7(c) had been available (which it was not), there would have been no need for the elaborate machinations engaged in by the Indian government in annulling the Devas Agreement.

[12] Letter from Antrix (Madhusudhan) to Devas (Apr. 15, 2011) (Ex. C-138).

[13] Letter from Devas (Viswanathan) to Antrix (Madhusudhan) (Apr. 18, 2011) (Ex. C-140).

expropriation was unlawful in numerous other respects, Claimants are entitled to an award declaring Respondent liable to make reparation.

22. Claimants furthermore are entitled to a declaration that Respondent has breached Article 4(1) of the Treaty (guaranteeing "fair and equitable treatment" and barring "unreasonable or discriminatory measures"), as well as the "most favored nation clause" in Articles 4(2) and 4(3) of the Treaty, including denial of full security and protection to Claimants' investment.[14]

II.
STATEMENT OF FACTS

23. This Statement of Facts is drawn from the witness statements of (i) Ramachandran Viswanathan, the CEO of Devas; (ii) Dr. Rajendra Singh, the founder of Telcom Ventures and a Devas Board member; (iii) Arun Gupta, a partner of Columbia Capital and a Devas Board member; (iv) Larry Babbio, the former Vice-Chairman of Verizon Communications and a Devas Board member and current Chairman of DEMPL; and (v) Gary Parsons, a pioneer in hybrid satellite-terrestrial systems and a Devas board member; as well as the report of John Lewis, an expert on ITU coordination and satellite communication systems. These witnesses give evidence based on their personal knowledge of and involvement in the Devas project and, in Mr. Lewis' case, his experience at the ITU and with satellite communication systems. Their evidence is confirmed by certain statements made in the Suresh Committee Report ("Suresh Report"

[14] In accordance with the agreed schedule, a further hearing in which damages can be quantified should then be conducted.

or "Suresh Rep.", Ex. C-94), and the Chaturvedi Report ("Chaturvedi Report" or "Chaturvedi Rep.", Ex. C-137),[15] both of which are referenced herein.[16]

A. The Parties

1. The Claimants

24. Each of the Claimants is incorporated in Mauritius, a Contracting State to the applicable BIT.[17] The address of all three Claimants is 608 James Court St Denis Street, Port Louis, Mauritius.

25. The First Claimant, CC/Devas, was formed in 2006 and has its registered office in Port Louis, Mauritius. It is affiliated with Columbia Capital LLC ("Columbia Capital"), a venture capital firm based in Alexandria, Virginia.

26. The Second Claimant, DEMPL, was formed in 2009 and has its registered office in Port Louis, Mauritius. It is a subsidiary of Devas Employees Fund US, LLC, a Delaware limited liability company with membership units owned by certain non-Indian Devas employees pursuant to an Equity Incentive Plan.

27. The Third Claimant, Telcom Devas, was formed in 2006 and has its registered office in Port Louis, Mauritius. It is affiliated with Telcom Ventures LLC

---

[15] In all other respects, Claimants do not accept the assertions made in these Reports, which are the result of investigative processes in which Claimants and Devas were neither involved nor consulted or heard.

[16] As noted earlier, the Indian Government disclosed a copy of the Suresh Report, after heavy redaction, in response to a request by Devas under the Right to Information Act. (S*ee supra* n.4.) By contrast, the Indian government affirmatively made public parts of the Chaturvedi Report on February 4, 2012, *after* the annulment of the Devas Agreement, in an apparent effort to justify that action.

[17] *See* Exs. C-25, C-27 & C-91 (Claimants' respective certificates of incorporation); Exs. C-26, C-28 & C-92 (Claimants' Constitutions).

("Telcom Ventures"), a United States venture capital firm owned by Dr. Rajendra Singh, a pioneer in the field of hybrid satellite-terrestrial communications systems.[18]

2. The Respondent

28. Respondent is the Republic of India. The various emanations of the Indian state at issue in this case include:

(a) The Prime Minister of India, who is the head of the Union Government, head of the executive branch, and the chief advisor to the President (who is the head of state). The Prime Minister is also the Minister of Space. The current Prime Minister is Dr. Manmohan Singh, member of the Congress Party and leader of the current government (of which the Congress Party is the senior coalition partner), who has held this office since 2004.

(b) The Office of the Prime Minister of India ("PMO"), which includes the Prime Minister's staff.

(c) The Union Cabinet, or the Union Council of Ministers, a core decision-making body of the Indian government that is comprised of 35 ministers.

(d) The Indian Cabinet Committee on Security ("CCS"), a select Cabinet committee that, among other matters, "deal[s] with all Defence related issues", "issues relating to law and order, and internal security" and "economic and political issues impinging on national security."[19] It is composed of the Prime Minister, the Minister of Home Affairs, the Minister of External Affairs, the Minister of Finance, and the Minister of Defense.[20]

---

[18] Dr. Rajendra Singh, an inventor, developer, entrepreneur and investor, is well-known within the wireless communications field. He is an expert in integrated satellite systems and has been heavily involved in the development of ATC/CGC and interference cancellation technology. Telcom Ventures has invested in numerous wireless and satellite communications companies, including XM Satellite Radio and Aether Systems. *See* Singh ¶¶ 2-19.

[19] Composition and Functions of the Cabinet Committees (as on 30.08.2011) at 7-8, *available at* http://cabsec.nic.in/archive.php (viewed June 12, 2013) (Ex. C-148).

[20] (*Id.* at 7.) During 2011, the members of the CCS were Prime Minister Manmohan Singh, Minister of Finance Mr. Pranab Mukherjee, Minister of Defense Mr. A.K. Antony, *(cont'd)*

(e) The Indian Space Commission (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."[21] The Space Commission is composed of appointees from across the Indian government, including the Minister of State, the National Security Advisor (who reports to the Prime Minister), the Cabinet Secretary, the Principal Secretary to the Prime Minister, the Secretary for Economic Affairs in the Ministry of Finance, the Secretary Department of Expenditure, Secretary to the Government of India, and senior directors of ISRO centers.

(f) The Department of Space ("DOS"), the government department responsible for the development of India's space policy and the implementation of the decisions of the Space Commission. Since its establishment in 1972 under Prime Minister Indira Ghandi, DOS has formed part of the Prime Minister's portfolio and has reported to the PMO.[22]

(g) The Indian Space Research Organization ("ISRO"), a body of the Indian Government under the direction of DOS and the Space Commission that engages in research and testing in order to encourage the "rapid development of activities connected with space science, space technology and space applications" with "responsibility in the entire field of science and technology of outer space."[23] ISRO builds, launches, operates and leases satellites for various uses, including telecommunications, television and radio broadcasting.[24]

(h) Antrix, a corporation wholly owned by the Indian government[25] that is under the administrative control of DOS that purports to

---

(cont'd from previous page)
Minister of Home Affairs Mr. P. Chidambaram and Minister of External Affairs Mr. S. M. Krishna. (*Id.*)

[21] ISRO Website, "Introduction, About ISRO, Indian Space Research Organization," *available at* http://www.isro.gov.in/isrocentres/bangalore_departmentofspace.aspx (viewed June 12, 2013) (Ex. C-190).

[22] *See* Prime Minister's Website, "PM's Team, Prime Minister of India," *available at* http://pmindia.nic.in/pmsteam.php (viewed June 12, 2013) (Ex. C-189).

[23] *See* Chaturvedi Rep. at 2-3 ¶¶ 1.4-1.5 (Ex. C-137).

[24] *Id.* at 17-19 ¶¶ 2.16-2.18.1.

[25] *See* Antrix Corp. Ltd., Articles of Association (Ex. C-2).

operate as the commercial marketing arm of ISRO and DOS. Antrix was created to promote the commercial exploitation of India's space program. Antrix is expected to seek out "[v]enture capital funding" from private partners and to promote the transfer of technology from such commercial entities to ISRO[26] in order to develop India's space-related, industrial capabilities.[27] Among other things, Antrix leases transponder capacity on its satellites to companies that provide satellite communications and broadcasting services.[28]

(i) The Additional Solicitor-General, one of the law officers of the Republic of India who represents the Government in the Supreme Court and provides it with legal advice. The highest legal officer in India is the Attorney General, who holds a constitutional post. By statute, the Attorney General is assisted by the Solicitor-General of India (the second highest law officer in India), who in turn is assisted by Additional Solicitors-General. In 2010, Additional Solicitor-General Mohan Parasaran issued the legal opinion suggesting that DOS/ISRO/Antrix manufacture a *force majeure* event in an effort to justify termination of the Devas Agreement. (*See infra* ¶¶ 91, 95-101.) Mr. Parasaran has since been promoted to Solicitor-General.[29]

29. The relationship among certain of these emanations within the Indian state is depicted in the graphic below, which has been reproduced from the ISRO website:[30]

---

[26] *See* Chaturvedi Rep. at 7-8 ¶¶ 1.11-1.13 (Ex. C-137).

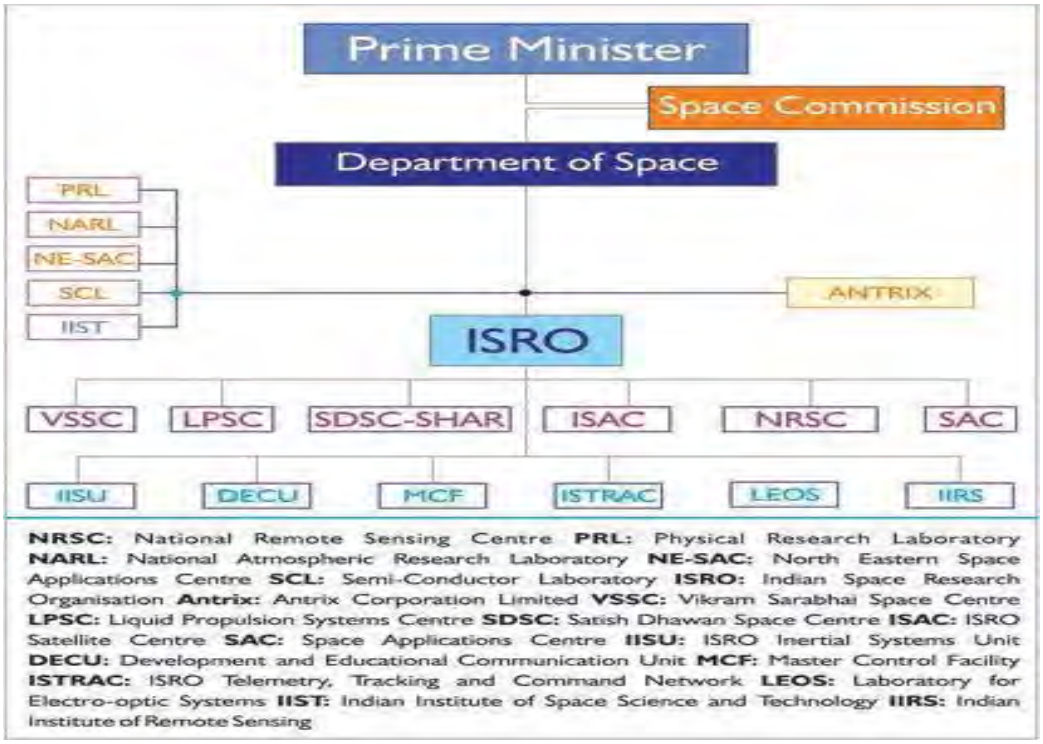
[27] Antrix Corp. Ltd., Company Brochure at 9 (Ex. C-192).

[28] *Id.* at 5.

[29] *See* Ministry of Law and Justice, "List of Law Officers," http://lawmin.nic.in/la/lawofficers.htm (viewed June 24, 2013) (Ex. C-181).

[30] Ex. C-190 (http://www.isro.org/scripts/Aboutus.aspx; "Click here for Organisation Chart").

Figure 1[31]



30. At all times relevant to this dispute, the Space Commission, DOS, ISRO and Antrix operated in an integrated manner, with the same person serving as the Chairman of the Space Commission, Secretary of DOS, Chairman of ISRO, and Chairman of Antrix. Specifically, Dr. K. Kasturirangan served in these positions until August 2003; he was succeeded by Dr. G. Madhavan Nair, who served in these positions from September 2003 to October 2009; and from November 2009 until around July 2011, these positions have been held by Dr. K.R. Radhakrishnan, who worked closely with Dr. Nair prior to assuming these roles.

---

[31] The Prime Minister thus maintains direct control over, and is kept apprised of activities and developments related to, the whole space program. This structure also ensures that Antrix has access to all ISRO technologies and information about its commercial capabilities. (*See* Chaturvedi Rep. at 43 ¶ 4.3 (Ex. C-137).)

31. As discussed further below, Dr. Radhakrishnan figures prominently both in the inducement of and the ultimate destruction of Claimants' investments.

B. Overview of Claimants' Investments in India

32. As noted above, this case concerns Claimants' investments in India, made through their equity investments in Devas, an Indian company.[32] As the Chaturvedi Report recognized, Devas was a "state-of-the-art communication infrastructure."[33] It was designed to enable Devas to provide audio-visual broadcast and broadband wireless access services to users throughout India using an integrated system of satellites and terrestrial networks.

33. In order to bring the Devas venture to fruition, Devas sought partners that could provide both capital and expertise in satellite and terrestrial communications systems. CC/Devas and Telcom Devas, as affiliates of Columbia Capital and Telcom Ventures, respectively, both had valuable experience investing in and operating satellite and telecommunications ventures.[34] Indeed, Devas's proposed hybrid satellite-terrestrial system utilized technological innovations pioneered by Dr. Rajendra Singh, one of Telcom Devas's representatives on the Devas board and a founder of Telcom Ventures.

---

[32] Devas was incorporated in Karnataka, Bangalore, India on December 17, 2004, with its registered office at 2nd Floor, Prema Gardenia, 357/6, 1st Cross, I Block, Jayanagar, Bangalore, India. Devas Multimedia Private Limited, Certificate of Incorporation (Ex. C-14).

[33] Chaturvedi Rep. at 22 ¶ 3.1.2 (Ex. C-137).

[34] Another shareholder in Devas is Deutsche Telekom Asia Pte. Ltd. ("DT Asia"), a subsidiary of German telecom company Deutsche Telekom AG ("DT"). We understand that DT has sent the Government of India a request for amicable settlement, a potential pre-cursor to UNCITRAL arbitration under the Germany-India bilateral investment treaty.

34. In addition to their expertise, Claimants invested significant amounts of capital in Devas. The cash infusions from the "Series A" and "Series B" investments made by CC/Devas and Telcom Devas in 2006 and 2007 enabled Devas to make its upfront capacity reservation fee payments to Antrix for the building of the satellites under the Devas Agreement.[35] DEMPL acquired its stakes beginning in 2009.[36]

35. As of today's date, July 1, 2013, Claimants' respective shareholdings in Devas are:

(a) CC/Devas holds 15,730 Class A Rs. 10/- Equity Shares, 11,978 Class B Rs. 10/- Equity Shares, 525 Class C Rs. 10/- Equity Shares and 3,116 Class D Rs. 10/- Equity Shares in Devas, representing 17.06% of issued share capital as at 2011 and today;

(b) DEMPL holds 6,402 Class D Rs. 10/- Equity Shares in Devas, currently representing 3.48% of issued share capital as at 2011 and today; and

(c) Telcom Devas holds 15,730 Class A Rs. 10/- Equity Shares, 11,978 Class B Rs. 10/- Equity Shares, 525 Class C Rs. 10/- Equity Shares and 3,116 Class D Rs. 10/- Equity Shares in Devas, currently representing 17.06% of issued share capital as at 2011 and today.

36. Claimants' investments were duly approved by the Foreign Investment Promotion Board ("FIPB") of India.[37]

---

35 *See also infra* ¶ 65.

36 *See infra* ¶ 74.

37 *See* Submission for Issuance and Allotment of Shares at 3 (June 11, 2009) (chart setting forth FIPB approval history) (attachment to Letter from Ministry of Finance, FIPB Unit (Saxena) to Devas (Sept. 29, 2009)) (Ex. C-82); *see also* Exs. C-33, C-49, C-51, C-55 & C-78 (various approval letters from FIPB).

C. The Establishment of Devas's Business

1. Overview of the Devas System

37. As noted above, Devas's business involved the establishment of an integrated satellite-terrestrial communications system[38] that would enable Devas to deliver video, multimedia and information services across India to mobile users. A hybrid satellite-terrestrial system provides advantages over a satellite-only communications system because, with the latter, the "end-user" on the surface of the earth must have a direct line of sight to the satellite in order to send and receive radio signals. When a direct line of sight is not possible, such as in urban and developed areas where most mobile users are located, or in hilly or mountainous areas, the radio signal will be blocked or degraded.[39]

38. Beginning in the 1990s, technology pioneered by Dr. Rajendra Singh and others was developed to use "satellite transmission . . . augmented by terrestrial transmission so as to reuse [satellite] signals seamlessly."[40] Terrestrial transmission was accomplished by building a series of Complementary Ground Component ("CGCs")[41] on the surface of the earth, often towers, that use the same frequencies as the satellites and transmit, receive, and augment such signals between the satellite and the end-user and vice versa. As the Suresh Report acknowledged, the Devas Agreement was a "significant

---

[38] (*See* Suresh Rep. at 8 § 5; *id.* at 15 § 14(i); *id.* at 16 § 15; *see also id.* at 10 § 8; 16 § 15 (Ex. C-94).) The Devas Agreement contemplated bringing this cutting edge, "evolving" technology into India. (*See* Chaturvedi Rep. at ii ¶ 5; *see also id.* at 29 ¶¶ 3.2.7.1-3.2.8; *id.* at 41 ¶ 3.7.2 (Ex. C-137).)

[39] Viswanathan ¶¶ 30-31.

[40] Suresh Rep. at 8 § 5 (Ex. C-94); *accord* Singh ¶ 16.

[41] In the United States, these are referred to as Ancillary Terrestrial Components ("ATC"). (*See* Parsons ¶ 8.)

step for bringing a new satellite based service to India."[42] Under the Devas Agreement, ISRO was responsible for developing the satellite segment (by building and launching the two satellites), and Devas was responsible for developing the terrestrial segment by, among other things, building out the CGC elements of the network.[43]

39. As noted above, Devas was positioned through this plan to offer two main services: BWA and AV.[44] Devas planned to offer BWA service in all urban areas with populations greater than 200,000 people. The AV service was to be offered nationwide, including in rural areas where users would have direct line-of-sight to the satellite(s).

40. Prior to launching service in any city, Devas planned to build a terrestrial network. This would entail building a network of AV towers (also called "repeaters"), sufficient to cover the geographic area of the city, that would receive content from the satellites for a fixed number of AV channels and re-transmit it to users' mobile terminals. The BWA network similarly would consist of a network of towers sufficient to cover the geographic area of the city, with additional towers added over time to support a growing subscriber base. Data centers/hubs would transmit internet content to the BWA towers,

---

42 Suresh Rep. at 16 § 15 (Ex. C-94).

43 *See* Chaturvedi Rep. at 23 ¶ 3.1.4.1 (confirming that, on the recommendation of the Shankara Committee, "it was only appropriate that ISRO confines itself to leasing of transponders rather than getting involved in a full-fledged Joint Venture.") (Ex. C-137).

44 DVB-SH stands for "Digital Video Broadcasting - Satellite to Handheld," and is a system architecture specifically developed for transmitting content to mobile devices in hybrid satellite-terrestrial systems. (*See* Parsons ¶ 20.)

which would then communicate the internet content to subscribers. The towers and hubs would be physically connected via fiber (or microwave links) to the internet.[45]

41. As a practical matter, no other operator could use the S-band spectrum that had been allocated to Devas under the Devas Agreement while it was being used by Devas.[46] This is because uncoordinated use of the same spectrum by another operator could cause significant interference or "static" leading to degraded system performance or the total unavailability of the service. The interference could be in either direction, from terrestrial transmitters into receivers seeking to capture the signal from the satellite, or from the satellite transmitter into terrestrial receivers seeking to capture signals from terrestrial transmitters.[47]

42. Owing much to Claimants' significant injections of capital and assistance in designing and building Devas's hybrid satellite-terrestrial system, Devas was in a position by January 2010 to begin to deliver[48] – as soon as ISRO launched PS1 – its Devas Services throughout India, thereby meeting the growing untapped demand in India for mobile media, entertainment, interactive and data services.

2. The Devas Agreement

43. The Devas Agreement, formed in January 2005, was the foundation of the Devas project and central to Claimants' investments in India.

---

[45] By the time Antrix purported to terminate the Devas Agreement, in February 2011, technology had advanced such that Devas would not have had to build separate AV towers, but could have used the BWA towers alone. (*See* Parsons ¶ 21.)

[46] *See* Lewis ¶ 18, 77; Viswanathan ¶ 34.

[47] Lewis ¶ 18, 77; accord Chaturvedi Rep. at iii ¶ 7 ("Any other MSS use in the band would not be as efficient due to interference of signals.") (Ex. C-137). On its own, this was an extremely valuable aspect of the Devas Agreement.

[48] *See* Viswanathan ¶¶ 144-147.

44. Under the Devas Agreement, which was signed by Antrix as the "marketing arm" of ISRO, Devas received a lease of 70 MHz of space segment capacity in the S-band ("Leased Capacity"), on two Indian satellites to be built, launched and operated by ISRO ("PS1" and "PS2"). Antrix/ISRO had two primary obligations: (1) to manufacture/build, launch and operate a primary and secondary satellite system (PS1 and PS2) that would be the basis for a hybrid satellite-terrestrial Devas System; and (2) lease transponder capacity in the S-band on these satellites to Devas for the same purpose.[49]

45. It was also agreed that 90% of the total bandwidth on the satellites was allocated to Devas, and the other 10% was allocated to DOS.[50]

46. Under the Devas Agreement, Devas was required to pay Antrix an upfront capacity reservation fee of the INR equivalent of USD 20 million to reserve transponder capacity on the first satellite.[51] Within 30 months of payment of the first installment of that fee (with a 6-month grace period), ISRO was required to deliver a fully operational and ready PS1.[52] This deadline included in-orbit testing and verification by Devas.[53] Under the agreement, Devas had the option (which it exercised) to lease S-band capacity on a second satellite (PS2) that was also to be built and launched by ISRO.[54] Devas had to pay an upfront capacity reservation fee of the INR equivalent of USD 20 million to

---

49 Devas Agreement at 2 § 2 & 9-10 § 12 (Ex. C-16).

50 *See* Viswanathan ¶ 196; *accord* Chaturvedi Rep. at ii ¶ 5 (noting that "Devas Agreement" provided for transponder leasing to Devas for 90% of the satellite transponder capacity in S-band) (Ex. C-137).

51 Devas Agreement at 2 § 3(b) & Ex. B (Ex. C-16).

52 *Id.* at 2 § 3(b); *see also id.* at 9-10 §§ 12(a)(ii), 12(a)(iii).

53 *Id.*

54 *Id.* at 4-5 § 4 & Ex. B.

reserve transponder capacity on the second satellite as well. In addition to these upfront fees, Devas also was required to pay Antrix an ongoing annual lease fee for the transponders of the INR equivalent of USD 9 million, rising to the INR equivalent of USD 11.25 million once Devas became cash flow positive.[55]

47. Antrix was obligated to acquire "all necessary Governmental and Regulatory Approvals relating to orbital slot and frequency clearances, and funding for the satellite to facilitate DEVAS services."[56] Antrix further undertook "through ISRO/DOS" to obtain clearances of all relevant international and national agencies, including the WPC and the ITU, for the orbital slot and frequency resources required to support the Leased Capacity,[57] and to "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."[58]

48. The Devas Agreement provided that the "Leased Capacity" would be a "Non-Preemptible service, except as specifically provided for in Article 7,"[59] a condition that precluded the space segment capacity from being used or repurposed for use by another party during the life of the satellite (unless Devas was in default of its

---

55 *Id.* at 4 § 4, & Ex. B; *see also* Chaturvedi Rep. at 35 ¶ 3.5.5 (noting that Devas was expected to become cash positive around the sixth year of operation) (Ex. C-137).

56 Devas Agreement at 2 § 3(c) (Ex. C-16).

57 *Id*. at 9 § 12(a)(ii).

58 *Id.* at 2 § 3(c).

59 Article 7 of the Devas Agreement relates to termination of the Devas Agreement.

obligations).[60] The Devas Agreement thus gave Devas the exclusive right to the Leased Capacity.

49. The parties to the contract were required "to discharge their obligations in utmost good faith."[61]

50. Devas could assign the Leased Capacity at its sole discretion upon sixty days advance notice to Antrix.[62] This enabled Devas to undertake a range of transactions with investors, from a simple stock sale to a joint venture, at any time during the life of the contract, without forfeiture of the Leased Capacity. From an investment perspective, this right was viewed as important by the Claimants.[63]

51. Upon expiration of the Lease Term of 12 years, the lease would be "put up for renewal . . . for another twelve (12) years, at Lease Fees to be mutually agreed upon." [64] Devas and Antrix later agreed by amendment that such fees would be "reasonable."[65]

52. The Devas Agreement provided for "Delay Damages" of USD 416,666 monthly (for a cap of USD 5 million after 12 months of delay) if Antrix failed to deliver PS1 within three years of the first upfront capacity reservation payment. It also provided

---

60 Devas Agreement at 2 § 2 (Ex. C-16).

61 *Id.* at 15 § 21.

62 *Id.* at 14 § 17.

63 Singh ¶ 30; Gupta ¶ 15.

64 Devas Agreement at 4 § 3(1) (Ex. C-16).

65 Amendment No. 1 to Agreement No. ANTX/203/DEVAS/2005 (July 27, 2006) (Ex. C-37).

that the failure to deliver PS1 within one more year, *i.e.* four years from the first payment, would be a material breach of the agreement.[66]

53. Article 11 of the Devas Agreement provides that neither Devas nor Antrix was "liable for any failure or delay in performance of its obligations" in the event of a "Force Majeure." As specified in the Agreement, a *force majeure* event was limited to matters "beyond the reasonable control of the party affected" and that prevented performance "despite all efforts of the Affected Party to prevent it or mitigate its effects."[67] As discussed further below, the eventual declaration of *force majeure* by Antrix (premised upon a February 2011 Union Cabinet "policy decision") was improper because it was purposefully procured by Antrix/ISRO/DOS in an effort to extricate Antrix from the Devas Agreement. (*See infra* ¶¶ 178-184.)

D. The Devas Project Is Fully Endorsed by Indian Officials

54. The Devas project was fully endorsed by the Indian government from its inception. Indeed, the history of the investment shows that the Devas Agreement was carefully considered prior to the execution of the contract, and approved after officials

[66] Devas Agreement, Ex. B at B3 § 2.1.2.2 (Ex. C-16); *see also* Chaturvedi Rep. at 35 ¶ 3.5.3 (Ex. C-137).

[67] Devas Agreement at 8-9 § 11(b) (Ex. C-16).

concluded it represented a technically sound[68] telecommunications system useful for the Indian market.[69]

55. Negotiations for what was to become the Devas Agreement originated in talks between Antrix and Forge Advisors LLC ("Forge Advisors"), a U.S. company headed by Mr. Viswanathan. While these negotiations were underway, in May 2004, at the direction of the Chairman of ISRO, a High Power Committee was constituted to review the "technical feasibility, risk mitigation, time schedule, financial and organisational aspects of this project,"[70] including "alternate uses for space segment."[71] The Committee was chaired by Dr. K.N. Shankara (the "Shankara Committee"), the then-Director of the Space Application Center in Ahmedabad, India. The Shankara Committee "had several detailed discussions" with Forge Advisors concerning the technology and its viability.[72] Based on its review, the Shankara Committee concluded that the contemplated system of "satellite transmission . . . augmented by terrestrial transmission so as to reuse the signals seamlessly in Indian environment" was not only "technically sound and reliable" but also "quite attractive."[73]

---

68 *See* Suresh Rep. at 15 § 14(i) ("There is absolutely no doubt on the technical soundness of the digital multimedia services as proposed in this hybrid satellite and terrestrial system.") (Ex. C-94); *see also id.* at 8 § 5 ("The [Shankara] committee has concluded that the concept is technically sound and reliable.").

69 *See id.* at 8 ¶ 5 (noting that the "[Shankara] [c]ommittee also noted that this proposal of utilising a relatively small spacecraft enabled by innovative collaboration of space and ground equipment is quite attractive.").

70 *Id.* at 6 ¶ 4; *see also* Chaturvedi Rep. at 22 ¶ 3.1.3 (Ex. C-137).

71 Chaturvedi Rep. at 22 ¶ 3.13 (Ex. C-137).

72 *Id.*

73 *See* Suresh Rep. at 8 § 5 (Ex. C-94).

56. Based on the recommendations of the Shankara Committee, the Antrix Board of Directors accepted "in principle" in June/July 2004 a venture to utilize the S-band for communications across India. Then, in December 2004, after further discussions with and presentations by Mr. Viswanathan, and discussions within the space hierarchy, the Antrix Board "approved the draft agreement negotiated with Devas [and recommended by the Shankara Committee.]"[74] In December 2004, the Antrix Board included Dr. Nair, who, as noted above, was at that time the Chairman of ISRO/Space Commission/Antrix and the Secretary of DOS, as well as Ratan Tata and Jamshyd Godrej, who were private businessmen and two of three "External" board members.

57. The operative version of the Devas Agreement was signed in January 2005.[75] Dr. Radhakrishnan has publicly stated that when the Devas Agreement was signed, it was "putting [the S-band] to the best use at that time."[76]

E. The Indian Cabinet Gives the Go-Ahead for the Satellites, and the Devas Agreement Becomes Fully Operative

58. Right after the Devas Agreement was signed in January 2005, Devas formed its core management team, including Dr. M.G. Chandrasekhar, an ISRO veteran with over 40 years of experience, as chairman of the Board, and established a company infrastructure, including an office in Bangalore.[77] In total, the Devas team came to

---

74 *Id.* at 7 ¶ 4.

75 *Id*.

76 Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 15 (Feb. 8, 2011) (Ex. C-125).

77 *See* Viswanathan ¶ 68.

include individuals with over 450 combined years of experience in the satellite industry that had launched or operated over 60 satellite systems.[78]

59. Even when announcing the annulment of the Devas Agreement, a senior Antrix official, Dr. Kasturirangan, gave the highest praise to the Devas team, stating that the Devas System

> is the outcome of a consortium of top designers of communication systems across the world. Don't think that this is something which is done in the Indian laboratory. It is a very unique technology which has been contributed to by some of the best peers in the field. So, that part of it we have no doubt that [Devas] coordinated itself into creating that system to provide the best of the technology for this mission.[79]

60. The construction of the satellites specified in the Devas Agreement was approved by the Union Cabinet. Specifically, 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.[80] This was to be the satellite that would be known as PS1.

61. Following that briefing, on December 1, 2005, the Indian government's Press Information Bureau formally announced that the Union Cabinet had given its approval to undertake the design, development and launch of PS1.[81] The Union Cabinet's

---

78 *Id.*

79 Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 15 (Feb. 8, 2011) (Ex. C-125).

80 *See* Modified Coordination Filing for S-band (Ex. C-21).

81 (Press Information Bureau, Government of India, Cabinet, *Multimedia mobile s-band satellite mission (GSAT-6/INSAT 4-E)* (Dec. 1, 2005) (Ex. C-19).) Although media reports (and certain government officials) have suggested that the Union Cabinet was misled about the Devas Agreement because the Devas Agreement was not specifically identified by DOS in the Cabinet Note concerning GSAT-6, the government's own reports acknowledge that it is official practice *not* to identify the commercial end-user of *(cont'd)*

approval of this satellite was fully in line with the stated objectives of the Indian government. For at least five years, the official policy of the Indian government had been that DOS/ISRO/Antrix would seek partnerships with private industry, in order to bring financial and intellectual capital into the space industry and the country.[82]

62. By its terms, Devas Agreement became effective once Antrix notified Devas that Antrix was in receipt of all required approvals for the Devas System.[83] This happened on February 2, 2006, when Antrix issued a letter informing Devas that it had obtained the necessary frequencies and orbital slots for satellite operations:

> Antrix Corporation is pleased to inform you that it has received the necessary approval for building, launching, and leasing the capacity of S-band satellite, henceforth officially designed as INSAT-4E.
>
> As per the Agreement signed with Devas, Antrix is responsible for getting the national and international frequency coordination for the operation of INSAT-4E satellite at the designated orbital slot. In this connection it may please be noted that the S-band frequencies of the INSAT-4E satellite are within the spectrum in use for satellite applications in India by DOS/ISRO, for which we had completed the necessary ITU level co-ordination and registration. DOS/ISRO have taken the necessary additional steps to enable registration of applicable parameters for INSAT-4E operation.
>
> Antrix is now in a position to go ahead with the building and launch of the INSAT-4E spacecraft and lease the capacity on the same to Devas Multimedia Pvt. Ltd., as per Agreement No. Antrix/2003/DEVAS/2005 dated 28 January 2005.[84]

(cont'd from previous page)
satellite spectrum in such Cabinet notes. (*See* Suresh Rep. at 8 § 6 (Ex. C-94); Chaturvedi Rep. at 39 ¶ 3.6.1(a) (Ex. C-137).) As was later reported, the Space Commission approved the building of GSAT-6A (or the PS2 satellite in the Devas Agreement) in October 2009. (*Id.* at 27 ¶ 3.1.12.)

82 *See* Viswanathan ¶ 28.

83 Devas Agreement at 17 § 27 (Ex. C-16).

84 Letter from Antrix (Murthi) to Devas (Viswanathan) (Feb. 2, 2006) (Ex. C-24).

63. The Devas Agreement thus became "effective" as of February 2, 2006.[85] This also provided confirmation to Devas and its prospective foreign investors, namely Claimants, that the Indian government was fully behind the Devas Agreement.

64. After the Devas Agreement became effective, the Indian government worked continuously to protect the rights in the 83°E orbital slot at meetings at the ITU, including at a meeting of the ITU in 2007, in which India secured a "grandfathered" right to use higher allowable amounts of power in a satellite beam operating in the S-band than could be used by other countries in the world.[86] The enhanced power was a feature of the Devas System architecture, and thus this act demonstrated India's commitment to the launch of the Devas System.[87]

F. Devas Raises Capital from Claimants and Deutsche Telekom and Further Develops Its Hybrid Satellite-Terrestrial System

65. Claimants CC/Devas and Telcom Devas made a first round investment of approximately USD 7.5 million each in May 2006,[88] which Devas used to pay the first installment of the upfront capacity reservation fee for PS1 under the Devas Agreement.[89] In June 2007, Claimants CC/Devas and Telcom Devas each made a second round

---

85 Chaturvedi Rep. at 26 ¶ 3.1.11.1 ("The contract, thus, became effective from [2nd February 2006]."") (Ex. C-137); Suresh Rep. at 7 (similar observation) (Ex. C-94).

86 *See* Lewis ¶ 68.

87 Viswanathan ¶¶ 94-95.

88 Share Subscription Agreement (Mar. 16, 2006) (Ex. C-31); Devas Multimedia Private Limited, Minutes of the 13th Meeting of the Board of Directors (May 19, 2006) (Ex. C-34).

89 Letter from Devas to Antrix, with enclosed check (June 21, 2006) (Ex. C-35).

investment of approximately the same amount, which Devas used to pay the first installment of the upfront capacity reservation fee for PS2.[90]

66. In April 2007, Devas obtained a pre-existing "internet service provider" ("ISP") license by acquiring Manipal Software Pvt. Ltd.[91] Devas subsequently was granted an ISP license in its own right in August 2008, which permitted it to deliver internet and related services throughout India.

67. In March 2008, after a period of due diligence, DT Asia signed a Share Subscription Agreement.[92] The investment by DT Asia, which closed in August 2008, gave Devas approximately USD 75 million of additional capital as well as access to DT experts in building terrestrial telecommunications networks, as well as to DT's preferred suppliers and pricing.[93]

68. In April 2008, Devas and Antrix officials and personnel, including, in certain instances, Mr. Gary Parsons and Mr. Larry Babbio of Devas and Mr. K.R. Sridhara Murthi ("Mr. Murthi") of Antrix, attended the first Design Review of GSAT-6.[94] During these meetings the technical specifications and progress on the GSAT-6 satellite were discussed. After April 2008, eight more design reviews were held (with the last in August 2010).[95]

---

90 Share Subscription Agreement (June 11, 2007) (Ex. C-39); Letter from Devas to Antrix, enclosing check (June 18, 2007) (Ex. C-40); Singh ¶¶ 39-40; Gupta ¶¶ 20-21.

91 Viswanathan ¶ 97.

92 Share Subscription Agreement (March 19, 2008) (Ex. C-45); Babbio ¶ 23.

93 Viswanathan ¶ 108; Singh ¶ 50.

94 Design Review: GSAT-6 (Apr. 16, 2008) (Ex. C-46).

95 *See* Parsons ¶ 39.

69. In August 2008, Devas secured licenses from various Indian government ministries to conduct experimental trials.[96] Having secured such licenses, Devas conducted successful trials in September 2009 that demonstrated the technological feasibility of its proposed communications system.[97] Dr. Radhakrishnan, who would succeed Dr. Nair as Chairman of ISRO, Secretary of DOS and Chairman of Antrix, was present at the September 2009 trials.[98] After the trials, Devas had a celebratory ceremony at its new office in Bangalore. Both Dr. Nair and Dr. Radhakrishnan were present. Dr. Radhakrishnan acknowledged the progress of the Devas project and stated that he looked forward to future collaborations with Devas and Claimants.[99]

G. In 2009, ISRO/Antrix Announces Delays in Delivery of the Satellites

70. Under the Devas Agreement, Antrix was obligated to launch PS1/GSAT-6 by December 2008 (or, within the 6-month grace period, by June 2009).[100]

71. On April 11, 2009, members of the Devas team, including Dr. Chandrasekhar and Mr. Venugopal, met with senior Antrix and ISRO officials, including Mr. V.R. Katti, ISRO's Program Director of GEOSAT (and a Devas Board Member) and

---

96 Viswanathan ¶¶ 120-26; *see also* GSAT 6A Spacecraft Project Report (July 2009), §§ 1, 3 (GEOSAT Programme Management Office of ISRO Satellite Center noting that GSAT-6A's "services . . . will be used by DEVAS Multimedia Pvt., Ltd. and Antrix Corporation of ISRO similar to GSAT 6" for "multimedia and information service . . . that will be delivered via satellite and terrestrial systems using fixed, portable and mobile receivers including mobile phones") (Ex. C-67).

97 Viswanathan ¶¶ 130-33; Singh ¶¶ 52-54; Gupta ¶ 27; Babbio ¶ 26; Suresh Rep. at 11 § 9 (Ex. C-94).

98 *See* Viswanathan ¶¶ 131-132; Exs. C-70 to C-75 (photographs).

99 *See* Singh ¶ 55; Gupta ¶ 28.

100 Devas Agreement at 2 § 3(b) (providing that the initial launch date for GSAT-6/PS1 was to be 30 months from the date of the initial Upfront Capacity Reservation Fee with a 6 month grace period) (Ex. C-16).

Antrix Executive Director Mr. Murthi.[101] At this meeting, for the first time, Antrix projected that (despite the contractual deadline of June 2009) the satellites would not be launched until late 2009 or early 2010. At this meeting, Dr. T.K. Alex, Director of ISAC, stated that "the schedule projected was realistic" and Mr. Murthi stated that "all efforts are to be put to retain our right over this important asset [the S-band] by launching the satellite in time."[102]

72. While this was disappointing to Devas, Antrix Executive Director Mr. Murthi, confirmed ISRO's intention to accomplish the launch as soon as possible in early 2010.[103]

73. In September 2009, Claimants CC/Devas and Telcom Devas, as well as DT Asia, made a further capital injection of USD 25 million to purchase additional shares in Devas, in order to equip Devas with sufficient capital to begin rolling out services as soon as PS1 was launched in early 2010.[104]

74. Also in mid-2009, Devas implemented an "Equity Incentive Plan" for key employees. As part of that program, as approved by the Indian FIPB, DEMPL (*i.e.* the Second Claimant) purchased Class D shares in Devas.[105] It did so through two tranches in 2009 and 2010, resulting in DEMPL owning 6,402 Class D shares in Devas.[106]

---

101 *See* Compilation of Presentations made during the Status Review of GSAT-6 and Minutes of the Review (Ex. C-64); *see also* Viswanathan ¶ 155.

102 "Minutes of the Status Review of GSAT 6 held with M/s Devas Multimedia Pvt. Ltd." at 1 (Apr. 15, 2009) *in* Compilation of Presentations made during the Status Review of GSAT-6 and Minutes of the Review (Ex. C-64).

103 *Id.*

104 Viswanathan ¶¶ 135-37; Singh ¶ 56; Gupta ¶¶ 29-31.

105 (Viswanathan ¶¶ 138-43; *see also* Ex. C-82 (FIBP approval for DEMPL investment).) The directors and executives who participated in the plan were *(cont'd)*

75. Shortly after the experimental trials were held, on November 11 and 12, 2009, Devas held a joint status review with ISRO/Antrix at the ISRO Space Application Centre in Ahmedabad, India and ISRO Satellite Centre in Bangalore, India, respectively. At the meetings, Devas was informed that despite significant progress having been made on PS1, due to certain technical issues, the launch date for PS1 was now projected for June 2010.[107]

76. The pushing back of the launch date for PS1 was not acceptable to Devas. Thus, at a Board meeting held on December 4, 2009, Devas determined to form a committee of its Board, headed by Mr. Parsons (who had a great deal of experience in satellite manufacturing) to supervise the completion of ISRO's building of the satellites.[108]

H. In December 2009, Dr. Radhakrishnan Secretly Orders a "Comprehensive Review" of the Devas Agreement

77. Outwardly, the Indian Government had given its backing to the Devas System since its inception and throughout 2009 – notwithstanding the launch delays. Claimants know now, however, that the Indian government began secretly undermining the contract (and Claimants' investments) as soon as Dr. Radhakrishnan took over from Dr. Nair at the end of October 2009.

(cont'd from previous page)
Ramachandran Viswanathan, Paresh Shah, Kari Lehtinen, Gary Parsons, Lawrence T. Babbio, Jr., George R. Olexa, Ramanaryan V. Potarazu, Rajiv Mahajan, and Vignaraj Sanmugalingam. (*See* Viswanathan ¶ 142.)

106 *See* Share Subscription Agreement (Sept. 2, 2009) (Ex. C-76); Share Subscription Agreement (June 15, 2010) (Ex. C-96).

107 GSAT-6 Overview, presented by V.R. Pratap, Project Director, GSAT-6, ISRO Satellite Centre, Bangalore at 32 (Nov. 12, 2009) (Ex. C-85); *see also* Viswanathan ¶ 157.

108 Parsons ¶ 38.

78. In this respect, in February 2011, Dr. Radhakrishnan announced publicly that on December 8, 2009 – for reasons that have yet to be fully explained – he "instituted a committee with a former member of the Space Commission to have a comprehensive review of all aspects of [the Devas Agreement]."[109] Dr. Radhakrishnan commissioned Dr. B.N. Suresh, Director of the Indian Institute of Space and Technology, as assisted by Mr. SK Jha, the Director of DOS, Mr. S. Sayeenathan, Deputy Director of the Prime Minister's Office, and Mr. Parameshwara, Director of Business Development (the "Suresh Committee"),[110] to "review and examine the legal, commercial, procedural and technical aspects related to licensing of spectrum/frequency and leasing of transponders with reference to Devas Multimedia Contract."[111]

79. The Suresh Committee prepared a report over the course of five months after "[a]ll applicable documents were . . . scrutinized in detail" and "[d]etailed discussions were held with Antrix, SCPO and DOS officials on all aspects" of the "legal, commercial, procedural and technical aspects of th[e] contract."[112] As discussed further below, the Suresh Report found no wrongdoing on the part of Devas, and does not suggest, much less recommend, that the Devas Agreement should be annulled.[113]

I. Antrix Announces Further Delays in the Launch of the Satellites

80. On December 23, 2009, Devas sent a letter to senior management at Antrix and ISRO expressing Devas's continuing concern about "delays on the delivery

---

109 Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 7 (Feb. 8, 2011) (Ex. C-125).

110 Suresh Rep. Encl. 1 (Ex. C-94).

111 *Id.*

112 Suresh Rep. at 3 (Ex. C-94).

113 *Id.* at *passim*.

schedule of the satellite system" and asked Antrix to "prioritiz[e] . . . the Devas satellite system" by providing the "resource allocation required to launch the satellites expeditiously." The letter outlined "Devas['s] . . . significant investments [for] years into technology development, ground systems development, terminal development, technical trials, and preparation for commercial operations," and concluded by requesting that "[t]he Devas senior management along with the investor consortium . . . meet with Chairman ISRO [Dr. Radhakrishnan], Dr. A. Bhaskaranarayana and [Mr. Murthi] in 4th week January or 1st week of February of 2010 to review the progress & schedule of the satellite system as well as discuss plans for initiation of commercial services."[114] Devas wanted to meet Dr. Radhakrishnan because, as successor to Dr. Nair and Chairman of ISRO and Antrix, he was in a position – so Devas thought – to prevent any further delays by prioritizing the launch of the satellite.[115]

81. In a letter dated just one week later, on December 30, 2009, Mr. Murthi reassured Devas that "Antrix/ISRO is putting all efforts to meet the launch schedule of July 2010," and suggested that the Devas team meet with Dr. Radhakrishnan in the first week of February 2010.[116]

82. On February 4, 2010, Dr. Radhakrishnan met with representatives of Devas and Claimants at ISRO headquarters in Bangalore. At that meeting, even though Devas stressed (in a presentation) the vital importance of the "[c]ompletion and launch of GSAT 6 & 6A [*i.e.*, PS1 and PS2] at the earliest," and for PS1, a "launch by no later than

---

114 Letter from Devas (Viswanathan) to Antrix (Murthi) & ISRO (Bhaskarnarayana) (Dec. 23, 2009) (Ex. C-87).

115 Viswanathan ¶ 159.

116 Letter from Antrix (Murthi) to Devas (Viswanathan) (Dec. 30, 2009) (Ex. C-88).

August 2010,"[117] Dr. Radhakrishnan would not commit to a July or August 2010 launch date. Instead, he indicated a new shipment date of September 1, 2010.[118] Dr. Radhakrishnan failed to mention that (as Claimants know) he had already ordered a "comprehensive review" of the Devas Agreement by the Suresh Committee.

83. Subsequently, after further meetings in the Spring of 2010, Devas became deeply concerned when ISRO started to de-link the satellite shipment date from the satellite launch date, suggesting that the launch of PS1 could be even further delayed.

J. Devas Successfully Completes Phase II Trials in Germany and in China

84. Devas continued with Phase II experimental trials in Germany and China. These highly successful trials further validated the technical viability of the Devas System.[119]

85. Subsequently, on April 21, 2010, Devas made a presentation in Bangalore, India to the Director of the Satellite Communication and Navigation Programmes ("SCNP") at ISRO. The presentation detailed Devas's accomplishments and progress to date, including its strategic partnerships with ISRO/Antrix and DT, Claimants, and the members of its "[i]ndustry [e]cosystem" dealing with virtually every facet of the Devas System.[120] It also noted that in addition to Devas's numerous approvals and licenses,

---

117 Presentation by Devas to Dr. Radhakrishnan at 13 (Feb. 4, 2010) (Ex. C-89).

118 Viswanathan ¶ 161; *see also* Gupta ¶ 32; Singh ¶ 59.

119 Viswanathan ¶ 162.

120 (Presentation by Devas to Director of SCNP, ISRO at 16 (Apr. 21, 2010) (Ex. C-93); *see also* Viswanathan ¶ 163; Babbio ¶¶ 18-21.) These vendors included: Tata, Quippo, Unique Broadband Systems, Axcera, American Tower, TataSky, Star, ZeeTV, Sequans Communications, DiBcom, Qualcomm, Intel, Quantum, Sasken, LG, Samsung, HTC, Nokia, Huawei, Alcatel-Lucent, Runcom, Nokia Siemens Networks, and Ericsson.

Devas had (1) filed intellectual property patents; (2) conducted Phase I trials and adapted TD-LTE [121] for its system; and (3) designed and tested translator and embedded terminals.[122]

K. The Indian Press Begins To Misrepresent the Devas Agreement

86. In late May 2010, a stream of reckless and erroneous allegations began to appear in the Indian press concerning the Devas Project.[123]

87. In an attempt to counter any misapprehension from this malicious press reporting, Devas held numerous meetings with various Indian governmental ministries in the summer and autumn of 2010.[124] These meetings explained Devas's history, progress to date and, most importantly, the substantial benefits Devas would provide to the Indian people and government. At none of these meetings did any agency or individual, including the Law Minister (who was later quoted as stating that the Devas Agreement was "illegal"[125]), express any doubts or concerns about the Devas System; instead, they appeared to be interested in the potential benefits Devas could have for them.[126] Nor did

---

121 As Mr. Babbio explains, TD-LTE (an acronym for Time-Division Long-Term Evolution) is a "communication technolog[y] that allow[s] for the wireless delivery of high-speed Internet service to large geographic areas." Babbio ¶ 19. TD-LTE technology also allows for VOIP and IPTV services. *Id.*

122 Presentation by Devas to Director of SCNP, ISRO at 17, 18 (Apr. 21, 2010) (Ex. C-93).

123 Viswanathan ¶ 165.

124 Viswanathan ¶ 166; Singh ¶¶ 60-63; Gupta ¶¶ 34, 38-39; *see also* Devas Presentation to Sam Pitroda, Advisor to the Prime Minister of India on Public Information Infrastructure & Innovations (June 10, 2010) (Ex. C-95); Devas Presentation to Mr. Bhattacharya, Administrator of USO (July 22, 2010) (Ex. C-99).

125 India Telecom, *Law Ministry says ISRO's 60 MHz spectrum-leasing deal with a private firm is illegal* (Aug. 1, 2010) (Ex. C-100).

126 Viswanathan ¶ 167; *see* Babbio ¶ 31.

anyone claim that any governmental user had a need for the S-band spectrum that had been allotted to Devas.

L. The Indian Government Takes Covert Measures To Undermine the Devas Agreement

1. The Suresh Committee Issues Its Report to the Department of Space

88. The Suresh Committee's investigation eventually resulted in a report to Dr. Radhakrishnan dated May 2010[127] and apparently delivered in June 2010. Although the report made certain suggestions concerning *future* contractual negotiations by Antrix and ISRO, *it did not find any fault with Devas's conduct in reaching the agreement*. Nor does the Suresh Report suggest in any way that the Devas Agreement should be annulled. Concerning Devas, it noted, among other things, that "[t]here is absolutely no doubt on the technical soundness of the digital multimedia services as proposed in this hybrid satellite and terrestrial system."[128]

89. The Suresh Report contains a chronology of events which is consistent with the factual summary recorded above:

Figure 2[129]

Date	Event
March 2003	Forge Advisors, USA makes presentation on technology aspects on digital multimedia services to ISRO/Antrix officials.
May 2003	Presentation by FA to top management of Antrix/ISRO.

127 Suresh Rep. at 1 (Ex. C-94).

128 *Id.* at 15 § 14(i).

129 (*Id.* at 6-8.) Mr. Viswanathan's witness statement describes same events in greater detail and chronological precision.

Date	Event
July / Aug 2003	[Memorandum of Understanding] signed between FA and ISRO/Antrix to explore mutually beneficial opportunities in the area of digital multimedia services.
April 2004	JV partnership proposal submitted by FA wherein ISRO to invest in Space Segment and FA in Ground Segment.
May 2004	Constitution of High Power Committee with Director, [Space Applications Centre] as Committee Chairman, by Chairman, ISRO to evaluate technical feasibility, risk mitigation, time schedule, financial and organisation aspects.
June / July 2004	• Proposal sent to DOS by Antrix • Antrix Board considers JV proposal of FA Advisors in 54th Meeting and also reviews the High Power Committee findings and accords in principle approval for the agreement.
October 2004	Presentation to Chairman, ISRO, Director, [ISRO Satellite Centre] and [Executive Director], Antrix at Vancouver on progress update on Devas' competitive landscape, international trends, Devas technology developments, receiver pricing aspects, etc.
Aug-Dec 2004	• Committee reviews and recommends terms for definite agreement. • Briefing to Technical Advisory Group in Nov 2004. • M/s Forge initiates to start separate Indian company, Devas Multimedia Pvt Ltd with dedicated resource commitments.
December 2004	Antrix Board (57th Meeting on 24th Dec. 2004) approved the draft agreement negotiated with Devas Multimedia Pvt Ltd for lease of Space segment on ISRO/Antrix S-band spacecraft.
January 2005	Definitive agreement signed in January 2005.
May 2005	Space Commission approval obtained for GSAT-6.
September 2005	Devas makes a detailed presentation to ISRO/Antrix product update, investment status and road map.
December 2005	Cabinet approval for GSAT-6 obtained in December 2005.

Date	Event
February 2006	Antrix informs Devas of receipt of approval on the satellite and frequency coordination on 2nd Feb 2006. Contract with Devas becomes effective.
June 2006	Receipt of first installment of Capacity Reservation fee of Rs 29.19 Crores for GSAT-6 from Devas (time schedule clock start clicking).
June 2007	Devas exercises option for the second satellite. Receipt of first installment of Capacity Reservation fee of Rs 29.19 Cr for GSAT-6A from Devas.
December 2008	• Chairman approves VR Katti, Programme Director, GEOSAT to be nominated on Devas Board. • Devas obtains ISP category A license. • PDR for GSAT-6 conducted at ISAC and SAC. • Presentation to Chairman, ISRO/Antrix & Secretary, DOS relating to Deutesche [sic] Telekom partnership, new ground technologies and Devas strategy.
Feb-Nov 2008 [*sic*: 2009]	• ISRO task team constituted by Director, SCPO for trials. • Inclusion of IPTV in ISP license. • Devas obtains WPC experimental license for terrestrial transmissions. • Trials carried out under the guidance of ISRO task team. • Status reviews conducted on GSAT-6 and 6-A at SAC and ISAC.
December 2009	Review by Chairman, ISRO on various aspects of agreement and constitution of one man committee to review all aspects of contract.

90. The Suresh chronology ends in December 2009 precisely because, as Claimants now know, that is when Dr. Radhakrishnan, who became Secretary of DOS, Chairman of the Space Commission, Chairman of ISRO and Chairman of Antrix on

October 31, 2009, initiated a "comprehensive review" of the Devas Agreement and formed the Suresh Committee for this specific purpose.[130]

2. The Space Commission Authorizes the Annulment of the Devas Agreement

91. Claimants are not aware of the precise chronological sequencing of what happened next in Dr. Radhakrishnan's quest to annul the Devas Agreement. However, it would appear that in June 2010, shortly after receiving the Suresh Committee Report,[131] Dr. Radhakrishnan sought the opinion of the Additional Solicitor-General as to how the Devas Agreement could be annulled. In the ASG Opinion (which was issued to DOS on July 12, 2010 and made public by *The Hindu* February 11, 2011, *see infra* ¶ 10), the Additional Solicitor-General described the purpose of the query raised by Dr. Radhakrishnan as being, among other things, to ensure a level playing field for terrestrial users of the S-band Spectrum in India.

92. Without waiting for the opinion of the Additional Solicitor-General, the Space Commission, on July 2, 2010, decided that the "Department [of Space], in view of the priority to be given to nation's strategic requirements including societal ones may take actions necessary ***and instruct ANTRIX to annul the ANTRIX-DEVAS contract***."[132]

---

130 Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 4 (Feb. 8, 2011) (Ex. C-125); *see also* Chaturvedi Rep. at 43 ¶ 4.1 (Ex. C-137).

131 Notwithstanding that the Suresh Report found no wrongdoing on the part of Devas and contained no suggestion that the Devas Agreement should be annulled, Dr. Radhakrishnan has stated that the "Conclusion [of that Committee] was the reason for [his] taking up the subject [of the Devas Agreement] to the Space Commission." Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 7.

132 Copy of Decisions/Recommendations of the Space Commission in its meeting of July 2, 2010 (emphasis added) (Ex. C-97).

93. According to Dr. Radhakrishnan, this constituted a determination by the Space Commission that the Devas Agreement should be annulled.[133] Indeed, he later called it a "proactive action taken by the Department of Space as part of our internal review process and the action started in December 2009," and emphasized the "very senior members" of the Commission who were involved in the decision,[134] which included representatives of the Prime Minister's Office.[135]

94. In February 2011, when Dr. Radhakrishan first publicly revealed the fact of the Suresh Report and the July 2, 2010 Space Commission decision, he stated:

> Subsequent to the decisions taken by the Space Commission, . . . we started necessary actions for terminating the contract which required extensive consultations with the concerned agencies in the government. Department of Telecommunication, Department of Law and Justice, all included. The idea is to ensure that a ___ contract that has been entered into has to be now terminated without causing much of embarrassment and damage and financial loss to the government.[136]

In other words, having already decided to annul the contract, Dr. Radhakrishan then tried to find a *post-hoc* legal justification for the decision. This is the antithesis of the promises contained in the Devas Agreement to perform every obligation "in utmost good faith."[137]

---

133 Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 11 (Feb. 8, 2011) (Ex. C-125).

134 *Id.* at 4.

135 *Id.*

136 *Id.*

137 Devas Agreement at 15 § 21 (Ex. C-16).

3. As Secretary DOS, Dr. Radhakrishnan Asks the Additional Solicitor-General for His Opinion As To How the Devas Agreement Can Be Terminated

95. Having determined to annul the Devas Agreement, Dr. Radhakrishnan approached Mr. Mohan Parasaran, Additional Solicitor-General of India, for an opinion on how to minimize the damage from the decision that had already been made.[138]

96. On July 12, 2010, the Additional Solicitor-General issued his opinion to Dr. Radhakrishnan on "whether there are justifiable or legal grounds existing for termination of Antrix-Devas contract."[139] As recorded therein, the Additional Solicitor-General's "[o]pinion ha[d] been sought . . . as to whether Antrix-Devas contract can be annulled by invoking any of the provisions of the contract in order to (i) preserve precious S band spectrum for strategic requirements of the nation and (ii) to ensure a level playing field for other service providers using terrestrial spectrum."[140]

97. The Additional Solicitor-General first considered whether termination for convenience was available according to the terms of Article 7(c) of the Devas Agreement. As noted above, however, the Indian Government had already made coordination filings with the ITU specifically to protect orbital slot 83°E and successfully protected the higher PFD limits at that slot.[141] In the circumstances, it is not a surprise that the Additional Solicitor-General rejected any notion that Antrix could properly invoke Article 7(c) of the Devas Agreement, stating:

---

138 ASG Opinion (Ex. C-131); *see also* Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 4 (Feb. 8, 2011) (Ex. C-125)

139 ASG Opinion (emphasis omitted) (Ex. C-131).

140 *Id.*

141 *See supra* ¶¶ 62-63.

> The modus of termination has been specified in the agreement in clause 7. But I am afraid that the conditions stipulated in this clause cannot be invoked at this stage for the purpose of terminating the contract.[142]

98. But the Additional Solicitor-General did not leave matters there. Rather, he continued "[t]he only other relevant provision for seeking recourse to terminate the contract under the given factual scenario viz., national needs and change in governmental policies, would be Article 11 of the contract, relating to 'Force Majeure.'"[143]

99. At this point, the Additional Solicitor-General's opinion ran into an inherent contradiction: even though he acknowledged that a *force majeure* event was "any event, condition or circumstance that is beyond the reasonable control of the party affected" and that the affected party must seek to "prevent or mitigate" the effect of a *force majeure* event, he nevertheless recommended that DOS/ISRO/Antrix should cause the Government of India to create a *force majeure* event that would terminate the contract. The Additional Solicitor-General noted that Dr. Radhakrishnan had said in its briefing note that "[t]he governmental policies with regard to allocation of satellite spectrum has undergone a sea change and there has been a tremendous demand for allocation of spectrum for national needs."[144]

100. The Additional Solicitor-General went on to provide a road-map for how to concoct a *force majeure* event, stating:

> However, I only wish to add one note of caution. It is always advisable that in the present case, instead of the Department of Space taking a decision to terminate, it would be more prudent that a decision is taken by the [Government of India ("GOI")], as a matter of policy, in exercise of its

---

142 ASG Opinion (Ex. C-131).

143 *Id.*

144 *Id.*

> executive power or in other words, a policy decision having the seal and approval of the Cabinet and duly gazetted as per the Business Rules of the GOI. That would give a greater legal sanctity to the decision to terminate the contract in as much as the contractual provisions expressly stipulate that for the force majeure event, to disable one of the parties to perform its obligations under the contract, the act must be an act by the governmental authority acting in its sovereign capacity.[145]

101. In short, then, the Additional Solicitor-General's opinion expressly states that: (1) annulment of the Devas Agreement was being sought by Dr. Radhakrishnan; (2) terrestrial telecommunications providers sought the same spectrum; and, ostensibly, (3) that the Indian government now had a need for national strategic requirements for the S-band spectrum that had been allocated to Devas, even though no such need was ever expressed to Devas in its many meetings with India's government agencies and officials. On this basis, the Additional Solicitor-General's opinion suggested that Respondent should concoct a *force majeure* event based on a "policy" decision having the "seal and approval of the Cabinet."

M. Devas Continues To Press For Shipment of the First Satellite, PS1

102. Immediately upon launch of PS1, Devas would have been in a position to commence its A/V broadcasting. In addition, Devas (as the only entity with the right to lease transponder capacity on that satellite, or to use the 70 MHz of S-Band spectrum allocated to it in the Devas Agreement) would, immediately upon launch of PS1, have filed for a WPC license. As the sole holder of the Leased Capacity, as a practical matter, Devas was the only operator capable of using the S-band allocated to it,[146] and because Antrix had promised to assist in obtaining any needed governmental license necessary for

---

145 *Id.*

146 S*ee supra* ¶ 41.

the Devas System,[147] Devas had every reason to expect to obtain a WPC license promptly, and, indeed, expected to receive such a license for a nominal fee.[148]

103. On July 20, 2010, Devas sent a letter to Antrix Executive Director Mr. Murthi, requesting confirmation of the October 2010 PS1 shipment date previously promised to Devas and reminded Antrix and ISRO of their prior representations that the satellite launches would be slated for expedited delivery.[149] Devas also asked for express confirmation that DOS/ISRO/Antrix would "coordinate . . . submittal of Devas operating license application to WPC."[150]

104. On September 2, 2010, frustrated by ISRO's inaction, Mr. Viswanathan wrote to all the members of the Space Commission to emphasize the importance of the Devas System to India.[151] The letter provided an overview of the Devas System and reminded the Space Commission that, between 2003 and 2005, the period during which the parties negotiated and signed the Devas Agreement, an integrated satellite multimedia system was not on the market.[152]

105. On September 29, 2010 Devas arranged for a meeting with Dr. Radhakrishnan at the annual meeting of the International Academy of Astronautics in Prague and reminded Dr. Radhakrishnan about his assurance in February 2010 that

---

147 Devas Agreement at 2 § 3(c) (Ex. C-16)

148 Viswanathan ¶ 152.

149 Letter from Devas (Viswanathan) to Antrix (Murthi) (July 20, 2010) (Ex. C-98).

150 *Id.*

151 *See, e.g.*, Letter from Devas (Viswanathan) to Shri T. K. Alex, Director ISAC & Member, Space Comm'n (Sept. 2, 2010) (Ex. C-106); Viswanathan ¶ 176.

152 *See, e.g.*, Letter fom Devas (Viswanathan) to Shri T. K. Alex, Director ISAC & Member, Space Comm'n (Sept. 2, 2010) (Ex. C-106).

ISRO/Antrix would launch PS1 by September 1, 2010. At the Prague meeting, Dr. Radhakrishnan assured Devas that the PS1 satellite would be shipped in early December 2010.[153] Amazingly, he did not mention that the Space Commission had already decided to annul the Devas Agreement. Nor did he express any need for the S-band spectrum that had been allocated to Devas.

106. Later, on October 11, 2010, Mr. Viswanathan for Devas sent a letter to Dr. Radhakrishnan, again outlining the appropriate next steps for ISRO/Antrix, namely:

- An expedited Critical Design Review ("CDR") meeting regarding the PS1 satellite, including space and ground compatibility tests;
- That the PS1 satellite launch be prioritized by use of a Russian cryogenic engine;
- That ISRO/Antrix continue to coordinate ITU filings to preserve the Devas System;
- That ISRO/Antrix support and provide assistance with Devas's application to the WPC; and
- That Antrix establish a contract to secure uplink services from ISRO.[154]

N. In January 2011, DOS/ISRO/Antrix Sever Communications with Devas and Claimants

107. The last meeting between Devas and officials of DOS/ISRO/Antrix occurred on January 10, 2011.[155] After that point, the Indian Government cut off communications.

108. For example, on January 24, 2011, Devas wrote to Dr. Radhakrishnan, asking him to confirm Antrix's commitment to launch GSAT-6/PS1 within 3-4 months

---

153 *See* Singh ¶ 64.

154 Letter from Devas (Viswanathan) to Chairman, ISRO & Antrix, and Secretary, DOS (Radhakrishnan) (Oct. 11, 2010) (Ex. C-108); Viswanathan ¶ 181.

155 *See* Viswanathan ¶ 186.

and asking for a further meeting "to appraise Devas['s] readiness for service launch and work out further course of actions to launch GSAT 6 at the earliest."[156] Dr. Radhakrishnan did not respond.

109. On January 25, 2011, Devas's Chief Technology Officer, D. Venugopal, sent an e-mail to Antrix Executive Director Mr. Madushudhan, requesting Antrix to "kindly identify urgently a person from Antrix/ISRO for jointly working with Devas on joint evaluation of the procured launch for GSAT-6."[157] Antrix, ISRO and DOS did not respond.

O. The Indian Government Officially Annuls the Devas Agreement

1. In Early February 2011, Dr. Radhakrishnan Announces the Indian Government's Plan to Annul the Devas Agreement

110. Starting in May 2010,[158] but continuing through February 2011, the Indian press made a series of reckless and erroneous allegations about the Devas Agreement and Claimants' investment. These reports reached new levels of intensity in February 2011, when elements of the press – completely without factual foundation – sought to draw a comparison between the Devas Agreement and a series of wholly unrelated controversies concerning the DOT's grant of spectrum licenses to 2G cellular operators.[159]

111. In this overheated (and ill-informed) climate, on February 8, 2011, Dr. Radhakrishnan conducted a press conference together with Dr. Kasturirangan, a senior

---

156 Letter from Devas (Viswanathan) to Chairman, Space Commission, Secretary, DOS & Chairman, ISRO and Antrix (Radhakrishnan) (Jan. 24, 2011) (Ex. C-121).

157 Email from Devas (Venugopal) to Antrix (Madushudhan) (Jan. 25, 2011) (Ex. C-122).

158 Viswanathan ¶ 165.

159 *See, e.g.*, Pradeep Thakur, *Another spectrum scam hits govt, this time from ISRO*, Times of India (Feb. 8, 2011) (Ex. C-126).

member of Antrix and Member Science, Planning Commission and former Chairman of ISRO/Antrix and Secretary of DOS.[160] At that conference, he announced the government's decision to annul the Devas Agreement.

112. When asked whether the Devas Agreement had officially been terminated, Dr. Radhakrishnan explained that the Space Commission had made the decision to annul the Devas Agreement in July 2010 and that "we are going through the process of consultations [with other parts of the Indian government] for this process."[161] He admitted that the government was not able to terminate the contract under its terms and therefore was still in the process of figuring out how to best justify its improper actions:

> In any contract, there will be penalty clauses from both sides. And there are ____ damages, there are prohibitions for termination of an agreement from both sides actually. Hence there are force majeure clauses. These are part of any clauses and once you sign a contract, you ensure all these things are in place and when you decide to terminate also you have to ensure that you use the right application of mind about this clause.
>
> So this is the process that is going on.[162]

113. In case it was not already perfectly clear that the government was unable to justify its patently improper annulment, Dr. Kasturirangan, a senior Antrix official, added: "I don't think there is finality of how we want to do this. This is under study. What is the best option . . . ."[163]

---

160 Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 4 (Feb. 8, 2011) (Ex. C-125).

161 *Id.*

162 *See id.* at 11, 12 (responding to question of "When you [terminate the contract], will ISRO be considered a reliable business partner hereon onwards or are you like any other fly-by-night operator who signs a contract, annuls it under political pressure?").

163 *Id.* at 12.

2. The Prime Minister Constitutes the Chaturvedi Committee to "Review" the Devas Agreement, Taking Into Account the Decision That Had Already Been Made To Annul the Contract

114. On February 9, 2011, the Indian Prime Minister constituted another committee, this time named the "High Powered" review committee and chaired by B.K. Chaturvedi. The mandate of this committee was the same as for the Suresh Committee (*i.e.* "review the technical, commercial, procedural and financial aspects of the Agreement"), but this time the committee was required to "tak[e] into account the report of internal review conducted by the Department of Space."[164] The committee also was charged to "review the adequacy of the procedures and approval processes followed by" Antrix, ISRO, and DOS, and to suggest improvements, and again was required to "tak[e] into account the review mandated by the Space Commission at its 117th meeting, held on 2nd July, 2010."[165]

3. ISRO Announces that the Government May Take A Policy Decision that Results in a *Force Majeure* Under the Devas Agreement

115. On February 10, 2011, as media and political pressure mounted, a memorandum was posted on ISRO's website confirming the Indian government's pre-ordained agenda to terminate the Devas Agreement. Entitled "Background Note on Agreement between M/s. ANTRIX Corporation and M/s. DEVAS Multimedia Pvt. Ltd. regarding lease of space segment capacity," the memorandum stated, *inter alia*, that:

> the Government in exercise of its sovereign power and function may take a policy decision to the effect that due to strategic requirements, it would

---

164 Chaturvedi Rep., Cover Letter (March 12, 2011) (Ex. C-137); *see also* Press Release, *Government Appoints High Powered Review Committee on DOS* (Feb. 9, 2011) (Ex. C-127).

165 Chaturvedi Rep., Cover Letter (March 12, 2011) (Ex. C-137).

> not be able to provide orbit slot in S-band for operating PS-1 to ANTRIX for commercial activities. In that event, ANTRIX in terms of Article 7(c) read with Article 11 dealing [sic] with Force Majeure may terminate the Agreement and inform Devas accordingly.[166]

116. The next day, on February 11, 2011, *The Hindu* (an Indian newspaper) published a leaked copy of the Additional Solicitor-General's advice of July 2010, giving the Indian Government a road map on how to annul the Devas Agreement by creating a *force majeure* event.[167]

117. That same day, Devas wrote to Dr. Radhakrishnan, pointing out that his December 2009 decision to "review" the Devas Agreement (as he had stated in his February 8 press conference) without informing Devas was contrary to the provision in the Devas Agreement requiring the parties to act in "utmost good faith."[168] The letter also demanded a full and complete disclosure of all and any issues arising from, and in relation to, the Devas Agreement that might further adversely impact the ability of DOS/ISRO/Antrix to perform the Devas Agreement.[169] Devas also called upon DOS/ISRO/Antrix to refrain from committing any further breaches of the Devas Agreement.[170] Dr. Radhakrishnan did not respond to this letter.

---

166 Background Note on Agreement between M/s. ANTRIX Corporation and M/s. DEVAS Multimedia Pvt. Ltd. regarding lease of space segment capacity in S-Band spectrum on ISRO's satellites GSAT-6 and GSAT-6A (Feb. 10, 2011) (Ex. C-193).

167 ASG Opinion (Ex. C-131); *see supra* ¶ 10.

168 Letter from Devas (Viswanathan) to Chairman, Antrix, Chairman, ISRO, Secretary, Department of Space and Chairman, Space Commission (Radhakrishnan) (Feb. 11, 2011) (Ex. C-132); *see also* Devas Agreement at 15 § 21 (Ex. C-16).

169 Letter from Devas (Viswanathan) to Chairman, Antrix, Chairman, ISRO, Secretary, Department of Space and Chairman, Space Commission (Radhakrishnan) at 2 (Feb. 11, 2011) (Ex. C-132).

170 *Id.*

118. On the same date, February 11, 2011, Devas (through its Indian counsel, Dua Associates) reminded Antrix of the delay in the delivery of the space segment capacity for the period from June 22, 2009 to June 21, 2010,[171] and called upon Antrix to pay forthwith the liquidated amount of Indian Rupees equivalent to USD 5,000,000, as a "Late Delivery Penalty" mandated by paragraph 2.1.2.2 of Exhibit B to the Devas Agreement.[172] No one responded.

119. In light of Antrix's silence, on February 14, 2011, Devas wrote again to Antrix, seeking immediate confirmation whether Antrix intended to honor and abide by the terms of the Devas Agreement.[173] Devas further informed Antrix that if Devas did not receive a response to the said letter within one (1) week, Devas would invoke Article 20(a) of the Devas Agreement and refer the matter to the senior management of Antrix and Devas for resolution. Yet again, there was no response.[174]

4. On February 17, 2011, the Cabinet Committee on Security Makes a "Policy Decision" Reserving the S-band for "National Needs"

120. In a press release dated February 17, 2011, the Indian Government announced that the Cabinet Committee on Security had decided to "annul" the Devas Agreement.[175] The Law Minister, Mr. M. Veerappa Moily, issued the following statement:

---

171 Letter from Dua Associates (Sharma) to Antrix (Radhakrishnan) (Feb. 11, 2011) (Ex. C-130).

172 *Id.* at 9.

173 Letter from Devas (Viswanathan) to Antrix (Radhakrishnan) (Feb. 14, 2011) (Ex. C-133).

174 *See* Viswanathan ¶¶ 192-193.

175 Press Information Bureau, Government of India, Cabinet, *CCS Decides to Annul Antrix-Devas Deal* (Feb. 17, 2011) (Ex. C-134).

> 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 societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix for commercial activities, including for those which are the subject matter of existing contractual obligations for S band.
>
> In light of this policy of not providing orbit slot in S Band to Antrix for commercial activities, the [Devas Agreement] shall be annulled forthwith.[176]

121. It is notable that, while the press release of the Cabinet Committee on Security's "policy" decision conveniently adopted the exact form of the language in the Additional Solicitor-General's Opinion concerning the potential strategic uses for the S-band,[177] it notably left out the other motivation mentioned in the reference to the Additional Solicitor-General: "to ensure a level playing field for other service providers using terrestrial spectrum."[178]

122. No one from the Indian government informed Devas or Claimants in advance of this meeting of the Cabinet Committee on Security, or gave Devas an opportunity of presenting objections to the "annulment" of the Devas Agreement.

123. Tellingly, the February 17, 2011 press release does not articulate the "national needs" that supposedly prompted the Cabinet Committee on Security to revoke the use of the S-band for commercial purposes by DOS. The press release itself uses an extremely "catch all" formula, referring to "defence, para-military forces, railways and other public utility services as well as societal needs," as well as "the needs of the

176 *Id.*

177 *Id.*

178 ASG Opinion (Ex. C-131).

country's strategic requirement." At no point in their prior dealings with the Indian Government was it ever suggested to Devas or Claimants that these "needs" might require the annulment of the Devas Agreement.[179] Nor did the Indian Government ever consult with Devas about whether the Devas Agreement needed to be varied or any of the allotted spectrum reassigned, to take into account any of these supposed "needs."

124. The claim of "national needs" also is inconsistent with the Devas Agreement itself. Under the Devas Agreement, DOS/ISRO controlled 10% of the capacity on the satellite, meaning that DOS could have used this spectrum according to whatever "needs" the government saw fit.[180] And, moreover, the mandate of the Shankara Committee, which approved the Devas Agreement before it was signed, was specifically to weigh the Devas Agreement against other "possibilities of alternate uses for [the] space segment."[181] The Shankara Committee had concluded that a customer broadcasting system of the type set forth in the Devas Agreement was the optimal use of the S-band, taking into account all competing national needs, and the Union Cabinet in 2005 endorsed this view when it approved the building of the satellites on this basis. This careful policy process stands in sharp contrast to the result-oriented, cynical steps that led to the termination of the Devas Agreement.

125. In addition, as Mr. Parsons explains, he had personally discussed the possibility of the Indian Department of Defense collaborating with DOS to build a state

---

179 During meetings held with various governmental officials in the summer of 2010, those government officials appeared satisfied with the societal benefits that the Devas System brought to India. (Viswanathan ¶¶ 165-170.)

180 *See* Viswanathan ¶ 198.

181 Chaturvedi Rep. at 22 ¶ 3.1.3 (Ex. C-137).

of the art satellite system that would function seamlessly alongside the Devas System in the S-band.[182] Remarkably, nobody from DOS or DOD approached him or any other Devas team member before re-taking the S-band spectrum for "national needs."[183] And since 2011, no reported use of the S-band has been announced by the Indian government for national needs. To the contrary, most recently, a senior advisor to the Prime Minister has suggested that the S-band should be made immediately available to private terrestrial operators.[184]

126. The "policy" decision of the CCS thus can be traced not to any "national needs" but to the legal predicament that DOS/ISRO/Antrix found themselves in: unable to terminate the contract for convenience under Article 7, they needed to find a *deus ex machina* – hence, the manufactured "*force majeure*" event.

5. Citing the Central Government Decision, Antrix Terminates the Devas Agreement

127. On February 25, 2011, Antrix issued a letter to Devas, giving notice of "terminat[ion]" of the Devas Agreement.[185] Antrix's February 25, 2011 "termination" notice refers to the purported "policy decision" of February 17, 2011 by the Indian Cabinet Committee on Security, which Antrix claims had the effect of denying Antrix the use of orbital slot in S-band for "commercial activities."[186] On the basis of this alleged "policy decision," Antrix purported to terminate the Devas Agreement "for convenience"

---

182 Parsons ¶¶ 36-37, 49-51.

183 *See id.* ¶ 51.

184 *See infra* ¶ 137.

185 Letter from Antrix (Madhusudhan) to Devas (Feb. 25, 2011) (Ex. C-135).

186 *Id.* at 1.

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.[187]

128. Antrix of course knew that it had no proper basis for terminating for "convenience" pursuant to Article 7(c) because, among other things, the Additional Solicitor-General had specifically and correctly noted that the relevant orbital slot already had been obtained from the ITU.[188] Predictably, therefore, Antrix's notice inserted the further ground of "*force majeure*" on the basis of the Indian Government's "policy decision," in line with the July 2010 advice of the Additional Solicitor-General.[189]

129. Thus, like the Cabinet Committee on Security's earlier decision, the invocation of the *force majeure* clause, which is expressed in very general terms, adheres closely to the text of the Additional Solicitor-General's Opinion:

> [N]otice of force majeure as defined in Article 11, is expressed. The policy decision of the Central Government acting in its sovereign capacity is the event of force majeure which has occurred on 23rd February 2011. The force majeure event commenced on 23rd February 2011. The scope and duration of the said decision cannot be anticipated. It is likely to be indefinite. It is not possible for Antrix to take any effective step to resume the obligations under the Agreement. The event of force majeure is beyond the reasonable control of Antrix and is clearly covered by Article 11(b) of the Agreement and, in particular, 11(b)(v) '. . . act of governmental authority [sic] in its sovereign capacity . . . ' Any possibility of resumption of obligations by Antrix under the Agreement stands excluded. The [Devas Agreement] therefore, is terminated with immediate effect.[190]

---

187 *Id.* at 2.

188 *See supra* ¶¶ 97.

189 *See supra* ¶¶ 98-101.

190 Letter from Antrix (Madhusudhan) to Devas (Feb. 25, 2011) (Ex. C-135).

130. Devas responded by: (1) immediately denying the validity of the termination notice[191] and (2) attempting, unsuccessfully, to hold a "senior management" consultation in conformity with the pre-dispute procedures in Article 20 of the Devas Agreement.[192]

131. In April 2011, again relying on its claim that the contract was "terminat[ed] . . . under Article 7(c) and the notice of force majeure as defined in Article 11," Antrix tendered Devas a check (for the amount of Rs.58,37,34,000, or approximately USD 13 million) as a purported "reimbursement" of the upfront capacity reservation fees that Devas had already paid to Antrix.[193]

132. Devas rejected this tender on the grounds that the purported cancellation of the contract lacked any justification under these provisions. By letter dated April 18, 2011, Devas explained that Antrix had failed to state a proper basis for terminating the Devas Agreement pursuant to Article 7(c) and that, as a matter of law, Antrix was not entitled to claim *force majeure* as the events allegedly giving rise to the claim of *force majeure* were self-induced.[194] Devas returned Antrix's check.[195]

---

191 Letter from Devas (Viswanathan) to Antrix, Chairman, ISRO and Secretary, DOS (Radhakrishnan & Madhusudhana) (Feb. 28, 2011) (Ex. C-136); *see also* Letter from Antrix (Madhushudhan) to Devas (Apr. 15, 2011) (Ex. C-138); Letter from Devas (Viswanathan) to Antrix (Madhusudhana) (May 30, 2011) (Ex. C-141); Letter from Antrix (Madhusudhana) to Devas (June 15, 2011) (Ex. C-142).

192 Antrix ignored the request for a senior management meeting and failed to negotiate within the 21-day contractual timeframe established by Clause 20(a). Eventually, a meeting occurred in mid-2011, but failed to produce any resolution.

193 Letter from Antrix (Madhushudhana) to Devas (Apr. 15, 2011) (Ex. C-138).

194 Letter from Devas (Viswanathan) to Antrix (Madhusudhan) (Apr. 18, 2011) (Ex. C-140).

195 *Id.*

6. The Chaturvedi Report Seeks To Justify India's Actions By Referring to the Fact that Devas Has Foreign Shareholders

133. In March 2011, the High Powered Review Committee issued the Chaturvedi Report.[196] The parts that were released repeatedly stress the fact that Devas shareholders included foreign investors and suggests they somehow received an unduly favorable deal:

> The shareholding in Devas and changes in it subsequently have also been a serious cause of concern . . . . The original proposal, which had envisaged development and innovation by some former ISRO scientists, seem to have been diluted with the entry of major foreign players. While technically this was permitted, the entry of foreign telecom companies with huge premiums indicated that they had used this as an opportunity for entering the telecom market, which had in the meanwhile expanded rapidly in India during 2005-10. This was not an intended purpose of the original agreement.[197]

134. This suggests that the *foreign ownership* of Devas was a further motivating factor in the Indian government's decision to cancel the Devas Agreement.

7. There Are Calls To Re-allocate the S-band Spectrum to Other Terrestrial Cellular Companies

135. As discussed above, the Additional Solicitor-General was requested, in 2010, to provide a legal basis for the annulment of the Devas Agreement in part in order to "ensure a level playing field for other service providers using terrestrial spectrum."[198] Indeed, as early as March 2008, the Cellular Operators Association of India ("COAI") had requested, in a submission to the DOT, that India's National Frequency Allocation

---

196 *See* Chaturvedi Rep. at cover page (Ex. C-137). In an effort to justify India's conduct in the court of public opinion, the Indian government published parts of the Chaturvedi Report on February 4, 2012.

197 *Id.* at 38 ¶ 3.5.9.

198 ASG Opinion (Ex. C-131).

Plan ("NFAP") should re-orient the S-band for terrestrial cellular operations.[199] In its submission, COAI argued that because the "frequency band 2500-2690 MHz [i.e., the S-band] is identified for IMT [International Mobile Telecommunications] applications, therefore [it] . . . should be earmarked as an extension band for terrestrial 3G systems."[200]

136. The WPC and Telecom Regulatory Authority of India ("TRAI") took up this call by July 2008. TRAI's "Recommendations on Allocation and Pricing for 2.3-2.4 GHz, 2.5-2.69 GHz & 3.3-3.6 GHz bands" (which includes the S-band) was largely focused on the auction specifically entrusted to DOT, including of the 40 MHz held by DOT in the S-band. However, TRAI also recommended that "DoT/WPC should coordinate with the Department of Space (DoS) and ascertain the feasibility of vacation of additional spectrum" in the S-band and further noted that "[t]he results of the efforts made by the WPC to get the required spectrum bands vacated/re-farmed from the incumbents are not available in the public domain."[201]

137. Contemporary media reports from 2011 emphasized that domestic, terrestrial cellular operators were seeking access to the S-band.[202] These calls have since

---

199 COAI's Proposal for Review of Draft NFAP – 2005 at 3 ("IND 53 A" row) (Ex. C-43).

200 *Id.*

201 Telecom Regulatory Authority of India, *Recommendations on Allocation and Pricing for 2.3-2.4 GHz, 2.5-2.69 GHz & 3.3-3.6 GHz bands* at 2 ¶ 1.9, 16 ¶ 2.33(i) (July 11, 2008) (Ex. C-50).

202 *See* T. A. Johnson, *Why S-Band Is So Valuable*, The Indian Express (Feb. 9, 2011) (noting that "[t]errestrial mobile phone operators have been insisting that the '2.5 -2.69 GHz band (S-Band) be fully preserved as an extension band for 3G services'") (Ex. C-128); *India rocks with another scam*, Flare (Apr. 15, 2011) ("The key here is the S-band. According to a telecom industry report, the S-band is unique: 'As mobile voice and data traffic increases, wireless operators around the world will require additional spectrum. *(cont'd)*

continued.[203] On May 17, 2013, Dr. Sam Pitroda, Prime Minister Singh's Public Information Infrastructure and Innovation Advisor, was quoted in the Indian Press as stating that the "Empowered Group of Ministers," a group of government ministers with power over spectrum allocation, should cause DOS spectrum in the S-band to be used for 4G mobile telephony. According to the article:

> Pitroda is of the view that 80 megahertz of airwaves frequencies for 4G services can be freed from the spectrum held by Department of Space (DoS).
>
> "DoS has earlier released 40 Mhz for mobile services. Out of the balance 150 Mhz, as per radio regulations, DoS has no proposal to utilise 80 Mhz. The frequency has been earmarked internationally for 4G/BWA (Wireless Broadband) services," [Pitroda] said.[204]

P. Devas Brings a Contractual Claim Against Antrix

138. On June 29, 2011, Devas commenced an ICC arbitration against Antrix, entitled *Devas Multimedia (Private) Limited v. Antrix Corp. Ltd.* (No. 18051/CYK).[205] In

---

(cont'd from previous page)
However, few bands remain available for new allocation to mobile wireless services.'") (Ex. C-139).

[203] *Eyes on S-Band*, Down to Earth (March 15, 2012) (noting that "[m]obile operators have been lobbying for part of this S-band (2.5 - 2.69 GHz) as an extension for 3G services" and that "Sudhir Gupta, principal advisor (mobile services) in TRAI, informs that they have already recommended to the government that a part of S-band be allocated for commercial services like high-speed packet access used in 3G") (Ex. C-170); *accord* Letter from Deputy Director General, Cellular Operators Association of India (Dua) to Wireless Advisor, WPC (Chandra), Annex. 1 at 3 (Nov. 22, 2010) (requesting that the National Frequency Allocation Plan submit the 2.5-2.69 GHz band, *i.e.*, the S-band, for IMT/3G services) (Ex. C-113).

[204] *Sam Pitroda asks PM to reactivate GoM on spectrum vacation*, The Economic Times (May 17, 2013) (Ex. C-187); *see also* Katya B. Naidu, *PMO backs Pitroda's spectrum use views*, Business Standard (May 17, 2013) (Ex. C-186).

[205] The Devas Agreement contains a broad arbitration clause providing for disputes to be submitted to arbitration venued in New Delhi, and specifying that "[t]he Arbitration proceedings shall be held in accordance with the rules and procedures of the [ICC] or UNCITRAL." (Devas Agreement at 15 § 20(c) (Ex. C-16).)

that Notice, Devas appointed V.V. Veeder, Q.C. of the United Kingdom as its arbitrator.[206]

139. Antrix reacted by seeking to obstruct the ICC arbitration, arguing, in its letter to the ICC of July 11, 2011, that Devas's notice of arbitration was invalid and that

> to invoke the arbitration proceedings the parties first need to exhaust the remedy provided in Clause 20(a) [meetings of managers] and thereafter arrive at [a] mutual agreement selecting the arbitration rules to be applied to an arbitration in accordance with Clause 20(c) of the Agreement before issue of a notice of arbitration.[207]

140. Thus, on Antrix's absurd (and eventually unsuccessful) argument, the arbitration clause in Clause 20 was not a manifestation of consent to arbitration, and no recourse to the ICC rules was permissible unless it (Antrix) gave a further, post-dispute consent to ICC arbitration.[208]

141. In August 2011, acting on this basis, Antrix commenced a proceeding in the Supreme Court of India for injunctive relief to restrain the ICC Arbitration. This Supreme Court application was adjourned several times during 2011. Meanwhile, Antrix boycotted the ICC proceeding and failed to appoint an ICC arbitrator within the timeframe specified by the ICC Secretariat. On October 13, 2011, the ICC Court

---

206 *Devas Multimedia Pvt. Ltd. v. Antrix Corp. Ltd.*, Request for Arbitration (June 29, 2011) (without exhibits) (Ex. C-144).

207 Letter from Antrix (Hegde) to ICC Secretariat (Wong) at 3 (July 11, 2011) (Ex. C-145).

208 Antrix also purported to commence its own rival arbitration, predicated upon its view that the ICC arbitration was "misconceived" and invalid. In that rival arbitration, Antrix proposed to appoint Mrs. Justice Sujata V. Manohar, a former Justice of the Supreme Court of India, as arbitrator. In its May 2013 decision, the Supreme Court of India held that this rival arbitration could not be used as a basis for invalidating Devas's previously-filed ICC arbitration. *See Antrix Corp. Ltd. v. Devas Multimedia P. Ltd.*, Arb. Pet. No. 20 of 2011, Judgment ¶ 31 (India Sup. Ct. 2013) (Ex. C-184.)

appointed as second arbitrator the former Chief Justice of India, the Hon. Dr. Justice Adarsh Sein Anand, and on November 10, 2011, after the two party-appointed arbitrators had been unable to agree on a Chairman, the ICC Court appointed Professor Michael Pryles of Australia as President.[209]

142. On January 10, 2012, with due notice to Antrix, a preliminary teleconference in the ICC proceeding was conducted – which Antrix boycotted. At that conference, and as reflected in the Provisional Timetable and Terms of Reference subsequently adopted by the Tribunal, a briefing schedule was established, with a final two-day hearing to take place in New Delhi from April 12 to 13, 2012.

143. On February 20, 2012, Devas duly submitted its Statement of Claim, with witness statements and expert reports supporting its claim for specific performance of the Devas Agreement or, in the alternative, damages of $1.6 billion.

144. On April 9, 2012, just 3 days prior to the final ICC merits hearing in New Delhi, Antrix's Supreme Court petition was again listed before the Supreme Court of India. At that hearing, at the urging of Antrix's counsel, the Supreme Court of India granted an order staying the ICC arbitration, pending argument on Antrix's application for a final injunction staying the ICC arbitration.[210]

145. At subsequent hearings that occurred throughout 2012, that injunction continued in force. It was only discharged on May 10, 2013, when, in a decision by Chief Justice Altamas Kabir, the Supreme Court of India rejected Antrix's Section 11

---

[209] Letter from ICC Secretariat (Wong) to Devas's counsel and Antrix (Hegde) (Oct. 13, 2011) (Ex. C-157); Letter from ICC Secretariat (Khong) to Tribunal (Nov. 10, 2011) (Ex. C-160).

[210] *Antrix Corp. Ltd. v. Devas Multimedia P.Ltd.*, Arb. Pet. No. 20 of 2011, Order (India Sup. Ct. 2012) (Ex. C-172).

application, holding that Antrix's interpretation of Clause 20 was without merit and that Devas had validly invoked ICC arbitration pursuant to that clause. The ICC arbitration has since been resumed, although Antrix still is not participating in the arbitration.

146. In the ICC arbitration, Devas sought both specific performance and/or damages. Devas had expected that these claims would be heard at the scheduled ICC arbitration hearing dates of April and/or July 2012. The Supreme Court of India's injunction granted on April 9, 2012 led to the cancellation of these hearings, and thus removed any prospect of getting a prompt specific performance order in the ICC arbitration during 2012 or the first three quarters of 2013, as the Supreme Court's stay was not vacated until mid-May 2013.

147. On June 13, 2013, Devas wrote a letter to Antrix and noted that there "clearly was no basis for [Antrix] to terminate the [Devas] Agreement" and that "Antrix also has obstructed the expeditious determination of the arbitration proceedings commenced by Devas." Devas further noted that "Antrix continues to be in repudiatory breach of the [Devas] Agreement even today and has clearly evinced its intention not to perform the [Devas] Agreement." Devas then notified Antrix that it "has elected to, and does hereby, accept Antrix's repudiatory breach of the [Devas] Agreement, bringing the Agreement to an end as a result of Antrix's wrongful actions."[211]

148. It is also notable that, since 2011, Devas has been subject to a range of harassing measures from various parts of the Indian government, including its Registry of Companies (which has attempted to "investigate" the Devas Agreement even though this forms no part of its statutory functions), India's Enforcement Directorate, tax authorities,

---

[211] Letter from Devas (Viswanathan) to Antrix (Hegde) (June 13, 2013) (Ex. C-191.)

and other government entities.[212] It is all too clear that these steps have been taken in retaliation for Devas and Claimants daring to exercise their respective rights.

Q. The Current Proceeding

149. By letters dated December 12 and 13, 2011, Claimants invited the Republic of India to resolve the disputes that are the subject of this claim on an amicable basis, in conformity with Article 8(1) of the Treaty.[213] Respondent did not acknowledge, much less substantively respond to, these communications, and no amicable resolution of the dispute occurred.

150. On July 4, 2012, Claimants commenced the present Proceeding.

III. THIS TRIBUNAL HAS JURISDICTION OVER CLAIMANTS' TREATY CLAIMS

A. Claimants Are "Investors" As Defined By the Treaty

151. Both Claimants and Respondent have consented to arbitration of the claims that are the subject of this dispute. Article 8 of the Mauritius-India BIT establishes the scope of this Tribunal's jurisdiction. It provides:

> (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:
>
> . . . .

---

212 Viswanathan ¶¶ 216-223.

213 Exs. C-165 to C-167 (Claimants' Requests to Settle Dispute).

> (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 . . . .

152. Thus, this Tribunal's jurisdiction is established whenever an (i) "investor of one Contracting Party" (a term defined by the Treaty), (ii) has "[a]ny dispute" with the other Contracting party "in relation to an investment of the [investor]."

153. As with all the terms of the Treaty, Article 8 should be interpreted by the customary interpretive principle of international law, as codified in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties,[214] requiring that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[215] Applying this interpretive principle, Claimants, as companies incorporated and established in Mauritius (*see supra* ¶¶ 24-27) plainly are "investors" as defined by Article 1(1)(b) of the Treaty,

---

[214] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("VCLT") (Ex. CL-42). Mauritius acceded to the VCLT as from January 18, 1973. Although India has not acceded to the VCLT, Articles 31 and 32 of that convention have been held "on several occasions" to "reflect[]" the "customary international law" on treaty interpretation. *See Dispute Regarding Navigational & Related Rights (Costa Rica v. Nicaragua)*, 2009 I.C.J. Rep. 213, Judgment at 237 ¶ 47 (July 13) (holding that "the principles of interpretation set forth in Articles 31 and 32 of the [VCLT]" represented "customary international law on the subject," and applied notwithstanding that "Nicaragua is not a party to the [VCLT]") (Ex. CL-10); *Saluka Invs. B.V. v. Czech Republic*, Partial Award ¶ 296 (UNCITRAL 2006) (noting that the VCLT's provisions regarding treaty interpretation "represent customary international law") (Ex. CL-31).

[215] VCLT, art. 31(1) (Ex. CL-42); *accord Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award ¶ 402 (PCA 2013) (interpreting inter-governmental agreement according to the "ordinary meaning of the terms there used") (Ex. CL-18); *White Indus. Australia Ltd. v. India*, Final Award ¶ 7.3.2 (UNCITRAL 2011) ("The correct approach to be adopted by the Tribunal in assessing whether an 'investment' has been made is to consider the plain and ordinary meaning of the words used in the [Australia-India] BIT in their context and in the light of its object and purpose . . . .") (Ex. CL-38).

because they are "corporation[s], firm[s] or association[s], incorporated or constituted in accordance with the law of [a] Contracting Party[,]" *i.e.*, Mauritius.

B. Claimants' Dispute Is "In Relation To" An "Investment"

154. This dispute is "in relation to" an "investment," as that term is defined by the Treaty. Article 1(1)(a) of the Mauritius-India BIT defines "investment" broadly as:

> 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 concession conferred by law or under contract, including any concessions to search for, extract or exploit natural resources.

155. Similarly-worded BIT provisions have been recognized as conveying "a very broad meaning for the term 'investment'"[216] and applied in commensurately broad fashion. Indeed, the *chapeau* "every kind of asset" is "generally acknowledged as '[p]ossibly the broadest . . . general definition' contained in a BIT."[217]

156. For purposes of Article 1(1)(a), Claimants' investment consists of:

---

[216] *Fedax N.V. v. Venezuela*, No. ARB/96/3, Decision on Jurisdiction ¶ 32 (ICSID 1997) (Ex. CL-13); *see also White Indus.* ¶ 7.3.1 (remarking that the similar definition of "investment" appearing in Australia-India BIT was "set out in broad terms") (Ex. CL-38).

[217] *Saipem S.p.A. v. Bangladesh*, No. ARB/05/07, Decision on Jurisdiction ¶ 121 n.30 (ICSID 2007) (alterations in original) (citation omitted) (Ex. CL-30).

(a) Each Claimant's respective shareholdings in Devas;

(b) Each Claimant's partial indirect interest in Devas's business assets, acquired by virtue of their equity ownership of Devas, including:

i. rights and claims to performance held by Devas pursuant to the Devas Agreement;

ii. 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," and the corresponding ability to box-out any other potential users from this portion of the S-band;

iii. the right, pursuant to the Devas Agreement, to broadcast from the 83°E orbital slot and other available slots allocated to India by the ITU in the S-band;

iv. the business developed by Devas (described above) 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;

v. intellectual property rights, goodwill, technical processes, know-how and expertise committed by Devas in performing the Devas Agreement and the developing of the Devas integrated satellite system; and

vi. working capital, regulatory approvals and other assets of Devas.

157. These interests are plainly all covered by Article 1(1)(a)'s inclusive definition of "investment." While the examples in Article 1(1)(a) are non-exclusive (and would thus cover interests that are not specifically enumerated therein), Claimants also note that share and equity interests fall within sub-paragraph (ii), covering "shares in and stock and debentures of a company and any other form of participation in a company," and Devas's various assets fall within sub-paragraphs (i), (iii), (iv) and (v).[218]

[218] Claimants' investments furthermore satisfy Article 2 of the Treaty, which confirms 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 *(cont'd)*

158. Finally, the scope of India's consent to arbitration under Article 8 of the Mauritius-India BIT refers to "[a]ny dispute . . . in relation to an investment." As Kenneth J. Vandevelde explains (interpreting, among others treaty clauses, a similar phrase in the Australia-India BIT):

> This consent is quite broad. It does not require that the dispute involve an alleged violation of a provision of the BIT. All that is required is that the dispute concern an investment. . . . Occasionally, the consent applies to 'any dispute,' which is clearly even broader . . . .[219]

159. Claimants' allegations easily fall into the category of "any dispute . . in relation to" its investment – and, moreover, specifically relate to violations of the Treaty. In these circumstances, then, there can be no doubt that the dispute is "in relation to" "an investment," as required by the Mauritius-India BIT.

IV.
INDIA HAS UNLAWFULLY EXPROPRIATED CLAIMANTS' INVESTMENTS

A. Articles 6 and 7 of the Treaty Prohibit Expropriations by India Except for Public Purposes, Under Due Process of Law, on a Nondiscriminatory Basis, and Against Fair and Equitable Compensation

160. 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 non-discriminatory basis and against fair and equitable compensation. Such compensation shall amount to

---

(cont'd from previous page)
accordance with its laws and regulations, whether made before or after the coming into force of this Agreement." Mauritius-India BIT, art. 2 (Ex. C-1). As noted above, each of Claimants' various equity investments was approved by the Indian FIPB. (*See supra* ¶ 36.)

[219] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* at 433 § 10.2.1.1 (2010) (footnote omitted); *see also id.* at 433 n.26 (citing BITs) (Ex. CL-45).

> 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.

161. Article 7 of the Treaty further requires that "any compensation paid pursuant to Article[] . . . 6" be "freely transferred, without unreasonable delay and on a non-discriminatory basis" and "effected without unreasonable delay in any freely convertible currency at the market rate of exchange prevailing on the date of transfer."

162. The protections afforded by Articles 6 and 7 are supplemented in this case by the the "MFN" provisions 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.[220]

163. The provisions of Article 6 and 7 (and the related obligations under the MFN clause) applies in any case where an investment is "subjected to measures having effects equivalent to nationalisation or expropriation." These terms reflect the widespread acceptance that "expropriation" includes:

> not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[221]

---

[220] *See also* Mauritius-India BIT, art. 11(1) (preserving investor's right to "obligations under international law" that may entitle Claimants to "treatment more favourable than that provided for by the [Treaty]") (Ex. C-1).

[221] *Metalclad Corp. v. Mexico*, No. ARB(AF)/97/1, Award ¶ 103 (ICSID 2000) (Ex. CL-23); *accord CME Czech Republic B.V. v. Czech Republic*, Partial Award ¶ 606 (UNCITRAL 2001) ("*CME Liability*") (Ex. CL-5); *see also Gemplus S.A. v. Mexico; Talsud S.A. v. Mexico*, Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award ¶ 8-23 (ICSID 2010) ("[A]n indirect expropriation occurs if the state deliberately deprives the investor of the ability to use its investment in any meaningful way and a direct expropriation occurs if the state deliberately takes that investment away from the investor.") (Ex. CL-15); *RosInvestCo. UK Ltd. v. Russia*, No. 079/2005, Final Award ¶¶ 624 (SCC 2010) (noting that indirect expropriation includes "deprivation of (i) the economic value of an investment (as [the investor] articulated the standard at the hearing), (ii) fundamental ownership rights, in particular, control of an ongoing business, or (iii) deprivation of legitimate investment-backed expectations" where "the 'net effect' of the measure (or set of measures) is the same as an outright expropriation, *i.e.*, a substantial or total deprivation of the economic value of an asset") (Ex. CL-28); Restatement (Third) on Foreign Relations Law § 712 cmt. g (1987) (stating that expropriation embraces "action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property") (Ex. CL-46); *Starrett Hous. Corp. v. Iran*, Case No. 24, Award No. ITL 32-24-1, Interlocutory Award, 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (1983) (expropriation embraces "interfere[nce] with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated . . . .") (Ex. CL-34).

164. Furthermore, the term "expropriation" extends to direct and indirect interference with both tangible and intangible assets, including interference with *in personam* rights and contract rights, such as Claimants' interest in Devas, Claimants' indirect ownership of the Devas Agreement and Claimants' indirect ownership of the Devas System and business, as well as a pre-emptive position in the 70 MHz of S-band spectrum allocated under the Devas Agreement for operation of Devas's hybrid satellite-terrestrial system (*see supra* ¶ 41).[222]

165. As discussed in further detail below, the Government of India directly and indirectly expropriated and/or nationalized Claimants' investments. (*See infra* ¶¶ 166-173.) The expropriation did not comply with Articles 6 and 7 of the Treaty, not least because India has failed to compensate Claimants as required by Article 6(3) and international law. (*See infra* ¶¶ 195-198.)

B. The Actions of India's Cabinet Committee on Security, Antrix, DOS and Space Commission in Annulling the Devas Agreement Deprived Claimants of the Benefits of Their Investments in India

166. The evidence here shows that:

(a) Beginning in 2009, spearheaded by Dr. Radhakrishnan, DOS covertly began a "review" of the Devas Agreement (*see supra* ¶¶ 78-79);

(b) According to Dr. Radhakrishnan, the inter-ministerial "Space Commission" decided on July 2, 2010 to annul the Devas Agreement (*see supra* ¶¶ 91-94, 112);

---

222 *Deutsche Bank AG v. Sri Lanka*, No. ARB/09/02, Award ¶ 506 (ICSID 2012) ("Contractual rights may be expropriated, a position that has been accepted by numerous investment arbitration tribunals.") (Ex. CL-8); *Occidental Petroleum Corp. v. Ecuador*, No. ARB/06/11, Award ¶ 455 (ICSID 2012) ("*Occidental 2012 Award*") (finding that an "administrative sanction," which had the effect of terminating a long term contract, was a measure "tantamount to expropriation") (Ex. CL-27).

(c) On July 12, 2010, the Additional Solicitor-General advised that the contract could not be terminated for convenience under Article 7 of the Devas Agreement. However, he suggested a path to contrive a *force majeure* event (*see supra* ¶¶ 97-100);

(d) The Indian government spent the next seven months putting in place the arrangements to annul the Devas Agreement (*see supra* ¶¶ 112-113);

(e) In early February 2011 the "review" of the Devas Agreement and the decision to annul by the Space Commission was made public (*see supra* ¶¶ 110-113);

(f) On February 17, 2011, the CCS made precisely the "policy" decision that the Additional Solicitor-General had recommended in order to create a "*force majeure*" event (*see supra* ¶¶ 120-121);

(g) On February 25, 2011, citing the CCS decision as an "act" by a "governmental authority acting in its sovereign capacity" triggering a "*Force Majeure*" and also citing Article 7 (even though the Additional Solicitor-General had advised that Article 7's "termination for convenience" was unavailable), Antrix "cancelled" the Devas Agreement (*see supra* ¶¶ 127-129); and

(h) The annulment of the Devas Agreement and rights therein destroyed Devas's ability to execute its business plan or otherwise monetize its assets (*see supra* ¶ 20).

167. These measures plainly "ha[d] the effect of depriving" Claimants "of the use or reasonably to be expected economic benefit of"[223] their investments in Devas, therefore constituting an expropriation under Article 6 of the Treaty.

168. In *Occidental*, the Ecuadorian government issued an administrative decree that operated to cancel a contract in its entirety. The action (which had no justification whatsoever under the contract, arose in a "political" environment and an atmosphere of "ill-feeling" against the investor following an earlier international arbitration award favorable to Occidental) was held to be expropriatory.[224]

---

223 *CME Liability* ¶ 606 (Ex. CL-5) (citing *Metalclad* ¶ 103 (Ex. CL-23)).

224 *Occidental 2012 Award* ¶¶ 439, 442-43, 456 (Ex. CL-27).

169. In *Deutsche Bank AG v. Sri Lanka*, the government expropriated "the entire value of [the investor's] investment . . . for the benefit of [the government] itself."[225] It did so through an order of the Sri Lankan Supreme Court blocking any payment to the investor under a hedging contract, as well as a similar administrative action by the Sri Lankan Central Bank.[226] These "coordinated actions" of the Sri Lankan Supreme Court and Central Bank were found to have "deprived Deutsche Bank of the economic value of the [Hedging Agreement,]" thus constituting an "expropriation of Deutsche Bank's rights[.]"[227]

170. A comparison may also be made to *Middle East Cement*, where the investor obtained a governmental license to import cement at a specifically-built port facility in Egypt. When the government enacted a measure banning the importation of cement other than through the Egyptian Cement Office, Claimant's argued that this "condemn[ed]" the investor's business "to paralysis" constituting an expropriation,[228] and the tribunal agreed that there had been a *de facto* expropriation under the Greece-Egypt BIT because the decree had "deprive[d] the investor of the use and benefit of his investment even though he may [have] retain[ed] nominal ownership."[229]

171. Likewise here, the coordinated measures adopted by the CCS, DOS, the Space Commission, and ISRO/Antrix operated to prevent Devas from commencing the

---

225 *Deutsche Bank* ¶ 523 (Ex. CL-8).

226 *Id.* ¶ 521.

227 *Id.*

228 *Middle East Cement Shipping & Handling Co. S.A. v. Egypt*, No. ARB/99/6, Award ¶ 82 (ICSID 2002) (Ex. CL-24).

229 *Id.* ¶ 107.

provision of telecommunication services that it had developed on the basis of that agreement. It is classic expropriation of Claimants' rights and business.

172. It bears emphasis that Antrix's cancellation of the contract (and declaration of "*force majeure*") was explicitly predicated on a "sovereign" action having occurred to prevent its performance of the Devas Agreement. Indeed, the Additional Solicitor-General's opinion stated that a "decision . . . taken by the Government of India, as a matter of policy, in exercise of its executive power or in other words, a policy decision having the seal and approval of the Cabinet and duly gazetted" would be "an act by the governmental authority acting in its sovereign capacity."[230] Moreover, as the above facts show, the expropriation itself was engineered through DOS and the Space Commission, as well as ISRO. Thus, it is not necessary to reach the issue of whether Antrix's actions are attributable to the State (an issue addressed separately below)[231] in order to conclude that there has been expropriation by the government of India.

173. In sum, the facts clearly show that Claimants were deprived of the use and enjoyment of their investments, constituting an expropriation for purposes of Articles 6 and 7 of the Mauritius-India BIT.

---

230 ASG Opinion (Ex. C-131).

231 (*See infra* ¶ 214-215.) It is likewise not necessary to find Antrix in breach of contract in order to find an expropriation. *See Impregilo S.p.A. v. Pakistan*, No. ARB/03/3, Decision on Jurisdiction ¶ 258 (ICSID 2005) ("[T]he fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.") (Ex. CL-17); *accord Compañía de Aguas del Aconqija S.A.* v. *Argentina,* No. ARB/97/3, Decision on Annulment ¶ 113 (ICSID 2002) (Ex. CL-6).

C. The Expropriation Was Unlawful in Every Respect

1. The Expropriation Was Not for a Public Purpose

174. Article 6 of the Mauritius-India BIT prohibits India from expropriating or nationalizing investments unless four conditions are satisfied, namely that it be (1) "for public purposes"; (2) "under due process of law"; (3) "on a nondiscriminatory basis"; *and* (4) "against fair and equitable compensation."

175. India's expropriation of Claimants' investment is unlawful if any one of these conditions was not satisfied.[232] Here, *none* of these conditions were satisfied.

176. The above-quoted Treaty provisions indicate that an expropriation will be unlawful for purposes of Article 6 unless it was done "for public purposes."[233] A sovereign's mere assertion that it acted for public purposes is not sufficient to satisfy this condition; instead, Respondent must demonstrate that its measures were actually motivated by public purposes.[234] In addition, it must also show that the expropriation was proportional to the purported public purpose.[235]

---

232 *See Kardassopoulos v. Georgia*; *Fuchs v. Georgia*, Nos. ARB/05/18 & ARB/07/15, Award ¶¶ 390, 405 (ICSID 2010) (failure to provide due process of law, and failure to provide "'prompt, adequate and effective compensation,'" constituted independent bases for regarding expropriation as unlawful) (Ex. CL-20); *Funnekotter v. Zimbabwe*, No. ARB/05/6, Award ¶ 98 (ICSID 2009) (finding that a similar treaty provision imposed "cumulative" conditions) (Ex. CL-14).

233 Mauritius-India BIT, art. 6(1) (Ex. C-1).

234 *ADC Affiliate Ltd. v. Hungary*, No. ARB/03/16, Award ¶¶ 430-32 (ICSID 2006) (host state failed to "substantiate [that it was acting in the public interest] with convincing facts or legal reasoning"; holding that "[i]f mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met" (emphasis omitted)) (Ex. CL-1).

235 *See James v. United Kingdom*, App. No. 8793/79, Judgment (Merits) ¶ 50 (Eur. Ct. H.R. 1986) ("Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must *(cont'd)*

177. A sovereign is *not* acting for public purposes when its measures are "financially motivated" (either in favor of itself or other investors) as that is an "improper motive."[236] Indeed, an expropriation accompanied by "serious breaches of due process, transparency and indeed a lack of good faith" will rarely satisfy the "public purpose" test.[237]

178. The facts here readily dispel any notion of a taking "for public purposes." The CCS decision, which purported to deny "orbital slot in S band . . . for commercial activities," was publicly disclosed on February 17, 2011 and made reference to a miscellany of supposed national "needs," including military needs.[238] More than two years later, however, India has *made absolutely no use of the S-band spectrum for* ***any*** *purpose*, much less the supposed "needs" identified by the Cabinet Committee on Security. Similarly, while the Additional Solicitor-General was told by Dr. Radhakrishnan that there were "strategic and societal applications" (including, according

---

(cont'd from previous page)
also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.") (Ex. CL-19); *see also Occidental 2012 Award* ¶ 456 (observing that the administrative taking was done through measures that were not "a proportionate response" to the situation facing the government) (Ex. CL-27).

236 *Deutsche Bank* ¶¶ 523-24 (Ex. CL-8); *see also ADC* ¶¶ 304, 433 (Hungary's claim of a "public interest" was "unsustainable" because the expropriated property, an airport, was subsequently re-privatized to a competitor of the investor, for a profit to the State of $2.26 billion) (Ex. CL-1); *Siemens A.G. v. Argentina*, No. ARB/02/8, Award ¶ 273 (ICSID 2007) (An expropriation was not in the public interest when "[i]t was an exercise of public authority to reduce the costs to Argentina of the Contract recently awarded through public competitive bidding, and as part of a change of policy by a new Administration eager to distance itself from its predecessor.") (Ex. CL-33).

237 *See Deutsche Bank* ¶ 523 (Ex. CL-8).

238 Press Information Bureau, Government of India, Cabinet, *CCS Decides to Annul Antrix-Devas Deal* (Feb. 17, 2011) (Ex. C-134).

to Dr. Radhakrishnan, the Indian Armed Forces, Coast Guard, Police, or Railways) none of these agencies have sought to use the S-Band.[239]

179. And, tellingly, Dr. Radhakrishnan's orchestrated process to annul the Devas Agrement *did not* involve any of these agencies. According to him, he "started necessary actions for terminating the contract which required extensive consultations with the concerned agencies in the government," which actions involved the "Department of Telecommunication, Department of Law and Justice." [240] Notably, Dr. Radhakrishnan's list does not include any agencies concerned with "defence, para-military forces, railways or other public utility services," the departments whose "needs" supposedly animated the Cabinet Committee on Security "policy" decision.[241]

180. Meanwhile, calls for the S-band spectrum to be made available to other commercial operators, including terrestrial cellular phone operators – calls that began in 2008 and were evident at the time of Dr. Radhakrishnan's "review" of the Devas Agreement[242] – have continued. As noted above, on May 17, 2013, Sam Pitroda, Prime Minister Singh's Public Information Infrastructure and Innovation Advisor, was quoted as

---

239 ASG Opinion (Ex. C-131).

240 Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 4 (Feb. 8, 2011) (emphasis added) (Ex. C-125).

241 *Id.*

242 (*See infra* ¶¶ 135-137.) In this regard, DOS's reference to the Additional Solicitor-General for an opinion on how to annul the Devas Agreement is telling, as it describes the purposes behind the annulment as "to . . . preserve precious S band spectrum for strategic requirements of the nation" and "***to ensure a level playing field for other service providers using terrestrial spectrum***." ASG Opinion (Ex. C-131) (emphasis added). The CCS "policy" decision (the purported basis for Antrix's invocation of force majeure) tellingly omits this justification (*see supra* ¶ 121).

suggesting that 80 MHz of the S-band spectrum held by DOS should be "freed" "for 4G services," *i.e.*, terrestrial operations. (*See supra* ¶ 137.)[243]

181. The fabricated nature of India's "policy" decision to extricate itself from the Devas Agreement is further evident when compared with its initial decision to enter the Devas Agreement in the first place. In 2004, when the Devas Agreement was presented for final consideration, a high-level government committee, the Shankara Committee, specifically considered "alternate uses for [the] space segment" before concluding that the Devas Agreement was beneficial and should be signed (*see supra* ¶ 184). Thereafter, the Indian government took deliberate steps to protect PFDs at ITU WR-07.[244] And all of this comported with SATCOM Policy, which is still in force today. There is a strong contrast between the careful analysis preceding the Devas Agreement, and the covert, *ad hoc* and result-oriented processes leading to the 2011 cancellation, all of which indicates that the so-called "policy" decisions underlying the cancellation were self-interested and pre-textual.

182. The "purpose" actually admitted by Dr. Radhakrishnan, and apparent in his actions, was the goal of extricating the Indian government from the Devas Agreement, amid political pressure and dissatisfaction with the contract's terms. The Additional

---

[243] Mr. Parsons believes that 60 Mhz of the 80 MHz that Dr. Pitroda is advocating should be "freed" is the spectrum that was allocated to Devas under the Devas Agreement. (Parsons ¶ 52). An arrangement between the Government of India and cellular operators concerning the S-band and/or the Devas Agreement that contributed to the expropriation of Claimants' investments clearly would defeat any allegation that India had acted "for public purposes." *See Rumeli Telekom A.S. v. Kazakhstan,* No. ARB/05/16, Award ¶ 707 (ICSID 2008) (Ex. CL-29) (finding that an expropriation "was not directly for the benefit of the State" when "the court process which resulted in the expropriation of Claimants' shares was brought about through improper collusion between the State, acting through the Investment Committee, and Telcom Invest [a private, domestic entity].")

[244] Lewis ¶¶ 59-70.

Solicitor General noted that DOS was "concern[ed]" about "the technical, commercial, managerial and financial aspects of Antrix [sic]-Devas contract," and "severe penalty clauses for delayed delivery of the spacecraft and for performance failure . . . ."[245] And Dr. Radhakrishnan stated the "review" of the Devas Agreement was commenced by him in order to terminate the contract "***without causing much of embarrassment and damage and financial loss to the government.***"[246] As a matter of law, a desire to escape a commercial arrangement, or avoid political outcomes, is not a "public purpose." (*See supra* ¶ 177 & n.236.)

183. Even if some colorable "public purpose" could be ascribed to the expropriation, Respondent's actions (leading to the destruction of Devas's rights and Claimants' investments) could in no way be described as "proportional" to that purpose. The lack of proportionality in India's actions is evident not only in the blanket nature of the CCS decision (which purported to quarantine the entire S-band for unspecified and vaguely-described national or strategic "needs"), but also by the fact that India took action covertly and unilaterally, without even attempting to explore whether its supposed "needs" could be accommodated within the structure of the Devas Agreement and Devas's need to use the S-Band for provison of audio/visual and BWA satellite and terrestrial services.[247] In fact, as discussed by Mr. Parsons, had the Indian government approached Devas about any real national needs for the S-band, Devas could have

---

245 ASG Opinion (Ex. C-131)

246 Transcript, Press Conference by Dr. Radhakrishnan and Dr. Kasturirangan, CNN-IBN at 4 (Feb. 8, 2011) (emphasis added) (Ex. C-125).

247 *See supra* ¶¶ 123-125.

worked with the government to accommodate those needs within the framework of the Devas Agreement.[248]

184. The evidence thus indicates that Respondent's actions in causing the cancellation of the Devas Agreement lacked a legitimate public purpose. But it bears emphasis that the Mauritius-India BIT requires that *every* nationalization, lawful or unlawful, must be the subject of compensation,[249] meaning that Respondent remains liable to compensate Claimants even if somehow it is able to show its measures were undertaken "for public purposes."

2. The Expropriation Was Effected Without Due Process

185. Article 6 of the Treaty further requires that an expropriation must be "under due process of law," a requirement that the Indian Government has utterly failed to meet.

186. The concept of "due process" in Article 6 refers to more than mere compliance with local law, but also incorporates the principles of *international* due process:

> [T]he contents of the notion of due process of law make it akin to the requirements of the "Rule of Law", an Anglo-Saxon notion, or of the "Rechtsstaat", as understood in continental law. Used in an international agreement, the content of this notion is not exhausted by a reference to the

248 *See* Parsons ¶¶ 35-37, 49-51.

249 *See* Mauritius-India BIT, art. 6 (Ex. C-1); Vandevelde, *Bilateral Investment Treaties* at 307 § 6.5.3.4 ("While an expropriation must be for a public purpose if it is to be lawful, the fact that it is for a public purpose in no way excuses the obligation to pay compensation.") (Ex. CL-45).

> national law of the Parties concerned. The "due process of law" of each of them must correspond to the principles of international law.[250]

187. As indicated in *Siag* and *Middle East Cement*, one basic element of due process is that the host state explicitly notify the investor of the proposed expropriatory measures and give it the opportunity to be heard and/or to mitigate the impact of the threatened measures.[251] Furthermore, due process also requires that the expropriation be conducted with "reasonable advance notice and a fair hearing" and cannot be "carried out in a manner that can at best be described as opaque."[252]

188. Finally, denial of due process may occur not just where procedural rights are ignored, but "due process may be denied . . . substantively[,]"[253] which occurs when a host state ignores and violates its own and/or international law in the conduct of an expropriation.[254]

---

[250] *Kardassopoulos* ¶ 394 (emphasis omitted) (Ex. CL-20) (quoting Organisation for Economic Co-operation and Development, *Draft Convention on the Protection of Foreign Property*).

[251] In *Siag*, without prior notice Egypt's Ministry of Tourism enacted, a ministerial resolution, cancelling a land development contract and "redeeming 'all the land . . . with all the structures thereon.'" *Siag v. Egypt*, No. ARB/05/15, Award ¶¶ 36, 442 (ICSID 2009) (Ex. CL-32). This was held to be a violation of due process. *Id.* ¶ 442. In *Middle East Cement*, the tribunal considered Egypt's seizure of the ship the M/V Poseidon 8, which was conducted without individual notice to the investor, to violate due process. *Middle East Cement* ¶ 143 (Ex. CL-24). The tribunal determined that, even though Egypt advertised the auction in local newspapers, and may have accorded with Egyptian law, nevertheless the expropriation was not conducted "under due process." *Id.* ¶¶ 143, 147; *cf. Metalclad* ¶¶ 91, 97 (finding "procedural and substantive deficiencies" when investor was denied a permit "at a meeting . . . of which [it] received no notice, to which it received no invitation, and at which it was given no opportunity to appear") (Ex. CL-23).

[252] *Kardassopoulos* ¶ 397 (Ex. CL-20); *accord ADC* ¶ 435 (Ex. CL-1).

[253] *Siag* ¶ 440 (Ex. CL-32).

[254] *See Kardassopoulos* ¶ 441 (due process requires a compensation process that is "both procedurally and substantively fair") (Ex. CL-20).

189. India's clandestine conduct leading up to the cancellation of the Devas Agreement is a classic denial of due process. First, Dr. Radhakrishnan commissioned the Suresh Report, as part of a secret "review" of the Devas Agreement (*see supra* ¶¶ 78-79). The Space Commission decision of July 2010 to "annul" the contract likewise was taken behind closed doors, without any notice to Devas or Claimants. The decision preceding the announcement of February 8, 2011 that the government was "reviewing" the contract with a view to cancelling it, as well as Antrix February 10, 2001 and the CCS decision of February 17, 2011 denying use of the S-band were likewise all taken by the Government unilaterally and in secret. (*See supra* ¶¶ 90-101, 111-113.) The result was that the termination notice of February 25, 2011 presented the cancellation of the Devas Agreement as a *fait accompli*, with no prior opportunity (much less notice) to Devas or Claimants to allow them to present objections to India's decisions.[255] Moreover, the decision to fabricate a *force majeure* event was enacted in contravention to the contractual requirement that a *force majeure* event must be "beyond the reasonable control of the party affected" and have only have occurred "despite all efforts of the Affected Party to prevent it or mitigate its effects."[256]

190. Worse still, all throughout this time, Devas was performing the Devas Agreement, in reliance upon India's prior indications of support for the Devas System and business, including making final preparations for the launch of PS1 (which ought to have commenced by that stage) and further preparations for the PS2 satellite launch (which

---

255 As Mr. Parsons relates, had the Indian government approached Devas, any legitimate public need for the S-band spectrum could have been accommodated without terminating the Devas Agreement. *See* Parsons ¶¶ 35-37, 49-51.

256 Devas Agreement at 8 § 11 (Ex. C-16).

Devas was led to believe would launch soon after PS1). (*See supra* ¶¶ 65-69, 73, 84-85, 102-106.)

191. Such secrecy and dishonesty, whereby the drastic government action annulling the Devas Agreement was first announced in the media, is the antithesis of due process. Indeed, as the *Kardassopoulos* tribunal remarked, "'*[b]ack-door press reports are the opposite of due process*.'"[257]

3. The Expropriatory Measures Were Discriminatory

192. Respondent's expropriatory measures also were unlawful because they were not taken on a "non-discriminatory" basis, as required by Article 6(1) of the Treaty. Discrimination in the expropriation context takes place when an investment is nationalized "for reasons unrelated to the host state's legitimate regulatory objectives"; for example, "a measures that expropriates foreign investment solely because it is foreign-owned would violate this condition."[258]

193. In *ADC* and *CME*, the respondent host state was found to have breached the applicable BITs because their expropriations involved nationalization of a foreign investor's assets due, at least in part, to the investor's foreign nationality.[259]

194. Here, the evidence shows that the measures in question were aimed exclusively at extinguishing the interests of Devas, and were motivated in part by the fact that Devas was owned by the Claimants and DT Asia, who are foreign. This is made clear by the Indian government's own statements, which have derided Devas because of

---

257 *Kardassopoulos* ¶ 402 (alteration in original) (citation omitted) (Ex. CL-20).

258 Vandevelde, *Bilateral Investment Treaties* at 273 § 6.5.1 (Ex. CL-45).

259 *See ADC* ¶ 443 (Ex. CL-1); *CME Liability* ¶ 612 (Ex. CL-5).

its partial foreign ownership,[260] as well as reports and other evidence that indicate that the S-band spectrum was most likely withheld from Devas at the behest of more politically-powerful domestic terrestrial operators.[261] Thus, because the expropriation appears to have been motivated at least in part by the fact that Devas was substantially foreign owned, it was discriminatory.

4. India Not Only Has Failed to Pay Fair and Equitable Compensation, It Has Categorically Refused to Do So

195. Article 6(1) of the Mauritius-India BIT mandates that "fair and equitable compensation" "made without unreasonable delay" is a condition of any expropriation. 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.[262]

---

260 *See supra* ¶¶ 133-134; Chaturvedi Rep. at 38 ¶ 3.5.9 (Ex. C-137).

261 *See supra* ¶¶ 135-137.

262 Mauritius-India BIT, art. 6(1) (Ex. C-1). Although the quantification of damages awaits the next phase of this proceeding, the meaning of "market value" can hardly be contested. It is:

> [t]he price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

American Society of Appraisers, *International Glossary of Business Valuation Terms* 27 (2009) (defining "fair market value") (Ex. CL-43); *accord Starrett Hous. Corp. v. Iran*, Case No. 24, Award No. 314-24-1, Final Award, 16 Iran-U.S. Cl. Trib. Rep. 112, 201 (1987) (defining "fair market value as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat") (Ex. CL-35).

196. The failure to pay "market value" compensation alone constitutes a breach of Article 6(1) of the Treaty. In *Kardassopoulos*, it was "uncontroversial on the facts of [that] case[] that no payment was made to Mr. Kardassopoulos by the Georgian Government in compensation for the expropriation of his investment."[263] Accordingly, the tribunal concluded that "[Georgia] breached the [treaty] by reason of its continuing failure to pay prompt, adequate and effective compensation, as required by the terms of [the treaty]."[264]

197. In a similar vein, the tribunal in *Funnekotter* observed that the takings of certain landholdings by alleged war veterans, which were encouraged and supported by the government of Zimbabwe, constituted an unlawful expropriation because no payment had been made.[265]

198. In this instance, Respondent has not even attempted to pay Claimants the fair market value of their lost investment,[266] and in fact has repudiated its duty to do so. On this basis as well, the expropriation is unlawful.

---

263 *Kardassopoulos* ¶ 405 (Ex. CL-20).

264 *Id.* ¶ 408.

265 *Funnekotter* ¶ 107 (Ex. CL-14); *accord Gemplus* ¶ 8-25 (finding that "these expropriations were unlawful under the BITs and international law, given the facts found by the Tribunal and the further fact that the Respondent did not meet the condition required by Article 5 . . . regarding the payment of adequate compensation.") (Ex. CL-15).

266 As noted above, Antrix purported to tender USD 13 million as a termination fee under the Devas Agreement – a tender that was rejected by Devas. (*See supra* ¶¶ 131-132.)

V.
INDIA'S CONDUCT ALSO VIOLATED OTHER ARTICLES OF THE TREATY

A. Expropriatory Action Also Constitutes Unfair and Inequitable Treatment, Thus Violating Article 4(1) of the Treaty

199. 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.

200. The first sentence of Article 4(1) constitutes a "fair and equitable treatment" clause of a type commonly found in modern BITs. The *Gemplus* tribunal, interpreting comparable provisions of the Mexico-France and Mexico-Argentina BITs, observed that "this phrase . . . includes the exercise of good faith or the absence of manifest irrationality, arbitrariness or perversity by [the host state]."[267]

201. As the *Saluka* tribunal further explained, the "fair and equitable treatment" standard is to be given broad effect:

> Bilateral investment treaties . . . are designed to promote foreign direct investment as between the Contracting Parties; in this context, investors' protection by the "fair and equitable treatment" standard is meant to be a guarantee providing a positive incentive for foreign investors.
>
> . . . .
>
> The [host state] . . . has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the [BIT] is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, non-

---

267 *Gemplus* ¶¶ 7-2 & 7-72 (Ex. CL-15).

> transparent, unreasonable (*i.e.*, unrelated to some rational policy), or discriminatory (*i.e.*, based on unjustifiable distinctions).[268]

202. In *CME*, it was held that where, as here, an expropriation occurs, this almost by definition also violates the fair and equitable treatment standard in that the expropriation "undermin[es]" the investment, which "equally is a breach of the obligation of fair and equitable treatment."[269]

203. In *Occidental*, the Tribunal interpreted the "fair and equitable treatment" standard in a setting where the measure in question – termination – was purportedly done as a sanction against the claimant's breach of an anti-transfer provision in one of its agreements. In such a setting, the "fair and equitable treatment" standard required that the measures in question "bear a proportionate relationship" to the supposed

---

[268] *Saluka* ¶¶ 293, 309 (Ex. CL-31). As *Saluka* indicates, the obligation to provide fair and equitable treatment still affords the State room to exercise "its legitimate right to take measures for the protection of the public interest." *Id.* ¶ 309. There is, however, no basis for claiming such a "right" in this case: not only were the measures taken here neither *bona fide* nor for any national "needs", but, moreover, these measures were grossly disproportionate, carried out in secrecy and without any transparency, commercially self-interested, and undertaken without due process of law (*see supra* ¶¶ 178-191). Thus, as in *Saluka*, claims of "public interest" carry no weight here.

[269] *See CME Liability* ¶ 611 (Ex. CL-5); *see also El Paso Energy Int'l Co. v. Argentina*, No. ARB/03/15, Award ¶ 515 (ICSID 2011) (finding the "cumulative effect" of a series of adverse regulatory measures was such as to violate the fair and equitable treatment standard) (Ex. CL-11); *Walter Bau AG (In Liquidation) v. Thailand*, Award ¶¶ 12.43-12.44 (UNCITRAL 2009) (breaches of contractual commitments, over time, defeated legitimate expectations of investor and thus violated fair and equitable treatment standard) (Ex. CL-37); *Eureko B.V. v. Poland*, Partial Award ¶¶ 232-34 (*Ad hoc* tribunal 2005) (finding breach of Netherlands-Poland BIT's fair and equitable treatment obligation: "[Poland], consciously and overtly, breached the basic expectations of Eureko that are the basis of its investment" and "[Poland], by the conduct of organs of the State, acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character") (Ex. CL-12); *CME Liability* ¶ 611 (holding that host state "breached its obligation of fair and equitable treatment [in Netherlands-Czech BIT] by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest") (Ex. CL-5).

governmental aims underlying the state measures in question.[270] The expropriatory measures in that case were held to be disproportionate to any national need, and thus a violation of the "fair and equitable treatment" standard.[271]

204. For these reasons, the expropriatory nature of Respondent's actions mandates the conclusion that Respondent has breached Article 4(1) of the Treaty.

B. India's Conduct Violated Numerous Other Aspects of the "Fair and Equitable Treatment" Standard

205. The fair and equitable treatment standard is flexible, and has been held to arise in a variety of situations where a state violates other "legitimate expectations," including cases of: (1) denial of due process or procedural fairness; (2) coercion and harassment by the organs of the host state; (3) failure to offer a stable and predictable legal framework; (4) unjustified enrichment; (5) evidence of bad faith; (6) absence of transparency; and (7) arbitrary and discriminatory treatment.[272]

206. As the *Gemplus* tribunal further observed, a state commits a breach of the fair and equitable treatment where its actions are "manifestly irrational, arbitrary and perverse, being also conducted in bad faith towards the Claimants and their rights as investors under the . . . BIT[]."[273]

---

270 *Occidental 2012 Award* ¶ 416 (Ex. CL-27).

271 *Id.* ¶¶ 450-52. Here, issues of proportionality do not even arise, because the measures in question were not borne of legitimate policy aims.

272 *Siag* ¶ 450 (Ex. CL-32); *Lemire v. Ukraine*, No. ARB/06/18, Decision on Jurisdiction and Liability ¶ 284 (ICSID 2010) (Ex. CL-21); Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* 154-81 (2008) (Ex. CL-44); *see also Rumeli* ¶ 609 (Ex. CL-29).

273 *Gemplus* ¶ 7-76 (Ex. CL-15).

207. In *El Paso*, the "fair and equitable treatment" standard was said to mean that "the State should not unreasonably modify the legal framework or modify it in contradiction with a specific commitment not to do so."[274]

208. The facts of this case evidence serial violations of these standards.

209. First, Respondent's conduct – fabricating a sham "*force majeure*" decision to try to mask a deliberate revocation of the contract has consistently been held to be contrary to international law and good faith.[275] Claimants' legitimate expectations in connection with their investment in Devas were completely subverted by these actions.

210. Second, Respondent's conduct is contrary to the numerous repeated commitments of support for the Devas Agreement, many of which were made directly to Claimants and thus plainly intended to induce Claimants to inject such capital.[276]

211. Third, Respondent's conduct unjustly enriched the state at the expense of the investor; a recognized indicia of unfair and inequitable conduct.[277]

---

274 *El Paso* ¶ 364 (emphasis omitted) (Ex. CL-11).

275 *See Nykomb Synergetics Tech. Holding AB v. Latvia*, Award § 3.8(b) (SCC 2003) (holding that a *force majeure* clause that "expressly ma[de] reservations for new laws or regulations, which may alter the parties' rights or obligations under the contract" did not permit a government to use legislation to "revoke" contractual commitments) (Ex. CL-26); *Himpurna California Energy Ltd v. PT. (Persero) Perusahaan Listruik Negara*, Final Award ¶ 144 (UNCITRAL 1999) (holding that a state enterprise could not "avoid liability by invoking State actions" where the "legal framework" between the State and the enterprise indicated they were entwined) (Ex. CL-16).

276 *CME Liability* ¶ 611 (Ex. CL-5).

277 *See Total S.A. v. Argentina*, No. ARB/04/1, Decision on Liability ¶ 112 (ICSID 2010) ("'[I]f a State . . . deprives an investor of acquired rights in a manner that leads to the unjust enrichment of the State, then there is at least a *prima facie* case for arguing that the fair and equitable standard has been breached.'") (Ex. CL-36) (quoting United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Vol. III) at 12 (1999)).

212. Fourth, the Government of India engaged in arbitrary decision-making, and made only abrupt, "ambush" announcements regarding its behavior (*see supra* ¶ 190), in violation of the duty to act transparently and consistently.[278]

213. Finally, the bad faith conduct of the government has been compounded by the harassing measures in order to punish Devas and Claimants for exercising their respective rights.[279]

214. It bears emphasis that Respondent cannot evade liability for its various bad faith actions by claiming that they were solely attributable to Antrix. First, as a factual matter, the current case implicates conduct by a plethora of state actors, from the Prime Minister on down. Moreover, the facts here show that Antrix, in practice, is fully integrated into DOS and ISRO, rendering the entities inseparable. (*See supra* ¶¶ 29-30.) Were that not enough, Antrix entered into the Devas Agreement explicitly *on behalf of* DOS/ISRO, in respect of transponder capacity on satellites ***to be owned and operated by ISRO***, and furthermore (in Article 3 of the Devas Agreement) placed responsibilities on Antrix for "obtaining all necessary Governmental and Regulatory Approvals relating to orbital slots and frequency clearances."[280] And, not only did it accede to the Devas Agreement only after a government committee – the Shankhara Committee – had

---

278 *See Saluka* ¶ 309 (Ex. CL-31).

279 *Supra* ¶ 148. *See Desert Line Projects LLC v. Yemen*, No. ARB/05/17, Award ¶¶ 186-94 (ICSID 2008) (holding that "fair and equitable treatment" standard breached when investor was subjected to a pattern of state harassment intended to deprive it of the benefit of rights under an international arbitral award, leading to a surrender of such rights under duress) (Ex. CL-7).

280 Devas Agreement at 2 § 3(c) (Ex. C-16). This represents a point of contrast to the *White Industries* case, where no allegation of agency was made with respect to the subject entity, Coal India.

endorsed the agreement as being consistent with government policy (*see supra* ¶ 55),[281] but Antrix purportedly also undertook to terminate the Devas Agreement upon the instructions of the Space Commission and under the direction of the Department of Space (*see supra* ¶ 92-94). These facts all indicate that Antrix has acted as agent of DOS/ISRO.[282] Accordingly, in assessing Respondent's liability, Antrix's various actions, including its executives' repeated assurances of support for the Devas System and its subsequent cynical adoption of the manufactured *force majeure*, should be directly attributed to Respondent.[283] And even if Antrix were regarded as separate from the Indian Government, the integrated DOS/ISRO/Antrix management structure means that any knowledge imputed to Antrix must also be imputed to Respondent.

---

281 *Cf. Maffezini v. Spain*, No. ARB/97/7, Award ¶¶ 78, 83 (ICSID 2000) (English translation) (certain actions of Spanish industrial development company, Sociedad para el Desarrollo Industrial de Galicia Sociedad Anonima (SODIGA) were attributable to the State when they involved "implementation of government policies relating to industrial promotion," including activities regarding a particular loan) (Ex. CL-22).

282 *See, e.g.*, *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. United Arab Emirates*, No. 3572, Final Award (ICC 1982), *reprinted in* Sigard Jarvin et al., *Collection of ICC Arbitral Awards 1986-1990* 154, 162 (1994) (holding Government and Rakoil "jointly and severally liable" where "Rakoil must be seen as an instrument chosen by the Government to enjoy certain rights and discharge certain obligations on behalf of the Government, but not to the exclusion of the Government's own rights or obligations.") (Ex. CL-9); *Wintershall A.G. v. Qatar*, Partial Award on Liability at 27-28 (*Ad hoc* tribunal 1988), 28 I.L.M. 798, 811-12 (1989) (although national oil company had a separate legal personality under Qatari law, it was "'an arm or agent of the Government in respect of the concession areas held by it'") (Ex. CL-39); *Nykomb* § 4.2 (finding that Latvia "must be considered responsible for Latvenergo's [a state enterprise's] actions under the rules of attribution in international law" where "Latvenergo cannot be considered to be, or to have been, an independent commercial enterprise, but clearly [sic] a constituent part of the Republic's organization of the electricity market") (Ex. CL-26).

283 Respondent's liability for violations of the Treaty is readily established even before considering Antrix's status, for the reasons already set forth above and based on the expropriatory and other conduct of the PMO, CCS, Space Commission, DOS, ISRO and the numerous officials and representatives of these organizations.

215. By reason of each and all of the above matters, Respondent has violated the "fair and equitable" guarantees in the first sentence of Article 4(1) of the Treaty.

C. The Measures Were "Unreasonable," In Breach of Article 4(1)

216. The measures adopted by Respondent furthermore violated the second sentence of Article 4(1) of the Treaty, which prohibits a host state 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."

217. In *Rumeli*, an unjustifiable termination of the foreign investor's interest in a joint venture for the provision of mobile telecommunications services was held to constitute an "unreasonable" measure in breach of the Turkey-Kazakhstan BIT.[284] The Tribunal held:

> [T]he standard of "reasonableness" has no different meaning than the "fair and equitable treatment" standard "*with which it is associated.*" Reasonableness therefore requires that the State's conduct "*bears a reasonable relationship to some rational policy . . . .*"[285]

218. In *Rumeli*, the fact that a measure violated the "fair and equitable" treatment protection meant that it also was "unreasonable" and also (in the circumstances of that case) "discriminatory." Precisely the same conclusions are open in this case, for the reasons already set forth above. (*See supra* ¶¶ 199-215.)

219. In *CME*, the state "Media Council" took a series of state measures, all intended to deprive the Dutch investor of the use and enjoyment of a license. The *CME*

---

[284] *Rumeli* ¶ 681 (Ex. CL-29). The relevant obligation in *Rumeli*, imported via the MFN clause, was "the obligation not to impair by unreasonable, arbitrary, or discriminatory measures the management, maintenance, use, enjoyment, or disposal of such investments." *Id.* ¶ 575.

[285] *Id.* ¶ 679 (footnote omitted) (quoting *Saluka* ¶ 460 (Ex. CL-31)).

tribunal found that the State Media Council's actions were "unreasonable" measures in violation of the Treaty:

> On the face of it, the Media Council's actions and inactions in 1996 and 1999 were unreasonable as the *clear intention* of the 1996 actions was to *deprive the foreign investor of the exclusive use of the Licence* under the [Memorandum of Agreement] and the clear intention of the 1999 actions and inactions was [to] collude with the foreign investor's Czech business partner to deprive the foreign investor of its investment.[286]

220. The substantive holdings of the UNCITRAL tribunal in *BG Group v. Argentina* (none of which were considered, much less impugned, by any subsequent post-award proceedings),[287] endorsed the view that "unreasonableness" can be ascertained from the circumstances of the case:

> "[R]easonableness" should be measured against the expectations of the parties to the bilateral investment treaty, rather than as a function of the means chosen by the State to achieve its goals:
>
> > . . . As with the fair and equitable standard, the determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behaviour in light of the goals of the Treaty.
>
> . . . Thus, withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making an investments [sic] is by definition unreasonable and a breach of the treaty.[288]

---

286 *CME Liability* ¶ 612 (emphasis added) (Ex. CL-5).

287 The *BG Group* award is currently subject to post-award proceedings on recognition and enforcement, which are pending before the Supreme Court of the United States. The object of those proceedings does not involve the merits of the tribunal's substantive determinations, but certain matters concerning the jurisdiction of the tribunal.

288 *BG Group Plc. v. Argentina*, Final Award ¶¶ 342-43 (UNCITRAL 2007) (Ex. CL-3) (second alteration in original) (footnotes omitted) (quoting *CME Liability* ¶ 158 (Ex. CL-5)).

221. That same observation applies here: the nullification of an investment on specious grounds, through a fabricated and self-made *force majeure*, in direct contravention of numerous prior state approvals and assurances of support, is plainly "unreasonable."

D. The Measures Furthermore Were "Discriminatory," in Breach of Article 4(1)'s Second Sentence

222. Separately and independently,[289] the measures also violated Article 4(1) because they were "discriminatory." As indicated above, the facts indicate that Respondent's representatives have sought to justify Respondent's annulment of the Devas Agreement on the grounds that foreigners stood to gain from the investment. (*See supra* ¶¶ 133-134.)

223. In *CME*, the government took deliberate steps to undermine a foreign investor's use and enjoyment of a media license.[290] In *Saluka*, the host state treated a domestic bank owned by the foreign investor in a manner that was adverse to the treatment it provided to similarly-situated banks with domestic owners.[291] In both cases,

---

289 Importantly, a measure can violate Article 4(1)'s "unreasonableness" standard even if no "discrimination" occurred. In *Siag*, for example, an Egyptian state measure, annulling the right to use a hotel resort even though there was no basis for doing so, was an "unreasonable" measure in violation of the Italy-Egypt BIT, even though no discrimination was found. *See Siag* ¶ 459 ("The Tribunal has no hesitation in finding that many of the measures taken by Egypt in the course of this dispute were unreasonable in the ordinary meaning of that term.") (Ex. CL-32); *see also MTD Equity Sdn Bhd. v. Chile*, No. ARB/01/7, Award ¶ 196 (ICSID 2004) (declining to reach a holding on the claim that a decision by a state, reversing a prior policy to allow a given parcel of land to be used for urban development, was discriminatory, on the grounds that "[t]he approval of an investment against the Government urban policy can be equally considered unreasonable") (Ex. CL-25).

290 *See CME Liability* ¶ 612 (Ex. CL-5).

291 *See Saluka* ¶ 347 (Ex. CL-31).

it was held that the measures deliberately targeting a foreign investor were discriminatory and therefore a violation of the Netherlands-Czech BIT's ban on "discriminatory" measures, and the same conclusion applies here with respect to Article 4(1) of the Treaty.

E. India Failed to Provide Full Security and Protection to Claimants' Investments, As Required by the MFN Clauses in Articles 4(2) and 4(3)

224. Pursuant to the MFN clauses in Articles 4(2) and (3) of the Treaty,[292] Claimants are entitled to the protections set forth in Article 3(2) of the Serbia-India BIT, which provides that "[i]nvestments and returns of investors . . . shall enjoy full legal protection and security."[293]

225. As the *CME* tribunal explained, a "full security and protection" clause obligates the host state "to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued."[294] In this case, this standard has been violated by (1) the Cabinet's actions, and other affirmative acts, which caused a "withdrawal and devaluation" of the investment, and (2) the other numerous government acts described above that served as a pretextual basis for annulling the Devas Agreement. Accordingly, Respondent has violated the MFN provisions of Articles 4(2) and (3) of the Treaty.

---

292 *See supra* ¶ 162; *cf. White Indus.* ¶¶ 11.2.3-11.2.4 (Ex. CL-38).

293 Serbia-India BIT, art. 3(2) (Ex. CL-40).

294 *CME Liability* ¶ 613 (Ex. CL-5); *see also Azurix Corp. v. Argentina*, No. ARB/01/12, Award ¶¶ 406, 408 (ICSID 2006) (interpreting "full protection and security" guarantee as being broader than mere guarantee of "physical" security; noting that the word "full" extends the scope of protection such that "full protection and security may be breached even if no physical violence or damage occurs") (Ex. CL-2).

VI.
CLAIMANTS SHOULD BE AWARDED THEIR FEES AND COSTS FOR THIS PROCEEDING

226. The power of the Tribunal to award costs is set forth in Articles 38 and 40 of the UNCITRAL Rules 1976 (Ex. CL-41):

> *Article 38*
>
> The arbitral tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> (b) The travel and other expenses incurred by the arbitrators;
>
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague
>
> . . . .
>
> *Article 40*
>
> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such

costs between the parties if it determines that apportionment is reasonable.

227. In *Kardassopoulos*, it was said that "there is no reason in principle why a successful claimant in an investment treaty arbitration should not be paid its costs," which included "legal fees, experts' fees, administrative fees and the fees of the Tribunal."[295] The same principle applies to BIT cases governed by the UNCITRAL Rules, and, indeed, costs have been awarded to the successful party in cases governed by the UNCITRAL Rules (1976). As one UNCITRAL tribunal noted, the "more recent practice in investment arbitration [is] of applying the general principle of 'costs follow the event.'"[296]

228. Claimants respectfully submit that they should be awarded all of their legal fees, costs and other disbursements associated with this arbitration, as well as their share of the costs of the Tribunal and any costs associated with applications to the Appointing Authority.

VII.
RELIEF SOUGHT

229. Claimants respectfully request that the Arbitral Tribunal issue an award:

(a) Declaring that the Tribunal has jurisdiction over all of Claimants' claims;

(b) Declaring that Respondent has unlawfully expropriated Claimants' investments, in breach of Articles 6 and 7 of the Mauritius-India BIT;

---

[295] *Kardassopoulos* ¶¶ 689, 692 (Ex. CL-20); *see also Gemplus* ¶ 17-24 ("[T]he Tribunal decides to apply the general principle that the Claimants, as the successful party, should recover their costs from the Respondent, as the unsuccessful party.") (Ex. CL-15); *ADC* ¶ 542 (awarding costs to successful claimant) (Ex. CL-1).

[296] *Chevron Corp v. Ecuador*, Final Award ¶ 375 (UNCITRAL 2011) (Ex. CL-4).

(c) Declaring that Respondent has failed to accord fair and equitable treatment to the Claimants' investments, in violation of Article 4(1) of the Mauritius-India BIT;

(d) Declaring that Respondent has engaged in unreasonable and/or discriminatory measures with respect to Claimants' investments, in violation of Article 4(1) of the Mauritius-India BIT;

(e) Declaring that Respondent has failed to provide full legal protection and security with respect to Claimants' investments, in violation of the "most favored nation" provisions of Articles 4(2) and 4(3) of the Mauritius-India BIT, which incorporate Article 3(2) of the Serbia-India BIT;

(f) Declaring that Respondent is liable to pay the costs of these proceedings to date; and

(g) Ordering that these proceedings continue for the purposes of determining the reparations due to Claimants, including a determination of the damages owed to Claimants, and the allocation of costs and other matters related to quantum.

Dated: July 1, 2013

Respectfully submitted,

John L. Gardiner
Timothy G. Nelson
Elizabeth Hellmann
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
U.S.A.
Telephone: +1-212-735-3000
Facsimile: +1-212-735-2000

SKADDEN, ARPS, SLATE
MEAGHER & FLOM (UK) LLP
David Kavanagh
40 Bank Street
Canary Wharf
London, E14 5DS, England
Tel: +44.20.7519.7000
Fax: +44.20.7519.7070

Claimants' Legal Representatives