UNCITRAL ARBITRATION

PCA CASE NO. 2013-09

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

CLAIMANTS

V.

THE REPUBLIC OF INDIA

RESPONDENT

RESPONDENT'S STATEMENT OF DEFENCE

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2 December 2013

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TABLE OF CONTENTS

INTRODUCTION

1. The Republic of India ("Respondent") submits this Statement of Defence in response to the Statement of Claim filed by CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited ("Claimants"), in accordance with Procedural Order No. 1 issued by the Tribunal on 16 October 2013.[1]

2. This case arises out of the policy decision taken by the Government of India to reserve S-band spectrum for strategic use. As a consequence of that policy decision, the Government denied an orbital slot for satellites intended to use S-band for commercial purposes and annulled a contract between an Indian private company in which Claimants are shareholders, Devas Multimedia Private Limited ("Devas"), and an Indian state-owned company, Antrix Corporation Limited ("Antrix"), for the lease of spectrum capacity in S-band on two satellites that were to be built and launched by the Indian Space Research Organisation ("ISRO").[2]

3. This is one of two arbitrations instituted by Claimants and Devas arising out of the same set of facts. Both cases present an abuse of the international arbitral process.

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[1] References herein in the form "**Ex. R-__**" are to the factual and legal exhibits filed by Respondent in this Arbitration; those in the form "**Ex. C-__**" and **Ex. CL-__**" are to the exhibits filed by Claimants. In accordance with section 3(a)(iii) of Procedural Order No. 1, all legal authorities that are publicly available are not being filed with this Statement of Defence. The investment treaty awards may be found at italaw.com, the ICJ decisions may be found at icj-cij.org, the European Court of Human Rights decisions may be found at echr.coe.int and all UN documents are available at un.org.

[2] **Ex. R-1**, Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft by Devas Multimedia Private Limited, 28 January 2005, as amended on 27 July 2006 (the "Devas Contract"). In parts of the Statement of Claim, Claimants seek to create the impression that Government agencies were parties to the Devas Contract. *See, e.g.,* Statement of Claim, ¶ 4. That was not the case, as is evident from a simple reading of the Devas Contract. *See* ¶¶ 17, 143-154, *infra*.

4. The first arbitration was instituted by Devas itself, apparently at the behest of these Claimants (although not necessarily the other major shareholder of Devas, Deutsche Telekom Asia ("DTA")),[3] against Antrix under the Devas Contract, an arbitration devoid of merit as demonstrated in the Statement of Defence filed by Antrix in that case on 15 November 2013.[4] Apart from the fact that Devas has no viable claim, the most striking aspect of the Devas Arbitration is that Devas seeks the astronomical sum of US$1.6 billion for a business that never got off the ground, had made virtually no investment, faced stiff competition, had not obtained its most important governmental approvals, was dependent upon satellites that had not yet been launched and were already two years delayed as of the date of termination of the Devas Contract, would have a net negative cash flow even under its own expert's overly optimistic projections for at least the first nine years of operation if it ever did get off the ground, would barely have a positive net present value even under those same overly optimistic cash flow projections using any remotely appropriate discount rate, and would have a negative net present value once any number of additional costs that were certain to be incurred were accounted for or any number of necessary adjustments to the unrealistic revenue

[3] Strangely, DTA, which did not join Claimants in this Arbitration, has now instituted yet a third arbitration arising out of the same facts, also against the State but under the bilateral investment treaty between Germany and India.

[4] In order for this Tribunal to have the complete picture of Claimants' attempts to obtain compensation based on false premises, unsubstantiated allegations and erroneous legal theories, Respondent is submitting herewith as **Ex. R-2** the Statement of Claim filed by Devas ("Devas ICC Statement of Claim") in *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK (the "Devas Arbitration"), and as **Ex. R-3** the Statement of Defence filed by Antrix ("Antrix ICC Statement of Defence") in the Devas Arbitration. Claimants seem to find relevance in Antrix's decision to challenge jurisdiction in the Devas Arbitration through legal channels, characterising Antrix's position as "absurd." Statement of Claim, ¶ 140. The Tribunal is invited to review the Devas ICC Statement of Claim and the Antrix ICC Statement of Defence and see for itself which side is making absurd arguments.

assumptions used by Devas' economic expert were made.[5] Indeed, Devas' damage claim in the Devas Arbitration is nothing short of stunning in its boldness, but the validity of claims in international arbitration is not supposed to be assessed based on shock value.

5. Apparently impatient with the progress of the Devas Arbitration, Claimants decided to institute this Arbitration, formulating claims under the Mauritius-India bilateral investment treaty.[6] But despite Claimants' efforts to transform a contract claim into a treaty violation, this Arbitration is no more meritorious than the Devas Arbitration.

6. In both cases, Claimants have spun a tale of bad deeds by Antrix and an array of Government officials that dashed the hopes and dreams of Devas and its shareholders for a pan-India hybrid satellite-terrestrial multimedia empire. In the Devas Arbitration, the claim is for alleged breach of the Devas Contract. Here Claimants make rote investment treaty allegations to paint this as a garden-variety expropriation case, throwing in pro forma claims that Respondent violated the fair and equitable treatment ("FET"), most favoured nation ("MFN"), and unreasonable and discriminatory treatment provisions of the Mauritius Treaty.[7] As demonstrated herein, both cases are based upon false factual premises and neither can be sustained as a matter of law.

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[5] *See* **Ex. R-3**, Antrix ICC Statement of Defence, ¶¶ 155-161. These and other points relevant to this case are elaborated on in the expert report on valuation submitted by Antrix in the Devas Arbitration. **Ex. R-4**, Expert Report on Valuation, Vladimir Brailovsky and Daniel Flores, filed in the Devas Arbitration on 15 November 2013 ("Antrix ICC Expert Report on Quantum").

[6] **Ex. C-1**, Agreement between the Republic of India and The Republic of Mauritius for the Promotion and Reciprocal Protection of Investments, signed on 4 September 1998 and entered into force on 20 June 2000 (the "Mauritius Treaty").

[7] Among the rote allegations is the one made at the outset of the Statement of Claim concerning the benefits Claimants were supposedly providing to India, proposing to make use of S-band spectrum that "had lain fallow for years." Statement of Claim, ¶ 4. Later, Claimants arrogantly state that "Mr. Viswanathan wrote to all members of the Space Commission in 2010 to emphasize the importance of the Devas system to India." *Id.*, ¶ 104. Such allegations of so-called benefits to host countries and knowing what is best for them are typical of claimants seeking to manufacture claims under investment

7. With respect to factual premises, Claimants repeatedly argue that the Government's policy decision to reserve S-band for strategic use was a "contrived," "concocted," "engineered" and "fabricated" *force majeure* designed purely and simply to extricate Antrix from commercial commitments for financial reasons, and that the Government acted arbitrarily because there were no legitimate national security reasons for reserving S-band for strategic purposes. The extensive documentary record submitted with this Statement of Defence leaves no doubt that those allegations, which underlie Claimants' argument here and Devas' argument in the Devas Arbitration, are divorced from reality.[8] The record shows that, notwithstanding Claimants' allegations, there have been competing demands for S-band capacity from the military and other security agencies since even before the Devas Contract was entered into.[9] Those demands continued to escalate until they were crystallised in December 2009, after extensive discussions among all governmental departments concerned demonstrating that, given the limited S-band spectrum available to India,[10] there was no way of satisfying the national security needs of the nation if the Devas Contract were to proceed.[11] Once this basic point is understood, Claimants' entire case collapses, as every single argument they make stems from the same untenable premise that the

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treaties. In this case, not only are the allegations baseless, but they are plainly irrelevant. Whether or not the Devas Contract made sense in 2005 and whether or not it would have benefitted India had the authorisations for the use of S-band spectrum for the commercial purposes of the Devas Contract been obtained has no bearing on the central legal issue in this case, which is whether the Government had the right to decide to reserve that spectrum for non-commercial, strategic use.

[8] *See* ¶¶ 16-75, *infra*.

[9] *See* ¶¶ 31-38, *infra*.

[10] Direct Testimony of Mr. A. Vijay Anand, Joint Secretary, Department of Space, Government of India, 2 December 2013 ("Anand Witness Statement"), **App. VA-10**, Minutes of Meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO, 25 January 2010.

[11] *See* ¶¶ 39-57, *infra*.

Government's policy decision to reserve S-band for non-commercial, strategic use was a "sham."

8. The second false factual premise underlying both this Arbitration and the Devas Arbitration is that Devas had some sort of acquired right to proceed with the Devas Contract uninterrupted by any governmental action. A simple review of the Devas Contract, which is the asset that Claimants allege was expropriated, shows that no such right existed.[12] The relevant features of the Devas Contract defining exactly the scope of the rights Devas had are the following:

- The parties to the Devas Contract are clearly defined as Devas and Antrix.[13] Neither ISRO nor the Department of Space, the Department of Telecommunications, the Space Commission, the Prime Minister or the Cabinet Committee on Security (the committee of the Cabinet that took the decision to reserve the S-band capacity and annul the Devas Contract) or any other governmental body is a party.

- Throughout the Devas Contract, the parties recognised the distinction between Antrix and the Government, acknowledging the role of the Government as regulator and not as party to the Devas Contract.[14]

- The Devas Contract concerned the lease of space segment capacity in the S-band spectrum. It did not deal with the terrestrial aspect of the services that Devas had intended to provide.[15]

- Antrix was responsible under the Devas Contract for obtaining regulatory approvals relating to orbital slot and frequency clearances for the satellites.[16] Devas was "solely responsible for securing and obtaining all licenses and approval[s] (Statutory or

[12] *See* ¶¶ 16-30, 99-105, 135, 155, *infra*.

[13] **Ex. R-1**, Devas Contract, p. 1.

[14] *See* ¶¶ 17, 145, *infra*.

[15] Direct Testimony of Mr. K. Sethuraman, Associate Director, ISRO, 2 December 2013 ("Sethuraman Witness Statement"), ¶¶ 5, 10. *See* ¶¶ 62-66, *infra*.

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

otherwise) for the delivery of Devas Services via satellite and terrestrial network."[17]

- The Devas Contract contained a comprehensive set of provisions outlining the rights and obligations of the parties in the event of termination, including termination due to the withholding of required governmental approvals or licences.[18] In all cases, Article 7 of the Devas Contract limited the consequences of such termination exclusively to either the retention or the refund of the Upfront Capacity Reservation Fees paid by Devas to Antrix.[19]

- Among the termination provisions was one expressly anticipating the possibility that Antrix might be denied the required orbital slot for the satellites. In that circumstance, the provision called upon Antrix to refund the Upfront Capacity Reservation Fees already paid, which Antrix attempted to do, only to be rebuffed by Devas, which disputed the applicability of that provision and claimed breach.[20] But even under the provision addressing the consequences of material breach by Antrix, the exclusive remedy that Devas agreed to in the Devas Contract was the same refund of paid Upfront Capacity Reservation Fees.[21]

- The Devas Contract also contained a *force majeure* clause covering a wide range of situations, including "acts of or failure to act by any governmental authority acting in its sovereign capacity,"[22] which again shows that the parties were cognizant of the fact that the Government reserved the right to take sovereign decisions affecting the Devas Contract, including the denial of approvals and licences.[23] It is hard to imagine a more sovereign decision regarding S-band than the decision to reserve capacity for national security purposes.[24]

- The Devas Contract made clear that it was governed by the laws of India, and under Indian law there is no doubt that Devas had no

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

[18] *Id.*, Article 7.

[19] *See* ¶¶ 20-28, 60-61, *infra*.

[20] *See* ¶¶ 59-61, *infra*.

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

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

[23] *See* ¶¶ 29, 145, 155, *infra*.

[24] *See* **Ex. R-3**, Antrix ICC Statement of Defence, ¶¶ 100-124.

right to compensation in excess of a refund of paid Upfront Capacity Reservation Fees.[25]

9. Significantly, what the Devas Contract did not contain was any provision or indication whatsoever that the Government was restricted from taking policy decisions that could affect the Devas Contract or, indeed, that there was any other commitment on the part of the Government. That included any commitment on the use of S-band capacity or the manner in which the burgeoning strategic needs of the nation would be met.[26]

10. Thus, Claimants' case is based on an expropriation of a right that never existed. Not satisfied with the refund of the Upfront Capacity Reservation Fees that Antrix tendered upon termination of the Devas Contract, which was the maximum compensation Devas could ever have legitimately expected under the provisions it had freely and heavily negotiated with Antrix,[27] Claimants now seek to expand the rights of Devas by inventing an alternative basis for their surrealistic compensation claim. But if Devas itself did not have such expanded contract rights, Claimants cannot acquire greater rights by claiming expropriation or any of their other afterthoughts under the Mauritius Treaty.[28]

11. While it is clear that Claimants have no claim under the substantive provisions of the Mauritius Treaty, there are two threshold issues that preclude the

[25] **Ex. R-1**, Devas Contract, Article 19. *See* **Ex. R-3**, Antrix ICC Statement of Defence, ¶¶ 138-142.

[26] Claimants repeatedly argue that a 2004 commission considered that the proposed use of S-band for the Devas Contract would be beneficial for the nation. Statement of Claim, ¶¶ 55, 124, 181. That was long before the security needs of the nation were crystallised. *See* n. 348, *infra*. In any event, there is no legal content to that argument, even if factually correct. Claimants do not argue that there was any kind of commitment on the part of the Government that might be analogised to a stabilisation clause binding the Government not to adopt policies regarding national security that might affect the Devas Contract. The very statement of that proposition shows how untenable it is. *See* ¶ 130, *infra*.

[27] *See* ¶¶ 22-28, *infra*.

[28] *See* ¶¶ 99-172, *infra*.

claims asserted herein: the "essential security interests" provision of Article 11(3)[29] and the fact that the Mauritius Treaty, like most other investment treaties, does not cover pre-investments.[30] There can be no genuine dispute as to the facts relevant to both of these issues, which are largely the same as the facts negating any of Claimants' substantive claims.

12. With respect to the essential security interests issue, the Tribunal will recall that Respondent pointed out from the outset that Article 11(3) of the Mauritius Treaty will be directly at issue in this case.[31] Now Respondent has documented this point with an extensive record leaving no doubt that the policy decision challenged by Claimants here was "directed to the protection of [India's] essential security interests."[32] It is difficult to fathom an argument that a policy decision taken at the highest levels of the Indian Government, after extensive consultation with the entire national security hierarchy, that the security interests of the nation required reservation of S-band for strategic, non-commercial purposes was somehow not a decision "directed to the protection of [India's] essential security interests." Given that it was precisely such a decision, Article 11(3) of the Mauritius Treaty, which expressly states that "[t]he provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is

[29] **Ex. C-1**, Mauritius Treaty, Article 11(3). *See* ¶¶ 76-89, *infra.*

[30] *See* ¶¶ 90-98, *infra.*

[31] Transcript of the First Procedural Meeting, 15 May 2013, p. 37 ("First, to clarify, we will be raising the essential security provision of the India-Mauritius treaty in this case. It will be an issue. This is not a likelihood; it will be an issue."). *See also* Respondent's E-mail to the Tribunal, dated 11 May 2013.

[32] **Ex. C-1**, Mauritius Treaty, Article 11(3). *See* ¶¶ 31-38, *infra.*

directed to the protection of its essential security interests,"[33] precludes the claims asserted by Claimants in this Arbitration.

13. It is also clear that the Mauritius Treaty does not provide for pre-investment protection.[34] In this case, Claimants were fully aware that the project could not be implemented without, and was totally dependent upon, Government approvals and licences that both sides, Devas and Antrix, required. There is no dispute that the necessary orbital slot for the satellites was denied to Antrix, and there is no dispute that Devas never even reached the stage of applying for the frequency authorisation and operating licence that it required to engage in the hybrid space/terrestrial services it proposed to provide.[35] Everything done prior to obtaining such approvals and licences falls within the category of "pre-investment" activity not covered by the Mauritius Treaty. In other words, even if the Government had no reason at all to deny the necessary approvals and licences, which the record shows is obviously not the case, there could be no claim here under the Mauritius Treaty.

14. Apart from the foregoing threshold issues, each of which independently warrants dismissal of this case, Respondent will demonstrate herein that in any event none of the claims based on the expropriation,[36] FET,[37] MFN[38] and unreasonable and discriminatory treatment[39] provisions of the Mauritius Treaty has any merit.

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[33] **Ex. C-1**, Mauritius Treaty, Article 11(3).

[34] *See* ¶¶ 90-98, *infra.*

[35] *See* ¶¶ 62-66, *infra.*

[36] *See* ¶¶ 99-120, *infra.*

[37] *See* ¶¶ 121-156, *infra.*

[38] *See* ¶¶ 166-172, *infra.*

[39] *See* ¶¶ 157-165, *infra.*

15. Finally, although it was agreed at the procedural hearing in this case that quantum would be deferred to a second stage of this Arbitration (if a second stage were ever to be reached), quantum is already being fully briefed and litigated in the Devas Arbitration along with all other issues. While there is no need to change the procedural order in this case, this Tribunal may note from the papers filed by both sides in the Devas Arbitration that the US$1.6 billion damage claim is pure fantasy.[40]

STATEMENT OF FACTS

A. The Devas Contract

16. The Devas Contract, which was executed on 28 January 2005, provided for the lease to Devas of transponders on satellite GSAT-6, referred to in the Devas Contract as Primary Satellite 1 or PS1.[41] It also contained an option for Devas to lease transponders on a second satellite, GSAT-6A, referred to in the Devas Contract as Primary Satellite 2, or PS2.[42]

17. The parties to the Devas Contract were Devas, an Indian start-up limited liability company with the minimum paid-up capital required by Indian law and no significant assets,[43] and Antrix, a company incorporated under the Indian Companies

[40] **Ex. R-4**, Antrix ICC Expert Report on Quantum, ¶¶ 17-167.

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

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

[43] At the time of its formation on 10 December 2004, and at the time the Devas Contract was executed on 28 January 2005, Devas had a minimum authorised and paid-up share capital of INR 1,00,000 (Rupees). *See* **Ex. R-5**, Articles of Association of Devas Multimedia Private Limited, 10 December 2004, Articles 2 and 3; **Ex. R-6**, Memorandum of Association of Devas Multimedia Private Limited, 10 December 2004, Clause V. Thereafter, following its initial rounds of financing, pursuant to which Columbia Capital LLC and Telcom Ventures LLC, two U.S. companies that formed Mauritius entities through which the funds were channelled, Devas increased its authorised share capital. *See* **Ex. R-7**, Articles of Association of Devas Multimedia Private Limited, as amended 9 June 2007, Articles 4 and 5; **Ex. R-8**, Memorandum of Association of Devas Multimedia Private Limited, as amended 9 June 2007, Clause V. Subsequently, changes were made to the Articles of Association and Memorandum of Association when DTA became a

Act and wholly owned by the Government of India.[44] The role of the Government in connection with the Devas Contract, as is apparent from the Devas Contract terms themselves, was that of a regulator. That is why the Devas Contract refers to and defines "Governmental or Regulatory Authority" as "any Government state or Central, municipality, local authority, town, village, court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of India," and defines "Regulatory Approval" as "any and all approvals, licenses, or permissions from Governmental or Regulatory Authorities."[45]

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

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

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shareholder in 2008, upon the formation of Devas Employees Mauritius Private Limited (a vehicle through which the founders and employees would own shares of Devas), and a capital call that Devas made in July 2009. *See* **Ex. R-9**, Articles of Association of Devas Multimedia Private Limited, as amended 29 September 2009, Articles 4 and 5; **Ex. R-10**, Memorandum of Association of Devas Multimedia Private Limited, as amended 29 September 2009, Clause V.

[44] **Ex. R-11**, Antrix Corporation Limited, *Company Overview*.

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

> However the cost of obtaining such approvals shall be borne by DEVAS.[46]

19. Under the Devas Contract, Devas was to pay an "Upfront Capacity Reservation Fee" prior to the launch of each satellite and lease fees thereafter.[47] The aggregate amount of the Upfront Capacity Reservation Fee was to be US$20 million per satellite, to be paid in three equal instalments.[48] The first such instalment was due upon notice from Antrix that it had received all necessary approvals for the capacity lease service for the satellite.[49]

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

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[46] *Id.*, Article 3(c). In their Statement of Claim, Claimants refer to a letter sent by Devas to Antrix on 11 October 2010 requesting "that ISRO/Antrix support and provide assistance with Devas's application to the WPC." Statement of Claim, ¶ 106. Similarly, in the Devas Arbitration, Devas stated that the Department of Space, ISRO and Antrix would "sponsor and co-ordinate the submission of Devas' operating licence application" to the Wireless Planning Co-Ordination Wing of the Department of Telecommunications. **Ex. R-2**, Devas ICC Statement of Claim, ¶ 113. However, the Devas Contract makes clear that neither the Department of Space nor ISRO had any role to play in connection with Devas' licensing activities, and the role of Antrix was strictly limited to providing "appropriate technical assistance," which it did. **Ex. R-1**, Devas Contract, Article 3(c). As discussed below, Devas never applied for the required operating licence. *See* ¶¶ 62-66, *infra*. Because the use of the S-BSS frequencies for terrestrial services, which is a part of what Devas hoped to accomplish with its hybrid multimedia system, was not permitted under Indian policy at the time (except to the extent that 40 MHz of S-band had been allocated to the Department of Telecommunications in the early 2000s for such purposes), any such efforts at obtaining a licence for the terrestrial aspects of its purported business would have required an exception to or change in India's policy. *See* Sethuraman Witness Statement, ¶¶ 6-15. *See also* n. 161, *infra*.

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

[48] *Id.*, Exhibit B, Article 2.1.1.

[49] *Id.*

Article 7. Termination

a. Termination for convenience by DEVAS

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

b. Termination by DEVAS for fault of ANTRIX

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

c. Termination for convenience by ANTRIX

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

d. Termination by ANTRIX for fault of DEVAS

ANTRIX may terminate this Agreement at any time if:

i. DEVAS is in material breach of any provisions of this Agreement and DEVAS has failed to cure the breach within

three months after receiving notice from ANTRIX regarding such breach or,

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

iii. In the event that:

a. A liquidator trustee or a bankruptcy receiver or the like is appointed by a competent court and such appointment remains un-stayed or un-vacated for a period of 90 (ninety) days after the date of such order by a competent court in respect of DEVAS, or

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

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

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

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

e. Termination under Special Circumstances

In the event of two successive Launch Failures of PS1 by ANTRIX, DEVAS shall have the option, exercisable in its sole discretion, to (a) either terminate this Agreement, in which event ANTRIX agrees to immediately reimburse DEVAS all the Upfront Capacity Reservation Fees for PS1 received by ANTRIX till that date, and after that, neither

> Party shall have any further obligation to the other Party under this Agreement, or (b) forego the refund of the Upfront Capacity Reservation Fees and service taxes and request ANTRIX to launch a satellite within 24 months of the exercise of this option, based on mutually agreed-upon terms.
>
> f. General Provisions
>
> Termination of this Agreement for any reason whatsoever, shall not extinguish the rights and obligations of Parties under clauses related to Arbitration (Article 20), Confidentiality (Article 18) and obligations related to refund/payment of monies that have accrued before termination, and they shall survive termination and or expiry of this Agreement for a further period of 5 (five) years or fulfillment of these terms whichever is later.[50]

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

22. The Devas Contract's detailed termination provisions, including the limitation of liability in the event of termination, were heavily negotiated. Devas proposed a "definitive binding term sheet" on 20 September 2004 that included terms that Mr. Viswanathan claims were consistent with the parties' discussions to that date, but neither he nor Claimants provided the proposed "definitive binding term sheet" itself

[50] *Id.*, Article 7.

to this Tribunal.[51] Indeed, it is quite remarkable that Claimants purported to provide a Statement of Facts setting forth a comprehensive history of this matter without any discussion of the clear negotiating and drafting history of the Devas Contract itself. The reason is apparent from a review of the term sheet, which includes provisions that Devas hoped to obtain but that are a far cry from what it actually obtained in the negotiations. The difference between the termination provisions Devas proposed and those agreed to by the parties in Article 7 of the Devas Contract establishes that, as a result of the negotiations, it was the parties' mutual intention and agreement in light of the risks each faced at the time the Devas Contract was executed to limit liability in the event of a termination to the retention or refund by Antrix of the Upfront Capacity Reservation Fees paid to date.

23. With respect to termination, subparagraph 1 of Section 2.7, "Termination and Effects of Termination," of Devas' proposed binding term sheet provided that "ANTRIX shall not be entitled to terminate this Binding Term Sheet or the Definitive Agreements, except for non-payment of fees by DEVAS,"[52] thereby precluding

[51] Witness Statement of Ramachandran Viswanathan, 29 June 2013 ("Viswanathan Witness Statement"), ¶¶ 48-49. That term sheet was sent to Mr. K. R. Sridhara Murthi of Antrix and Dr. A. Bhaskaranarayana of ISRO by e-mail on 20 September 2004. *See* **Ex. R-12**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, with attached "binding term sheet." An earlier draft had been presented to Antrix and ISRO on or about 12 September 2004. *See* **Ex. R-13**, Draft of "Binding Term Sheet" received on or about 12 September 2004. This earlier draft identified ISRO as the "Vendor." *Id.*, Section 1.1. In two e-mails to Dr. M. G. Chandrasekar, who was working with Mr. Viswanathan on behalf of Devas, Mr. M. N. Sathyanarayana of ISRO provided comments on the earlier term sheet, noting, *inter alia*, that the Vendor should be "Antrix and not ISRO"; that "[t]o my limited understanding, the entire set of points under this clause," referring to Section 2.7 (entitled "Termination and effects of termination"), "appears to be one sided"; that, as a general matter, "ANTRIX cannot take the responsibility for obtaining clearances and approvals from statutory bodies and departments of the Government of India"; and that "the feeling is that the proposal is extremely one sided and highly demanding." *See* **Ex. R-14**, E-mail from ISRO to Devas, 14 September 2004; **Ex. R-15**, E-mail from ISRO to Devas, 20 September 2004. Devas also submitted a witness statement of Mr. Viswanathan in the Devas Arbitration, again without introducing the proposed binding term sheet. **Ex. R-16**, Witness Statement of Ramachandran Viswanathan in the Devas Arbitration, 20 February 2012, ¶ 42.

[52] **Ex. R-12**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, Section 2.7.1.

termination by Antrix for any other breach by Devas or the inability of Antrix to obtain orbital slot or frequency coordination, or for reasons of governmental action that would prevent Antrix from performing.[53] Devas then proposed a series of provisions that would have obligated Antrix to pay significant liquidated damages, in addition to refunding amounts that may have been paid by Devas to Antrix, in case of termination for any reason other than Devas' non-payment of fees. Section 2.7 of the term sheet provided as follows:

> 2. In the event that ANTRIX terminates the Definitive Agreement for any other reason following signature of Definitive Agreements and prior to DEVAS raising its institutional financing, ANTRIX shall refund to DEVAS all the amounts paid by DEVAS to ANTRIX for any reason whatsoever, plus liquidated damages of INR 460 million for investment in the business and related losses including but not limited to investments, capital raising costs, lost business opportunities, reputation loss, penalties, development costs, mobile receiver and terrestrial repeater development, infrastructure costs, severances, and vendor and dealer negotiation costs[.]
>
> 3. In the event that ANTRIX terminates the Definitive Agreement for any other reason following signature of Definitive Agreements and after DEVAS has raised its first institutional round of funding, ANTRIX shall refund to DEVAS all the amounts paid by DEVAS to ANTRIX for any reason whatsoever, plus liquidated damages of INR 6.9 billion for investment in the business and related losses including but not limited to investments, capital raising costs[,] lost business opportunities, reputation loss, penalties, development costs, mobile receiver and terrestrial repeater

[53] The term sheet contained no *force majeure* provision. It also stated that "DEVAS shall not be entitled to terminate this Binding Term Sheet or the Definitive Agreements." *Id.*, Section 2.7.1. This was added to the earlier draft term sheet that Devas had provided to Antrix and ISRO on or about 12 September 2004, after Mr. Sathyanarayana advised Dr. Chandrasekar that the term sheet, and in particular the termination provisions, were "one-sided." *See* **Ex. R-14**, E-mail from ISRO to Devas, 14 September 2004. As will be seen, even though Devas added this language to provide the appearance of mutuality, the term sheet did not provide for any consequences in the event that Devas were to terminate the agreement, which stood in stark contrast to the onerous liquidated damages Devas wanted Antrix to pay in the event of a termination by Antrix for reasons other than non-payment of fees.

> development, infrastructure costs, severances, and vendor and dealer negotiation costs[.][54]

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

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

[54] **Ex. R-12**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, Sections 2.7.2-2.7.3 (emphasis added). At the prevailing exchange rate on 20 September 2004 of US$1 = INR 45.74, the liquidated damages figures amounted to approximately US$10 million (in subparagraph 2) and US$150 million (in subparagraph 3). These amounts were on top of the refund of the fees paid by Devas to reserve the space capacity and any other payments that Devas may have made to date.

[55] *Id.*, Sections 1.5.1(c), 2.7.5. While the term sheet recognised that Devas was to obtain the operating licence that would be required (*id.*, Section 1.5.1(d)), it provided that the "frequency allocation," for which Antrix would be required to obtain "clearances, licenses, and other approvals" under Section 1.5.1(c), was "inclusive of terrestrial augmentation." *Id.*, Section 1.3.2 (defining "Frequency Allocation"). Thus, under the provisions of the term sheet proposed by Devas, the risk of not obtaining a licence due to lack of governmental approval for the use of spectrum for space or terrestrial services fell on Antrix, not Devas, and was a risk for which Antrix would bear exposure to liquidated damages. The Devas Contract that was ultimately negotiated changed this allocation of responsibilities for obtaining licences and approvals. While Antrix was responsible under the Devas Contract for obtaining "Governmental and Regulatory Approvals relating to orbital slot and frequency clearances, and funding for the satellite," its obligation regarding "required operating licenses and Regulatory Approvals from various ministries so as to deliver DEVAS services via satellite and terrestrial networks" was limited to providing "appropriate technical assistance" on "a best effort basis" to Devas, which was responsible for obtaining such licences and approvals. **Ex. R-1**, Devas Contract, Article 3(c). Therefore, under the Devas Contract, in contrast to the term sheet, Devas bore the risk of not obtaining the necessary licences and frequency allocations.

> development, infrastructure costs, severances, and vendor and dealer negotiation costs.[56]

25. There was nothing in Devas' proposed binding term sheet that provided for liquidated damages running from Devas to Antrix in the event that Devas were to terminate the agreement for its convenience or in the event of breach by Devas. Indeed, under the term sheet, Devas was entitled to rescind the agreement "without affecting its accrued rights (if any) against ANTRIX, but without incurring any liability for such rescission," for a number of reasons, including lack of requisite approvals.[57]

26. Not surprisingly, the lopsided termination and liability provisions proposed by Devas in the term sheet were subjected to negotiation alongside other provisions. For example, a later iteration of the term sheet provided for a degree of mutuality in that it set liquidated damages at equal amounts in the event of termination by either party.[58] However, a term sheet was never executed, and the parties instead proceeded to the negotiation of the Devas Contract itself.[59] The result was Article 7, which not only provides for mutuality, but also for a single remedy – either retention by Antrix of the Upfront Capacity Reservation Fees or their refund to Devas – in the event of termination for any reason, whether for breach by one or the other of the parties (Articles 7(b) and 7(d)) or due to non-approval by the Government of a matter for which one of the parties was responsible (Articles 7(a) and 7(c)) or otherwise (Article 7(f)). The liquidated damages that Devas sought to impose in its one-sided term sheet – to cover its

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[56] **Ex. R-12**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, Section 2.7.5 (emphasis added). Under subparagraph 4, Devas could, instead of terminating the agreement in the event of a breach, assign all or part of its rights and obligations to a third party, with Antrix being required to consent thereto. *Id.*, Section 2.7.4.

[57] *Id.*, Section 2.7.6.

[58] *See* **Ex. R-17**, Draft term sheet received on or about 27 September 2004, Section 2.7.

[59] **Ex. R-2**, Devas ICC Statement of Claim, ¶¶ 20-21.

"investment in the business and related losses[,] including but not limited to investments, capital raising costs, lost business opportunities, reputation loss, penalties, development costs, mobile receiver and terrestrial repeater development, infrastructure costs, severances, and vender and dealer negotiation costs"[60] – were substituted by the Upfront Capacity Reservation Fees.

27. The latest drafts of the Devas Contract exchanged between the parties are particularly telling in this regard. The draft proposed by Devas on 6 December 2004 contained a provision stating:

> In the case of material breach, in addition to termination and refund of fees, the terminating party reserves the customary rights and remedies provided by Indian law against the defaulting party.[61]

28. Antrix reviewed the proposed draft and submitted a revised draft on 13 December 2004, in which the provision reserving the right of the terminating party to seek damages beyond the remedies specifically provided for in the termination clause was deleted.[62] In the end, after extensive negotiation, the parties agreed to the consequences of termination spelled out clearly in Article 7, namely, that with the exception of the retention or refund of the Upfront Capacity Reservation Fees, "neither Party shall have any further obligation to the other Party under this Agreement nor be liable to pay any sum as compensation or damages (by whatever name called)."[63]

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[60] **Ex. R-12**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, Section 2.7.2.

[61] **Ex. R-18**, E-mail from Devas to Antrix, 6 December 2004, Draft Contract, Article 7(6).

[62] **Ex. R-19**, E-mail from Antrix to Devas, 13 December 2004, Draft Contract, Article 7(6).

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

29. Also in contrast to Devas' proposed binding term sheet, the Devas Contract contained a *force majeure clause*, which provided that neither party "shall be liable for any failure or delay in performance of its obligations hereunder if such failure or delay is due to Force Majeure as defined in this Article, provided that notice thereof is given to the other Party within seven (7) calendar days after such event has occurred."[64] The clause defined "Force Majeure Event" to include "acts of or failure to act by any governmental authority acting in its sovereign capacity."[65] That obviously included the Government of India, which had the power to take action to prevent the performance by either or both of the parties to the Devas Contract.[66]

30. With respect to the governing law, Article 19 of the Devas Contract provided: "This Agreement and the rights and responsibilities of the Parties hereunder, shall be subject to and construed in accordance with the Laws of India."[67]

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

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

[66] Both the Statement of Claim submitted by Devas in the Devas Arbitration and the Statement of Claim in this Arbitration acknowledge this point, but Devas and Claimants argue that no *force majeure* existed because the Government's decision was not an action taken in its "sovereign capacity." **Ex. R-2**, Devas ICC Statement of Claim, ¶¶ 219-232; Statement of Claim, ¶¶ 53, 178-182. Although there can be no serious doubt that a policy decision of the nature taken in this case is a classic example of a government acting in a "sovereign capacity," the Tribunal is referred to the extensive discussion of this issue in the Antrix Statement of Defence filed in the Devas Arbitration. **Ex. R-3**, Antrix ICC Statement of Defence, ¶¶ 100-124.

[67] **Ex. R-1**, Devas Contract, Article 19. Notwithstanding this undisputed point, Devas virtually ignored Indian law in its Statement of Claim in the Devas Arbitration. *See* **Ex. R-3**, Antrix ICC Statement of Defence, ¶¶ 80, 88, 143-145. It should also be noted that Article 11 of the Mauritius Treaty states: "Except as otherwise provided in this Agreement, all investments shall, be governed by the laws in force in the territory of the Contracting Party in which such investments are made." **Ex. C-1**, Mauritius Treaty, Article 11(2).

B. Competing Demands for S-band Capacity

31. Through a complex process involving application to the ITU and bilateral negotiations with countries responsible for neighbouring orbital slots, a country can obtain allocations of, and the right to use, radio frequencies in specified orbital slots. At the time the Devas Contract was entered into, India had been allocated a total of 190 MHz of capacity by the ITU in the portion of the S-band encompassing frequencies between 2500 MHz and 2690 MHz. The ITU does not specify precisely how a country is to use the allocated spectrum, instead providing broad guidelines. Ultimately, when the actual use of the spectrum is specified, the country must go through another level of regulatory actions with the ITU/affected networks, which may also include bilateral negotiations, to assure that the use will not interfere with a competing existing or planned use of a neighbouring country.

32. Pursuant to its national planning and to satisfy its national requirements, India internally allocated the 190 MHz that had been identified by the ITU. It allocated 110 MHz (in frequencies 2500-2555 MHz for uplink, *i.e.*, earth-to-space transmissions, and 2635-2690 MHz for downlink, *i.e.*, space-to-earth transmissions) for mobile satellite services (MSS), which are services that permit two-way communications. India allocated the remainder, in frequencies 2555-2635 MHz, for downlink only, and only for broadcast satellite services (BSS, *i.e.*, the transmission of one-way signals, from the satellite to earth, to multiple recipients, all of which can receive the signals provided that they have the necessary antenna). From the outset of India's space program, the S-MSS frequencies were utilised solely for non-commercial, national strategic and societal purposes, including, for example, military communications and educational and medical interactions. The S-BSS band has likewise been used only for non-commercial

national interest purposes, including at the outset by the national television company, Doordarshan, the national radio company, All India Radio, national weather forecasting and national emergency warnings and communications. In the early 2000s, years prior to the execution of the Devas Contract, 40 MHz of the S-MSS capacity (frequency ranges 2535-2555 MHz and 2635-2655 MHz) were assigned by the Government to the Department of Telecommunications for use in the terrestrial telecommunications industry, leaving the Department of Space with 80 MHz of S-BSS and 70 MHz of S-MSS capacity.[68]

33. The S-band is a scarce and highly desirable spectrum because its frequencies have low attenuation (*i.e.*, the signal does not fade). Further, the signal can be sent and received by small units, such as mobile phones and laptop computers, without requiring the antenna on such units to be pointed directly at the satellite. In other words, the signal can be picked up with small omni-directional antennae.[69]

34. Devas intended to offer a "new digital multimedia and information service, including but not limited to audio and video content and information and interactive services, across India that will be delivered via satellite and terrestrial systems via fixed, portable, and mobile receivers including mobile phones, mobile video/audio receivers for vehicles, etc. ('Devas Services')."[70] To deliver this service, Devas required S-band capacity, since the S-band signal, unlike those of other satellite bandwidths allocated to India by the ITU, could be received and sent from units in motion using compact omni-directional antennae.

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[68] Sethuraman Witness Statement, ¶ 6.

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

[70] **Ex. R-1**, Devas Contract, Recitals, Fourth WHEREAS Clause.

35. The Devas Contract provided for the lease of five C x S transponders and five S x C transponders on each of the two satellites. One C x S transponder and one S x C transponder from each of the satellites was to be directed towards one of five different areas covered by the satellite, so that each of the satellites could cover the entire country.[71] The Devas concept was that earth-to-space transmissions would use the S-MSS band, and that the signal would then be decoded and re-transmitted to a hub station on earth through the C-band, directed by the hub station back to the satellite through C-band and then downlinked through the S-BSS band to the recipient.[72]

36. Each of the C x S transponders (the downlink) required 10 MHz of capacity in each of C-band and S-band (S-BSS), 8.1 MHz of which was usable for the Devas Service.[73] Each of the S x C transponders (the uplink) required 3.3 MHz of capacity in each of the S-band (S-MSS) and C-band, 2.7 MHz of which was usable.[74] Because of the development by India of the satellite antenna that allowed the spectrum to be targeted (or "beamed") toward particular geographic locations, the five downlink transponders on each satellite consumed a total of 30 MHz of S-BSS

[71] ISRO had developed technology, a large antenna that would unfurl from the satellite once it had reached its fixed place in space over the centre of India, which would allow the signals to be intensified in a manner that each of the five geographical areas could be serviced from a single transponder.

[72] The C-band spectrum is, at least currently, not scarce as compared to S-band.

[73] *See* **Ex. R-1**, Devas Contract, Article 2 and Exhibit A, Article 2.1. In addition to the 8.1 MHz of usable capacity for the Devas Service, each transponder had an additional 0.9 MHz of "usable" capacity. The additional 1 MHz in each 10 MHz range was not usable, because at the edges of the 10 MHz band, the signal will interfere with the transmissions from the contiguous frequency. Therefore, a "guard-band" is required, meaning that 0.5 MHz of the 10 MHz range at both ends is not usable. The 0.9 MHz of additional usable capacity was to be used by ISRO for its purposes, although given the limited bandwidth (and the fact that any ISRO use would require its own guard band to prevent interference with the Devas Services) any such use was at best theoretical. Sethuraman Witness Statement, ¶ 20.

[74] *See* **Ex. R-1**, Devas Contract, Article 2 and Exhibit A, Article 3.1.

spectrum.[75] Thus, the Devas Contract provided for the lease of 75% of India's S-BSS allocation (30 MHz for each satellite, for a total of 60 MHz of India's total of 80 MHz of S-BSS) and 10 MHz of the S-MSS allocated for use by the Department of Space.[76]

37. India's military and paramilitary agencies also had demands for S-band capacity for non-commercial purposes, starting prior to the time that the Devas Contract was executed but then growing substantially as the need for satellite capacity for defence and security purposes expanded with technological advances.[77] Unlike Claimants' position on this point, which assumes that the national security issue in this case is "contrived," "concocted," "engineered" and "fabricated," Respondent's position is based on a record of indisputable facts, including the following:

- In May 2003, ISRO launched a satellite for military purposes to utilise a 20 MHz segment of S-MSS capacity. The military, however, was looking for higher performance and capacity due to the limitations of the MSS as compared with the BSS, and demanded from ISRO a communication system with greater capacity (including increased data rates and the ability to service a larger number of terminals).[78]

- On 28 June 2003, *The Hindu*, a leading newspaper in India, reported as follows:

> India needs a "dedicated military satellite" for future defence purposes, the Chief of Air Staff, Air Chief Marshal, S. Krishnaswamy, said today. Future wars would be fought through air and aerospace. "So one day

[75] So long as the same 10 MHz of S-BSS spectrum was beamed to non-contiguous geographical locations, it could be "re-used" on the same satellite. For example, on PS1, one of the 10 MHz frequency ranges could be used for the east and west geographical locations (which had no overlap or common border) and a second could be used for the north and south (which likewise did not overlap or have a common border). The 10 MHz range for the centre geographical region, the one directly below the satellite, could not be reused on the five-transponder satellites, as the centre was contiguous with each of the other geographical locations.

[76] Sethuraman Witness Statement, ¶ 3.

[77] Anand Witness Statement, ¶¶ 4-6.

[78] *Id.*, ¶ 5.

> we will need that (a dedicated satellite)," he told presspersons after attending the Indian Air Force's (IAF) annual commanders' conference (June 25 to 27) at the Training Command Headquarters here. Citing the example of satellite television, which delivered news faster through broadcast vans and satellites, the Air Chief said the military too needed to adopt similar technology for speedy communication and thus, faster decision-making. "The Central Command can use satellite imagery to transmit identified targets to the cockpit so that the pilot's mission is successful," he said.[79]

- In April 2004, the military ordered a dedicated satellite for Naval use.[80] The relevant document noted specifically: "Naval Communications are indeed most intricately complex, because of four distinct participants viz. ships, submarines, aircraft and shore authorities. All need to communicate with each other in real time. . . . Ship shore communications serve command and control functions, need to be global in nature and are therefore termed strategic communications." This requested satellite, using 8 MHz, was launched during the end of August 2013.[81]

- On 7 January 2005, *The Times of India* reported the head of the India Air Force as stating: "Space is fast becoming vital in all military operations. Though space-based laser and other orbiting weapons still belong to the realm of cinematic fantasy, satellites are now increasingly being used for military communications, tracking enemy forces and precision guiding of 'smart bombs.'"[82]

- In October 2005, a Note by a senior military officer outlined the importance of relying on space technology for defence, particularly starting in 2008 when a new plan would enter in place:[83] "Space Systems are beginning to become an integral component of the

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[79] **Ex. R-20**, *We Need Military Satellite: Air Chief*, THE HINDU, 28 June 2003.

[80] Anand Witness Statement, ¶ 5; **App. VA-1**, Directorate of Naval Signals, *Draft Preliminary Naval Staff Qualitative Requirements of Dedicated Naval [Communications] Satellite*, 5 April 2004, ¶¶ 9, 11.

[81] The 8 MHz consist of 4 MHz for uplink and 4 MHz for downlink. The satellite was originally scheduled to be launched in 2011. However, during 2010, ISRO experienced two launch failures from its indigenous Geostationary Launch Vehicle (GSLV) program. Anand Witness Statement, nn. 7, 49. These launch failures have resulted in the need for technological changes and testing, which has delayed a number of satellite launches.

[82] **Ex. R-21**, Rajat Pandit, *IAF is Keen on Aerospace Command, Says New Chief*, THE TIMES OF INDIA, 7 January 2005.

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

total combat potential of many nations. It is but imperative that our Defence Forces do not lack in the exploitation of Space for War fighting. Till 2008 Indian Space capability and programmes have been defined and there is no alternative but to exploit available assets except for minor up gradations where feasible, during this time frame. However, beyond that period our Defence Forces should be able to examine and specify the needs to enable our technologists to support our requirements. Space capabilities are vital tools of the Information Revolution and critical to activities of the Defence Forces. Space is emerging as a centre of gravity for information dependent forces and it is highly probable that continued and assured access to Space will be a major determinant of national power."[84] This Note projected the bandwidth requirements of the Army, Navy and Air Force through 2010, 2015 and 2020. With respect to the S-band, the projected needs were for 86 MHz by 2010, 151 MHz by 2015 and 208 MHz by 2020.[85]

- In February 2006, military leaders met with the Department of Space to address the projected S-band capacity required for the Defence Space Vision through 2020.[86] In his introductory remarks, the Chairman of the military task force "expressed a genuine concern at the rapid build up of Chinese Space Programme," noting that "[t]here is a need to take cognisance of this at the stage to identify & develop our Space programme to effectively combat this proliferation."[87] He also stated that the "Services especially Army has an ambitious plan for phased development of MSS. Consequent of this there is inescapable necessity for continue of S-band [sic]. The total BW contemplated for S-band would be 86 MHz – 151 MHz – 208 MHz for short, medium & long term respectively (extract from DSV-2020)."[88]

- In August 2006, another Note from a senior military officer advised the Department of Telecommunications to block bandwidth in several orbital slots, including the S band: "Refer to the Bandwidth Projections of Service HQs for satellite communications given in

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

[85] *Id.*, **App. VA-2**, HQ Integrated Defence Staff, Note, 14 October 2005, Appendix H.

[86] *Id.*, **App. VA-3**, Minutes of Third Task Force Meeting with DoS Held on 21 Feb 06 at HQ IDS New Delhi, 6 March 2006.

[87] *Id.*, **App. VA-3**, Minutes of Third Task Force Meeting with DoS Held on 21 Feb 06 at HQ IDS New Delhi, 6 March 2006, ¶ 4.

[88] *Id.*, **App. VA-3**, Minutes of Third Task Force Meeting with DoS Held on 21 February 2006 at HQ IDS New Delhi, 6 March 2006, ¶ 14.

DSV 2020 (. . . dated Oct 14 05), copy enclosed. It is requested that the matter be taken up Deptt. of Telecommunications for blocking the bandwidth in S, C, Ku, Ka and UHF Bands for satellite communications by three services as per requirements envisaged in DSV 2020."[89]

- In March 2007, the Ministry of Defence advised the Department of Space of the particularly critical requirements of the Army for sufficient S-MSS bandwidth to support the exponential growth in the required mobile briefcase terminals, stating that 60 MHz would be needed by 2010, an additional 15 MHz would be required by 2015 and an additional 45 MHz would be required by 2020.[90]

- In August 2007, India's military leaders constituted an expert committee on S-band to assure adequate access in the national interest as opposed to commercial usages.[91]

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

[89] *Id.*, **App. VA-4**, HQ Integrated Defence Staff ops Branch/IW & IT Dte, Note, *Bandwidth Requirements – Satellite Commn*, 9 August 2006.

[90] *Id.*, **App. VA-5**, Minutes of the Integrated Space Cell Meeting Held on 19 February 2007 at HQ IDS, 26 March 2007. The spectrum requirements also encompassed other bandwidths in which the military was and would be operating.

[91] *Id.*, **App. VA-6**, HQ Integrated Defence Staff, Convening Order, *Constitution of Expert Committee on Spectrum and Satellite Uses of Frequency Band 2.5 GHz to 2.69 GHz (S-Band) by Defence Services*, 30 August 2007. Among other things, this document addressed the upcoming ITU World Radiocommunication Conference (the "WRC") scheduled for October 2007, a conference where the representatives of the Government of India opposed proposed limitations on the allowable power for satellites using S-band. Statement of Claim, ¶ 64; Viswanathan Witness Statement, ¶¶ 94-95; Lewis Expert Report, ¶ 17. Claimants argue that this "demonstrated India's commitment to the launch of the Devas System." Statement of Claim, ¶ 64. This is pure fantasy. India, along with a number of other nations that use S-band, has been opposing limitations on power for S-band satellites since the issue was first raised, prior to the time the Devas Contract was executed. India's intention was to protect its ability to continue using high-powered satellites to preserve the clarity of the signal for its strategic and societal needs. Sethuraman Witness Statement, ¶¶ 26-27.

> requirements of the Defence Services. . . . The non availability of the Spectrum could stymie the future operational plans of the Defence services."[92]

- In November 2008, a special meeting was held between senior military leaders and ISRO to address issues relating to satellite-based communication. The minutes of that meeting state: "The requirement of 'S' band carriers by the Army was spelt out by the Chairman. Dr. A Bhaskaranarayana stated that the scarce 'S' band spectrum should be optimally utilized. . . . He proposed that [the military] consolidate the requirement of 'S' band for various services, to enable optimal utilization by way of the dedicated 'S' band specific satellite."[93] The military committed to providing the consolidated requirements in the near term.[94]

- In May 2009, a task team was established at ISRO to address the needs for dedicated military S-band satellites.[95]

- In December 2009, the military presented details regarding the national security requirements for satellite services.[96] At this meeting, the Armed Forces set forth their requirements for S-band as follows: "(i) To cater for requirements up to 2012 – 120 Carriers, 17.5 MHz. Out of which 50 Carriers are being used by the Armed Forces. (ii) Additional in 12th Plan – 40 MHz. (iii) Additional in 13th Plan – 50 MHz."[97]

38. Accordingly, even prior to the time the Devas Contract was entered into, the need for S-band capacity was already a subject of discussion within the agencies charged with national security and defence. Those discussions intensified as the military learned of the limitations of the MSS frequencies for their data communication

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

[93] *Id.*, **App. VA-8**, Minutes of the Special ISC Meeting Between Reps of ISRO & Reps of Three Services to Address Satellite Based Communication Related Issues, 25 November 2008, p. 2.

[94] *Id.*, **App. VA-8**, Minutes of the Special ISC Meeting Between Reps of ISRO & Reps of Three Services to Address Satellite Based Communication Related Issues, 25 November 2008, p. 4.

[95] *Id.*, **App. VA-9**, Office Order of ISRO, 20 May 2009.

[96] *Id.*, **App. VA-10**, Minutes of Meeting held on 15 December 2009 at ISAC, Bangalore between ISC of HQ IDS, MOD and ISRO, 25 January 2010.

[97] *Id.*, **App. VA-10**, Minutes of Meeting held on 15 December 2009, p. 3.

requirements and as technology advanced.[98] As a consequence of a detailed review of capacity requirements for strategic purposes, it became clear that the national security requirements far exceeded India's S-band capacity, assuming that the orbital slot and frequency allocations necessary for the Devas Contract were to be granted to Devas.[99] In addition to the 8 MHz of S-band that were to be utilised by the satellite for the Navy that was ordered in 2004 and launched in August 2013,[100] the following military and paramilitary needs had been identified:

- 17.5 MHz in S-band for meeting immediate requirements of the Armed Forces.[101]
- Another 40 MHz of S-band during the five-year period from 2012 to 2017 (the 12th plan period).[102]
- Another 50 MHz of S-band during the subsequent five-year period (the 13th plan period from 2017-2022).[103]
- Requirements from internal security agencies, including the Border Security Force, the Central Industrial Security Force, the Central

[98] The S-MSS frequencies, which are used for two-way communications, cannot effectively be used at the same time for high-speed large content data transmissions, such as maps, satellite photographs and aerial feeds, to border and front line forces or security forces responding to terrorist or insurgent activities within the country, which require such feeds on a real-time basis. This is due to the fact that two-way communications (*e.g.*, mobile telephone communications) cannot support large amounts of data to multiple users simultaneously as compared to satellite broadcast. The S-BSS band, a one-way broadcast band, is required for such data transmissions because the military and security forces will be in motion, reacting to information as it is received, and need to have devices (*e.g.*, computers) with omni-directional antennae to assure continuous connectivity with headquarters for the data feeds. Anand Witness Statement, ¶ 4; Sethuraman Witness Statement, ¶¶ 6, 17.

[99] Under the Devas Contract, as already noted, Devas was to have uninterrupted use of 30 MHz of S-BSS capacity from each satellite. Even without the Devas Contract, the emerging needs of the military and other security forces stretched the S-band capacity that had been allocated for satellite use.

[100] Anand Witness Statement, ¶ 5, nn. 6-7.

[101] *See* ¶ 37, *supra*; *Id.*, ¶ 5 and **App. VA-10**, Minutes of Meeting held on 15 December 2009, p. 3.

[102] *See* ¶ 37, *supra*; *Id.*, ¶ 5 and **App. VA-10**, Minutes of Meeting held on 15 December 2009, p. 3; **Ex. R-22**, Department of Space, Note for the Cabinet Committee on Security, *Annulling the "Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-band Spacecraft by Devas Multimedia Pvt Ltd.*," 16 February 2011 (the "Note for the Cabinet Committee on Security"), ¶ 20.

[103] *See* ¶ 37, *supra*; *Id.*, ¶ 5 and **App. VA-10**, Minutes of Meeting held on 15 December 2009, p. 3.

Reserve Police Force, the Coast Guard and the Police for meeting their secured communications needs.[104]

- Capacity for the train-tracking requirements of India Railways, one of the largest national railway systems in the world.[105]

C. The Devas Contract Is Reviewed and the Policy Issue of Deciding between the Competing Demands for S-band Is Resolved at the Highest Levels of Government

39. In November 2009, even before the military presented its final assessment of defence needs for S-band, Mr. A. Vijay Anand, the new Joint Secretary of the Department of Space, who is also its Chief Vigilance Officer, learned of possible irregularities relating to the Devas Contract and initiated a preliminary, internal review of certain of the allegations.[106] That review revealed matters of serious concern. For example, it had been alleged that the minutes of a 6 January 2009 meeting of a review committee of the Technical Advisory Committee ("TAG") of the Indian Satellite Coordination Committee ("ICC") relating to the experimental licence requested by Devas had been altered in a manner that, *inter alia*, eliminated significant comments that had been made at the meeting by the representatives of the Wireless Planning and Coordination Wing ("WPC"), the body within the Department of Telecommunications

[104] **Ex. R-22**, Note for the Cabinet Committee on Security, ¶ 21; **Ex. R-23**, Minutes of 117th Meeting of the Space Commission Held at DOS Branch Secretariat, New Delhi, on 2 July 2010, signed 21 July 2010, ¶ 117.6.3; Anand Witness Statement, ¶ 6 and n. 21.

[105] **Ex. R-22**, Note for the Cabinet Committee on Security, ¶ 22; **Ex. R-23**, Minutes of 117th Meeting of the Space Commission Held at DOS Branch Secretariat, New Delhi, on 2 July 2010, signed 21 July 2010, ¶ 117.6.3; Anand Witness Statement, ¶ 6 and n. 21.

[106] Anand Witness Statement, ¶ 8. Claimants argue that "for reasons that have never been explained to Claimants," Dr. Radhakrishnan, the Secretary of the Department of Space, "targeted" Devas starting in late 2009, and that "[t]hese targeted actions culminated in the cancellation of the Devas Agreement in February 2011." Statement of Claim, ¶ 7. That irresponsible and unsubstantiated allegation should be compared to the documentary record in this case, which shows the real reasons for the investigations into the Devas Contract as well as the basis for the decision to reserve S-band for national security purposes and annul the Devas Contract.

headed by the Wireless Advisor to the Government of India from which Devas would have been required to seek its operating licence and frequency allocation.[107]

40. The information gathered by the Joint Secretary showed that Dr. S.V. Kibe, who attended the meeting at the request of Dr. Bhaskaranarayana, had prepared minutes reporting that "WPC reps stated that license for terrestrial transmission is permitted in certain allocated bands but not in this portion of S-band,"[108] but that Dr. Bhaskaranarayana had directed him to delete this statement from the minutes prior to circulation. Other members of the review committee who had attended the meeting and received the truncated minutes wrote to Dr. Kibe, commenting on this precise point, as well as other omissions.[109]

41. The omission was significant. Providers of terrestrial telecommunications services had been demanding the redeployment of S-band allocated for satellite services. However, the S-BSS frequencies had been preserved for space-to-earth broadcasting only and were not authorised for terrestrial transmission, as the WPC representatives observed at the meeting. This meant that Devas would not be

[107] Anand Witness Statement, ¶ 9.

[108] *Id.*, **App. VA-15**, Minutes of 6th January 2009 meeting of TAG Review Committee, as originally drafted by Dr. Kibe.

[109] Anand Witness Statement, ¶¶ 9-10. The minutes, as originally drafted and with Dr. Bhaskaranarayana's handwritten changes, are annexed to the Joint Secretary's witness statement as **App. VA-15**. The minutes that were circulated and reflect those changes are dated 29 October 2009. Anand Witness Statement, ¶ 10 and **App. VA-12**. The comments from Mr. Jain (Department of Telecommunications) are dated 4 November 2009 and those from Mr. Kalia (Department of Telecommunications) are dated 6 November 2009. These are annexed to the Joint Secretary's witness statement as **App. VA-13** and **App. VA-14**, respectively.

permitted to use the S-BSS frequencies for terrestrial transmission under existing policy. Yet that is precisely what it wanted to do.[110]

42. The disclosure of potential irregularities and the information developed by the preliminary internal investigation led to the establishment by the Department of Space of a "single man committee," Dr. B. N. Suresh, a former member of the Space Commission.[111] Although Dr. Suresh was not directed to review competing uses of the S-band, as his mandate was to review the "legal, commercial, procedural and technical aspects" of the Devas Contract,[112] in his May 2010 Report on GSAT-6 he noted that only 10% of the capacity to be leased to Devas under the Devas Contract would be available for ISRO, which "would bring in certain limitations on the availability of spectrum for any essential demands in future."[113] The Report recommended the following:

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[110] Anand Witness Statement, ¶ 11. Devas' hybrid satellite-terrestrial system contemplated transmission from the satellite using S-BSS and, in locations where the signal might be blocked, the "re-use" of the same S-BSS frequencies through terrestrial transmission from towers that would receive the satellite signal. This re-use was an important feature of the Devas system, particularly in cities (from where the vast majority of Devas' potential customers were expected to come), where the satellite transmission to ultimate users could be blocked by buildings. Claimants argue that it was confident that it would be granted an operating licence and frequency allocation for its services, including the terrestrial portion. Statement of Claim, ¶ 102. But apart from the fact that the Government made the decision to reserve the S-band for national security needs and to annul the Devas Contract, eliminating any possibility of allocation of, and an operating licence for, the S-BSS frequencies, there was good reason to doubt whether such an operating licence would ever be issued. Further, as discussed herein, Devas' contemporaneous documents do not reveal the confidence it now claims it had, and the fact is that Devas did not even intend to seek a licence until after the satellites were launched. *See* ¶¶ 62-66, *infra* and n. 46, *supra*.

[111] Anand Witness Statement, ¶ 12 and **App. VA-17**, ISRO, Memorandum, *Constitution of a Committee to Look into Devas Multimedia Contract and Terms of Reference*, 8 December 2009.

[112] *Id.*, **App. VA-17**, ISRO, Memorandum, *Constitution of a Committee to Look into Devas Multimedia Contract and Terms of Reference*, 8 December 2009, ¶ 3.

[113] **Ex. R-24**, *Report on GSAT-6*, Submitted by Dr. B.N. Suresh, Director, Indian Institute of Space and Technology, May 2010 (the "Suresh Report"), ¶ 11. This same observation was included in the Recommendation portion in the "Specific Review Observations" section of the Suresh Report, where Dr. Suresh stated: "Only 10% of the capacity is available for use by ISRO. This would bring in limitations on spectrum availability for essential strategic and social sectors applications in future." **Ex. R-24**, ¶ 14(v). As noted earlier, even the 10% availability was largely theoretical. *See* n. 73, *supra*; Sethuraman Witness Statement, ¶ 20.

> The utilization of the S-band frequency spectrum allotted for satellite based services to ISRO/DOS for satellite communications is extremely important. Therefore this aspect has to be critically examined considering all usages including GSAT-6 and GSAT-6A by a competent technical team on high priority. The strategic and other essential needs of the country should also be considered.[114]

43. While there were irregularities in the contracting process, the Devas Contract was not cancelled for that reason. It was cancelled for national security reasons based on the nation's strategic requirements for the spectrum. The only part of the Suresh Report that is relevant to this point is quoted above, and in fact its observation was particularly appropriate in light of the national security needs that had crystallised by the end of 2009, establishing that those needs could not be satisfied if the Devas Contract was to proceed.[115]

44. Following the submission of the Suresh Report, the Department of Space consulted with the Department of Telecommunications and the Ministry of Law and Justice as to whether the Devas Contract needed to be annulled in order to preserve the S-band spectrum for the strategic requirements of the nation.[116] In an opinion dated 18 June 2010, the Ministry of Law and Justice stated:

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[114] **Ex. R-24**, Suresh Report, ¶ 15(i) (emphasis added); Anand Witness Statement, ¶ 13. Claimants point out that the Suresh Report did not recommend termination of the Devas Contract. Statement of Claim, ¶ 9. They then draw the conclusion that the Government did not have the right to take the policy decision it did. There are several missing links in that chain of logic, which overlooks the factual record documenting the strategic requirements for S-band spectrum and making clear that the Devas Contract was incompatible with the national security demands of the Nation's defence and security agencies.

[115] *See* ¶¶ 37-38, *supra*.

[116] *See* **Ex. R-25**, Memo from the Department of Space to the Department of Telecommunications, 16 June 2010; **Ex. R-26**, Memo from the Department of Space to the Ministry of Law and Justice, 16 June 2010. The Department of Space also asked whether there were other problems with the Devas Contract in light of the fact that Devas had been allocated such a large portion of the S-band in an exclusive manner and pursuant to a process that did not involve a competitive auction. *See also* Anand Witness Statement, ¶ 14.

> [T]he Central Government (Department of Space)[,] in exercise of its sovereign power and function, if so desire and feel appropriate, may take a policy decision to the effect that due to the needs of strategic requirements, the Central Govt/ISRO would not be able to provide orbit slot in S band for operating PS1 to the ANTRIX for commercial activities. In that event, ANTRIX in terms of Article 7 (c) read with Article 11, of the agreement may terminate the agreement and inform M/s DEVAS accordingly. However on such termination ANTRIX shall be required to reimburse DEVAS all the Upfront Capacity Reservation Fees and corresponding service taxes received by ANTRIX till that date.[117]

For its part, the Department of Telecommunications stated:

> The agreement between DOS and ANTRIX indicates that M/S Devas is allowed to use part of frequency bands 2555-2635 MHz and 2500-2535 & 2655-2690 MHz whereas DOS sought the ITU coordination for MSS to be used for strategic operations. The spectrum planned by DOS for strategic use is not to be shared with commercial applications as in the case of M/s Devas Multimedia.[118]

The Department of Telecommunications also referred to the 2008 National Frequency Allocation Plan, noting only a part of S-band "has been enabled for BWA [Broadband Wireless Access] applications in view of the satellite based strategic requirement projected by DOS."[119]

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[117] Anand Witness Statement, ¶ 15 and **App. VA-18**, Opinion of the Advisor to the Minister for Law and Justice, 18 June 2010, ¶ 12.

[118] Anand Witness Statement, ¶ 16 and **App. VA-19**, Note from the Department of Telecommunications to the Department of Space, 6 July 2010, ¶ 2(i).

[119] *Id.*, ¶ 16 and **App. VA-19**, Note from the Department of Telecommunications to the Department of Space, 6 July 2010, ¶ 2(ii). The Department of Telecommunications, where the WPC, the licencing authority for spectrum allocation, is housed, was of the view that if S-BSS frequencies were to be utilised for terrestrial services (notwithstanding the existing policy expressed by the WPC at the meeting described in ¶¶ 39-41, *supra*), the "terrestrial component of the BSS frequencies should also be given similar treatment as in the case of 3G and BWA spectrum with regard to pricing and auction mechanism . . . for fair spectrum allocations." **Ex. R-27**, Note from the Department of Telecommunications to the Department of Space, 28 July 2010, ¶ 4.

45. The Department of Space then presented the matter to the Space Commission for its consideration and to seek guidance on a further course of action. 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,"[120] was then comprised of: (i) the Secretary of the Department of Space; (ii) the Minister of State, Prime Minister's Office; (iii) the Cabinet Secretary; (iv) the Principal Secretary to the Prime Minister; (v) the National Security Advisor; (vi) the Principal Scientific Advisor to the Government of India; (vii) the Secretary, Department of Economic Affairs; (viii) the Director, ISRO Satellite Centre; (ix) Finance Member, Space Commission; and (x) a Professor of Aerospace Engineering.[121]

46. At its 117th Meeting on 2 July 2010, the Space Commission considered the issue in detail.[122] The minutes of the meeting state:

> Focusing on the issue, Chairman stated that ISRO holds, in S band spectrum, 80 MHz in BSS and 70 MHz in MSS. The Antrix-Devas lease agreement on GSAT-6 and 6A would take away 70 MHz of the total S band spectrum available.
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> Shri Shivshankar Menon, NSA [National Security Advisor] stated that S band spectrum is crucial for several strategic and societal services. The Integrated Space Cell of IDS [Integrated Defence Staff], Ministry of Defence have projected a need for 17.5 MHz in S band for meeting the immediate requirements of Armed Forces, another 40 MHz during the 12th plan period and an additional 50 MHz during the 13th plan period. Armed Forces have also projected the need to build S band satellite capacity . . . for national

[120] **Ex. R-28**, Indian Space Research Organisation, *About ISRO*.

[121] Anand Witness Statement, ¶ 18. *See also* Statement of Claim, ¶ 28(e).

[122] *See* **Ex. R-29**, Department of Space, Note to Space Commission, *Agenda Item No. 4: GSAT-6/6A – Contract between M/s. Antrix Corporation Limited (ACL) and M/s. DEVAS Multimedia Pvt. Ltd.*, signed 2 July 2010. *See also* Anand Witness Statement, ¶¶ 18-20.

> security related mobile communications. There are further demands for S band transponders from internal security agencies viz., BSF [Border Security Force], CISF [Central Industrial Security Force], CRPF [Central Reserve Police Force], Coast Guard and Police for meeting their secured communication needs. Indian Railways have also projected S band requirements for train-tracking.
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> Commission noted that, in view of these emerging requirements, there is an imminent need to preserve the S band spectrum for vital strategic and societal applications.
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> . . . .
>
> It was noted that Space spectrum is a vital national resource and it is of utmost importance to preserve it for emerging national applications for Strategic uses and societal applications. Given the limited availability of S band spectrum, meeting the strategic and societal needs is of higher priority than commercial/entertainment sectors.[123]

47. After its deliberations, the Space Commission concluded that "[the] Department [of Space], in view of 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," and that "Department may evolve a revised utilization plan for GSAT-6 and GSAT-6A satellites, taking into account the strategic and societal imperatives of the country."[124] The Space Commission also directed the Department of Space to take necessary internal actions on the Suresh Report.[125]

48. The Department of Space thereafter sought the opinion of the Additional Solicitor General as to the steps to be taken to implement the Space Commission's

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[123] **Ex. R-23**, Minutes of 117th Meeting of the Space Commission Held at DOS Branch Secretariat, New Delhi, on 2 July 2010, signed 21 July 2010, ¶¶ 117.6.2-117.6.4, 117.6.6. *See also* Anand Witness Statement, ¶¶ 18-19.

[124] **Ex. R-22**, Note for the Cabinet Committee on Security, ¶¶ 42(a), 42(c). *See also* Anand Witness Statement, ¶ 20.

[125] **Ex. R-22**, Note for the Cabinet Committee on Security, ¶ 42(e). *See also* Anand Witness Statement, ¶ 20.

determinations.[126] That opinion, issued on 12 July 2010, is the basis for Claimants' repeated argument that the governmental concerns that ultimately led to the annulment of the Devas Contract in February 2011 were "contrived," "concocted," "engineered" or "fabricated." The Additional Solicitor General advised on the legally correct means of implementing the decision of the Space Commission, explaining that the Government's policy decision regarding the reservation of S-band for strategic purposes would constitute a *force majeure* under Article 11 of the Devas Contract. Nothing in the opinion indicates that the security reasons motivating the decision were contrived, concocted, engineered or fabricated. Nothing in the opinion indicates that the Devas Contract should be terminated for commercial reasons. And nothing in the opinion can be construed as anything other than the Additional Solicitor General's view that the Government had the absolute right to terminate the Devas Contract for the legitimate security grounds that he recited in his opinion. The Additional Solicitor General stated:

> The S band spectrum is crucial for several strategic and societal services. The Integrated Space Cell of IDS, Ministry of Defence have projected a need for 17.5 MHz in S band for meeting the immediate requirements of Armed Forces, another 40 MHz during the 12th plan period and an additional 50 MHz during the 13th plan period. Armed Forces have also projected the need to build S band satellite capacity through GSAT-7S, for national security related mobile communications. There are further demands for S band transponders from international security agencies viz., BSF, CISF, CRPF, Coast Guard and Police for meeting their secured communication needs. Indian Railways have also projected S band requirements for train tracking.
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> . . . .
>
> It is noticed that when the agreement was entered into between Antrix and Devas, way back in the year 2005, the circumstance was vastly different than what it is today. The

[126] Anand Witness Statement, ¶ 21.

> governmental policies with regard to allocation of satellite spectrum ha[ve] undergone a sea change and there has been a tremendous demand for allocation of spectrum for national needs, including for the needs of the Defence, para-military forces, railways and other public utility services as well as for societal needs. There can be no dispute whatsoever that the Government of India is the owner of satellite spectrum space and any policy taken by the Government of India with regard to allocation and use of S bandwidth, including those which are subject matter of contractual obligations, would fall within the doctrine of force majeure, as envisaged in the very agreement between Antrix and Devas. However, I only wish to add one note of occasion. 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, 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 as per the Business Rules of the Government of India. 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. Several reasons exist to resort to this sovereign power for preserving national interest. In my view, instead of the Department of Space directing Antrix to terminate the contract, it will be advisable from a legal perspective that the direction comes from the Department of Space on the basis of a governmental policy decision, as indicated above.[127]

[127] **Ex. R-30**, Opinion of the Additional Solicitor General to the Department of Space, 12 July 2010, pp. 1, 4. *See also* Anand Witness Statement, ¶ 21. Claimants say that the Additional Solicitor General "recommended that DOS/ISRO/Antrix should cause the Government of India to create a *force majeure* event that would terminate the contract." Statement of Claim, ¶ 99. This attempt to conflate DOS, ISRO and Antrix is typical of Claimants' loose approach to the facts of this case. In addition, the notion that Antrix, or even DOS or ISRO, could "cause the Government of India to create a *force majeure* event" is fantasy. Of course, the Additional Solicitor General was saying nothing of the kind. He opined, correctly, that the facts justified a *force majeure* event because he thought, again correctly, that the Government of India had the absolute sovereign right to reserve S-band capacity for strategic use. He recommended that the issue be brought to the appropriate level of Government for final decision. The Additional Solicitor General had no doubt that the Government had the right to take that decision, as he unequivocally stated: "There can be no dispute whatsoever that the Government of India is the owner of satellite spectrum space and any policy taken by the Government of India with regard to allocation and use of S bandwidth, including those which are subject matter of contractual obligations, would fall within the doctrine of force majeure, as envisaged in the very agreement between Antrix and Devas." **Ex. R-30**, Opinion of the Additional Solicitor General to the Department of Space, 12 July 2010, p. 4.

49. While Claimants see nothing in the foregoing opinion other than a sham *force majeure*, an excuse for non-performance without factual foundation, the Additional Solicitor General was actually quite clear as to the basis for his opinion. He referred expressly to the "crucial" role of S-band spectrum for "strategic and societal services," to the requirements of the armed forces, and to the "sea change" in "governmental policies with regard to the allocation of satellite spectrum" since the Devas Contract had been signed in 2005. All of those facts are established by other documents in the record from long before the Additional Solicitor General's opinion, including the history of demands for S-band spectrum by the military, the opinions of the Ministry of Law and Justice and the Department of Telecommunications, and the deliberations of the Space Commission. Following up on the decisions of all of these governmental agencies, the Department of Space sought the Additional Solicitor General's opinion, and the Additional Solicitor General advised that the matter be referred for decision at the appropriate level of government and that the nature of the decision as the sovereign act of the Indian Government be made crystal clear for the record. That opinion does not change the facts recited by the Additional Solicitor General in his opinion, does not alter the documents in the record, and does not transform a legitimate policy decision of a government acting in its sovereign capacity to address the essential security interests of the nation into a "contrived," "concocted," "engineered" or "fabricated" excuse or a commercial act.

50. As mandated by the Space Commission in its decisions taken at its 2 July 2010 meeting, the Additional Secretary of the Department of Space, Mr. G. Balachandhran, was asked to review the Suresh Report and provide comments thereon

so that appropriate internal actions could be taken.[128] The Balachandhran Report, which was issued in January 2011, emphasised that the limited spectrum for use by ISRO, mentioned in the Suresh Report, was a "very important point" as it "has implications on . . . nation's strategic and societal requirement," and recommended that the "[s]trategic and other essential needs of the country should be the first priority."[129] The Balachandhran Report went on to confirm as follows:

> 5.3.2 S-band spectrum required for our Defence: S-band spectrum required for our Defence and strategic use and the DEVAS agreement does not leave enough spectrum for ISRO/DOS use if required.[130]

51. Regarding the latter point, the Balachandhran Report criticised the failure of Antrix to follow the appropriate process at the outset, which required consultation with the INSAT Coordination Committee (ICC), resulting in a failure to consider adequately the national needs prior to the Devas Contract: "SATCOM Policy and ICC guidelines state that Spectrum may be allocated to Private Parties after taking care of the National needs. Considering that S-band spectrum is required for Defense and other security needs, why was this policy guideline not followed?"[131] The Balachandhran Report

[128] **Ex. R-31**, *Report on Dr. Suresh Committee Report on ANTRIX-DEVAS Agreement & Issues Arising From Therein*, Submitted by Mr. G. Balachandhran, Additional Secretary, Department of Space, 9 January 2011 (the "Balachandhran Report").

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

[130] *Id.*, p. 18. The Balachandhran Report observed that the Suresh Report omitted consideration of the "serious security implications" inherent in "[t]he provision in the contract that DEVAS is free to choose partner(s) in this venture without the consent of ANTRIX." *Id.*, p. 17.

[131] *Id.*, p. 20.

concluded: "Termination of ANTRIX-DEVAS contract as ordered by Space Commission in its 117th meeting need be expedited."[132]

52. The Additional Solicitor General had correctly advised that the ultimate policy decision as to whether S-band should be used for national security and defence needs or for commercial and entertainment purposes should be made in accordance with the Government of India's "Transaction of Business Rules."[133] Those Rules provide for consultation among, and concurrence of, various agencies interested in a particular matter. According to Article 4, "Inter-Departmental Consultations":

> When the subject of a case concerns more than one department, no decision be taken or order issued until all such departments have concurred, or, failing such concurrence, a decision thereon has been taken by or under the authority of the Cabinet. Explanation – Every case in which a decision, if taken in one Department, is likely to affect the transaction of business allotted to another department, shall be deemed to be a case the subject of which concerns more than one department.[134]

53. Consistent with the Additional Solicitor General's opinion, the Department of Space also asked Mr. Balachandhran to prepare a note for the Cabinet Committee on Security to present the matter for decision. The Cabinet Committee on Security, comprised of the Prime Minister, the Minister of Defence, the Minister of Home Affairs,

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[132] *Id.*, p. 25. The Balachandhran Report also referred to certain contentions in a note by Dr. Kibe. *Id.*, pp. 25-26; **Ex. R-32**, Note from Dr. Kibe to the Additional Secretary of the Department of Space, 1 December 2010. That note related to technology and intellectual property that Devas intended to use. Dr. Kibe concluded that the technology was not confidential and proprietary technology of Devas and questioned whether and when Devas obtained the right to use the technology in India. Under the Devas Contract, Devas had represented that it "has the ownership and right to use the Intellectual Property used in the design of DMR [Digital Multimedia Receivers] and CID [Commercial Information Devices]." *See* **Ex. R-1**, Devas Contract, Article 12(b)(iv).

[133] **Ex. R-33**, Government of India (Transaction of Business) Rules, 1961 (pursuant to Article 77(3) of the Constitution of India); **Ex. R-30**, Opinion of the Additional Solicitor General to the Department of Space, 12 July 2010, p. 4.

[134] **Ex. R-33**, Government of India (Transaction of Business) Rules, 1961, Article 4.

the Minister of External Affairs and the Minister of Finance, is the highest authority within India for matters relating to internal and external security and defence, and is the appropriate governmental body to address a policy decision of this nature. The functions of the Cabinet Committee on Security include, *inter alia*: "(i) to deal with all Defence related issues; (ii) to deal with issues relating to law and order, and internal security; (iii) to deal with policy matters concerning foreign affairs that have internal or external security implications including cases relating to agreements with other countries on security related issues; (iv) to deal with economic and political issues impinging on national security . . . ."[135]

54. The Note for the Cabinet Committee on Security included the inputs from various concerned Ministries, including the Ministry of Defence, the Department of Telecommunications, the Ministry of Finance, the Ministry of Law and Justice, the Ministry of Home Affairs and the Ministry of External Affairs, again in accordance with the Government's Transaction of Business Rules. The Note identified the additional demands for spectrum from several defence and security agencies in India:

> The Integrated Space Cell of Integrated Defence Staff, Ministry of Defence have projected, in December 2009, need for a bandwidth of 17.5 MHz in S- band for meeting the immediate requirements of Armed Forces; another 40 MHz during the 12th plan period; and an additional 50 MHz during the 13th plan period.
>
> There are further demands for S-band transponders from internal security agencies viz., Border Security Force, Central Industrial Security Force, Central Reserve Police

[135] *Id.*, First Schedule, Standing Committees of the Cabinet and their Functions, Cabinet Committee on Security, p. 10. *See also* Statement of Claim, ¶ 28(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'.").

> Force, Coast Guard and Police for meeting their secured communication needs.
>
> Indian Railways have also projected S band requirements for train-tracking. In view of these emerging requirements, there is an imminent need to preserve the S band spectrum for vital strategic and societal applications.[136]

55. The Note also outlined the deliberations that took place at the 117th meeting of the Space Commission in July 2010, which made similar observations and stated that the Devas Contract itself could give rise to security concerns:

> It was noted that Space spectrum is a vital national resource and it is of utmost importance to preserve it for emerging national applications for Strategic uses and societal applications. Given the limited availability of S band spectrum, meeting the strategic and societal needs is of higher priority than commercial/entertainment sectors. Commission noted that, in view of these emerging requirements, there is an imminent need to preserve the S band spectrum for vital strategic and societal applications.
>
> Further, Commission noted the concerns on the technical, commercial, managerial and financial aspects of the ANTRIX-DEVAS contract such as, severe penalty clauses for delayed delivery of the spacecraft and for performance failure/service interruptions, violation of the INSAT Coordination Committee's (ICC) guideline of 'non-exclusiveness' in leasing the capacity, the contract enabling Devas to sub-lease the capacity without any approvals – which could even give rise to security concerns.[137]

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[136] **Ex. R-22**, Note for the Cabinet Committee on Security, ¶¶ 20-22.

[137] *Id.*, ¶¶ 34-35. The Space Commission also reviewed other matters relating to the Devas Contract, including, *inter alia*, the failure to have provided the Space Commission with the Devas Contract before its execution. The Prime Minister pointed out that when the GSAT-6 satellite was first brought to the Cabinet in 2005 for funding approval, the Cabinet had not been informed about the Devas Contract: "In December 2005, the Union Cabinet approved building of the GSAT-6 satellite following the approval given by the Space Commission in May 2005. The proposal sought approval for launching the satellite to offer a satellite digital multimedia broadcasting service and in addition to use the satellite capacity for strategic and social applications. The proposal stated that ISRO is already in receipt of several firm expressions of interest by service providers for utilization of this satellite capacity on commercial terms. Neither the Space Commission nor the Cabinet was informed of the prior agreement between Antrix and Devas and therefore there was no question of approving it." **Ex. R-34**, Press Information Bureau, Government of India, *Excerpts of PM's Reply in the Rajya Sabha Debate on the Motion of Thanks on the President's Address*, 24 February 2011, pp. 2-3.

56. Based on the foregoing observations, the Note for the Cabinet Committee on Security recommended that an orbital slot in S-band for commercial activities not be provided to Antrix and that the Devas Contract be annulled.[138] The Cabinet Committee on Security followed the recommendation made in the Note and annulled the Devas Contract. The report of the Cabinet Committee on Security's decision stated:

> Taking note of the fact that Government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix for commercial activities, including for those which are the subject matter of existing contractual obligations for S band.
>
> In the light of this policy of not providing orbit slot in S Band to Antrix for commercial activities, the "Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd." entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith.[139]

57. The Prime Minister publicly explained the history of the matter as follows:

> There have been no backroom talks. I think I have not met anybody myself and the decision of the Space Commission to annul the deal was taken on 2nd July, 2010. Space Commission took a number of decision of which annulment of the contract was one of them. The Dept of Space was asked to take action on all the five decision points that emerged from the Space Commission meeting. The issue of how to annul the contract required consideration by legal experts and the Law Ministry was consulted. A decision had to be taken on whether to annul the contract using article 7(C) or Article 11 or both read together. Eventually it has

[138] **Ex. R-22**, Note for the Cabinet Committee on Security, ¶¶ 45.1-45.2; Anand Witness Statement, ¶ 22.

[139] **Ex. R-35**, Press Information Bureau, Government of India, *CCS Decides to Annul Antrix-Devas Deal*, 17 February 2011 (also submitted by Claimants as **Ex. C-134**).

been decided that the Government should take a sovereign policy decision regarding the utilization of Space Band capacity which uses S Band spectrum having regard to the country's strategic requirements.

I would like to mention that although the Space Commission took a decision to annul the contract in July 2010, the actual Cabinet note was received from the Deptt of Space in the PMO only in November 2010. And even then there was a number of consultations to polish it up. At the most you can say that between November and now the Prime Minister's Office has got this note ready for the Cabinet. Decision has been taken now but it requires consultations. . . . After the receipt of the note for the Cabinet from the Dept of Space for preparation of the Cabinet note a number of ministries were consulted and the Dept of Space itself took six revisions of the note before finally submitting it for approval.

It is certainly true that a number of letters were received by members of Space Commission including officials in the PMO from Devas after August 2010 including as late as a few days ago. Letters were also received in the PMO from the US Chamber of Commerce but no action was taken on any of these letters which were merely filed. At no stage was Dept of Space asked by the PMO to comment on the points made in the letters. They have no impact whatsoever on the processing of the case. On the contrary, the PMO followed up its verbal reminders to Dept of Space by sending a letter to the Dept of Space in October 2010 seeking a status of follow up of the decision taken by the Space Commission in its July 2010 meeting.

The matter was never raised by the German Minister of Foreign Affairs during his meeting with me in New Delhi on 18 October. I think some people have reported that the German Foreign Minister raised it with me. The meeting did take place but he never mentioned anything. It is a fact that the meetings did take place between Devas and officials of the Dept of Space, ISRO and Antrix after July last year since the agreement had not actually been annulled. But no further actions were taken by the Deptt of Space or ISRO to implement the agreement. No assurance was given in contravention of the recommendations of the Space Commission. Though there has been some delay in processing which were only procedural.

The fact is that the contract was not operational in any practical sense and there was no question of diluting in any way the recommendations of the Space Commission. All the consultations are now almost complete. The Ministries

> concerned have all had the opportunity to express their views as is required before having policy decisions taken by the Government at the level of the Cabinet, and also because this issue concerns many other Ministries apart from the Dept. of Space. These include Deptt of [Telecommunications], Defence, Home, Finance and Law. The matter is expected to be put before Cabinet Committee on Security for its final decision. That's the state of the affairs. There have been no effort[s] in the Prime Minister's office to dilute, in any way the decision taken by the Space Commission in July 2010. On that I would like to assure you and through you I would like to assure the country.[140]

58. Claimants do not deny that the Cabinet Committee on Security made the decision to annul the Devas Contract.[141] Rather, they base their case on the notion that the decision of the Cabinet Committee on Security was merely a contrivance to "extricate itself from the Devas Agreement . . . . amid political pressure and dissatisfaction with the contract's terms."[142] In other words, Claimants' thesis is that the Cabinet Committee on Security was manufacturing governmental concerns out of thin air. But the documents in the record clearly show that virtually the entire Government hierarchy responsible for national security was very concerned about the Devas Contract and was taking the action it considered necessary in the security interest of the nation to preserve valuable and scarce spectrum for non-commercial use by the Ministry of Defence and other security agencies.[143] There is no basis for Claimants' irresponsible speculation that the members of the Cabinet Committee on Security were

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[140] **Ex. R-36**, *Prime Minister Manmohan Singh's Interaction with Editors of the Electronic Media on Feb. 16, 2011*, THE HINDU, 16 February 2011, pp. 6-7.

[141] **Ex. R-35**, Press Information Bureau, Government of India, *CCS Decides to Annul Antrix-Devas Deal*, 17 February 2011; Statement of Claim, ¶ 120.

[142] Statement of Claim, ¶¶ 181-182.

[143] *See* ¶¶ 31-55, *supra*.

not properly exercising their discretionary functions as members of the Cabinet entrusted with the primary responsibility for matters of national security.[144]

59. Pursuant to the decision of the Cabinet Committee on Security, on 23 February 2011, the Department of Space directed Antrix to notify Devas of the decision of the Government of India regarding the termination of the Devas Contract.[145] Antrix notified Devas on 25 February 2011 that the Devas Contract was terminated.[146]

60. As indicated by the Prime Minister, there was considerable discussion as to whether the technical ground for termination of the Devas Contract was Article 7(c), which addressed denial of frequency and orbital slot to Antrix, or simply Article 11, the *force majeure* clause, which clearly applied to sovereign, governmental action preventing performance by either party. Article 7(c) required Antrix to refund the Upfront Capacity Reservation Fees paid by Devas, whereas no such refund would have been required under Article 11.[147] In order to avoid any argument concerning the impact of the *force majeure* on the portion of the Upfront Capacity Reservation Fees already paid, and in view of the fact that the decision of the Cabinet Committee on Security expressly stated that the orbital slot for S-band frequency would not be allotted for commercial use, Antrix invoked Article 7(c) of the Devas Contract in addition to *force majeure*, thereby agreeing to reimburse Devas the Upfront Capacity Reservation Fees

[144] *See* n. 323, *infra*.

[145] **Ex. R-37**, Letter from the Department of Space to Antrix, 23 February 2011. *See also* Anand Witness Statement, ¶ 23.

[146] **Ex. R-38**, Letter from Antrix to Devas, 25 February 2011. Antrix stated: "The Central Government has communicated that it has taken a policy decision not to provide orbital slot in S-Band to our Company for commercial activities including those which are the subject matter of the existing agreements." *Id*.

[147] *See* **Ex. R-1**, Devas Contract, Articles 7(c) and 11.

paid by Devas up to that date.[148] In fact, Antrix tendered to Devas a cheque in that amount.[149] Rather than accept that tender, which was all that Devas could have reasonably expected to receive in light of the heavily negotiated termination provisions of the Devas Contract, Devas returned the cheque and decided that it should be compensated in the surrealistic amount of US$1.6 billion.

61. As Claimants point out, Devas originally rejected the termination by Antrix and sought specific performance and damages for alleged breach.[150] Then, by letter of 13 June 2013, Devas stated its intention to withdraw its claim for specific performance, electing to accept the alleged "repudiatory breach," thereby "bringing the Agreement to an end."[151] While the Devas Contract was terminated long ago under Article 7(c) by reason of the Government's decision in the exercise of its sovereign prerogative not to provide Antrix with the orbital slot and to reserve the S-band capacity for military and strategic uses, Devas' purported termination of the Devas Contract would give rise to the same result under the Devas Contract. This is due to the fact that the same exclusive remedy – the refund by Antrix of the Upfront Capacity Reservation Fees paid by Devas – was expressly provided for both a termination by Antrix for lack of governmental approvals and a termination by Devas for material breach by Antrix.[152] Under the termination provisions of the Devas Contract, such a payment constitutes the entirety of the compensation due to Devas, as those provisions explicitly state: "Upon

[148] **Ex. R-38**, Letter from Antrix to Devas, 25 February 2011.

[149] **Ex. C-138**, Letter from Antrix to Devas, 15 April 2011.

[150] Statement of Claim, ¶ 143; **Ex. R-39**, Devas' ICC Request for Arbitration, 29 June 2011, ¶ 69; **Ex. R-2**, Devas ICC Statement of Claim, ¶¶ 252-278.

[151] **Ex. R-40**, Letter from Devas to Antrix, 13 June 2013; Statement of Claim, ¶ 147.

[152] *See* ¶¶ 20-28, *supra*.

such termination, neither Party shall have any further obligation to the other Party under this Agreement nor be liable to pay any sum as compensation or damages (by whatever name called)."[153]

D. Devas Never Obtained and Could Never Be Granted the Necessary Licences for Its Performance under the Devas Contract after the Decision of the Cabinet Committee on Security

62. Significantly, the decision of the Cabinet Committee on Security to deny orbital slot and annul the Devas Contract not only meant that the Devas Contract would be terminated, but it also left no doubt that no licence could be issued to Devas to operate the multimedia system contemplated by the Devas Contract and that Devas would consequently be unable to obtain the licences it was required to obtain under the Devas Contract.[154] The Statement of Claim itself states, although almost in passing, that Devas was required to obtain an operating licence from the WPC.[155] Indeed, Devas had prepared, but never submitted to the WPC, an application for that licence.[156]

63. Devas refers to this Application to the WPC and the requirement to obtain the licence that was never obtained in paragraphs 93 to 95 of its Statement of Claim in the Devas Arbitration, stating as follows:

> At this point [2010], DOT and WPC had granted all of Devas's prior requested licenses, including those necessary

[153] **Ex. R-1**, Devas Contract, Articles 7(b), 7(c). *See* ¶¶ 20-28, *supra*. Claimants' silence on the agreed consequences of termination and their failure to bring the negotiating and drafting history of Article 7 of the Devas Contract to the Tribunal's attention speak volumes about the lack of substance to their case. One cannot construct a valid treaty claim by ignoring the facts and cavalierly throwing around allegations of bad faith and ulterior motives.

[154] **Ex. R-1**, Devas Contract, Articles 3, 12(b)(vii).

[155] Statement of Claim, ¶ 102; Viswanathan Witness Statement, ¶¶ 149-152.

[156] *See* **Ex. R-2**, Devas ICC Statement of Claim, ¶ 94; **Ex. R-41**, Letter from Devas to Antrix, 20 July 2010.

> to conduct the experimental trials, as well as Devas's IPTV and ISP licenses. With the success of the experimental trials, Devas therefore fully expected that it would be granted a terrestrial spectrum license by the WPC, once the GSAT-6 satellite had launched.
>
> To this end, two senior advisors to Devas – R. N. Agarwal, former head of the WPC and Mr. K. Narayanan, former head of the Satellite Communications Programme Office, DOS/ISRO – began to work with Devas' Chief Technology Officer, D. Venugopal, on a draft WPC application. The first significant draft of this application was forwarded by Devas to Antrix in a letter dated 20 July 2010.
>
> The Devas team then engaged in a series of discussions with DOS and ISRO personnel regarding the WPC license application. Devas representatives engaged in several rounds of meetings with representatives of the Frequency Management Office at ISRO, including meetings with Mr. Neelakanatan, then Director of the Satellite Communication Programme Office at ISRO, and Mr. Madhusudhan, the Executive Director of Antrix. These officials signed off on a draft WPC Application by January 2011. Devas was therefore in a position to submit this application just as soon as the satellite launch date and vehicle were identified by ISRO.[157]

64. It is true that Devas was preparing a licence application to the WPC. It may also be true that Devas felt that it had a powerful team advising it in the form of the former head of the WPC and the former head of the Satellite Communications Programme Office, Department of Space/ISRO. But neither a powerful team of advisors nor wishful thinking can be equated with the granting of a licence which both Claimants and Devas concede Devas needed, did not have, and had no legal right to obtain. It was for the Government to determine whether a licence would be issued, after consideration of all of the elements of the case, including in particular the security concerns and strategic objectives and needs of the nation. In light of the decision of the Cabinet Committee on Security, no such licence would or could ever be issued.

[157] **Ex. R-2**, Devas ICC Statement of Claim, ¶¶ 93-95 (emphasis added, footnotes omitted).

65. In this case, Mr. Viswanathan, who also submitted a witness statement in the Devas Arbitration, makes the same points noted above.[158] But Claimants in their Statement of Claim add an interesting twist to the argument, stating:

> 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, and because Antrix had promised to assist in obtaining any needed governmental licence necessary for the Devas System, Devas had every reason to expect to obtain a WPC license promptly, and, indeed, expected to receive such a license for a nominal fee.[159]

66. The above-quoted passage reveals Claimants' strategy to obtain the frequency allocation and operating licence required for Devas to use S-band to provide its services through the satellites and the terrestrial component of its system, even though S-band had previously never been used or authorised in India for terrestrial services, as the frequency range 2555-2635 MHz had always been designated for broadcast (space-to-earth) services.[160] Obtaining such a licence would have required a change of policy on the part of the Government to allow such hybrid satellite-terrestrial use of S-band. What Devas was doing, on the one hand, was marshalling all the high-powered advisors it could find to assist it, and on the other hand, deferring the submission of its licence application until after the satellites were launched in order to

[158] Viswanathan Witness Statement, ¶¶ 149-152.

[159] Statement of Claim, ¶ 102 (emphasis added).

[160] Sethuraman Witness Statement, ¶¶ 4, 6-10. *See* ¶¶ 40-41, *supra*.

place itself in the position of being the only alternative, "as a practical matter," to improve its chances of effectuating that policy change and obtaining the licence. Thus, fully aware of the fact that Devas had no right to obtain the licence, Claimants and Devas devised a strategy for forcing the Government to change its policy regarding the use of S-BSS frequencies terrestrially. That strategy did not work, as the Government determined that it was necessary to reserve those frequencies for strategic use.[161]

[161] Claimants may well have thought that it would have been a good idea to re-use spectrum designated for satellite services terrestrially, and they point to the fact that the United States Federal Communications Commission had reached that conclusion as a matter of its regulation of spectrum in the United States of America. Parsons Witness Statement, ¶¶ 25-27. But in India, a decision to use spectrum designated for satellite service terrestrially would have required changes to the National Frequency Allocation Plan, as well as a detailed review and analysis by the Telecom Regulatory Authority of India ("TRAI"), with notice and opportunity for other stakeholders to be heard, including competitors of Devas, such as terrestrial mobile telecommunications service providers. Sethuraman Witness Statement, ¶¶ 6-15. *See* n. 46, *supra*. Moreover, the TRAI had recommended as early as July 2008 that S-band spectrum that might be used for terrestrial services (including not only the 40 MHz of capacity that had been allocated to the Department of Telecommunications in 2001, but also any additional S-band that might be made available for terrestrial services) would need to be auctioned to the highest bidder at reserve prices far in excess of the nominal fees that Claimants allege they anticipated Devas would have had to pay. Sethuraman Witness Statement, ¶¶ 11-15; Statement of Claim, ¶ 102. While there was no indication that S-band that had been allocated for satellite services was also going to be used for terrestrial services, as the WPC noted at the 6 January 2009 meeting of the TAG review committee, if such a redeployment had been made, the spectrum would have been required to have been auctioned under the TRAI's recommendation, which would have fundamentally altered the already fragile economics of the project. As demonstrated in the economic report submitted by Antrix in the Devas Arbitration, if Devas were required to pay the auction price for the terrestrial use of the spectrum, the net present value of Devas even according to its own economic expert would be negative by a wide margin. **Ex. R-4**, Antrix ICC Expert Report on Quantum, ¶¶ 32-35, 49, 103-106. Devas' presentations post-dating the July 2008 TRAI recommendations reveal just how questionable obtaining the licence for the terrestrial portion of its services was. For example, in a 4 February 2010 presentation, Devas noted that one of the "critical issues" was "[s]trong ISRO sponsorship for WPC operating license and CGC [Complementary Ground Component] policy essential." **Ex. C-89**, 4 February 2010 Presentation, Slide 13. *See also* **Ex. C-93**, 21 April 2010 Presentation, Slide 31 (same); **Ex. C-110**, 26 October 2010 Presentation, Slide 11 ("DOS/ISRO to endorse & forward Devas frequency authorisation license application to WPC for use of integrated satellite system"); **Ex. C-115**, 30 November 2010 Presentation, Slide 16 (same). But the Department of Space and ISRO had no obligation with regard to obtaining licences or spectrum allocation, much less to secure a change in policy, and the only obligation of Antrix in regard to the Devas operating licence was to provide technical support on a best efforts basis. *See* n. 46, *supra*; **Ex. R-1**, Devas Contract, Article 3(c). Devas had been told from the outset that Antrix could make no assurances regarding frequency allocation and that, in contrast to what Devas had proposed in the "binding Term Sheet" that was never executed, it would be Devas' responsibility to obtain the required licences and terrestrial spectrum allocations. *See* nn. 46, 55, *supra*.

E. The Commissions of Inquiry Subsequent to the Decision of the Cabinet Committee on Security

67. The concerns over the Devas Contract triggered several additional Commissions of Inquiry, the first of which was established at the time the Cabinet Committee on Security made its policy decision to annul the Devas Contract. That inquiry was conducted by a "High Powered Review Committee" comprised of Shri B.K. Chaturvedi, Member of the Planning Commission, and Professor Roddam Narasimha, Member, Space Commission, which was charged with reviewing the Antrix-Devas matter and making recommendations to the Prime Minister.[162]

68. The Committee issued its report on 12 March 2011, stating as follows:

> The allocation of spectrum has a security dimension, too, which has been further highlighted in the recent meeting of the Space Commission (July, 2010). During the discussions with the Committee, the assessment given by Dr. T.K. Alex, Member, Space Commission and Director, ISAC was that the total requirement of the Armed Forces was 107.5 MHz in the S-band in the next decade. The Committee was also informed by him that the Devas agreement posed a potential threat to national security in several ways. The private service provider, viz. Devas, was originally an Indian company and, subsequently, significant shares of company stock had been bought over by Deutsche Telekom and C/C Devas Mauritius. There was the risk that the S-band signals of the Armed Forces could be picked up by these service providers and misused by them. Secondly, the receivers which they were developing could have other uses also and may have GPS elements. Thirdly, Devas was having discussions with Railways for potential development of business. This, in Dr. Alex's opinion, was not desirable. The Committee assessed this view and felt that from the national security perspective allocation of a large part of the spectrum and running of service by a private player like Devas was an unjustified risk from the security point of view. This issue seems to have been completely overlooked. It would have been appropriate to discuss the allocation of satellite

[162] *See* **Ex. R-22**, Note for Cabinet Committee on Security, ¶ 43.2; **Ex. R-42**, Department of Space, Terms of Reference of High Powered Review Committee, 10 February 2011.

> capacity to service providers like Devas in ICC and based on their views, a well-considered assessment could have been made of how the national societal, commercial, technological and security interests would be best served. The decision to allocate almost the entire frequency to one company is clearly not prudent.[163]

69. The Committee also recommended the following corrective measures:

> Technology in these fields is evolving today rapidly. The orbit-spectrum resource is a very valuable natural resource. Efforts have to be made to augment its availability for the national use. Also it must be used in the most efficient manner which takes care of the country's national and international interests. Technology must be brought to bear on this usage. Similarly, in the terrestrial segment spectrum usage has to be done in an efficient manner using the most modern technologies. This, too, is an area which requires extensive study. The Committee would, hence, recommend that a Technical Group of Experts may be appointed by the Government either under Chairman, TRAI or Secretary, Department of Space, which can look at these issues. The Committee recommends that the entire problem should be discussed in ICC and immediate steps to chalk out a strategy for long-term efficient usage of orbit-spectrum resources is taken in the national interest.[164]

70. The High Level Team Committee, which was constituted by the Government of India to review the technical, commercial, procedural and financial aspects of the Devas Contract, noted several irregularities with Devas' financing in its 2 September 2011 report:

> For Devas, an internet service provider with a share capital of Rs. 1 lakh (About Rs. 5 lakh on 31st March 2007 and about Rs. 18 lakh on 31st March 2010), with no asset base and no IPR or patent in the relevant technology, and which has been making losses since inception, to collect Rs. 578 crore as share premium from foreign investors, appears to

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[163] Sethuraman Witness Statement, **App. KS-10**, Report of the High Powered Review Committee on Various Aspects of the Agreement between Antrix and M/s Devas Multimedia Private Limited by B.K. Chaturvedi and Professor Roddam Narasimha, March 2011 (the "Report of the High Powered Review Committee"), ¶ 3.4.6.

[164] *Id.*, **App. KS-10**, Report of the High Powered Review Committee, ¶ 3.7.3.

> be unusual and can only be attributed to the agreement that it had with Antrix. Further, as a result of the increased share valuation, some of the early shareholders including an ex-ISRO Scientist and members of the FA-USA team stood to make significant profits while divesting part of their shareholding in 2007-08. Changes in the shareholding pattern of Devas have led to 2 Mauritius based entities holding 34% and foreign entities holding over 54% of Devas' ordinary share capital as on 31st March 2010. It has also been brought to the notice of the High Level Team that Shri Bhaskaranarayana on one of his visits to USA enjoyed the hospitality of the private company involved in this case. The Department of Revenue and the Ministry of Corporate Affairs have initiated investigations for possible acts of omission and commission.[165]

71. Following the Report of the High Powered Review Committee, Mr. K. M. Chandrasekhar of the Cabinet Secretariat was asked to examine its findings and to submit recommendations to the Department of Space within fifteen days.[166] His Report made the following observations on the vast allocation of spectrum to Devas:

> As against a total usable spectrum bandwidth of 80 MHz in the "S" band, nearly 50-60 MHz were allocated for the use of Devas. It is not clear why Devas required such a huge bandwidth, when countries like Japan, Korea and USA are currently using only 20-25 MHz for providing satellite services. The apprehension that the orbit-spectrum allocation to India would have lapsed if it had not been utilized should have been discussed in the ICC, which is the inter-ministerial forum that includes DoT, who represent India in the ITU where orbital slots are co-ordinated. HPRC [High Powered Review Committee] has also noted that allocation of a large part of the "S" band spectrum (also in use by defence forces) to a private player was "an unjustified risk from the security point of view." The HPRC has re-iterated that a full discussion of this proposal in the ICC would have enabled a well considered assessment of how

[165] **Ex. R-43**, Government of India, *Conclusions and Recommendations from The Report of the High Level Team on the Agreement between M/s Antrix Corporation Limited and M/s Devas Multimedia Private Limited*, 2 September 2011, ¶ 6.10.

[166] **Ex. R-44**, Report by Mr. K.M. Chandrasekhar, Cabinet Secretariat Doc No. 601/1/4/2011-TS, Rashtrapati Bhavan, 12 April 2011 (the "Chandrasekhar Report").

> the national societal, commercial, technological and security interests could have been best served.[167]

72. The report by the High Level Team concluded that a number of individuals were responsible for various acts of commission and omission in connection with the Devas Contract, and that appropriate action should be taken under the service rules.[168] The High Level Team also recommended consideration of suspension or termination of pension privileges and action under other provisions of law.[169]

F. What Happened to the Satellites

73. The final part of the relevant factual background of this case, not the tale spun in the Statement of Claim and accompanying witness statements, is what happened to the satellites and the S-band capacity after the termination of the Devas Contract. Claimants would have this Tribunal believe – because it is an indispensable part of their legal theory – that the Government took its policy decision to extricate Antrix from an unfavourable commercial arrangement in order to permit Antrix to lease the capacity to other private parties for increased fees, thereby generating higher profits. That is a story fabricated to fit a legal theory, but it is not a story borne out by the facts.[170]

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[167] *Id.*, Chandrasekhar Report, ¶ 11(iii).

[168] The High Level Team was chaired by the Former Chief Vigilance Commissioner and included the Secretaries of the Departments of Telecommunications, Expenditure and Space and an Officer on Special Duty and Director (Legal) of the Department of Space. **Ex. R-43**, Government of India, *Conclusions and Recommendations from The Report of the High Level Team on the Agreement between M/s Antrix Corporation Limited and M/s Devas Multimedia Private Limited*, 2 September 2011, p. 74.

[169] *Id.*, pp. 71-73. Certain of the individuals mentioned by the High Level Team, including Dr. Bhaskaranarayana and Shri K. R. Sridhara Murthi, were in fact sanctioned.

[170] Two themes running throughout the Statement of Claim are that the Devas Contract was annulled due to pressure from terrestrial cellular operators seeking access to S-band and that Respondent's actions were "financially motivated." *See, e.g.*, Statement of Claim, ¶¶ 137, 177. This is another example of Claimants' propensity to engage in rank speculation and ignore hard facts. A basic, undisputed fact Claimants fail to come to grips with is that regardless of what terrestrial cellular operators would like to have, and irrespective of financial considerations, S-band has been reserved for non-commercial use.

74. The facts are that no such commercial leasing on more favourable terms has taken place. Antrix has not contracted, and in accordance with the decision of the Cabinet Committee on Security would not be permitted to contract, with any private party for commercial use of S-band capacity on any terms, regardless of how favourable they may be.[171] The satellites that were to be built for commercial use in connection with the Devas Contract are now being completed to fulfil the needs of the military and other security agencies.[172]

75. In sum, the entire basis of the claim in this case is belied by the record. While Claimants argue that the Government's decision was "financially motivated,"[173] the record shows that the Government, through its Cabinet Committee on Security, the body charged with overseeing India's security and defence needs and policies, made a policy decision not to grant an orbital slot and to annul the Devas Contract based upon all of the pertinent facts, most notably the needs of the Ministry of Defence and other security agencies for S-band capacity for secure and reliable communications and data transmission. That was a decision made in the exercise of the Government's sovereign prerogative to address real and demonstrable national security concerns, not a contrivance based upon commercial considerations.

[171] Anand Witness Statement, ¶ 24.

[172] *Id.*

[173] Statement of Claim, ¶ 177.

LEGAL ARGUMENTS

POINT I.

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

76. Although Claimants feign ignorance as to the relevance of the "essential security interests" provision of the Mauritius Treaty,[174] the central importance of that provision on the facts of this case is unquestionable. Article 11(3) of the Mauritius Treaty provides:

> The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests . . . .[175]

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

77. It is well established that the determination of what constitutes a State's essential security interests and by what means they are to be protected lies with national authorities, which clearly are better positioned than an international tribunal to assess the risks involved in any particular circumstance. As the European Court of Human Rights held:

> [I]t falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in

[174] *Id.*, n. 7.

[175] **Ex. C-1**, Mauritius Treaty, Article 11(3).

> principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.[176]

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

> National security is a matter of which the government is sole trustee. It is eminently a matter on which an international court can have no useful opinion and is probably not entitled to an opinion.[177]

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

> National security is the responsibility of the executive government; what action is needed to protect its interests is [. . .] a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.[178]

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[176] *Brannigan and McBride v. the United Kingdom*, European Court of Human Rights, Judgment, 25 May 1993, ¶ 43. *See also Ireland v. the United Kingdom*, European Court of Human Rights, Judgment, 18 January 1978, ¶ 207. In both cases the European Court of Human Rights held that the derogation from Article 5 (right to liberty and security) of the European Convention on Human Rights decided by the United Kingdom in the fight against terrorism based upon the derogation clause of the Convention was not in breach of the Convention.

[177] **Ex. R-45**, Robert Y. Jennings, *Recent Cases on "Automatic" Reservations to the Optional Clause*, 7 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 349 (1958), p. 362.

[178] **Ex. R-46**, *Council of Civil Service Unions v. Minister for Civil Service*, 22 November 1984, [1985] 1 A.C. 374, 412. At issue in that case was the government's decision that employees of the Government Communications Headquarters would not be allowed to join national trade unions for national security reasons. The appeal challenging the decision failed on national security grounds. In a later part of his opinion, Lord Diplock went on to say as follows: "[T]he crucial point of law in this case is whether procedural propriety must give way to national security when there is conflict between (1) on the one hand, the prima facie rule of 'procedural propriety' in public law, applicable to a case of legitimate

80. National security determinations are also granted a special deference in the case law of international human rights bodies. For example, the United Nations Human Rights Committee has held that "[i]t is not for the Committee to test a sovereign State's evaluation of an alien's security rating"[179] and that "the assessment of whether a case presents national security considerations bringing the exception contained in article 13 into play allows the State party very wide discretion."[180]

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expectations that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has theretofore enjoyed that benefit and that person has been given an opportunity to comment on the reason, and (2) on the other hand, action that is needed to be taken in the interests of national security, for which the executive government bears the responsibility and alone has access to sources of information that qualify it to judge what the necessary action is. To that there can, in my opinion, be only one sensible answer. That answer is 'Yes'." *Id*., pp. 412-413.

[179] *J.R.C. v. Costa Rica*, United Nations Human Rights Committee, Communication No. 296/1988, CCPR/C/35/D/296/1988, Decision on Admissibility, 3 April 1989, ¶ 8.4 (detention pending deportation on national security grounds of a person of undetermined nationality held consistent with the International Covenant on Civil and Political Rights, Adopted by the General Assembly of the United Nations on 19 December 1966 (the "Covenant")); *V.R.M.B. v. Canada*, United Nations Human Rights Committee, Communication No. 236/1987, CCPR/C/33/D/236/1987, Decision on Admissibility, 18 July 1988, ¶ 6.3 (proceedings relating to the deportation of an alien on national security grounds held consistent with the Covenant).

[180] *Mohammed Alzery v. Sweden*, Communication No. 1416/2005 CCPR/C/88/D/1416/2005, View, 25 October 2006 ("*Alzery*"), ¶ 11.10. Article 13 of the Covenant reads as follows: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." In *Alzery* the applicant had been deported from Sweden on national security grounds because of his past involvement in an Islamist opposition movement in Egypt. The applicant complained of the violation of his right to have his case reviewed under Article 13 of the Covenant. The Committee stated as follows:

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

Alzery, ¶ 11.10.

81. This same approach is taken in the Explanatory Report to Article 1 of Protocol No. 7 to the European Convention on Human Rights,[181] which states:

> The State relying on public order to expel an alien before the exercise of the aforementioned rights must be able to show that this exceptional measure was necessary in the particular case or category of cases. On the other hand, if expulsion is for reasons of national security, this in itself should be accepted as sufficient justification.[182]

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

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

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

> 1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> a. to submit reasons against his expulsion,
>
> b. to have his case reviewed, and
>
> c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Ex. R-47, Council of Europe, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11*, 1 November 1998, Article 1.

[182] **Ex. R-48**, Council of Europe, Explanatory Report, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ¶ 15.

> that felt threatened its own view about whether such a threat actually exists and what measures, if any, that State is allowed to take in response.[183]

83. The foregoing authorities make clear that international tribunals should not second-guess national security determinations made by national authorities, as the latter are uniquely positioned to determine what constitutes a State's essential security interests in any particular circumstance and what measures should be adopted to safeguard those interests.

84. In this case, the Cabinet Committee on Security, the highest authority in India for matters of internal and external security and defence, made a sovereign determination that S-band capacity should not be allocated for commercial purposes considering the growing demands of the military and security agencies of the nation, which undoubtedly form part of Respondent's essential security interests.[184] Moreover, the record shows that the decision was taken on the basis of extensive discussion and deliberation by the entire national security hierarchy of the Government of India.[185]

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[183] **Ex. R-49**, THE PROTECTION OF NATIONAL SECURITY IN IIAS, UNCTAD SERIES ON INTERNATIONAL INVESTMENT POLICIES FOR DEVELOPMENT (2009), pp. 3, 41.

[184] It is commonly accepted that the military interests of the host State present a quintessential illustration of its essential security interests. *See* **Ex. R-50**, Peter T. Muchlinski, *Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate. The Issue of National Security*, YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009 35 (2009), p. 54 ("As regards the traditional meaning of the term, it is clear that most states will place military and strategic security at the heart of their approach."). *See also* **Ex. R-49**, THE PROTECTION OF NATIONAL SECURITY IN IIAS, UNCTAD SERIES ON INTERNATIONAL INVESTMENT POLICIES FOR DEVELOPMENT (2009), Executive Summary ("While national security concerns in relation to foreign investment are nothing new and must be an issue even for the most liberal country, cases have become more frequent in recent years where foreign investors have been rejected for national security reasons or subjected to other restrictive measures after establishment. Most often, security concerns have been invoked in relation to planned investments in so-called strategic industries and critical infrastructure. Thus, the issue has implications that go far beyond the defence-related activities for which the national security exception was initially designed.").

[185] *See* ¶¶ 39-61, *supra*.

85. It is not unusual for national security deliberations to be conducted strictly among high level government officials without the participation of private parties. Indeed, there is no greater governmental function than the safeguarding of the nation's security. Nevertheless, Claimants complain that the Government did not include them in the national security deliberations.[186] They seem to think that they had some sort of vested right to be consulted on national security matters, and that had they been so consulted, they might have shown the Cabinet Committee on Security the light and avoided the policy decision resulting in the reservation of S-band spectrum for strategic use and the annulment of the Devas Contract. That argument evinces a fundamental misunderstanding of both the allocation of responsibility for national security determinations and the national security decision-making process. Of equal importance, it reflects a fundamental misunderstanding of the "essential security interests" provision of the Mauritius Treaty, which obviously does not contain a "private party consultation" requirement.[187]

86. The fact is that Claimants have no answer to Article 11(3) of the Mauritius Treaty and did not even bother to try to deal with that provision in their Statement of Claim filed on 1 July 3013, a month and a half after the First Procedural Meeting in this case, at which Respondent made clear that the essential security interests provision would be at issue.[188] All Claimants could say on this basic issue in their Statement of Claim was in a footnote, which reads as follows:

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[186] Statement of Claim, ¶¶ 123, 183.

[187] The Government is obviously fully aware of all conceivable arguments Claimants have advanced on the appropriate use of S-band, and there has been no change in its decision on the reservation of S-band for strategic use.

[188] *See* n. 31, *supra*.

> 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.[189] *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.[190]

87. In deciding on the arbitrator challenges made at the outset of this case, the President of the International Court of Justice did not require Respondent to "articulate a basis upon which Article 11(3) might excuse Respondent's conduct in this case."[191] He stated:

> . . . . I note that the intention of the Respondent to rely on the "essential security interests" provision in Article 11(3) of the Treaty seems credible, not just a pretext to mount the present challenge. According to the Notice of Arbitration, the Additional Solicitor-General of India recommended that the Government of India could make a "policy" decision to reserve the S-Band to itself for national and military purposes. Such decision, he opined, then could serve as

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[189] Respondent did not "describe" Article 11(3) as the "essential security" provision of the Mauritius Treaty. It is the text of the Article itself which uses the term "essential security interests." It states: "The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests . . . ." **Ex. C-1**, Mauritius Treaty, Article 11(3). No description is necessary when the provision is clear on its face.

[190] *See* Statement of Claim, n. 7. The Tribunal will recall the discussion at the First Procedural Meeting concerning the "essential security interests" provision and whether it is no more than an embodiment of the state of necessity defence under customary international law as reflected in Article 25 of the ILC Articles on State Responsibility. *See* Transcript, pp. 38-39. In the event that Claimants raise that argument based on the three Argentine decisions referred to at that Procedural Meeting, the Tribunal is respectfully referred to the decisions of the three annulment committees in those cases. *See* Transcript, pp. 5-7. *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Decision on Application for Annulment, 25 September 2007 ("*CMS Annulment*"), ¶¶ 128-136; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Application for Annulment, 29 June 2010, ¶¶ 186-219; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Application for Annulment, 30 July 2010, ¶¶ 355-395.

[191] **Ex. R-51**, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, ¶ 57.

> basis for Antrix to terminate the contract with Devas, the company in which the Claimants maintain to have made their investment. It is certain that the justification provided for the termination of the contract will be one of the legal issues to be considered by the Tribunal should it reach the merits of the dispute, including whether the Respondent can successfully rely on Article 11(3) of the Treaty.[192]

88. Thus, Claimants' failure to address the essential security interests provision in their Statement of Claim is not attributable to a lack of understanding of the issue or a lack of articulation by Respondent. It is attributable to the fact that they have nothing to say other than their undocumented and unsubstantiated speculation that the Government's action was *mala fide*. Aside from the fact that the extensive record in this case negates that argument as a matter of fact, it is an unacceptable basis for an investment treaty claim as a matter of law.[193]

89. In sum, the claims presented by Claimants herein should be dismissed as they are all barred by the essential security interests clause of the Mauritius Treaty.

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[192] *Id.*, ¶ 57. In a footnote to this statement, Judge Tomka also noted that Claimants' 12 December 2011 letter addressed to the Prime Minister of India, inviting the Government to settle the dispute pursuant to Article 8(1) of the Treaty, "was copied, among others, to the National Security Advisor to the Prime Minister of India." *Id.*, n. 44; **Ex. C-166**, Claimants' letter of 12 December 2011. The National Security Advisor is the chief executive of the National Security Council and a main advisor to the Prime Minister on security issues. *See* Anand Witness Statement, n. 41. The National Security Advisor played an important role in the Space Commission deliberations on the need to reserve S-band for non-commercial, strategic use. *See* ¶ 46, *supra*; **Ex. R-23**, Minutes of 117th Meeting of the Space Commission Held at DOS Branch Secretariat, New Delhi, on 2 July 2010, signed 21 July 2010, ¶ 117.6.3.

[193] *See* n. 323, *infra*.

POINT II.

THIS CASE ONLY INVOLVES "PRE-INVESTMENTS" NOT COVERED BY THE MAURITIUS TREATY

90. In spite of Claimants' repeated references to their investment, this case only involves pre-investment activities that are outside the scope of protection afforded by the Mauritius Treaty.

91. Like the majority of investment treaties, the Mauritius Treaty contains an "admission clause" whereby only assets invested and admitted in accordance with the laws and regulations of the host State are protected.[194] Article 1(1)(a) of the Mauritius Treaty defines an "investment" 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."[195] Likewise, Article 2 of the Mauritius Treaty limits the scope of the Treaty to

[194] Some investment treaties adopt the "right of establishment" model and offer limited protection to qualified "investors" with respect to the acquisition and establishment of investments. Examples of pre-investment protection are the North American Free Trade Agreement ("NAFTA") and the 2012 U.S. Model BIT, which accord most-favoured-nation and national treatment to putative investors in relation to the acquisition and establishment of their investments. *See* NAFTA, Article 1102 ("1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."); **Ex. R-52**, 2012 U.S. Model BIT, Article 3 ("1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."); **Ex. R-53**, BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING, UNCTAD SERIES ON DIVISION ON INVESTMENT, TECHNOLOGY AND ENTERPRISE DEVELOPMENT (2007), p. 22 (noting that the "Right of establishment" approach "consists in providing foreign investors with national treatment and MFN treatment not only once the investment has been established, but also with respect to the establishment.").

[195] **Ex. C-1**, Mauritius Treaty, Article 1(1)(a).

"investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations."[196]

92. Thus, the Mauritius Treaty follows the "admission clause" model, meaning that the host State retains control over the conditions under which investments are allowed into its territory and that the foreign investor has no right of establishment. The importance of the distinction between the "admission clause" and "right of establishment" models is widely recognized, as indicated by the following writings on the subject:

- Dolzer and Stevens: "Admission clauses are important because they determine the degree of control that a State party has retained over the conditions on the basis of which investments are allowed into the host State."[197]

- Dugan, Wallace, Rubins and Sabahi: "Most investment treaties, including bilateral agreements based on the OECD model, extend protection only to investments (however defined) once established, leaving host states free to promulgate whatever rules they deem appropriate with regard to admission or entry or establishment of foreign capital."[198]

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

[196] *Id.*, Article 2.

[197] **Ex. R-54**, Rudolf Dolzer and Margrete Stevens, BILATERAL INVESTMENT TREATIES (Martinus Nijhoff Publishers 1995), p. 51.

[198] **Ex. R-55**, Christopher Dugan, Don Wallace, Noah Rubins and Borzu Sabahi, INVESTOR-STATE ARBITRATION (Oxford University Press 2008), p. 285.

> and market. . . . The majority of BITs follow a 'controlled entry' approach."[199]

- Newcombe and Paradell: "Since most [international investment agreements] do not provide a general right of admission or establishment, the host state's foreign investment regime generally governs not only whether foreign investment is permitted to operate, but also the conditions applying to the entry of foreign investments."[200]

- Salacuse: "Consequently, the admission clause allows the host state to retain control over the entry of foreign capital, to screen investments to ensure their compatibility with the state's national security, economic development, and public policy goals, and to determine the conditions under which foreign investments will be permitted, if at all."[201]

- UNCTAD: "Another implication of the admission clause is that, regardless of whether the host country maintains any admission and screening mechanism for foreign investment — and unless the BIT states otherwise — there is no obligation on the part of the host country to eliminate discriminatory legislation affecting the establishment of foreign investment."[202]

93. The adoption of the "admission clause" model is a common feature of Indian BITs. As one commentator has noted, Indian BITs "apply only once a protected investor has established a qualifying investment" and "do not apply to the acquisition or establishment of the investment."[203] The same author stresses that "[p]re-investment activities are outside the purview" of Indian BITs.[204]

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[199] **Ex. R-56**, Ignacio Gómez-Palacio and Peter Muchlinski, *Admission and Establishment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 227 (P. Muchlinski, et al. eds., Oxford University Press 2008), pp. 228, 240-241.

[200] **Ex. R-57**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), p. 133.

[201] **Ex. R-58**, Jeswald W. Salacuse, THE LAW OF INVESTMENT TREATIES (Oxford University Press 2010), p. 197.

[202] **Ex. R-53**, BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING (2007), p. 22.

[203] **Ex. R-59**, Devashish Krishan, *India and International Investment Laws*, in INDIA AND INTERNATIONAL LAW, VOL. II (B.N. Patel ed., Martinus Nijhoff Publishers 2008), p. 301.

[204] *Id.*

94. The arbitral decisions on this point reflect the foregoing. In *Mihaly v. Sri Lanka*, the claimant, Mihaly International Corporation ("Mihaly"), obtained the exclusive right to enter into a letter of intent establishing benchmarks the company had to meet in order to obtain final approval to begin work on the construction and operation of a power plant.[205] Assuming that there existed an informal contract, Mihaly incurred significant expenses in obtaining financing, negotiating project documents and engaging consultants for feasibility analysis. When the Government refused to sign the project agreement, Mihaly initiated an ICSID arbitration under the US-Sri Lanka BIT to recover the costs incurred. The tribunal dismissed the claim, holding that Sri Lanka had undertaken no binding obligation with respect to the implementation of the project in question:

> The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States, let alone that of developing countries or Sri Lanka for that matter, to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as "investment" in the absence of the consent of the host State to the implementation of the project. . . . The Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment.[206]

95. The tribunal in *Nagel v. Czech Republic* also declined jurisdiction in a case involving pre-investment expenditures.[207] In that case, the claimant had entered into a cooperation agreement with a wholly-owned state enterprise and another private

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[205] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002.

[206] *Id.*, ¶¶ 60-61.

[207] *William Nagel v. Czech Republic (Ministry of Transportation and Telecommunications)*, SCC Case No. 49/2002, Final Award, 9 September 2003 ("*Nagel v. Czech Republic*").

operator whereby the parties agreed to jointly seek the licences necessary to establish and operate a GSM network. The Czech Government subsequently issued a resolution stating that two GSM licences would be issued; one to Eurotel and the other to the state-owned enterprise and a foreign partner to be selected through a competitive tender. In an arbitration filed under the United Kingdom-Czech Republic BIT, the claimant argued that the Government deprived him of his rights under the cooperation agreement that qualified as "claims to money or to any performance under contract having a financial value."[208] The tribunal rejected this claim, holding that although the cooperation agreement was a legally binding contract, the undertaking of the parties to work together for the purpose of obtaining the licences was not equivalent to a guarantee that the licences would be obtained:

> [T]he basic undertaking in the Cooperation Agreement was that the parties should work together for the purpose of obtaining a GSM licence. There was not, and could not be, a guarantee that a licence would in fact be obtained. That would depend on the Government, and the Government had made no undertaking in this regard. Mr Nagel could do no more than hope that his cooperation with the State-owned Czech company SRa would increase his chances to become involved in the operation of GSM in the Czech Republic, but he could not be certain of getting a licence. Although he may have been encouraged by various remarks from Ministers or Government officials or by the general interest they demonstrated in his plans, this was not sufficient, in the Arbitral Tribunal's view, to raise his prospects based on the Cooperation Agreement to the level of a "legitimate expectation" with a financial value. . . .
>
> While the Agreement was an important basis for further work, the Arbitral Tribunal considers that it was only of a preparatory nature and cannot find that the rights derived from it had a financial value.[209]

[208] *Id.*, ¶¶ 17, 45.

[209] *Id.*, ¶¶ 326, 328.

The tribunal therefore concluded that Mr. Nagel's rights under the cooperation agreement were not such as to constitute an "asset" and an "investment" within the meaning of the BIT.[210]

96. *Petrobart v. Kyrgyz Republic* involved a contract for delivery of 200,000 tons of gas condensate over twelve months and an agreement to agree on additional supplies at a later stage.[211] While the tribunal held that the first element involved an investment, it rejected the second, stating that "whatever discussions may have taken place between the parties about further business relations, they did not result in any binding undertakings in the Contract."[212]

97. Likewise, in *Zhinvali v. Georgia*, the tribunal rejected jurisdiction over a claim involving pre-investment expenditures by an Irish company.[213] In that case, negotiations between the claimant and Georgia for the rehabilitation of a hydroelectric power plant ultimately failed after Georgia received pressure from the World Bank to organise a competitive and transparent bidding process for the project. Relying on *Mihaly*, the tribunal stated that "the Claimant's 'investment' case then rises or falls depending on whether the category of 'development costs' in failed transaction is eligible for 'investment' treatment under the 1996 Georgia Investment Law."[214] In the absence of Georgia's express consent to the treatment of claimant's development costs

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[210] *Id.*, ¶ 329.

[211] *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case 126/2003, Award, 29 March 2005.

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

[213] **Ex. R-60**, *Zhinvali Development Limited v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, 10 ICSID REPORTS 3 (2006).

[214] *Id.*, ¶ 388.

as an investment, the tribunal concluded that the upfront costs did not qualify as an "investment."[215]

98. What all these cases show is that bilateral investment treaties that follow the "admission clause" model do not provide protection for pre-investment activities and expenditures. In this case, the Devas Contract itself made clear that the business Devas and Claimants hoped to engage in could not be commenced without certain essential governmental licences and approvals.[216] Those included the orbital slot frequency allocation for the satellites and the operating licence and frequency allocation Devas was required to obtain from the WPC, which Devas never even applied for.[217] Without those licences and approvals, there was no business, and everything Devas did in anticipation of obtaining those licences and approvals, including all expenditures made, constituted "pre-investment" not covered by the Mauritius Treaty. Therefore, while Claimants have no substantive claim under the Mauritius Treaty in any event, the fact that the Mauritius Treaty does not cover pre-investments would itself require dismissal of the claims herein.

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[215] *Id.*, ¶ 417.

[216] **Ex. R-1**, Devas Contract, Articles 3(c), 12(b)(vii). In fact, while Claimants make much of their raising venture capital financing and other preparatory activities, they had not commenced any infrastructure work. The money they spent was mainly on their own salaries and payment of the Upfront Capacity Reservation Fees, which Antrix offered to refund. **Ex. R-4**, Antrix ICC Expert Report on Quantum, ¶¶ 17-21, 25. Presumably, most of the funds raised in the financing remain in Devas.

[217] *See* ¶¶ 62-66, *supra*.

POINT III.

CLAIMANTS' "INVESTMENTS" HAVE NOT BEEN EXPROPRIATED

99. The main substantive claim asserted by Claimants is expropriation.[218] The crux of their claim is that their investments were expropriated when the Devas Contract was annulled. The fundamental problem with that position is that nothing was expropriated in this case. Without an identifiable right or asset that was expropriated, there can be no expropriation claim.

100. The first step in the analysis of any expropriation claim is to identify the expropriated investment. Here Claimants allege that their "investment" consists of the following for the purposes of Article 1(1)(a) of the Mauritius BIT:

> (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

[218] Claimants open their Statement of Claim with the following paragraph: "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." Statement of Claim, ¶ 1. While they go on to allege violations of other treaty provisions, those are clearly afterthoughts.

> 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.[219]

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

102. With respect to the first point, the only assets in the list of "expropriated" investments owned by Claimants are the "shareholdings in Devas" referred to in subparagraph (a). But there is no dispute in this case that those shares were not expropriated. Claimants retain all of their shareholdings in Devas and, presumably together with DTA, are in full control of the company. At the direction of its shareholders, Devas has instituted the Devas Arbitration against Antrix to vindicate the so-called rights that Claimants say were expropriated. Thus, there is no question of direct expropriation of any right or interest of Claimants in this case.

103. The real issue here is the "investments" listed in subparagraph (b) above, which refers to rights and interests of Devas, not Claimants. Article 6(3) of the Mauritius Treaty does allow the shareholder of an Indian company to bring a claim for expropriation of the assets of that company to the extent of its shareholding, but it does

[219] *Id.*, ¶ 156.

not expand the rights of the company so owned.[220] In other words, if Devas itself has no rights that were expropriated, then Claimants also have none and can raise no claim under the Mauritius Treaty.

104. With the exception of categories (v) and (vi) listed in subparagraph (b) above, which contain nothing that was "expropriated," all of the alleged Devas "investments" are dependent upon the Devas Contract. But as demonstrated in the Antrix Statement of Defence submitted in the Devas Arbitration and as is clear from a review of the Devas Contract in light of the documentary record in this case, Devas had no right under the Devas Contract other than the right to a refund of the Upfront Capacity Reservation Fees paid prior to the date of termination of the Devas Contract.[221]

105. As Claimants were aware from the outset, starting with the intensive negotiations of the Devas Contract, the rights of Devas were totally dependent upon the obtention of a number of Government approvals and licences,[222] and the Devas Contract set forth a comprehensive scheme defining the rights of the parties in the event such approvals and licences were not obtained.[223] The Devas Contract also outlined the specific consequences of termination of the agreement for breach by either

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[220] **Ex. C-1**, Mauritius Treaty, Article 6(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.").

[221] *See* ¶¶ 20-28, *supra*; **Ex. R-3**, Antrix ICC Statement of Defence, ¶¶ 12-20, 138-154.

[222] *See* ¶ 18 and nn. 46, 55, *supra*.

[223] **Ex. R-1**, Devas Contract, Article 7. *See* ¶¶ 20-28, *supra.*

party.[224] In no event was Devas entitled to receive more than a refund of the Upfront Capacity Reservation Fees paid prior to the date of termination. That was the only right Devas had. The shareholders of Devas cannot expand that right by calling the termination of the Devas Contract an "expropriation."

106. The importance of identifying precisely the scope of the rights or assets at issue in an expropriation case is well recognised in international jurisprudence and writings. Newcombe and Paradell state: "Conceptually, property can only be expropriated if it exists. If a right was never acquired or has been otherwise extinguished under local law, it cannot be expropriated."[225]

107. An UNCTAD study on expropriation states:

> The existence, nature and validity of rights or interests that are alleged to have been expropriated must be assessed in light of the laws and regulations of the host country of the investment. As the *Suez v. Argentina* tribunal stated, "to assess the nature of these rights in a case of alleged expropriation of contractual rights, one must look to the domestic law under which the rights were created." . . . Whether or not specified in the treaty, it is implicit that any investment susceptible to being expropriated must be a right or asset duly constituted, defined, formed and recognized

[224] *Id.* *See* ¶¶ 20-28, *supra.*

[225] **Ex. R-57**, A. Newcombe and L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, p. 351 (emphasis added). *See also* **Ex. R-55**, C. F. Dugan, D. Wallace, Jr., N. Rubins and B. Sabahi, INVESTOR-STATE ARBITRATION, p. 438 ("A threshold determination as to whether an expropriation has occurred is to identify the foreign investor's investment or property rights in question."); **Ex. R-61**, Hege Elisabeth Kjos, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW (Oxford University Press 2013), p. 242 ("[A]n expropriation presupposes and depends on the existence of an investment in the form of proprietary rights."); **Ex. R-62**, Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 151 (2004), p. 211 ("At the first stage, the treaty tribunal must decide, if it is a matter of contention, whether particular rights *in rem* constituting the alleged investment exist, the scope of those rights, and in whom they vest."); **Ex. R-63**, Campbell McLachlan, Laurence Shore and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (Oxford University Press 2007), ¶¶ 6.67-6.70.

> under the laws of the host State that is granting the protection under the [international investment agreement].[226]

108. This is illustrated in *Bayindir v. Pakistan*, in which a Turkish company had undertaken a project to construct a highway under a contract with Pakistan's National Highway Authority. After delays in performance and various disputes, the contract was terminated, Bayindir was expelled from the project and ordered to hand over possession of the work site, and attempts were made to cash its bank guarantees. Bayindir brought an ICSID arbitration under the Turkey-Pakistan bilateral investment treaty, alleging expropriation and violation of the treaty's FET provisions. The tribunal stated: "The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated."[227] It held that there could be no expropriation under the facts of that case given that, under the terms of the contract, the Highway Authority had full right to terminate on the grounds asserted:[228]

> Bayindir's contractual rights are defined by the terms of the Contract. To establish an expropriation of its rights as a result of NHA's [the National Highway Authority of Pakistan] exercise of its own contractual rights, Bayindir must start by proving that its contractual rights were not limited by NHA's contractual rights or that NHA took an action that, although allegedly based on the Contract's terms, was in fact clearly

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[226] **Ex. R-64**, EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (2012), p. 22 (emphasis added). *See also Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. and The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 155 ("Argentina's action in terminating the Concession purportedly in accordance with the Concession's terms was not an act of expropriation but rather the exercise of its alleged contractual rights.").

[227] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 ("*Bayindir*"), ¶ 442.

[228] The tribunal also rejected Bayindir's argument that its "reputation and creditworthiness were destroyed by the call on the guarantees, which caused the destruction of its value as a company," finding that such consequences were "part of the business risk that any contractor assumes" and that "[i]nvestment treaties are not meant to protect against business risks." *Id.*, ¶¶ 477, 482. *See also* **Ex. R-63**, C. McLachlan, L. Shore and M. Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 8.73 ("[I]nvestment treaties do not give foreign investors a guarantee of investment success.").

> in breach of such terms. Absent such proof, there can be no deprivation of the economic substance of Bayindir's rights, as the scope of such rights is limited by NHA's own rights under the Contract.[229]

109. Similarly, in *Generation Ukraine v. Ukraine*,[230] the claimant alleged that the government had interfered with several of its real estate construction projects in the Ukraine, which it alleged constituted an indirect "global expropriation of the company's rights and property."[231] It sought recovery, *inter alia,* of "anticipated revenues" from the projects, "invested funds" and "appraised market value" of a certain project and adjacent areas.[232] However, the claimant could not provide sufficient documentation of the transactions and projects it claimed to have undertaken, and thus could not prove the

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[229] *Bayindir*, ¶ 460. *See also* **Ex. R-65**, Santiago Montt, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (Hart Publishing 2009), p. 275 ("[E]xceptions [to an expropriation] can also be found in those situations where the state annuls, cancels, or revokes a contract or concession, if it does so in accordance with the conditions established in the same agreement or in the applicable rules of domestic law."); *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 137 ("In these circumstances, the present Arbitral Tribunal concludes that the principal reason given by the Respondent in its letter rescinding the Contract was sufficiently well founded, and gave the Respondent the right to withdraw from the Contract. It follows that the rescission of the Contract cannot be considered as a form of expropriation under international law."); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, ¶ 272 ("[T]he termination of the concession is not necessarily equal to expropriation. In fact, the Concession Contract provided for termination in various defined circumstances, and if the Contract is terminated in conformity with these provisions, this is not an act of expropriation by the State but an act performed by the public authorities in their capacity as a party to the Contract.").

[230] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003.

[231] *Id*., ¶¶ 20.1, 21.1, 22.1. The measures complained of included failure to grant new land lease agreements with valid site drawings, Kyiv City Council's cancellations of the company's 49-year land lease rights, and frustration of the claimant's right to use an adjoining property for staging the construction area.

[232] *Id*., ¶ 5.1. In rejecting the claim for anticipated revenues, the tribunal noted: "The Claimant's pleadings assume that the Claimant had a vested right to a commercial return on a completed office building, on or before the alleged final act of expropriation on 31 October 1997. This cannot possibly be so. As of 31 October 1997, not a single brick had been laid, nor had the foundations for the building been excavated, nor indeed had the Claimant definitively secured financing for the construction phase of the Parkview Project. The materialisation of the Claimant's legal interests – evidenced by the Order on Land Allocation, Lease Agreements, Foundation Agreement and Construction Permit – translate not to a right to a commercial return, but simply to proceed with the construction of the Parkview Office building." *Id*., ¶ 20.27.

nature and extent of its alleged rights.[233] Holding that "there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place," the tribunal cautioned: "Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred."[234] The tribunal rejected the expropriation claim in its entirety, stating:

> The fact that an investment has become worthless obviously does not mean that there was an act of expropriation; investment always entails risk. Nor is it sufficient for the disappointed investor to point to some governmental initiative, or inaction, which might have contributed to his ill fortune.[235]

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[233] For example, the tribunal held that a "Protocol of Intentions" regarding potential projects submitted by the claimant reflected at most "an agreement to agree" on various projects, but did not "generate legally enforceable rights and obligations . . . and therefore could not give rise to an expropriation claim." *Id.*, ¶ 18.9.

[234] *Id.,* ¶¶ 6.2, 8.8.

[235] *Id.,* ¶ 20.30. This concept was also addressed in the seminal *Oscar Chinn* case, in which claims were asserted against Belgium on behalf of a U.K. company engaged in river transportation, ship-building and repairing in the Congo River. Belgium had enacted a measure reducing transportation rates charged by a company of which it was the majority owner, the only other company providing such services in the area, making it commercially impossible for the U.K. company to continue in business. In dismissing all claims, the Permanent Court of International Justice stated:

> The Court, though not failing to recognize the change that had come over Mr. Chinn's financial position, a change which is said to have led him to wind up his transport and ship-building businesses, is unable to see in his original position – which was characterized by the possession of customers and the possibility of making a profit – anything in the nature of a genuine vested right. Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes; the interests of transport undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it. No enterprise – least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates – can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.

The Oscar Chinn Case (United Kingdom v. Belgium), Permanent Court of International Justice, Judgment, 12 December 1934, P.C.I.J. 65 (SERIES A/B, No. 63 1934), p. 88.

110. A claim for expropriation was also rejected in *Merrill & Ring v. Canada*.[236] In that case, the claimant argued that government regulations restricting the amount of logs that could be exported constituted an expropriation, for which it sought damages, including loss of future sales.[237] The tribunal explained that the first element to prove was the existence of "an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument" and that "an investor cannot recover damages for the expropriation of a right it never had."[238] It analysed the nature of the interest the claimant alleged was affected as follows:

> The question is then to establish from where the rights the Investor claims for arise. The Investor defines these rights as an "interest in realizing fair market value for its logs on the international market". While an intangible investment is certainly capable of expropriation under international law, the issue here is that the right as defined does not appear to arise from a contract that might be considered directly related to the investment made. In fact, it is only a potential interest that may or not materialize under contracts the Investor might enter into with its foreign customers.
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> The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the *Feldman* tribunal's conclusion that an investor cannot recover damages for the expropriation of a right it never had. Expropriation cannot affect potential interests.
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> . . . .
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> As for the proceeds from the Investor's future sales, as explained above, <u>such proceeds are only a potential future</u>

[236] *Merrill & Ring Forestry L.P. v. The Government of Canada*, NAFTA/UNCITRAL, Award, 31 March 2010.

[237] *Id*., ¶ 248.

[238] *Id*., ¶ 142.

> benefit that cannot be the subject of a taking because the Investor is not contractually entitled to them. The situation would be totally different if an existing contract for a certain volume of logs, at a certain price, had been interfered with by the government to the requisite extent. This is the kind of intangible property right protected under NAFTA and international law. But absent interference with rights of this sort, the state cannot guarantee a profit which is no more than an expectation on the drawing board and which may or may not actually be realized.[239]

111. The same principles discussed by the foregoing international arbitral tribunals are illustrated by cases dealing with compensable "takings" in the United States. These cases consistently stress that the first step in the analysis of whether a compensable taking exists is the identification of the property taken, and each makes clear that absent an identifiable property interest, no compensation could be due for the governmental action.

112. For example, in *Acceptance Insurance v. U.S.*, the court stated: "When evaluating whether governmental action constitutes a taking without just compensation, a court employs a two-part test. First, the court determines whether the claimant has

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[239] *Id.*, ¶¶ 140, 142, 149. *See also International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA/UNCITRAL, Award, 26 January 2006 ("*Thunderbird*"), ¶ 208 ("[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006, IIC 91 (2006), ¶ 184 ("[F]or there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador."); *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 (NAFTA), Award, 16 December 2002 ("*Feldman v. Mexico*"), ¶ 118 ("[I]t appears to the Tribunal that the Claimant never really possessed a 'right' to obtain tax rebates upon exportation of cigarettes, but only a right to the 0% tax rate. This is important, because as far as the Tribunal can determine, the only significant asset of the investment, the enterprise known as CEMSA, is its alleged right to receive . . . tax rebates upon exportation of cigarettes, and to profit from that business."); **Ex. R-66**, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge University Press 2009), ¶ 78 (quoting the award of the American-Turkish Claims Commission in *Hoachoozo Palestine Land and Development Co*. as follows: "In a case in which complaint is made that governmental authorities have confiscated contractual property rights, the preliminary question is one of domestic law as to the rights of the claimant under a contract in the light of the domestic proper law governing the legal effect of the contract. The next question for determination is whether, in the light of principles or rules of international law, rights under the contract have been infringed.").

identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.'"[240] The company in that case contended that the Government's refusal to approve the sale of an insurance portfolio deprived it of its interest in the portfolio without compensation. The court held that the claimant "did not have a cognizable property interest for Fifth Amendment purposes in the ability to freely transfer American Growers' portfolio of insurance policies. Thus, there was no cognizable property interest that could be 'taken' when the RMA rejected the proposed sale."[241]

113. In *Colvin Cattle Co. v. U.S.*, the court noted that "the threshold inquiry is 'whether a claimant has established a "property interest" for purposes of the Fifth Amendment.'"[242] Since the U.S. Constitution does not define the scope of compensable property interests, the court looked to "'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, [to] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking."[243] In *Colvin*, it was alleged that a ranch lost value by virtue of the loss of grazing rights as a result of governmental restrictions. However, the company had no protected property interest in grazing rights, since an earlier statute had granted the government the exclusive right to regulate grazing on federal lands.

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[240] **Ex. R-67**, *Acceptance Insurance Companies, Inc. v. United States*, 583 F.3d 849 (Fed. Cir. 2009), p. 854.

[241] *Id.*, p. 859.

[242] **Ex. R-68**, *Colvin Cattle Company, Inc. v. United States*, 468 F.3d 803 (Fed. Cir. 2006), p. 806.

[243] *Id.*, p. 807.

Any prior grazing was at the sufferance of the government and did not create a vested grazing right. Therefore, no "cognizable property interest" had been taken.[244]

114. The same analysis was followed in *American Pelagic Fishing Company v. U.S.*,[245] in which a company had purchased a ship and obtained licences to fish for mackerel and herring in the 200-mile Exclusive Economic Zone ("EEZ"). Due to concerns over conservation of fish stock, the U.S. Congress enacted a law prohibiting large vessels from fishing for mackerel in the EEZ. The company was relegated to fishing in waters outside the EEZ, which became unprofitable. It then sued the U.S. Government, alleging that the law constituted a taking of its property without just compensation. The court rejected the claim, holding that the company did not have a property right with respect to fishing in the EEZ:

> We have developed a two-part test to determine whether a taking has in fact occurred. First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment. "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." If the claimant fails to demonstrate the existence of a legally cognizable property interest, the court's task is at an end. Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest.
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> . . . .
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> [B]ecause the Magnuson Act assumed sovereignty for the United States over the management and conservation of the resources located in the EEZ, and specifically over fishery resources, American Pelagic did not have, as one of the sticks in the bundle of property rights that it acquired with title to the [vessel], the right to fish for Atlantic mackerel and

[244] *Id*.

[245] **Ex. R-69**, *American Pelagic Fishing Company, L.P. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004).

> herring in the EEZ. American Pelagic thus did not possess the property right that it asserts formed the basis for its takings claim. In the absence of that property right, its claim is fatally defective.[246]

115. Claimants' expropriation claim suffers from the same deficiencies as those of claimants in all of the above cases. They seek compensation for rights they never had, in effect asking this Tribunal to convert the Devas Contract with Antrix, which expressly subjected implementation of the project to government approvals and licences, into a binding, long-term concession agreement with the Government. No precedent or authority of any kind exists to support such a far-reaching proposition.

116. It is, however, worth examining the three cases Claimants cite on this issue,[247] as the contrast between those cases and this one highlights the weakness of Claimants' expropriation claim.

117. The first case, *Occidental v. Ecuador*,[248] involved a termination by the Government of Ecuador of a long-term oil production sharing agreement and the seizure of all of claimants' local assets, including wells, drilling rigs, storage facilities and other oil exploration and production assets.[249] The Ecuadorean Government claimed that the international oil company had breached the agreement. The tribunal agreed that a breach had occurred, but held that the exercise of the discretionary remedy of termination was not consistent with Ecuador's own Constitution and laws regarding proportionality.[250] The issue of proportionality is irrelevant in this case, which does not

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[246] *Id.*, pp. 1372, 1382-1383 (internal citations omitted).

[247] Statement of Claim, ¶¶ 168-170.

[248] **Ex. CL-27**, *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012.

[249] *Id.*, ¶¶ 199-200.

[250] *Id.*, ¶¶ 396-401, 424-425.

involve a discretionary remedy for breach by the investor, but rather a sovereign decision by the Government to reserve S-band for non-commercial, strategic use. That is a policy decision relating to national security, not an election of a discretionary remedy for contract breach and not a matter subject to a proportionality analysis.[251]

118. The second case, *Deutsche Bank v. Sri Lanka,*[252] concerned a Hedging Agreement between Deutsche Bank and Ceylon Petroleum Corporation ("CPC"). In that case, in an interim order that the Chief Justice of Sri Lanka acknowledged in public statements was issued for political reasons,[253] the Supreme Court of Sri Lanka suspended all payments due by CPC to Deutsche Bank under the Hedging Agreement on the grounds that CPC did not have the authority to enter into the Hedging Agreement and that the Agreement was structured in such a way as to benefit Deutsche Bank. The Court also ordered the Monetary Board of the Central Bank to investigate the relevant transactions. The interim order was later vacated by the Supreme Court, but the Central Bank decided that the suspension of the payments to Deutsche Bank would remain in force.[254] The arbitral tribunal found that the claimant's investment had been

[251] It should also be noted that in *Occidental*, the tribunal assessed the value of the terminated business, involving an operating oil field already producing over 100,000 barrels per day, at in excess of US$2 billion, a far cry from this case, in which Devas had not generated its first dollar of revenue and would have, according to the overly optimistic projections of its own economic expert in the Devas Arbitration, negative cash flow for at least the first nine years of operation if it ever got up and running. **Ex. R-4**, Antrix ICC Expert Report on Quantum, ¶ 44. The economic report submitted by Antrix in the Devas Arbitration shows the wisdom of the decision of the parties to the Devas Contract to provide for a refund of the paid Upfront Capacity Reservation Fees as the maximum amount payable in the event of termination of the Devas Contract. *Id.*, ¶ 81 and Table 3. Thus, apart from the irrelevance of any proportionality analysis as a matter of law in this case, there is no argument of lack of proportionality here on the facts.

[252] **Ex. CL-8**, *Deutsche Bank A.G. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012.

[253] *Id.*, ¶ 479.

[254] *Id.*, ¶¶ 58, 521.

expropriated because the decisions of the Supreme Court and the Central Bank had prevented the claimant from receiving the payment due under the Hedging Agreement.[255] It is difficult to see how that case could have any bearing on this case, which does not involve the taking of any monies due or anything remotely resembling what happened in *Deutsche Bank*.

119. In the third case, *Middle East Cement v. Egypt*,[256] the claimant, a Greek company, had obtained a licence to import and store cement in a free zone and to pack and dispatch the cement within Egypt. Egypt issued a decree prohibiting the import of grey cement (with narrow exceptions), withheld an approval to re-export claimant's assets, and seized and auctioned its ship. As the tribunal itself noted, there was "no dispute between the Parties that, in principle, a taking did take place."[257] The only question for the tribunal to resolve was the amount of the remaining term of the licence, upon which the amount of the compensation due turned.[258]

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[255] *Id*., ¶ 520.

[256] **Ex. CL-24**, *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002.

[257] *Id*., ¶ 107.

[258] *Id*. Claimants further argue that the alleged "expropriation" was "unlawful" since it was not for a public purpose, was effected without due process, was discriminatory and was not accompanied by the payment of fair and equitable compensation. Statement of Claim, ¶¶ 174-198. While these arguments are pointless given the fact that this case does not involve an expropriation, Claimants' fact allegations in that regard are also wholly without merit. First, as explained earlier, the termination of the Devas Contract was based on national security grounds, which constitutes a quintessential public purpose. *See* ¶¶ 31-38, *supra*. *See also* **Ex. R-70**, *Goetz and Others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability, 2 September 1998, 6 ICSID REPORTS 5 (2004), ¶ 126 ("In the absence of an error of fact or of law, of an abuse of power or of a clear misunderstanding of the issue, it is not the Tribunal's role to substitute its own judgment for the discretion of the Government of Burundi of what are 'imperatives of public need . . . or of national interest.'"). Second, due process obviously does not require consultation with Claimants as to national security matters. *See* n. 178 and ¶ 85, *supra*. Third, there was nothing discriminatory about the Government's policy decision to reserve S-band spectrum for non-commercial, strategic use. *See* ¶ 164, *infra*. And finally, India did not offer to pay compensation because Claimants had no right to compensation. As noted earlier, Antrix did tender a cheque to Devas to reimburse the Upfront Capacity Reservation Fees paid by Devas prior to the termination of the Devas Contract, which was rejected by Devas. Statement of Claim, ¶¶ 131-132, n. 266. *See also* ¶ 60, *supra*.

120. In sum, unlike all of the cases relied upon by Claimants, this case involves nothing resembling an expropriation. The fact that the S-band capacity was reserved for strategic use and the Devas Contract annulled does not mean that Devas, or indirectly these Claimants, had any "acquired rights" that were taken. Since nothing was expropriated, Claimants' expropriation claim would have to be dismissed even without the "essential security interests" provision of the Mauritius Treaty and even aside from the fact that the Mauritius Treaty does not cover "pre-investments."[259]

POINT IV.

THE FAIR AND EQUITABLE TREATMENT STANDARD HAS NOT BEEN VIOLATED

121. The FET provision of the Mauritius Treaty requires that "investments . . . of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party."[260] In making their FET claim, Claimants assume that the FET standard of the Mauritius Treaty goes beyond the minimum standard of treatment required by customary international law.[261] It does not, but even if it did, Claimants' FET claims would have to be dismissed because, apart from being precluded by the "essential security interests" provision of the Mauritius Treaty and the fact that they only involve "pre-investments,"[262] the claims do not pass muster either under the minimum standard of treatment under customary international law or the more expansive FET standard advocated by Claimants here.

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[259] *See* ¶¶ 76-98, *supra*.

[260] **Ex. C-1**, Mauritius Treaty, Article 4(1).

[261] Statement of Claim, ¶¶ 199-215.

[262] *See* ¶¶ 76-98, *supra*.

(i) The Minimum Standard of Treatment Under Customary International Law Applies to FET Claims under the Mauritius Treaty

122. Claimants understandably want this Tribunal to disregard the minimum standard of treatment under customary international law, which they do not even discuss in their Statement of Claim. However, there is no indication either in the language of the Mauritius Treaty or in its *travaux préparatoires* that the FET provision incorporates anything beyond the minimum standard of treatment under customary international law. Quite the contrary, there is evidence that the FET provision was only intended to protect investors against measures that violated that standard, as that is the case of India's bilateral investment treaties generally.

123. The FET clause of Indian investment treaties was inspired by the OECD Draft Convention on the Protection of Foreign Property.[263] The comment to the FET clause contained in the OECD Draft Convention explains the meaning of that provision:

> The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. . . . The standard required conforms in effect to the "minimum standard" which forms part of customary international law.[264]

[263] *See, e.g.,* **Ex. R-71**, Fax from the Indian Embassy in Moscow to Ministry of Finance of India, 15 November 1994. This is true for all Indian BITs. *See also* **Ex. R-72**, Surya P. Subedi, *India's New Bilateral Investment Promotion and Protection Treaty with Nepal: A New Trend in State Practice*, 28(2) ICSID REVIEW 384 (2013), p. 393 ("Since the India-Nepal BIPPA [Bilateral Investment Promotion and Protection and Agreement] does not define the term 'fair and equitable', it might be inferred that the parties intended to accept the traditionally generally agreed definition of this term under the customary international law principle of the international minimum standard of treatment available to foreign investors. There are no indications to suggest that the contracting parties intended to qualify this principle or accord a meaning that may vary from its meaning under the customary international law principle of minimum standard of treatment. Therefore, it is submitted that the meaning and scope of the principle of fair and equitable treatment in the India-Nepal BIPPA should be no different from the meaning and scope of the term generally understood in general international law.").

[264] **Ex. R-73**, OECD, *Draft Convention on the Protection of Foreign Property (1967)*, 7 INTERNATIONAL LEGAL MATERIALS 117 (1968), Article 1 and Notes and Comments to Article 1, ¶ 4(a).

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

> There is some state practice amongst major capital exporting states suggesting that fair and equitable treatment was viewed as reflecting, and as synonymous with, the minimum standard of treatment. For example, some elements of US, UK, Swiss and Canadian treaty practice suggest that these states considered that fair and equitable treatment reflected the minimum standard of treatment. . . . This view [of the 1967 Draft OECD Convention on the Protection of Foreign Property] was reconfirmed by the OECD's Committee on International Investment and Multinational Enterprises in 1984. Accordingly, it is arguable that when incorporating the fair and equitable treatment standard into their BITs, OECD states were guided by the meaning ascribed to that language by the intergovernmental organization (IGO) of which they were members.[265]

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

- "Commentators have voiced considerable concern about the broad-reaching interpretations given to the [FET] standard by recent tribunal awards."[266]
- "The 'fair and equitable' language, if viewed as an independent standard, is extremely dangerous to good governance."[267]

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[265] **Ex. R-57**, A. Newcombe and L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, pp. 268-269. *See also* **Ex. R-74**, Opinions of the Public International Law Directorate of the Swiss Federal Political Department (*Mémoire de la Direction du Droit International Public du Département Politique Fédéral*), 18 May 1979, in Lucius Caflisch, *La pratique suisse en matière de droit international public 1979*, 36 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT / ANNUAIRE SUISSE DE DROIT INTERNATIONAL 139 (1980), p. 178 ("What is referred to is thus the classic principle of international law according to which states must provide to foreigners on their territory and their property the benefit of the international 'minimum standard', that is to grant them a minimum of personal, procedural and economic rights.").

[266] **Ex. R-75**, J. Roman Picherack, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, 9(4) THE JOURNAL OF WORLD INVESTMENT & TRADE 255 (August 2008), p. 272.

[267] **Ex. R-76**, Marcos Orellana, *International Law on Investment: The Minimum Standard of Treatment (MST)*, 1(3) TRANSNATIONAL DISPUTE MANAGEMENT (July 2004), p. 7.

- Expansive interpretations of FET have been "nothing short of adventurous" and transform "the international law [minimum] standard from a bulwark against flagrant mistreatment of foreign nationals into an all-encompassing guarantee of highly flexible notions of fairness, equity, and due process."[268]

- The expansive interpretation of FET "does not accord with the case-law or State practice, which suggest that fair and equitable treatment should be equivalent to the minimum standard and provide protection for procedural fairness and duly diligent consideration of the effects of a proposed government policy on foreign investors."[269]

- "Generally, little justification has been provided in arbitral awards to account for the use of legitimate expectations in the context of the fair and equitable treatment standard. This may seem quite surprising considering that the concept has no explicit anchoring in the text of the applicable investment treaties. . . . The technique that has been used by most tribunals to buttress the application of the legitimate expectations principle is to simply refer to previous arbitral awards which have endorsed such concept, in a sort of cascade effect."[270]

- "The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor . . . does not correspond, in any language, to the ordinary meaning to be given to the terms 'fair and equitable.'"[271]

- "The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly."[272]

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[268] **Ex. R-77**, Gus Van Harten, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press 2007), p. 89.

[269] **Ex. R-78**, Graham Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, 41(2) JOURNAL OF WORLD TRADE 273 (2007), pp. 274-275.

[270] **Ex. R-79**, Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28(1) ICSID REVIEW 88 (2013), p. 90.

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

[272] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, ¶ 67.

- "Although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations."[273]

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

> Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. . . . This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf they act.[274]

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

- The United States of America: As the United States made clear in adopting its 2004 model BIT, it had never intended an expansive view of FET beyond the minimum standard of treatment under customary international law, even in its old BITs.[275] In the 2004 model, the United States was not taking any chances. To remove any doubt on the subject, the 2004 model explicitly provided: "For greater certainty, paragraph 1 prescribes the customary

[273] *CMS Annulment*, ¶ 89.

[274] **Ex. R-80**, *Public Statement on the International Investment Regime*, 31 August 2010, ¶ 5 (emphasis added).

[275] The 2004 Model BIT made explicit what was the United States' intention all along. Although the text of the 1994 U.S. Model BIT did not include this clarifying language, the U.S. State Department's official description of that model stated that the "fair and equitable treatment" provision was intended as the "minimum standard of treatment based on customary international law." **Ex. R-81**, Description of the U.S. Model Bilateral Investment Treaty (BIT), Submitted by the State Department, 30 July 1992, Hearing before the Committee on Foreign Relations, United States Senate, 102nd Congress, 2d Session, 4 August 1992, S. HRG 102-795, p. 62 ("This paragraph [on fair and equitable treatment] sets out a minimum standard of treatment based on customary international law."); **Ex. R-82**, 1994 U.S. Model BIT, Article II (3)(a). *See also* **Ex. R-83**, J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID REVIEW–FOREIGN INVESTMENT LAW JOURNAL 21 (Spring 2002), pp. 49-50 and n. 78 (noting that both before and after the entry into force of the NAFTA Agreement, the U.S. Department of State transmitted a series of bilateral investment treaties to the Senate for approval in which it stated that the obligation to provide "fair and equitable treatment" set out "a minimum standard of treatment based on customary international law.").

international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."[276] This provision was carried over into the 2012 U.S. Model BIT.[277]

- Canada: Like the model U.S. BIT, Canada's model investment treaty provides: "1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[278]

- The European Union: The European Parliament has adopted a resolution on investment policy that restricts the FET standard to the customary international law level of protection, following the example of the United States and Canada. The resolution states: "[F]uture investment agreements concluded by the EU should be based on the best practices drawn from Member State experiences and include the following standards: . . . fair and equitable treatment, defined on the basis of the level of treatment established by international customary law . . . ."[279] The report setting forth the resolution explains the motivation for the restriction of the FET standard: "The USA and Canada, which were among the first states to suffer as a result of excessively vague wording in the NAFTA agreement, have adapted their BIT model in order to restrict the breadth of interpretation by the judiciary and ensure better protection of their public intervention domain. The EU should therefore include in all its future agreements a specific clause laying down the right of the EU and [Member States] to regulate . . . . Moreover, standards of protection should be strictly defined, in order to avoid abusive interpretations by international investors. In particular . . . fair and equitable treatment must be defined on the

[276] **Ex. R-84**, 2004 U.S. Model BIT, Article 5 and Annex A.

[277] **Ex. R-52**, 2012 U.S. Model BIT, Article 5 and Annex A.

[278] **Ex. R-85**, Canada's Model Foreign Investment Promotion and Protection Agreement (2004), Article 5.

[279] **Ex. R-86**, European Parliament, *Resolution on the Future European International Investment Policy (2010/2203(INI))*, 6 April 2011, ¶ 19.

> basis of the level of treatment established by international customary law."[280]

128. The content of the minimum standard of treatment under customary international law was expressed in *Neer v. Mexico*, in which the tribunal held that in order to violate the standard, the treatment of an alien "should amount to an outrage, to bad faith, to wilful neglect of duty, or to insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[281] There is ample support for the proposition that despite the passage of time since the *Neer* decision, in order to find a violation of the minimum standard of treatment under customary international law "the threshold is extremely high," and "outrageous or egregious conduct is required before a violation is established."[282] For example:

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

[280] **Ex. R-87**, European Parliament, Committee on International Trade, *Report on the Future European International Investment Policy*, Report No. A7-0070/2011, 22 March 2011, Explanatory Statement, pp. 11-12.

[281] **Ex. R-88**, *L.F.H. Neer and Pauline E. Neer v. Mexico*, Mexico–U.S. General Claims Commission, Docket No. 136, Opinion, 15 October 1926, 21 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 555 (1927), p. 556.

[282] **Ex. R-89**, Patrick G. Foy and Robert J.C. Deane, *Foreign Investment Protection Under Investment Treaties: Recent Developments Under Chapter 11 of the North American Free Trade Agreement*, 16(2) ICSID REVIEW–FOREIGN INVESTMENT LAW JOURNAL 299 (Fall 2001), p. 314. *See also id.*, p. 313 ("A State's conduct has been held to fall below this standard where its treatment of non-nationals is egregious and amounts to an outrage, to wilful neglect of duty or to an insufficiency of governmental action that every reasonable and impartial person would recognize as insufficient. A State's conduct will also fall below the minimum standard when it is determined that there has been a denial, unwarranted delay or obstruction of access to courts; gross deficiency in the administration of judicial or remedial processes; or a failure to provide guarantees which are generally considered indispensable to the proper administration of justice.").

> wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[283]

- In *Thunderbird v. Mexico*, the tribunal stated: "Notwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[284]

- In *Glamis Gold v. United States of America,* the holding was as follows: "The Tribunal holds that Claimant has not established that the individual measures taken by the federal and California state governments fall below the customary international law minimum standard of treatment and constitute a breach of Article 1105 in that they are not egregious and shocking — a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[285]

- And in *Cargill v. United Mexican States*, the tribunal stated: "Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained. . . . If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or willful neglect of duty, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment."[286]

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

[283] *Alex Genin, Eastern Credit Limited, Inc. and A. S. Baltoil v. Republic of Estonia*, ICSID Case ARB/99/2, Award, 25 June 2001 ("*Genin*"), ¶ 367.

[284] *Thunderbird*, ¶ 194.

[285] *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award, 8 June, 2009, ¶ 824.

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

of the Government of India did not violate the minimum standard of treatment under customary international law.

(ii) No FET Violation Would Exist Even Under the Expansive FET Standard

130. Claimants' FET claims would have no merit even under their own overly broad interpretation of the FET provision of the Mauritius Treaty. A wealth of precedent and writings of international practitioners and scholars makes clear that: (i) an FET obligation cannot, absent a specific commitment by the state, deprive the state of its inherent sovereign right to regulate the conduct of business within its borders; (ii) the mere existence of a bilateral investment agreement is no substitute for such a commitment; (iii) absent such a specific commitment, an investor cannot assume that there will be no adverse changes in law or policy affecting its investment; and (iv) hopes and dreams are not legitimate expectations. The following are illustrative of these basic principles:

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

that international law generally extends to the right of domestic authorities to regulate matters within their own borders.'"[287]

- *AWG v. Argentina*: "[I]t is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare."[288]

- *Total v. Argentina*: "In the absence of some 'promise' by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a 'guarantee' of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor. The expectation of the investor is undoubtedly 'legitimate', and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law. . . . [S]ignatories of BITs do not thereby relinquish their regulatory powers nor limit their prerogative to amend legislation in order to adapt it to change, new emerging needs and requests of their people in the normal exercise of their prerogatives and duties."[289]

- *El Paso v. Argentina*: "FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilisation clauses specifically granted to foreign investors with whom the State has signed investment agreements. . . . The State has to be able to make the reasonable changes called for by the circumstances and cannot be considered to have accepted a freeze on the evolution of its legal system."[290]

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

[287] **Ex. CL-31**, *Saluka Investments B.V. (the Netherlands) v. Czech Republic*, Ad Hoc/UNCITRAL, Partial Award, 17 March 2006, ¶¶ 284, 305. *See also S. D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Partial Award, 13 November 2000, ¶ 263.

[288] *AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, ¶ 139.

[289] **Ex. CL-36**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 ("*Total*"), ¶¶ 117, 309(b).

[290] **Ex. CL-11**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 368, 371.

about the amendment brought to the regulatory framework existing at the time an investor made its investment. . . . It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law."[291]

- *Paushok v. Mongolia*: "In many instances, [foreign investors] will obtain the appropriate guarantees in that regard in the form of, for example, stability agreements which limit or prohibit the possibility of tax increases. . . . In the absence of such a stability agreement . . . Claimants have not succeeded in establishing that they had legitimate expectations that they would not be exposed to significant tax increases in the future."[292]

- *EDF v. Romania*: "Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable."[293]

- *Tza Yap Shum v. Peru*: "Sources of international law have frequently concluded that there is no responsibility of the State when it acts in exercise of its police powers and in a reasonable and necessary way in order to protect health, security, moral or public welfare."[294]

- *Feldman v. Mexico*: "Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue."[295]

- *U.S. Restatement*: "A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general

[291] *Parkerings-Compagniet A.S. v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶¶ 332, 344.

[292] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, Ad Hoc/UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 ("*Paushok*"), ¶ 302.

[293] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 ("*EDF*"), ¶ 217.

[294] **Ex. R-90**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, ¶ 145.

[295] *Feldman v. Mexico*, ¶ 112.

taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory."[296]

- *Newcombe and Paradell*: "All investors must reasonably assume that the regulatory environment, like the business environment, is subject to change (absent a specially negotiated stabilization clause)."[297]

- *Vandevelde*: "Tribunals have made clear that the [FET] standard does not impose on host states a general obligation always to act consistently over time. Host states generally have the discretion to change policies."[298]

- *Crawford*: "Reference to a general and vague standard of legitimate expectations is no substitute for contractual rights. The relevance of legitimate expectations is not a licence to tribunals to rewrite the freely negotiated terms of investment contracts."[299]

- *Dolzer and Schreuer*: "Legitimate expectations are not subjective hopes and perceptions; rather, they must be based on objectively verifiable facts."[300]

131. It should be recalled that the Devas Contract was expressly governed by Indian law,[301] and under Indian law there is no doubt that denial of a licence as a result of a policy decision such as that taken by the Cabinet Committee on Security cannot violate any notion of "legitimate expectations." The two leading cases on the subject in

[296] **Ex. CL-46**, RESTATEMENT OF THE LAW THIRD: RESTATEMENT ON THE LAW THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Volume 2 (The American Law Institute 1987), § 712(g).

[297] **Ex. R-57**, A. Newcombe and L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES STANDARDS OF TREATMENT, p. 282.

[298] **Ex. R-91**, Kenneth J. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION (Oxford University Press 2010), p. 234.

[299] **Ex. R-92**, James Crawford, *Treaty and Contract in Investment Arbitration*, 24(3) ARBITRATION INTERNATIONAL 351(2008), p. 373.

[300] **Ex. R-93**, Rudolph Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed., Oxford University Press 2012), p. 148.

[301] **Ex R-1**, Devas Contract, Article 19. Article 11(2) of the Mauritius Treaty also provides: "Except as otherwise provided in this Agreement, all investments shall, be governed by the laws in force in the territory of the Contracting Party in which such investments are made." *See* **Ex. C-1**, Mauritius Treaty, Article 11(2).

India are *India v. Hindustan Development Corporation*[302] and *PTR Exports v. India*.[303] In the first case, the Supreme Court drew a clear distinction between legitimate expectation and "a wish, a desire or a hope," stating:

> For legal purposes, the expectation can not be the same as anticipation. It is different from a wish, a desire or a hope nor [does] it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves can not amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation can not amount to a legitimate expectation.[304]

The Court went on to hold that no claim for violation of legitimate expectations could be made where the Government's decision was a matter of policy, "unless in a given case, the decision or action taken amounts to an abuse of power."[305]

132. In *PTR Exports*, the Supreme Court elaborated on the doctrine of legitimate expectations as follows:

> The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The Court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is a settled law that the Court gives the large leeway to the executive and the legislature. Granting licences for import or export is by executive or legislative policy. Government would take diverse factors for formulating the policy for import or export of the goods granting relatively greater priorities to various items in the overall larger interest of the economy of the country. It is, therefore, by exercise of the power given to the executive or as the case may be, the legislature is at liberty to evolve such policies. An applicant

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[302] **Ex. R-94**, *Union of India and others v. Hindustan Development Corpn. and others*, Supreme Court of India, Order, 15 April 1993, AIR 1994 SC 998 ("*Hindustan Development*").

[303] **Ex. R-95**, *PTR Exports (Madras) Pvt. Ltd. and others v The Union of India and others*, Supreme Court of India, Order, 9 May 1996, AIR 1996 SC 3461 ("*PTR Exports*").

[304] **Ex. R-94**, *Hindustan Development*, ¶ 29.

[305] *Id*., ¶ 36.

> has no vested right to have export or import licences in terms of the policies in force at the date of his making application. For obvious reasons, granting of licences depends upon the policy prevailing on the date of the grant of the licence or permit. The authority concerned may be in a better position to have the overall picture of diverse factors to grant permit or refuse to grant permission to import or export goods. The decision, therefore, would be taken from diverse economic perspectives which the executive is in a better informed position unless, as we have stated earlier, the refusal is mala fide or is an abuse of power in which event it is for the applicant to plead and prove to the satisfaction of the Court that the refusal was vitiated by the above factors. . . . A prior decision would not bind the Government for all times to come. When the Government are satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The Court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same.[306]

133. Last year, the Supreme Court affirmed the foregoing principles in *Monnet Ispat v. India*, stating:

> (iii) Where the decision of an authority is founded in public interest as per executive policy or law, the court would be reluctant to interfere with such decision by invoking doctrine of legitimate expectation. The legitimate expectation doctrine cannot be invoked to fetter changes in administrative policy if it is in the public interest to do so.
>
> (iv) The legitimate expectation is different from anticipation and an anticipation cannot amount to an assertible expectation.[307]

134. The claims herein are based on the following mistaken assumptions: (i) that Devas had "legitimate expectations" that the Government was bound to authorize the use of the S-band spectrum for commercial purposes and precluded from taking a policy decision to reserve that spectrum for strategic, non-commercial use, an assumption belied by the provisions of the Devas Contract itself making clear that the

[306] **Ex. R-95**, *PTR Exports,* ¶¶ 3-5.

[307] **Ex. R-96**, *Monnet Ispat and Energy Ltd. v Union of India (UOI) and Ors.*, Supreme Court of India, Judgment, 26 July 2012, (2012) 11 SCC 1, ¶ 153.

Government had no commitment whatsoever under that contract, that its sole role with respect to the project was not as a party but as regulator with the sovereign authority both to regulate and to withhold approvals and licences, and that in fact its decision in its capacity as a Government constituted *force majeure*;[308] (ii) that the Government was bound to licence a hybrid satellite-terrestrial telecommunications multimedia system, even though S-band spectrum could not be used for terrestrial communications under current Indian regulations and policies;[309] (iii) that the Government was bound to issue a licence for the terrestrial component of the proposed Devas services without auction, in contravention of governmental policy enunciated by the telecommunications regulatory authority (TRAI);[310] and (iv) that the Devas Contract could never be terminated for any reason, even though the Devas Contract itself provided for it and set forth a comprehensive scheme establishing the consequences of termination, limiting any compensation to, at most, a refund of the paid Upfront Capacity Reservation Fees, a point that was specifically the subject of intensive negotiation culminating in Article 7 of the Devas Contract.[311] As demonstrated in the Statement of Facts and the documents submitted with this Statement of Defence, each of the foregoing assumptions is false, negating any possible FET claim.

135. In addition to the provisions of the Devas Contract as actually signed by Devas and Antrix, it is most striking that the negotiating history of the Devas Contract appears nowhere in the Notice for Arbitration, the Statement of Claim or any of the

[308] *See* ¶¶ 17, 29, *supra*.

[309] *See* nn. 46, 55, *supra*; Sethuraman Witness Statement, ¶¶ 6-15.

[310] *See* n. 161, *supra*; Sethuraman Witness Statement, ¶¶ 11-15.

[311] *See* ¶¶ 20-28, *supra*.

extensive witness statements submitted by Claimants herein or by Devas in the Devas Arbitration. That history shows the following:

- The initial draft of the "binding Term Sheet" prepared by Devas in September 2004 proposed termination provisions that provided for substantial liquidated damages in the event of termination of the Devas Contract for any reason other than non-payment by Devas of fees. The proposed liquidated damages were in the amount of INR 460 million (approximately US$10 million), if such termination occurred "prior to Devas raising its institutional financing" and of INR 6.9 billion (approximately US$150 million) if the termination took place "after Devas has raised its first institutional round of funding."[312] That was in addition to the refund of all amounts paid by Devas to Antrix prior to the date of termination.[313] No *force majeure* clause was included.

- After being advised that the termination provisions were "one-sided" and should be mutual,[314] Devas sent a second draft term sheet, dated 20 September 2004, but that draft was also one-sided, providing for the same high liquidated damages (in addition to a refund of any payments made to Antrix prior to termination) in the event of termination by Antrix for any reason other than non-payment by Devas of fees.[315] The term sheet also provided for liquidated damages (again in addition to a refund of any payments made to Antrix prior to termination) in the amount of INR 6.9 billion in the event of a "failure of [ANTRIX] to meet its obligations, or breach of Agreement, or withdrawal of approvals and licences controlled by [ANTRIX]."[316] No liquidated damages were provided for in the event of breach by Devas. As in the case of the first draft term sheet, there was no mention of *force majeure*.

- A third draft term sheet was prepared on 27 September 2004, providing for the same high liquidated damages to be paid by Antrix (in addition to a refund of all amounts paid by Devas prior to the

[312] **Ex. R-13**, Draft of "Binding Term Sheet" received on or about 12 September 2004, Section 2.7.

[313] *Id.*, Sections 2.7.2, 2.7.3.

[314] **Ex. R-14**, E-mail from ISRO to Devas, 14 September 2004; **Ex. R-15**, E-mail from ISRO to Devas, 20 September 2004.

[315] **Ex. R-15**, E-mail from Forge Advisors to Antrix and ISRO, 20 September 2004, Section 2.7.

[316] *Id.*, Section 2.7.5. Under the term sheet, Antrix would have been responsible for obtaining the "clearances, licences and other approvals," inclusive of terrestrial augmentation. *Id.*, Sections 1.3.2, 1.5.1.c. That was not the case in the Devas Contract. **Ex. R-1**, Devas Contract, Article 12(b)(vii) ("DEVAS shall be solely responsible for securing and obtaining all licenses and approval (Statutory or otherwise) for the delivery of Devas Services via satellite and terrestrial network.").

date of termination) in the event of termination by Antrix for any reason other than non-payment of fees or *force majeure*.[317]

- The parties never executed a term sheet, proceeding instead to the Devas Contract itself. On 6 December 2004, Devas sent a draft contract eliminating the high liquidated damages for either side and proposing to reserve the right to recover damages under the general law. It stated: "In the case of material breach, in addition to termination and refund of fees, the terminating party reserves the customary rights and remedies provided by Indian law against the defaulting party."[318]

- One week later, the above-quoted reservation of the right to pursue "customary rights and remedies provided by Indian law against the defaulting party" was deleted, as Antrix refused to accept anything other than a refund of the paid Upfront Capacity Reservation Fees.[319]

136. These facts, which are established by an extensive documentary record, viewed in light of the extensive authorities cited above, make clear that no FET claim could exist under the circumstances of this case under even the most liberal FET standard. Claimants want this Tribunal to ignore the record and treat this case as if Antrix or the Government itself had guaranteed that all necessary approvals and licences for the project would be issued and the project implemented without any governmental interference, whether for national security purposes or otherwise, and that notwithstanding the comprehensive structure negotiated by Antrix and Devas, under the control of these very Claimants, Devas and Claimants were entitled to disregard the provisions of the Devas Contract making crystal clear that any compensation to be paid as a result of failure to obtain approvals, or even breach by Antrix, would be limited to a

[317] **Ex. R-17**, Draft term sheet received on or about 27 September 2004, Section 2.7.

[318] **Ex. R-18**, E-mail from Devas to Antrix, 6 December 2004, Draft Contract, Article 7.6.

[319] **Ex. R-19**, E-mail from Antrix to Devas, 13 December 2004, Draft Contract, Article 7.6.

refund of the paid Upfront Capacity Reservation Fees, with no further obligation to pay "any sum as compensation or damages (by whatever name called)."[320]

137. Notwithstanding the above, Claimants allege that the Government engaged in "serial violations" of FET. The first of such "serial violations" is based on the frivolous allegation, repeated throughout the Statement of Claim, that the Government was "fabricating a sham '*force majeure*' decision to try to mask a deliberate revocation of the Contract."[321] That allegation is based on the theory that this Tribunal may disregard the entire documentary record in this case establishing the basis for the Government's decision to reserve S-band capacity for national security purposes, as well as the terms and conditions of the Devas Contract itself.[322] It would also require this Tribunal to assume the *mala fide* of the Indian Government, an assumption

[320] **Ex. R-1**, Devas Contract, Article 7. *See* **Ex. R-97**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (Oxford University Press 2013), pp. 178-179 ("[M]any investment projects are based on or connected to a contract with the respondent State, a Statal entity, or a State-owned enterprise. The provisions of this contract naturally have a decisive impact on the value of the investment. This means that, for valuation purposes, the contractual provisions must be applied, even if the breach of the contract itself lies outside the jurisdiction of the tribunal."); **Ex. CL-32**, *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, IIC 374 (2009), ¶¶ 577-578 ("[I]t is important to bear in mind also the terms upon which that interest was held . . . . the Tribunal does accept that [the contractual term] had an effect on the value of the asset in the Claimants' hands."); *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, ¶ 85 ("[T]he Tribunal is concerned by claims of Treaty breaches, and not by breaches of the Contract. Toto's waiver of its right to invoke the CEGP [Lebanese Republic-Conseil Exécutif des Grands Projets]'s liability under the Contract to claim contractual damages does not affect its right to invoke Lebanon's breach of the Treaty before this Tribunal. However . . . the assessment of damages and of the compensation to be granted for a Treaty breach may be affected by a waiver not to claim compensation under the Contract, when both damage claims cover the same harm. Indeed, when it concerns the same damage for the same act, compensation that a Claimant has waived under the Contract cannot be recovered under the Treaty.").

[321] Statement of Claim, ¶ 209.

[322] *See* ¶¶ 31-61, *supra*.

inconsistent with both international and Indian authorities.[323] Claimants' irresponsible allegations of a "sham" *force majeure* do not constitute a basis for an FET claim.

138. Claimants next argue that "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."[324] But in fact Claimants cannot point to any commitment, contractual or

[323] Aside from the fact that there is extensive documentary evidence supporting the bona fide nature of the decision taken by the Cabinet Committee on Security, it is improper as a matter of law to presume bad faith on the part of a government or of government officials acting in their official capacity. **Ex. R-98**, *Lake Lanoux Arbitration (France v. Spain)*, Award, 16 November 1957, 24 I.L.R. 101 (1961), p. 126 ("there is a general and well-established principle of law according to which bad faith is not presumed"); **Ex. R-99**, *Tacna-Arica Question (Chile, Peru)*, Opinion and Award, 4 March 1925, 2 R.I.A.A. 921 (2006), p. 930 ("A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion."); *Bayindir*, ¶ 143 ("[T]he standard for proving bad faith is a demanding one, in particular if bad faith is to be established on the basis of circumstantial evidence."); *Chemtura Corporation v. Government of Canada*, NAFTA/UNCITRAL, Award, 2 August 2010, ¶ 137 ("the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one"); *Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, International Court of Justice, Separate Opinion of Judge Tanaka, 5 February 1970, p. 160 ("It is not an easy matter to prove the existence of bad faith, because it is concerned with a matter belonging to the inner psychological process, particularly in a case concerning a decision by a State organ. Bad faith cannot be presumed."); **Ex. R-100**, Robert Kolb, GOOD FAITH IN PUBLIC INTERNATIONAL LAW (*LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC*) (Presses Universitaires de France 2000), pp. 124-127 ("This presumption [of good faith] has often been employed by international tribunals, either in the negative, as in bad faith is not to be presumed, or in the positive form, that good faith is to be presumed. It is sometimes expressed as a prohibition on presuming an intention to abuse a right. . . . [B]ad faith manifests itself as a complex psychological fact comprised of malicious intent, intent to cause harm, and motives too terrible to admit."); **Ex. R-101**, Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989: Part Three*, 62 BRITISH YEAR BOOK OF INTERNATIONAL LAW 1 (1991), p. 18 ("the Court will be slow to accuse a State in its judgment of bad faith"). *See also* **Ex. R-58**, J. Salacuse, THE LAW OF INVESTMENT TREATIES, p. 243 ("[N]o modern arbitral decision has actually found a state to have acted in bad faith towards the investor under an applicable investment. . . . [P]roving a state's bad faith can be an extremely difficult task."). This position in international law is consistent with Indian law. *See* **Ex. R-102**, *Ajit Kumar Nag v. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia and Ors.*, Supreme Court of India, Judgment, 19 September 2005, AIR 2005 SC 4217, ¶ 44 ("It is well-settled that the burden of proving *mala fide* is on the person making the allegations and the burden is 'very heavy'. . . . There is every presumption in favour of the administration that the power has been exercised *bona fide* and in good faith. It is to be remembered that the allegations of *mala fide* are often more easily made than made out and the very seriousness of such allegations demands proof of a high [degree] of credibility. As Krishna Iyer, J. stated in [**Ex. R-103**] *Gulam Mustafa and Ors. v. State of Maharashtra and Ors*: 'It (*Mala fide*) is the last refuge of a losing litigant'.") (internal citations omitted).

[324] Statement of Claim, ¶ 210.

otherwise, on the part of the Government to grant the necessary approvals and licences for this project. Simply put, there is no stabilisation or similar clause purporting to tie the Government's hand and prevent it from taking policy decisions that might affect the Devas Contract. What exists is exactly the opposite: provisions in the Devas Contract and a negotiating history demonstrating that no such commitment existed.[325] Whatever capital was raised in anticipation and hope of implementation of the project was raised with full knowledge that such implementation remained subject to the necessary approvals and licences.[326] That is why Devas had not even commenced any infrastructure work and, apart from the Upfront Capacity Reservation Fees, had not incurred any significant expense other than the money received by Claimants' own promoters.[327]

139. Claimants then argue that "Respondent's conduct unjustly enriched the state at the expense of the investor; a recognized indicia of unfair and inequitable conduct."[328] Understandably, Claimants do not point to any fact to support that bizarre allegation. They do, however, point to *Total v. Argentina*, a case Respondent cited

[325] *See* ¶¶ 20-28, *supra*.

[326] Oddly, Devas has argued in the Devas Arbitration that Article 7 of the Devas Contract should not be interpreted to limit recovery to the paid Upfront Capacity Reservation Fees because such an interpretation would conflict with the "surrounding circumstances," including the fact that Devas sought to raise financing for the project. **Ex. R-3**, Antrix ICC Statement of Defence, n. 286. But the negotiating history Devas did not present to the tribunal in the Devas Arbitration and Claimants did not present to this Tribunal shows that the limitation was agreed with the financing in mind. The term sheets drafted by Devas' promoters actually had different liquidated damages levels depending upon whether the termination occurred "prior to DEVAS raising its institutional financing" or "after DEVAS has raised its first institutional round of funding." *See* ¶¶ 23, 135, *supra*. As reviewed earlier, those proposals were rejected in favour of the exclusive remedy of a refund of the paid Upfront Capacity Reservation Fees. *See* ¶¶ 20-28, 135, *supra*.

[327] *See* **Ex. R-4**, Antrix ICC Expert Report on Quantum, ¶¶ 17-21, 25.

[328] Statement of Claim, ¶ 211.

earlier because it supports Respondent's position, not Claimants'.[329] Claimants quote the following statement from the *Total* decision: "If 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 treatment standard has been breached."[330] This language actually comes from an UNCTAD report quoted in the *Total* decision.[331] What it shows is precisely the problem with Claimants' FET theory, which is that (i) Claimants had no acquired rights in this case and (ii) the State did not take the policy decision to reserve S-band for commercial purposes to "enrich" itself. No matter how hard Claimants try to represent this case as one involving a taking of some sort of long-term concession or other interest, the fact remains that the case involves a project that never got off the ground and was expressly subject to governmental approvals and licences that were never obtained.[332] That does not fit the definition of "acquired rights." In addition, far from enriching itself, the Government has decided for national security reasons to reserve the S-band capacity for non-commercial, strategic use,[333] obviously not the kind of "unjust enrichment" referred to in either the UNCTAD study or the *Total* decision mistakenly relied upon by Claimants.

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[329] **Ex. CL-36**, *Total*. *See* ¶ 130, n. 289, *supra*.

[330] **Ex. CL-36**, *Total*, ¶ 112.

[331] The full sentence of the UNCTAD report reads as follows: "Thus, for instance, if a State acts fraudulently or in bad faith, or capriciously and wilfully discriminates against a foreign investor, or 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 violated." **Ex. R-104**, FAIR AND EQUITABLE TREATMENT, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS (1999), p. 12.

[332] *See* ¶¶ 13, 18, 105, 115, *supra*.

[333] *See* ¶¶ 31-57, *supra*.

140. Claimants also argue that the Government engaged in "arbitrary decision-making, and made only abrupt, 'ambush' announcements regarding its behavior."[334] But despite Claimants' disagreement with the Government's policy decision to reserve S-band for strategic use, there was nothing arbitrary about it. On the contrary, the record shows not only sound grounds for the decision, but an extensive deliberation process conducted in accordance with the Government's "Transaction of Business Rules."[335] All relevant government agencies, including the defence forces, were involved in the decision-making process, and the decision was taken by the Government's highest authority on national security matters, the Cabinet Committee on Security.[336] What Claimants apparently are complaining about is that they were not involved in the national security deliberations. That is obviously no basis for an FET claim.

141. Lastly, Claimants allege that "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."[337] This allegation improperly assumes that Government officials requesting corporate information or conducting tax audits are acting in "bad faith," an unacceptable assumption under either international law or Indian law.[338] Moreover, by Claimants' own admission, all the acts complained of as so-called harassment occurred long after the decision of the Cabinet Committee on Security reserving the S-band capacity and annulling the Devas Contract. And finally,

[334] Statement of Claim, ¶ 212.

[335] *See* ¶¶ 52-55, *supra*.

[336] *See* ¶¶ 56-57, *supra*.

[337] Statement of Claim, ¶ 213.

[338] *See* n. 323, *supra*.

Claimants have shown that they are perfectly capable of exercising their right to seek a remedy for any such allegedly improper investigations or audits in the appropriate courts of India.[339] In short, the inflammatory allegations regarding post-annulment conduct of the Government add nothing of substance to Claimants' baseless FET claim.[340]

142. Thus, none of Claimants' arguments on FET withstands scrutiny on the facts of this case. Claimants are asking this Tribunal to stretch the FET concept beyond recognition, as no case has ever found an FET violation on circumstances remotely similar to this case. Apart from the impact of the "essential security interests" provision of the Mauritius Treaty and the fact that the Mauritius Treaty does not apply to "pre-investments," that is a request that in any event should be denied.

(iii) Claimants' Loose Allegations of Agency Add Nothing to Their FET Claim

143. Before leaving FET, it is worth noting that Claimants' loose and unfocused allegations that Antrix was merely acting as an agent of the Government, which are sprinkled throughout the Statement of Claim, add nothing to their FET argument and in fact only underscore their propensity to disregard facts in their drive to invent a treaty claim. Claimants have difficulty placing their allegations in a legal context, but they

[339] *See, e.g.,* Viswanathan Witness Statement, ¶¶ 218-219, 222.

[340] Claimants rely on *Desert Line v. Yemen* to support this argument. Statement of Claim, n. 279; **Ex. CL-7**, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008. There the tribunal considered that the circumstances of the case went "egregiously far beyond the bounds of ordinary relations" and "the Settlement Agreement was imposed onto the Claimant under physical and financial duress," with Yemen's unlawful actions "starving the Claimant for cash," leaving it "almost bankrupt when it signed the Settlement Agreement" and with "no realistic choice" but to enter into the agreement. *Id.*, ¶¶ 181, 184, 186. Those facts are a far cry from the circumstances of this case.

apparently want this Tribunal to consider Antrix as one and the same with the State so that the Devas Contract can be viewed as a contract with the State itself.

144. The jumbled nature of Claimants' argument on this point is best illustrated by paragraph 214 of the Statement of Claim. That paragraph reads in its entirety as follows:

> 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. . . . 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." And, not only did it accede to the Devas Agreement only after a government committee – the Shankhara Committee – had endorsed the agreement as being consistent with government policy . . . , 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 . . . . These facts all indicate that Antrix has acted as agent of DOS/ISRO. 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. 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.[341]

[341] Statement of Claim, ¶ 214 (emphasis in original).

145. It is difficult to decipher the foregoing paragraph, but every sentence individually shows Claimants' disregard for both the facts of this case and the applicable legal principles. In particular, the Tribunal may note the following:

- In the first sentence, Claimants argue that "Respondent cannot evade liability for its various bad faith actions by claiming that they were solely attributable to Antrix." The problem with this sentence is two-fold. First, it repeats the irresponsible allegation of bad faith conduct on the part of the State, an allegation contradicted by the entire record of this case and one made in the face of the well-settled principle that bad faith on the part of a government is not to be presumed.[342] Second, Respondent is not claiming that its actions were "solely attributable to Antrix," an allegation that makes no sense under any circumstances. As the record of this case makes clear, the Government acted *qua* government and has no reason to even attempt to attribute its actions to Antrix.

- In the next sentence, Claimants argue that "as a factual matter, the current case implicates conduct by a plethora of state actors, from the Prime Minister on down." It is unclear what Claimants mean by that statement, but it is true that virtually the entire national security hierarchy was involved in the decision-making process that led to the reservation of S-band for strategic use and the annulment of the Devas Contract. That point has been made throughout this Statement of Defence and it is evident in the record. What is not evident is how it helps Claimants' case.

- In the next sentence, Claimants say that "Antrix, in practice, is fully integrated into DOS and ISRO, rendering the entities inseparable." This is the kind of loose allegation Claimants throw around throughout their Statement of Claim in the hope that this Tribunal will overlook the basic fact that the Devas Contract clearly identified the parties as Devas and Antrix, not the Department of Space, ISRO or any other governmental body. As demonstrated in the discussion below and in the Statement of Defence filed by Antrix in the Devas Arbitration, Indian law is very clear on the status of State corporations such as Antrix, negating any allegation of inseparability such as that made by Claimants here.[343]

- Claimants then argue: "Were that not enough, Antrix entered into the Devas Agreement explicitly *on behalf of* DOS/ISRO . . ." The emphasis is actually in the original, meaning that Claimants want

[342] *See* n. 323, *supra*.

[343] *See* ¶¶ 146-151, *infra*; **Ex. R-3**, Antrix ICC Statement of Defence, ¶¶ 105-111.

this Tribunal to focus on the words "explicitly *on behalf of* DOS/ISRO." As demonstrated below and in the Statement of Defence filed by Antrix in the Devas Arbitration, there is no legal substance to Claimants' allegations of agency, but what is most striking about this particular misstatement is that Claimants say that Antrix entered into the Devas Contract "explicitly" on behalf of the Government. That allegation is plainly false on its face. Indeed, not only is there no explicit agency in the Devas Contract, but the Devas Contract is quite clear as to the identity of the parties. Indeed, its entire structure distinguishes between Antrix as a party and the Government as regulator, including: (i) the definitions in the Devas Contract of "Governmental or Regulatory Authority" and of "Regulatory Approval;"[344] (ii) the provisions of the Devas Contract referring to the requirement of governmental approvals and licenses;[345] and (iii) the *force majeure* clause, which specifies that acts of a government in a sovereign capacity constitute *force majeure*.[346] None of those provisions would make sense if Antrix were entering into the Devas Contract "*on behalf of*" the Government rather than in its own capacity as a separate legal person under Indian law.[347]

- That same sentence goes on to say "and furthermore (in Article 3 of the Devas Agreement) place responsibilities on Antrix for 'obtaining all necessary Governmental and Regulatory Approvals relating to orbital slots and frequency clearances.'" That statement is true, but it directly supports Respondent's position here, not Claimants'. As Respondent has stressed, the Devas Contract made clear that "Governmental and Regulatory Approvals" were required. Both parties, Antrix and Devas, needed such approvals. The fact that Antrix needed an approval from the Government does not show that Antrix and the Government are one and the same. It shows the opposite.

- In the next sentence, Claimants state that Antrix acceded to the Devas Agreement "only after a governmental committee – the Shankara Committee – had endorsed the agreement as being consistent with government policy" and that "Antrix purportedly also

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

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

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

[347] The Tribunal will recall that in the original term sheet for the Devas Contract drafted by Devas, the party to the proposed contract was identified as ISRO. This was immediately corrected to make clear that Antrix would be the party to the contract. *See* n. 51, *supra*; **Ex. R-13**, Draft of "Binding Term Sheet" received on or about 12 September 2004, Section 1.1. This is another example of Claimants' flagrant disregard for both the provisions of the Devas Contract and its negotiating history.

undertook to terminate the Devas Agreement upon the instructions of the Space Commission and under the direction of the Department of Space." The Tribunal will have noted from the Statement of Facts that the decision to reserve the S-band for strategic use and annul the Devas Contract was actually taken by the Cabinet Committee on Security, after extensive deliberation among all Government departments involved. But what is important here is that, once again, Claimants' allegation is devoid of legal content; it shows neither that Antrix and the Government are "inseparable" nor that Antrix entered into the Devas Contract "*on behalf of*" the Government.[348]

- Based on the foregoing, Claimants come to the conclusion that "Antrix has acted as agent of DOS/ISRO" and that all of Antrix' 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." The basic problem with that conclusion is that it is built entirely upon the false premises of the preceding sentences. Even if that were not the case, the undisputed fact remains that Devas knew full well that the Government reserved its right to take action affecting the Devas Contract in its sovereign capacity, that there was no stabilisation or similar clause guaranteeing Devas or these Claimants that the necessary licences or approvals would be issued, and that the provisions of the Devas Contract and its negotiating history, including the comprehensive structure devised to address the possibility that Government approvals or licences would not be issued, reflect the exact opposite of such a guarantee.

- The last sentence of Claimants' paragraph 214 states that "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." This sentence is again difficult to decipher. Claimants do not explain what knowledge they are referring to and make no effort to show how the knowledge of any particular fact by Respondent, whether actual or imputed, has any bearing on the legal issues of this case. Although there are questions surrounding the knowledge of various governmental bodies concerning the Devas Contract, even if all the facts concerning the Devas Contract were to be imputed to the Cabinet Committee on Security itself, that would have no bearing on the right of the Cabinet Committee on Security to take the sovereign decision that it took reserving S-band for strategic use and annulling the Devas Contract. Thus, while

[348] The Shankara Committee report was issued in 2004, long before the strategic needs for S-band were crystallised and seven years before the Cabinet Committee on Security made its decision to reserve S-band for strategic use. *See* n. 26, *supra*.

> paragraph 214 of the Statement of Claim is most instructive in terms of setting forth Claimants' position in this case, what it shows is the utter lack of merit in the claims asserted.

146. In addition to the foregoing, this Tribunal will note that Claimants introduced no Indian legal authority to support their allegations regarding the alleged inseparability of Antrix and the Government or their allegations of agency. There is in fact a wealth of Indian authority on the subject of the legal status of Indian state corporations that Claimants presumably were aware of when they were negotiating the Devas Contract.[349]

147. Antrix' constitutive documents make clear that it is a "private company limited by shares" within the meaning of Section 3(1)(iii) of the Indian Companies Act.[350] A unanimous line of Indian authority leaves no doubt as to the legal status of such companies under Indian law, even where owned by the State.

148. In *Electronics Corporation of India*, the Supreme Court of India held that "[a] clear distinction must be drawn between a company and its shareholder, even though that shareholder may be only one and that the Central or a State Government. In the eye of the law, a company registered under the Companies Act is a distinct legal entity other than the legal entity or entities that hold its shares."[351] Similarly, in *Western Coalfields*, in which state companies sought a tax exemption because they were wholly owned by the Government, the Supreme Court affirmed that "[t]he companies, which

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[349] As the International Court of Justice held in *Ahmadou Sadio Diallo*: "In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law." *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 24 May 2007, ICJ REPORTS 582 (2007), ¶ 61.

[350] **Ex. R-105**, Indian Companies Act, Section 3(1)(iii).

[351] **Ex. R-106**, *Electronics Corporation of India Ltd. and Ors. v. Secretary, Revenue Department, Govt. of Andhra Pradesh and Ors.*, Supreme Court of India, Judgment, 5 May 1999, AIR 1999 SC 1734, ¶ 15.

are incorporated under the Companies Act, have a corporate personality of their own, distinct from that of the Government of India. The lands and buildings are vested in and owned by the companies: the Government of India only owns the share capital."[352] In *Steel Authority of India*, the Supreme Court set aside the judgment of the Gujarat High Court in which the High Court had held that the Steel Authority of India was a department of the Union of India, and confirmed the separate personality of the Steel Authority of India.[353] And in *Agarwal*, the Supreme Court held that an employee of a state-owned corporation did not qualify as a person employed in a civil capacity under the Union or a State within the meaning of Article 311 of the Indian Constitution, stating that "the corporation which is Hindustan Steel Limited in this case is not a department of the Government nor are the servants of it holding posts under the State. It has its independent existence and by law relating to Corporations it is distinct even from its members."[354]

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

> The State Trading Corporation was, on the date of the petition, functioning under the direct supervision of the Government of India, the shareholding was in the names of the President and two Secretaries to the Government and its

[352] **Ex. R-107**, *Western Coalfields Limited v. Special Area Development Authority, Korba and Anr. and Bharat Aluminium Company Limited v. Special Area Development Authority, Korba and Ors.*, Supreme Court of India, Judgment, 26 November 1981, AIR 1982 SC 697, ¶ 21.

[353] **Ex. R-108**, *Steel Authority of India Ltd. v. Shri Ambica Mills Ltd. and Ors.*, Supreme Court of India, Judgment, 17 October 1997, AIR 1998 SC 418, ¶¶ 16-18.

[354] **Ex. R-109**, *Dr. S.L. Agarwal v. The General Manager, Hindustan Steel Ltd.*, Supreme Court of India, Judgment, 19 December 1969, AIR 1970 SC 1150, ¶ 10.

> entire subscribed capital was contributed by the Government of India. But it is a commercial body, incorporated as the Memorandum of Association indicates to organise and undertake trade generally with State Trading countries as well as other countries in commodities entrusted to it for such purpose by the Union Government from time to time and to undertake purchase, sale and transport of such commodities in India or any where else in the world and to do various acts for that purpose. The Articles of Association make minute provisions for sale and transfer of shares, calling of general meetings, procedure for the general meetings, voting by members, Board of Directors and their powers, the issue of dividend, maintenance of accounts and capitalisation of profits. The State Trading Corporation has been constituted not by any special statute or charter but under the Indian Companies Act as a Private Limited Company. It may be wound up by order of a competent Court. Though it functions under the supervision of the Government of India and its Directors; it is not concerned with performance of any governmental functions. Its functions being commercial, it cannot be regarded as either a department or an organ of the Government of India. It is a circumstance of accident that on the date of its incorporation and thereafter its entire share-holding was held by the President and the two Secretaries to the Government of India.
>
> . . . .
>
> The question whether the corporation either sole or aggregate is an agent or servant of the State must depend upon the facts of each case. In the absence of any statutory provision a commercial corporation acting on its own behalf, even if it is controlled wholly or partially by a Government Department, will be presumed not to be a servant or an agent of the State. The fact that a Minister appoints the members of the Corporation and is entitled to call for information and to supervise the conduct of the business, does not make the Corporation an agent of the Government. Where, however, the Corporation is performing in substance governmental, and not commercial functions an inference that it is an agent of the Government may readily be made.[355]

[355] **Ex. R-110**, *The State Trading Corporation of India Ltd. and Ors. v. The Commercial Tax Officer, Visakhapatnam and Ors.*, Supreme Court of India, Judgment, 26 July 1963, AIR 1963 SC 1811, ¶¶ 152, 154.

150. In *Heavy Engineering*, the Supreme Court of India explained these basic principles in terms that flatly contradict Claimants' argument that Antrix can be equated with, or deemed to be the agent of, the Government. In that case, the appellant company argued that the appropriate government within the meaning of the Industrial Disputes Act of 1947 to refer its disputes with its employees to the Industrial Tribunal was the Central Government, not the State Government. The Supreme Court started its analysis by recalling that under Section 2(a) of the Industrial Disputes Act the "appropriate Government" meant the Central Government in relation to any industrial dispute involving an industry carried on by or under the authority of the Central Government. The Supreme Court then proceeded to reject the line of analysis according to which because the appellant company was wholly owned by the Central Government, it was an industry carried on under the authority of the Central Government:

> It is an undisputed fact that the company was incorporated under the Companies Act and it is the company so incorporated which carries on the undertaking. The undertaking, therefore, is not one carried on directly by the Central Government or by any one of its departments as in the case of posts and telegraphs or the railways. . . . An incorporated company, as is well known, has a separate existence and the law recognises it as a juristic person, separate and distinct from its members. This new personality emerges from the moment of its incorporation and from that date the persons subscribing to its memorandum of association and others joining it as members are regarded as a body incorporate or a corporation aggregate and the new person begins to function as an entity. . . . Its rights and obligations are different from those of its shareholders. Action taken against it does not directly affect its shareholders. The company in holding its property and carrying on its business is not the agent of its shareholders. An infringement of its rights does not give a cause of action to its shareholders. Consequently, it has been said that if a man trusts a corporation he trusts that legal persona and must look to its assets for payment; he

> can call upon the individual shareholders to contribute only if the Act or charter creating the corporation so provides. The liability of an individual member is not increased by the fact that he is the sole person beneficially interested in the property of the corporation and that the other members have become members merely for the purpose of enabling the corporation to become incorporated and possess only a nominal interest in its property or hold it in trust for him. . . . The company so incorporated derives its powers and functions from and by virtue of its memorandum of association and its articles of association. Therefore, the mere fact that the entire share capital of the respondent-company was contributed by the Central Government and the fact that all its shares are held by the President and certain officers of the Central Government does not make any difference. The company and the shareholders being, as aforesaid, distinct entitles the fact that the President of India and certain officers hold all its shares does not make the company an agent either of the President or the Central Government. A notice to the President of India and the said officers of the Central Government, who hold between them all the shares of the company, would not be a notice to the company; nor can a suit maintainable by and in the name of the company be sustained by or in the name of the President and the said officers.[356]

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

> A Government company or a statutory corporation is regarded as a distinct or separate entity from the government. Though a Government company is owned by the government; its directors are nominated or removed by it, and the company has to give effect to the directives issued by the Government, nevertheless, in the eye of the law, the company or the corporation is regarded as a distinct personality having an existence and a juristic personality of its own, separate from the concerned government. In the eye of the law, the company is its own master and it cannot be regarded as an agent of the Government any more than a company can be regarded as an agent of the shareholders.[357]

[356] **Ex. R-111**, *Heavy Engineering Mazdoor Union v. State of Bihar and Ors*., Supreme Court of India, Judgment, 12 March 1969, AIR 1970 SC 82, ¶ 4.

[357] **Ex. R-112**, M.P. Jain and S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW (6th ed., LexisNexis 2013), pp. 1018-1019.

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

- *Amoco v. Iran*: "The Preamble clearly identifies the parties between which the Khemco Agreement is concluded as NPC and Amoco, and makes reference, several times, to them as 'both parties.' While NPC is controlled by Iran and was established pursuant to a State law, it has a legal personality distinct from that of the State and NPC contracted only for itself. . . . It is true that the development of petrochemical industries was considered by the Iranian Government as an important goal of the development policy of the country, and was promoted by the enactment in 1965 of an Act authorizing NPC to enter into joint ventures with foreign companies to this effect, and providing for tax exemptions and other privileges beneficial to such joint ventures. Such legislation, however, clearly shows that the State had no intention itself to engage in such industrial and commercial endeavors and left NPC to take the financial and commercial risks associated with them. . . . [T]he obligations embodied in the Khemco Agreement are obligations only as between the parties, namely NPC and Amoco, and as between the parties and Khemco . . . . Since only the rights of the parties in their mutual relationship . . . are at stake in the present Case, such rights can in no way be construed as creating obligations on the State."[358]

- *Amto v. Ukraine*: The State entity's contractual undertakings were not undertakings of the State, as "the contractual obligations have been undertaken by a separate legal entity."[359]

- *Nagel v. Czech Republic*: "Although SRa was a fully owned State enterprise, it was a separate legal person whose legal undertakings did not as such engage the responsibility of the Czech Republic."[360]

- *Hamester v. Ghana*: "The JVA was signed by Hamester and Cocobod, with no implication of the ROG [Republic of Ghana]. The

[358] **Ex. R-113**, *Amoco International Finance Corporation v. The Government of Islamic Republic of Iran et al.*, Iran-U.S.C.T. Case No. 56, Partial Award No. 310-56-3, 14 July 1987, ¶¶ 161-162, 164.

[359] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (ECT), Final Award, 26 March 2008, ¶ 110.

[360] *Nagel v. Czech Republic*, ¶ 321.

> ROG was not named as a party, and did not sign the contract. There has been no suggestion that the ROG was intended to be a party thereto."[361]

- Michael Feit: "[T]he conclusion of a contract by a state-owned entity cannot be attributed to the state, even if the state-owned entity was empowered with governmental authority."[362]

- Richard Happ: "[I]t is not possible to attribute a contract concluded by a sub-division or state entity to the state by using the rules on state responsibility. The rules of attribution have been developed in the context of attributing acts to the state in order to determine whether those acts are in breach of international law. They cannot be applied *mutatis mutandis*."[363]

153. The International Law Commission's Articles on State Responsibility make clear that the acts of a corporate entity such as Antrix may not be attributable to the State unless the entity is "empowered by the law of that State to exercise elements of the governmental authority" and the entity "is acting in that capacity in the particular instance."[364] As stated in the ILC's commentary to the Articles on State Responsibility:

> The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority.[365]

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[361] *Gustav F. W. Hamester GmbH & Co. K.G. v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 347.

[362] **Ex. R-114**, Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY JOURNAL OF INTERNATIONAL LAW 142 (2010), p. 154.

[363] **Ex. R-115**, Richard Happ, *The Nykomb Case in the Light of Recent ICSID Jurisprudence*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY (C. Ribeiro ed., JurisNet LLC 2006), p. 324.

[364] **Ex. R-116**, *Articles on Responsibility of States for Internationally Wrongful Acts 2001*, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 2001, VOL. II, PART TWO, Article 5.

[365] **Ex. R-117**, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 2001, VOL. II, PART TWO, p. 48.

154. Nothing in Antrix' constitutive documents empowers it to exercise governmental authority.[366] Nor did it exercise any governmental authority in the present case. The record shows that it was the Government itself, acting in its sovereign capacity, that exercised its governmental authority to take the decision to reserve the S-band capacity for strategic use and annul the Devas Contract.[367]

155. Moreover, the entire discussion of legal personality, agency and attribution is irrelevant in this case. As noted earlier, in addition to the lack of legal content in Claimants' allegations, none of those allegations in any way alters the basic facts that Devas knew full well that the Government reserved its right to take action affecting the Devas Contract in its sovereign capacity, that there was no stabilisation or similar

[366] **Ex. R-118**, Memorandum and Articles of Association of Antrix Corporation Limited, 28 September 1992.

[367] In two footnotes, Claimants cite four cases in support of their agency and attribution argument, none of which is apposite. Statement of Claim, nn. 281, 282. In *Maffezini v. Spain*, the tribunal held that it was "clear from the background leading to the establishment of SODIGA that the intent of the Government of Spain was to create an entity to carry out governmental functions." *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, ¶ 85. In the merits phase of the case the tribunal analysed each of SODIGA's specific acts at issue and determined that some of them had been carried out in the exercise of such governmental functions. **Ex. CL-22**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶¶ 58-83. Antrix has never been imbued with any governmental authority. The ICC award in *Deutsche Schachbau-und Tiefbohrgesellschaft v. United Arab Emirates* is equally inapposite. There the government was a party to a series of agreements with the claimant, and the tribunal observed that "[i]n the negotiations leading up to the signing of the Assignment Agreement, as well as in the relationship between the parties in the following period, the Government acted and was regarded as a direct participant." **Ex. CL-9**, *Deutsche Schachbau-und Tiefbohrgesellschaft v. United Arab Emirates*, ICC Case No. 3572, Final Award (1982), ¶ 25. Here the Government was not a party to any agreement, and the Devas Contract expressly contemplated the role of the Government as regulator, with authority to grant or withhold required approvals and licences and take action affecting the Devas Contract in its "sovereign capacity." In *Wintershall v. Qatar*, the exploration and production sharing agreement at issue was directly entered into by the claimants with the Government of Qatar. **Ex. CL-39**, *Wintershall A.G. et al. v. Government of Qatar*, UNCITRAL, Partial Award on Liability, 5 February 1988, 28 INTERNATIONAL LEGAL MATERIALS 798 (1989), p. 798. And in *Nykomb v. Latvia*, the tribunal specified, in the very paragraph from which Claimants quote, that the state-owned company involved in that case "had no commercial freedom." **Ex. CL-26**, *Nykomb Synergetics Technology Holding A.B. v. The Republic of Latvia*, SCC, Award, 16 December 2003, ¶ 4.2. It is against such a background that the tribunal held that Latvia was responsible for the entity's failure to pay the contractually agreed tariff. *Nykomb* does not stand for the proposition that acts performed by state-owned companies are always attributable to the state.

clause guaranteeing Devas or these Claimants that the necessary licenses or approvals would be issued, and that the entire structure of the Devas Contract and its negotiating history, including the comprehensive set of provisions expressly addressing the possibility that Government approvals or licenses would not be issued, reflect the exact opposite of such a guarantee.

156. In sum, apart from the bar created by the "essential security interests" provision of the Mauritius Treaty and the fact that this case only involves "pre-investments," there is in any event no factual or legal basis for Claimants' FET claims in this case.

POINT V.

UNREASONABLE AND DISCRIMINATORY TREATMENT

157. Claimants also argue that Respondent breached Article 4(1) of the Mauritius Treaty by acting in an unreasonable and discriminatory manner. This argument again adds nothing to Claimants' case.

158. It is commonly recognized that the terms "unreasonable" and "arbitrary" are interchangeable.[368] The standard definition of arbitrariness was proposed by the International Court of Justice in the *ELSI* case as a "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[369] Arbitral

[368] *See National Grid PLC v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 197 ("It is the view of the Tribunal that the plain meaning of the terms 'unreasonable' and 'arbitrary' is substantially the same in the sense of something done capriciously without reason."); **Ex. R-119**, Ursula Kriebaum, *Arbitrary / Unreasonable or Discriminatory Measures*, in INTERNATIONAL INVESTMENT LAW (M. Bungenberg et al. eds., Nomos forthcoming 2013), pp. 2-3 ("Treaties contain three different wordings as far as the 'arbitrary' element is concerned: 'arbitrary', 'unreasonable' and 'unjustifiable'. Tribunals seem to use these terms synonymously.").

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

tribunals have adopted similar formulations. For example, in *Alex Genin v. Estonia*, the tribunal held that the withdrawal of a licence was not an arbitrary act violating a "sense of juridical propriety" since that standard would require a showing of "bad faith, a wilful disregard of due process of law or an extreme insufficiency of action."[370]

159. Similarly, in *Enron v. Argentina*, the tribunal found that Argentina had not acted arbitrarily since the measures at issue were not manifestly improper:

> The measures adopted might have been good or bad, a matter which is not for the Tribunal to judge, and as concluded they were not consistent with the domestic and the Treaty legal framework, but they were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place.[371]

160. In *EDF v. Romania*, the tribunal defined "an arbitrary measure" as follows:

> a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose; b. a measure that is not based on legal standards but on discretion, prejudice or personal preference; c. a measure taken for reasons that are different from those put forward by the decision maker; d. a measure taken in wilful disregard of due process and proper procedure.[372]

161. Commentators have also noted that the threshold of proof for arbitrary conduct is high and that the burden is on the claimant to meet that high standard. As highlighted by Newcombe and Paradell, only a "manifest impropriety" would violate the

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[370] *Genin*, ¶ 371.

[371] *Enron Corp. and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007 ("*Enron Award*"), ¶ 281.

[372] *EDF*, ¶ 303.

standard and "[t]he requirement that some important measure of impropriety be manifest suggests a high standard."[373]

162. In the present case, the Government reserved the S-band spectrum for non-commercial, strategic requirements in light of the nation's burgeoning security needs.[374] There was nothing improper or shocking in the decision adopted by the Government; instead, it was the result of a considered and deliberative process. Arbitral tribunals have also confirmed that a measure is reasonable when there is a rational policy to which the measure in question is reasonably related. As the *AES v. Hungary* tribunal noted:

> There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.
>
> A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.[375]

163. There can be no serious dispute that the decision of the Government to reserve the S-band spectrum for non-commercial, strategic use meets these requirements.[376]

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[373] **Ex. R-57**, A. Newcombe and L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, pp. 302-303.

[374] *See* ¶¶ 31-38, *supra*; Anand Witness Statement, ¶¶ 5-6.

[375] *AES Summitt Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 ("*AES*"), ¶¶ 10.3.7-10.3.8. Claimants conflate unreasonable treatment with the FET standard. However, the two are conceptually different. *See* **Ex. R-93**, R. Dolzer and C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, p. 194 ("[T]here are weighty arguments in favour of treating the two standards as conceptually different. There is no good reason why treaty drafters would use two different terms when they mean one and the same thing. . . . it is difficult to see why one standard should be part of the other when the text of the treaties lists them side by side as two standards without indicating that one is merely an emanation of the other."). In any event, no claim exists in this case under either standard.

[376] *See* ¶¶ 31-38, *supra*; Anand Witness Statement, ¶¶ 5-6.

164. Claimants' argument that the governmental measures taken were discriminatory can only be described as frivolous. In order to find discriminatory treatment, tribunals have held that there has to be a "capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors."[377] Here there was no differentiation at all. The decision of the Cabinet Committee on Security reserved S-band spectrum for non-commercial, strategic use, without exception.[378] Claimants want this Tribunal to ignore that undeniable fact and find that the Government's decision to reserve S-band was motivated by a desire to discriminate against the foreign shareholders of Devas. That may be the basis for an imaginative literary work of fiction, but not a serious claim in international arbitration.

165. Thus, apart from the fact that the essential security interests provision of the Mauritius Treaty precludes any claim in this case and that this case only involves "pre-investment" activities not covered by the Mauritius Treaty, the unreasonable and discriminatory treatment claims are in any event wholly untenable.

POINT VI.

THERE IS NO BREACH OF THE MFN CLAUSE

166. Claimants attempt to import a provision from the India-Serbia treaty providing for full legal protection and security by invoking the MFN clause in the

[377] *Enron Award*, ¶ 282. *See also Sempra Energy International v. Argentina Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 319; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 261 ("Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases, without justification; a measure must be '*discriminatory and expose[s] the claimant to sectional or racial prejudice*'; or a measure must [have] '*target[ed] Claimant's investments specifically as foreign investments*'.") (emphasis in original).

[378] It should also be noted that, in any event, the decision to annul the Devas Contract affected equally Devas' foreign and Indian shareholders.

Mauritius Treaty.[379] But like the other substantive protections offered by the Mauritius Treaty, the MFN clause is inapplicable when the action taken by the host state is "directed to the protection of its essential security interests" or where only "pre-investment" activities are at issue.[380] In addition, as demonstrated below, Claimants invocation of the MFN clause to import an entirely new provision from another treaty would in any event be improper, as is their interpretation of the provision they seek to import.

167. In the first instance, investor-state tribunals have recognized that an MFN clause cannot be relied upon to create wholly new rights. For example, in *Hochtief v. Argentina*,[381] the German investor sought to import from the Argentina-Chile treaty a dispute resolution clause permitting direct reference to arbitration. The Germany-Argentina treaty, which was the applicable treaty, required an 18-month waiting period before the matter could be taken to arbitration.[382] Although the majority permitted importation, it noted that the MFN clause cannot create wholly new rights:

> In the view of the Tribunal, it cannot be assumed that Argentina and German[y] intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties. Non-statutory concessions to third party investors could, in principle, form the basis of a complaint that the MFN obligation has not been secured. In contrast (to take an example comparable to the ILC example

[379] Statement of Claim, ¶¶ 224-225.

[380] *See* ¶¶ 76-98, *supra*.

[381] *Hochtief Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011.

[382] *Id*., ¶ 80.

> concerning commercial treaties and extradition), rights of visa-free entry for the purposes of study, given to nationals of a third State, could not form the basis of such a complaint under the BIT. The MFN clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.[383]

168. Similarly, in *Paushok v. Mongolia*,[384] the claimant sought to import two provisions via the MFN clause: (i) an umbrella clause that was not present in the applicable treaty; and (ii) a broader FET clause. The tribunal permitted the importation of the broader FET clause but did not allow the importation of the umbrella clause, holding as follows:

> If there exists any other BIT between Mongolia and another State which provides for a more generous provision relating to fair and equitable treatment, an investor under the Treaty is entitled to invoke it. But, such investor cannot use that MFN clause to introduce into the Treaty completely new substantive rights, such as those granted under an umbrella clause.[385]

169. In the present case, Claimants are trying to create a standard that is not present in the applicable treaty. This attempt to import a wholly new right should be rejected.

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[383] *Id.*, ¶ 81 (emphasis added). Commenting on this case, UNCTAD has noted the following: "Considering the boundaries of the MFN clause, it [the tribunal] decided that the MFN clause may not operate to create wholly new rights where none otherwise existed under the Argentina-Germany BIT. Applying this analysis to the claims before it, the tribunal concluded that reliance on the third-party treaty (Argentina-Chile BIT) via the MFN clause 'would not give Hochtief a right to reach a position that it could not reach under the Argentina-Germany BIT: it would enable it only to reach the same position as it could reach, by its own unilateral choice and actions, under the Argentina-Germany BIT, but to do so more quickly and more cheaply, without first pursuing litigation in the courts of Argentina for 18 months'." **Ex. R-120**, Federico Ortino, *Latest Developments in Investor-State Dispute Settlement*, UNCTAD IIA Issues Note 1 (April 2012), pp. 6-7. J. Christopher Thomas, Q.C. issued a dissent in the *Hochtief* case, rejecting importation via the MFN clause altogether.

[384] *Paushok*.

[385] *Id.*, ¶ 570.

170. Even if the foregoing were to be disregarded and importation permitted, there would be no breach of the full legal protection and security clause on the facts of this case. Arbitral tribunals have noted that this clause cannot operate as a legal stabilisation clause. As the *AES v. Hungary* tribunal noted:

> [W]hile [the most constant protection and security] can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals.
>
> In the words of Brownlie, the duty is no more than to provide "a reasonable measure of prevention which a well-administered government could be expected to exercise under similar circumstances."
>
> . . . .
>
> To conclude that the right to constant protection and security implies that no change in law that affects the investor's rights could take place, would be practically the same as to recognizing the existence of a non-existent stability agreement as a consequence of the full protection and security standard.
>
> The Tribunal finds that there can have been no breach of the obligation to provide constant protection and security as a result of Hungary's reintroduction of regulated pricing in 2006-2007, such reintroduction being based on rational public policy grounds.[386]

171. As discussed earlier in connection with the FET claim, there is no stabilisation clause in this case; nor is there any agreement of the State of any kind compromising in any way its sovereign right to take national security measures or

[386] *AES*, ¶¶ 13.3.2-13.3.3, 13.3.5-13.3.6 (emphasis added).

committing it to issue the approvals or licences necessary to implement the Devas project.[387]

172. Thus, there would be no violation of the MFN clause of the Mauritius Treaty even if the essential security provision does not apply, even if this case did not involve "pre-investments," and even if it would be permissible to import a wholly new protection through the MFN clause.

CONCLUSION

173. For the reasons stated above, all claims raised by Claimants should be dismissed and all costs arising of this proceeding should be assessed against Claimants.

[387] *See* ¶¶ 131-138, *supra*. Claimants quote the following passage of the *CME* award: "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'." Statement of Claim, ¶ 225; **Ex. CL-5**, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 613. It is not clear what "agreed and approved security" Claimants refer to because the Devas Contract made clear that the Government could take decisions in its sovereign capacity. *See* ¶¶ 29, 137, *supra*. In any event, that award was not unanimous and was subject to a dissenting opinion. Further, a tribunal in a related case arrived at a different interpretation of the full protection and security clause. In the *Lauder* case, while interpreting the "full protection and security" clause, the Tribunal noted: "The Respondent's only duty under the Treaty was to keep the judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law. . . . [T]he numerous Czech court proceedings initiated by [different 4 investors] show that the Czech judicial system has remained fully available to the Claimant."). *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 314.

RESERVATION OF RIGHTS

174. Respondent hereby reserves the right to submit such additional evidence and arguments as it may deem appropriate to supplement this Statement of Defence and to respond to any evidence or arguments submitted by Claimants in this Arbitration.

Dated: 2 December 2013

Respectfully submitted,

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