UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CC/DEVAS (MAURITIUS) LTD., 608 St James Court St Denis Street Port Louis, MAURITIUS DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED, 608 St James Court St Denis Street Port Louis, MAURITIUS and TELCOM DEVAS MAURITIUS LIMITED 608 St James Court St Denis Street Port Louis, MAURITIUS Petitioners, v. THE REPUBLIC OF INDIA, South Block, Raisina Hill, New Delhi, INDIA-110 101 Respondent.	:	Civil Action No. **PETITION TO RECOGNIZE AND CONFIRM FOREIGN ARBITRAL AWARD**

OVERVIEW

1. This is a petition pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards June 10, 1958, 21 U.S.T. 2517 (the "New York Convention"), as statutorily enacted by Chapter 2 of the Federal Arbitration Act ("FAA"), *see* 9 U.S.C. § 201. Petitioners, three Mauritius-incorporated companies, CC/Devas (Mauritius) Ltd. ("CC/Devas"), Devas Employees Mauritius Private Limited ("DEMPL"), and Telcom Devas Mauritius Limited

("Telcom Devas"), seek recognition and confirmation of a final, binding arbitration award dated October 13, 2020, entitled "Award on Quantum" (the "Quantum Award"),[1] made in Petitioners' favor against the Republic of India ("Respondent" or "India") pursuant to the Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments (the "Mauritius-India BIT" or the "Treaty") (Ex. 5).

2. The Quantum Award stems from the significant investments made by each of the Petitioners (CC/Devas, DEMPL and Telcom Devas) in a business owned by Devas Multimedia Private Limited ("Devas"), an Indian company in which they hold shares. The Quantum Award comprises compensation for the loss of that business, which was expropriated by India in an abrupt cabinet committee decision, issued in secret without any due process, and without even attempting to pay fair compensation – all in direct violation of the Treaty.

3. In January 2005, Devas secured access to 70 MHz of electromagnetic spectrum through an agreement (the "Devas-Antrix Agreement") with Antrix Corporation Limited ("Antrix"), a corporation wholly owned by the Indian government and operating under the administrative control of the Indian Space Research Organization ("ISRO") and the Department of Space ("DOS"). Each of these organizations ultimately are controlled by the Indian Prime Minister. The Devas-Antrix Agreement committed Antrix to lease to Devas space segment capacity in the "S-band" (2500-2690 MHz), and to provide two satellites, to be built, operated and launched by ISRO. These satellites were to form an integral part of a hybrid satellite/terrestrial

[1] A duly certified true and correct copy of the Quantum Award is attached as Exhibit 1 to the accompanying Declaration of Elizabeth A. Hellmann, dated January 12, 2021 ("Hellmann Decl."). All references herein to exhibits ("Ex.") are references to the Hellmann Declaration.

system through which Devas would provide broadband wireless access ("BWA") and audio-video ("AV") services and cost-effectively service rural areas within India.[2]

4. Over the next five years, Devas assembled a world class team of experts in the satellite-terrestrial communications industry, and validated its system architecture through experimental trials conducted in India, Germany and China. All of this was done with the vociferous backing and encouragement of the Government of India. Even though Antrix missed the initial launch deadline of November 2009 for the first satellite, it ascribed this to technical issues and promised a launch date of mid-2010.

5. It has since come to light that, from October 2009 onwards, DOS's newly-installed Secretary, Dr. K.R. Radhakrishnan (who simultaneously acted as Chairman of ISRO, Antrix and the Space Commission)[3] secretly had begun to target the Devas-Antrix Agreement. In late 2009, he commissioned a covert internal "review" of all aspects of that agreement. Even though the review found no wrongdoing by Devas and did not recommend termination of the Devas-Antrix Agreement, Dr. Radhakrishnan persisted in exploring how to "annull" the Devas-Antrix Agreement. In July 2010 – and shortly after Devas was subjected to false attacks in the Indian media – Dr. Radhakrishnan secured a decision from the Space Commission authorizing the annulment of the Devas-Antrix Agreement. Devas was not told of any of this. The arbitration tribunal that later analyzed India's conduct in concealing this covert campaign found that it was conducted in bad faith, in violation of the "fair and equitable treatment" standard of the Treaty.

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

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

6. Worse was to come: on February 8, 2011, in the wake of media pressure,[4] Dr. Radhakrishnan announced that the government had decided to terminate the Devas-Antrix Agreement. On February 17, 2011, the Indian Cabinet Committee on Security ("CCS") announced a "policy decision" to revoke the orbital slot in the S-band previously assigned to DOS for commercial activities and that, as a consequence, the Devas-Antrix Agreement was annulled. Right on cue, on February 25, 2011, Antrix issued a notice to Devas terminating the Devas-Antrix Agreement on grounds of "*force majeure*" based on the CCS's so-called "policy decision." As a direct result, Devas's business was destroyed and, with it, the value of Petitioners' investments in that business.

7. In 2012, Petitioners commenced an arbitration against India under the Arbitration Rules of the United Nations Commission on International Trade Law (1976) (the "UNCITRAL Rules"), as prescribed in the Treaty for arbitrating disputes against India. In 2016, a three-member tribunal unanimously found that India's conduct in annulling the Devas-Antrix Agreement constituted an unlawful expropriation of Devas's business, in breach of Article 6 of the Treaty, and entitled Petitioners to damages equal to 40% of Devas's business at the time of expropriation.[5]

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[4] In early February 2011, the Indian government became enveloped in a controversy concerning "2G" spectrum allocated to terrestrial operators by the Department of Telecommunications. Although the Devas-Antrix Agreement had no connection whatsoever to the so-called 2G scandal, the media frenzy created political pressure on the Indian government to extricate itself from its commitments to Devas. (*See infra* ¶ 30.)

[5] (*See infra* ¶ 48.) The Tribunal found (by majority) that India's actions in withdrawing S-Band spectrum were attributable, in part, to "essential security" interests, meaning that the expropriation protections of the Treaty applied only to 40% of the value of Devas's business. As noted below, subsequent developments indicate that India's evidence about supposed military "needs" (as proffered during the 2013-16 merits phase) was incomplete and misleading, and India's conduct in suppressing relevant evidence later led the tribunal to express its "grave concern" and to reiterate the need for "trustworthy conduct and candour" in international proceedings. (*See infra* ¶¶ 62-63; Quantum Award ¶ 659.)

8. In 2020, the tribunal issued the Quantum Award, ordering India to pay Petitioners damages totaling USD $111,296,000, plus interest at LIBOR plus 2% as and from February 17, 2011, together with USD $10,000,000 in attorney's fees, and post-award interest on all such sums.

9. Accordingly, Petitioners seek an order: (a) recognizing and confirming the Quantum Award; (b) entering a judgment in Petitioners' favor in the full amount of the Quantum Award, plus the pre- and post-award interest specified therein, post-judgment interest pursuant to 28 U.S.C. § 1961, and the fees and costs of this Petition; and (c) granting such other relief as the Court deems just and proper.

THE PARTIES

10. Petitioner CC/Devas is a corporation organized under the laws of Mauritius.

11. Petitioner DEMPL is a corporation organized under the laws of Mauritius.

12. Petitioner Telcom Devas is a corporation organized under the laws of Mauritius.

13. Each Petitioner holds shares in Devas, a corporation organized under the laws of the Republic of India. CC/Devas owns 17.06% of the issued share capital of Devas, DEMPL owns 3.48% of the issued share capital of Devas, and Telcom Devas owns 17.06% of the issued share capital of Devas. Petitioners thus hold, in aggregate, 37.6% of the of the issued share capital of Devas.

14. The First and Third Petitioners are affiliated with two highly-respected U.S. venture capital firms, namely Columbia Capital and Telcom Ventures respectively, both of which are very experienced in the satellite and telecommunications industries.

15. Respondent India is a foreign state within the meaning of the Foreign Sovereign Immunities Act ("FSIA"). *See* 28 U.S.C. § 1603.

JURISDICTION AND VENUE

16. This Petition to recognize and enforce the Quantum Award is governed by the New York Convention, a treaty in force in the United States for the recognition and enforcement of international arbitration awards, because the Quantum Award is an arbitral award that arises from a legal relationship (*i.e.* Petitioners' investments in India) that is commercial in nature, and does not exclusively involve United States citizens. *See* 9 U.S.C. §§ 201-02. This Court has jurisdiction over this proceeding under 9 U.S.C. § 203 (actions under the Convention) and 28 U.S.C. § 1330(a)-(b) (actions against foreign states).

17. Under the FSIA, India does not enjoy sovereign immunity from the jurisdiction of this Court for two independent reasons. First, by entering into the New York Convention, India waived any immunity it may otherwise possess in relation to an action to enforce an award in this jurisdiction. *See* 28 U.S.C. § 1605(a)(1); *see also Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) ("The waiver exception applies to this case. In *Creighton* [*Ltd. v. Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999)], we concluded that a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states. Because Ukraine and the United States have both signed the Convention, Ukraine falls within the waiver exception as *Creighton* construed it." (citation omitted))[6], *cert. denied*, 140 S. Ct. 901 (2020); *Process & Indus. Devs.. Ltd. v. Fed. Republic of Nigeria*, No. 18-cv-594 (CRC), 2020 WL 7122896, at *1, *6 & n.4 (D.D.C. 2020) ("Nigeria waived its immunity under the FSIA by signing

[6] In *Creighton*, the United States Court of Appeals for the District of Columbia cited case law to the same effect from the United States Court of Appeals for the Second Circuit. *See* 181 F.3d at 123 (citing *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 578-79 (2d Cir. 1993) (holding that signatory to New York Convention "implicitly waive[s] any sovereign immunity defense" when it "becomes a signatory to the Convention")).

the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . ., then agreeing to arbitrate in the territory of another Convention signatory."). Second, this is an action "to confirm an award made pursuant to . . . an agreement to arbitrate" where the award is "governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards," namely, the New York Convention. *See* 28 U.S.C. § 1605(a)(6).

18. Venue is proper in this Court because under the FSIA, a civil action may be brought "in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof." 28 U.S.C. § 1391(f)(4).

THE UNDERLYING DISPUTE CONCERNING EXPROPRIATION OF PETITIONERS' INVESTMENT IN THE BUSINESS OF DEVAS

19. The Quantum Award pertains to India's February 2011 expropriation of Petitioners' investments in a hybrid satellite and terrestrial communications business owned by Devas, an Indian corporation. The relevant factual background is summarized in the July 26, 2006 "Award on Jurisdiction and Merits" (hereinafter "2016 Merits Award") issued by the tribunal in the arbitration. (*See* Ex. 3.)

20. On January 28 2005, Devas entered into a contract with Antrix entitled "Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft" (the "Devas-Antrix Agreement"). (2016 Merits Award ¶ 5.) Antrix was identified in the Devas-Antrix Agreement as the "marketing arm" of DOS and the "entity through which ISRO [the Indian Space Research Organization] engages in commercial activities." (*Id.* ¶ 193.)

21. Notably, Antrix is wholly owned by the government of India. (*Id.* ¶ 5.) Moreover, the minister responsible for DOS and ISRO (and through them, Antrix) has at all materials times been the Prime Minister of India.

22. By the Devas-Antrix Agreement, Antrix agreed to build, launch and operate two ISRO satellites and to make available to Devas 70 MHz of the electromagnetic spectrum in the "S-band." (*Id.* ¶¶ 71, 86, 202, 300.) This segment of spectrum, which was leased to Devas exclusively and on a "Non-Preemptible" basis, had been allocated to India by the International Telecommunications Union, or "ITU." (*Id.* ¶¶ 71, 88, 202.) The Devas-Antrix Agreement formed the "framework" for Devas to deliver communications services throughout India. (*Id.* ¶ 71.)

23. The Devas-Antrix Agreement became fully binding and effective on February 2, 2006, when Antrix wrote to Devas confirming that it had "'received the necessary approval for building, launching and leasing'" the first satellite. (*Id.* ¶ 204 (quoting Antrix February 2, 2006 letter to Devas).) On the basis of Antrix's notification, and the other indications of support from Indian government officials, the Petitioners injected capital into Devas, including:

(a) on March 16, 2006, the First and Third Petitioners CC/Devas and Telcom Devas made a first round of investments in Devas (of approximately USD 7.5 million each), part of which funded the "upfront capacity reservation fee" for the first satellite to be built by Antrix for Devas's use under the Devas-Antrix Agreement (2016 Merits Award, ¶¶ 107, 205);

(b) on June 18, 2007, CC/Devas and Telcom Devas made a second round of investments in Devas, a portion of which was used by Devas to pay the "upfront capacity reservation fee" for the second satellite to be built by Antrix for Devas's use under the Devas-Antrix Agreement (*Id.* ¶¶ 108, 205); and

(c) during the period 2009 to 2010, each of the Petitioners (*i.e.* CC/Devas, DEMPL and Telcom Devas) invested further capital in Devas. (*Id.* ¶ 111.)

24. Starting in 2008, Devas also received investments from Deutsche Telekom Asia Pte Ltd., a subsidiary of Deutsche Telekom AG ("DT"), a German telecommunications company that is partially owned by the German government. (*Id.* ¶¶ 111, 108.) By virtue of its investments, DT owns approximately 20% of Devas's issued share capital.

25. As a result of the above investments, and the considerable contribution of know-how and expertise that accompanied them, Devas developed a business for the provision of BWA and AV services across India, utilizing the satellites as part of a hybrid satellite/terrestrial communications system.

26. During 2009, with the full support of Antrix, ISRO and DOS (indeed, in the presence of DOS Secretary Dr. K. Radhaskrishnan) Devas successfully conducted field trials of its technology in Bangalore, India, that successfully demonstrated its hybrid satellite-terrestrial systems and end-user terminals. (*Id.* ¶ 109.) Meanwhile, and despite a delay in the initial June 2009 launch date, Antrix promised that the first satellite would be launched in late 2009 or early 2010. (*Id.* ¶ 110.)

27. Although Devas continued to perform under the Devas-Antrix Agreement throughout 2009, 2010 and early 2011,[7] with the ostensible support of DOS, ISRO and Antrix, it turned out that the Indian government was taking covert steps to annul the Devas-Antrix Agreement. Specifically, in late 2009, Dr. Radhaskrishnan (the head of DOS, as well as the Chairman of Antrix and ISRO) commissioned an internal "comprehensive review" of the Devas-Antrix Agreement, supposedly out of a concern about "potential irregularities" regarding the contract. (*Id.* ¶ 121.) Although that review – whose existence was concealed from Devas – revealed absolutely no wrongdoing by Devas in connection with the Devas-Antrix Agreement or its negotiation (*see id.* ¶ 123), Dr. Radhaskrishnan nevertheless secured advice from the Indian Ministry of Law and Justice as to how to the Devas-Antrix Agreement "could be annulled" in light of purported "new strategic needs" for the S-band spectrum. (*Id.* ¶ 131.)

[7] Indeed, as the Tribunal noted, Devas at all times "honoured" its obligations under the Devas-Antrix Agreement. (2016 Merits Award ¶ 208.)

28. Dr. Radhaskrishnan's maneuvers coincided with certain reports in the Indian media that purported to be critical of the Devas-Antrix Agreement. (*Id.* ¶ 127.) It is relevant to note that, by 2010, the commercial value of the S-band (and, indeed, any spectrum that could be utilized for communications purposes) had risen sharply, partly as a result of the growth in "smart phones" and hand-held devices during the late 2000s.

29. On July 2, 2010, Dr. Radhaskrishnan obtained a decision from the "Space Commission" (a deliberative body under DOS) that, "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 [Devas Agreement]." (*Id.* ¶ 134 (alterations in original).) Later in July 2010, the Additional Solicitor-General of India ("ASG") gave written advice, at Dr. Radhaskrishnan's request, on how the contract could be "annulled" in order to "'(i) preserve precious S-band spectrum or strategic requirements of [India] and (ii) to ensure a level playing field for other service providers using terrestrial spectrum.'" (*Id.* ¶¶ 135 (quoting July 12, 2010 ASG opinion).) The ASG advised that "'any policy taken by the Government of India with regard to allocation and use of S bandwith [sic] [. . .] would fall within the doctrine of force majeure, as envisaged in the [Devas Agreement],'" and that the most "'prudent'" means of achieving a *force majeure* event was to obtain "a policy decision having the seal and approval of the Cabinet," on the theory that "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." (*Id.* ¶ 137.)

30. In early February 2011, the Indian Government experienced a political crisis when an unrelated series of transactions (associated with "2G" terrestrial spectrum allocated by the

Department of Telecommunications) led to the arrest of senior Indian officials.[8] Though the Devas-Antrix Agreement had no connection with the "2G" scandals, elements of the Indian media attacked the agreement,[9] creating further pressure on DOS and the Indian Prime Minister (who directly oversees India's space agencies).

31. On February 8, 2011, Dr. Radhaskrishnan convened a press conference where he publicly stated, for the first time, that the Space Commission already had decided that the Devas-Antrix Agreement would be annulled.[10] (*Id.* ¶ 142.) Dr. Radhaskrishnan also commissioned the drafting of a "Note" to the Indian Cabinet Committee on Security ("CCS") recommending the annulment of the agreement – effectively using the mechanism recommended by the Additional Solicitor-General in July 2010 – and the "Note" was circulated on February 16, 2011. (*Id.* ¶ 143.)

32. Then, on February 17, 2011, the CCS announced that it "had decided to annul" the Devas-Antrix Agreement. (*Id.* ¶ 146.) Its press release of that date stated in part:

> 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.
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> 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

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[8] This incident, which is a matter of public record, was described in the Concurring and Dissenting Opinion of Arbitrator Haigh that accompanied the Merits Award. (*See* Ex. 4 ¶¶ 46, 107.)

[9] *See id.* ¶ 50.

[10] In addition, on February 16, 2011, the Prime Minister of India told reporters that the Devas-Antrix Agreement would be annulled. *See id.* ¶ 55.

> between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith.

(*Id.* ¶ 146.) A few days later, citing the CCS decision, Antrix informed Devas that the Devas-Antrix Agreement was "terminated." (*Id.*)[11]

33. As a consequence of the annulment of the Devas-Antrix Agreement, Devas's business was completely destroyed (and with it, Petitioners' investments in that business). (*Id.* ¶ 422.)

PETITIONERS COMMENCE ARBITRATION UNDER THE TREATY

34. At all material times, each of the Petitioners, being incorporated in Mauritius, qualified as an "investor" under the Mauritius-India BIT. (2016 Merits Award ¶ 210; *see also* Mauritius-India BIT, art. 1(1)(b).) Furthermore, each of their investments in the Devas business qualified as an "investment" under the Mauritius-India BIT, which defined protected "'investments'" as "'every kind of assets established or acquired under the relevant laws and regulations of the Contracting Party in whose territory the investment is made,'" including "'shares, debentures and any other form of participation in a company.'" (2016 Merits Award ¶ 198 (quoting Mauritius-India BIT, art. 1(a)); *see also id.* ¶ 210.)

35. The Treaty further provides, among other things, in Article 4(1), that "investments" of "investors" shall be accorded "fair and equitable treatment," and, in Article 6, that investments shall not be expropriated or nationalized "except for public purposes under due process of law, on a non-discriminatory basis and against fair and equitable compensation." (Mauritius-India BIT, arts. 4(1), 6(1).)

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[11] Devas did not accept the validity of the termination notice and, as noted below, commenced a contract arbitration in which it sought and obtained an award of damages for repudiation of the Devas-Antrix Agreement. (*See infra* ¶¶ 66-68.) As noted below, that award remains unpaid.

36. Petitioners thus were entitled to invoke Article 8 of the Mauritius-India BIT, which states in full:

> Settlement of Disputes Between an Investor and a Contracting Party
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> (1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> (2) If such dispute cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request for settlement, the investor may submit the dispute to:
>
> (a) arbitration in accordance to the law of the Contracting Party; or
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> (b) if the Contracting Party of the investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, of March 18, 1965 and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes, such a dispute shall be referred to the Centre; or
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> (c) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law; or
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> (d) to an ad hoc arbitral tribunal set up in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:
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> (i) The appointing authority under Article 7 of the Arbitration Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.
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> (ii) The parties shall appoint their respective arbitrators within two months.
>
> (iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding on the parties to the dispute.
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> (iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

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

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

37. Article 8 is a "standing offer" to arbitrate by India, which creates an obligation to arbitrate disputes with investors of the other Contracting Party (*i.e.*, Mauritius). *See Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 206 (D.C. Cir. 2015) (construing similar submission to UNCITRAL Rules arbitration in U.S.-Ecuador investment treaty and holding that it "includes a standing offer to all potential U.S. investors to arbitrate investment disputes, which [investor] accepted in the manner required by the treaty").

38. Petitioners accepted India's agreement to arbitrate in the manner required by the Treaty. In December 2011, pursuant to Article 8(1) of the Treaty, Petitioners sought to settle their disputes amicably with India for over six (6) months, writing to India with a description of the matters in dispute and seeking to resolve them. (*See* Exs. 12 to 14 (letters dated December 12 and 13, 2011 from each of Petitioners to Indian government).) Each of these letters expressly referenced Petitioners' right to commence arbitration pursuant to Article 8(2) of the Treaty, should their disputes not be resolved.

39. As at mid-2012, India had not responded to Petitioner's notices, with the result that Petitioners' disputes remained unresolved as of six months from their letters to the Government of India. Article 8(2) thus permitted Petitioners to submit the dispute to arbitration under the UNCITRAL Rules, as prescribed by Article 8(2)(d).

40. On July 3, 2012, therefore, pursuant to Article 8(2)(d) and the UNCITRAL Rules, Petitioners commenced the Arbitration by sending India a Notice of Arbitration in accordance with the UNCITRAL Rules. (2016 Merits Award ¶ 8.)

THE JURISDICTIONAL AND MERITS PHASE OF THE ARBITRATION – AND THE UNANIMOUS FINDING THAT INDIA BREACHED THE TREATY

41. On February 4, 2013, a three-member arbitral tribunal (the "Tribunal") was constituted in accordance with the UNCITRAL Rules and Article 8(2)(d) of the UNCITRAL Rules. (2016 Merits Award ¶ 11.)

42. The Tribunal initially consisted of Professor Francisco Orrego Vicuna, a national of Chile (co-arbitrator appointed by Petitioners), the Hon. Shri Justice Anil Dev Singh, an Indian national (co-arbitrator appointed by India) and the Hon. Marc Lalonde, P.C., O.C., Q.C., a Canadian national, appointed by the co-arbitrators as Presiding Arbitrator. (*See id.* ¶¶ 9-11.) On October 9, 2013, following the disqualification of Professor Orrego Vicuna,[12] Petitioners appointed David R. Haigh, Q.C., a Canadian national, as co-arbitrator. By agreement of the parties, the arbitration was administered by the Permanent Court of Arbitration ("PCA").

43. The Tribunal (Arbitrators Lalonde, Haigh and Singh) issued a procedural order that, among other things, provided for the seat of arbitration to be The Hague, The Netherlands, and

[12] On May 20, 2013, invoking Article 11 of the UNCITRAL Rules, India brought a challenge to Arbitrators Lalonde and Orrego Vicuna. (*See* 2016 Merits Award ¶¶ 21-23.) The challenge was referred to the Hon Peter Tomka, President of the ICJ (and the "Appointing Authority" per Article 8(2)(d)(i) of the Treaty). (*See id.* ¶ 23.) The challenge was rejected as to Arbitrator Lalonde but upheld as to Arbitrator Orrego Vicuna, by reason of comments he had made in respect of various unrelated cases (not involving India). (*Id.* ¶ 26.)

bifurcated the Arbitration into two phases: jurisdiction/merits and quantum. (*See id.* ¶¶ 9-11, 17-20.)[13]

44. The Tribunal then received briefing and evidence from the parties on jurisdiction and merits issues. (*See id.* ¶¶ 31-34.) Over that same period, the parties engaged in several rounds of document disclosure. (*See id.* ¶¶ 35-42.) Among the issues in dispute during this phase was: (i) India's arguments that Petitioners had not made a qualifying "investment" for purposes of the Treaty (*see id.* ¶¶ 171-82); and India's argument (raised for the first time in arbitration) that the "essential security" clause in Article 11(3) of the Treaty could relieve it of liability (*see id.* ¶¶ 213-15, 221-23, 250-51, 261-65, 292, 304-05, 311-14).

45. From September 1 through 5, 2014, at the Peace Palace in The Hague, the Netherlands, the Tribunal conducted an in-person hearing, on jurisdiction and merits – including on India's challenge to the existence of an "investment," and its "essential security" defenses – with fact and expert witness evidence. (*Id.* ¶¶ 44-45.) After the jurisdiction/merits hearing, the Tribunal received certain further evidence and submissions from the parties. (*See id.* ¶¶ 46-54, 61-63.)

46. On July 25, 2016, the Tribunal issued its 2016 Merits Award, a reasoned, 141-page, 501-paragraph decision unanimously upholding jurisdiction and finding India liable for breaches of the Treaty in connection with the annulment of the Devas-Antrix Agreement (*see id.* ¶ 501), along with the Dissenting Opinion of Arbitrator Haigh (concurring on both jurisdiction and liability, but dissenting on the extent of liability). (Ex. 4.)[14]

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[13] The procedural framework of the arbitration was further memorialized in a "Terms of Appointment" signed by the parties at the initial session of the arbitration on May 10, 2013. (*See id.* ¶ 20.)

[14] Though styled a "dissent," Arbitrator Haigh's opinion concurred in the finding that India had violated the Treaty when the CCS annulled the Devas-Antrix Agreement. (*See id.* ¶ 1.) The dissent solely related to the extent to which the "essential security" clause in Article 11(3) of

47. Among other things, the Tribunal unanimously rejected India's jurisdictional challenge, holding that Petitioners' interests in the Devas business were "investments" protected by the Treaty. (2016 Merits Award ¶¶ 198-210, 501(a).) The Tribunal further held, by majority, that India's decision to annul the Devas-Antrix Agreement was only "in part directed to the protection of [India's] essential security interests" for purposes of Article 11(3) of the Treaty (*id.* ¶ 501(c); *see also id.* ¶¶ 371-73), that "a reasonable allocation of spectrum directed to the protection of [India's] essential security interests would not exceed 60% of the S-band spectrum allocated to [Petitioners]" (*id.* ¶ 373) and that, consequently, "the remaining 40%" of spectrum was protected by assurances against expropriation contained in Article 6 of the Treaty (*id.*).

48. The Tribunal thus held that

(a) India "expropriated the [Petitioners'] investment insofar as [India's] decision to annul the Devas[-Antrix] Agreement was in part motivated by considerations other than the protection of [India's] essential security interests" (*id.* ¶ 501(d)); and

(b) "[T]he protection of essential security interests accounts for 60% of [India's] decision to annul the Devas[-Antrix] Agreement" and therefore Petitioners are owed compensation by India for the expropriation of 40% of the value of their investments. (*Id.* ¶ 501(e).)

49. The Tribunal further held that India's concealment, from July 2, 2010 onwards, of the Space Commission's decision to annul the Devas-Antrix Agreement had left Petitioners "completely in the dark," and was contrary to "good faith." (*Id.* ¶ 468.) Such conduct, it held, was a "clear breach of the simple good faith required under international law" and constituted a breach

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the Treaty could limit India's liability. (*Id.*) Arbitrator Haigh was of the view that none of India's actions fell within the "essential security" clause for purposes of Article 11(3); in particular he considered that military "needs" for S-band spectrum had *not* formed the basis for the CCS decision. (*See* Ex. 4 ¶ 101.) Arbitrator Haigh would have held that Petitioners were entitled to 100% compensation for India's expropriation because India did not make out any essential security defense at all. (Ex. 4 ¶¶ 110-12.)

of the obligation, in Article 4(1) of the Treaty to accord "fair and equitable treatment" to Petitioners' investments. (*Id.* ¶ 470; *see also id.* ¶ 501(d).)

50. Having decided these matters, the Tribunal held that "any decision regarding the quantification of compensation or damages, as well as any decision regarding the allocation of the costs of arbitration, shall be reserved for a later stage of the proceedings." (*Id.* ¶ 501(h).)

THE QUANTUM PHASE – AND THE 2020 QUANTUM AWARD AGAINST INDIA

51. From 2017 to 2018, the parties submitted further briefing and evidence on the issue of quantum. (Quantum Award ¶¶ 45-46, 52, 57, 60-61, 69-75, 77, 80, 82-84, 88-94, 100-02, 105-11, 114-20.) The Tribunal also decided various further document requests made by each party.[15] (*Id.* ¶¶ 47-51, 76, 78-81, 85-87, 119.)

52. From July 16 to 21, 2018, at the Peace Palace in The Hague, the Netherlands, the Tribunal conducted an in-person hearing on quantum, with fact and expert witness evidence. (*Id.* ¶¶ 124-27.) Following the conclusion of the hearing, the Tribunal received certain further authorities, evidence and other submissions from the parties, including concerning the attorneys' fees and costs incurred by them in the arbitration. (*Id.* ¶¶ 128-69.)

53. On October 13, 2020, the Tribunal issued the Quantum Award (Ex. 1) and the accompanying Dissenting Opinion of Arbitrator Singh (Ex. 2). In it, the Tribunal, by majority, explained that it was required to award an amount that will, "as far as possible, wipe out all the consequences of the illegal act" (*i.e.* India's violations of Articles 4(1) and 6 of the BIT) and "re-establish the situation which would, in all probability, have existed if that act had not been

[15] The full unredacted text of some of the documents emerged after the issuance of the November 13, 2017 merits award (the "DT 2017 Merits Award"), rendered in a separate UNCITRAL arbitration brought against India by DT under the Germany-India BIT arising from the loss of DT's investment in Devas. (*See* Quantum Award ¶ 69; *see also infra* ¶¶ 59-62.)

committed." (*Id.* ¶ 206.) It further determined that the appropriate measure of compensation was to "determine the value that a willing buyer would have been ready to pay, just before the CCS decision of February 17, 2011, for the shares in Devas held by [Petitioners] . . . and then to retain 40% of that value as subject to compensation in proportion to [Petitioners'] shareholding in Devas." (*Id.* ¶ 353.)[16]

54. Evaluating the evidence on quantum, the Tribunal majority then held that, as at February 17, 2011, the total value of Devas was USD 740 million. (*Id.* ¶¶ 606, 663(a).) It thus concluded, and the Quantum Award holds, that each of the Petitioners "is entitled to compensation pursuant to the [2016 Merits Award] in an amount corresponding to 40% of USD 740 million, multiplied by the percentage of its shareholding." (*Id.* ¶ 663(b).)

55. On the basis of these holdings, the Quantum Award ordered India to pay:

(a) $50,497,600 as compensation to Petitioner CC/Devas (owner of 17.06% of the issued share capital of Devas) (*id.* ¶ 663(c));

(b) $10,300,800 as compensation to Petitioner DEMPL (owner of 3.48% of the issued share capital of Devas) (*id.*);

(c) $50,497,600 as compensation to Petitioner Telcom Devas (owner of 17.06% of the issued share capital of Devas) (*id.*);

(d) interest on the above amounts at a rate of the six-month USD LIBOR + 2 percentage points, compounded semi-annually from February 17, 2011 until the date of full payment (*id.* ¶ 663(d)); and

(e) $10,000,000 to Petitioners under Articles 38(c), (d) and (e) of the UNCITRAL Rules,[17] for their "reasonable costs for legal representation and assistance, travel

[16] Arbitrator Singh dissented from the Quantum Award concerning the amount that should be awarded to Petitioners.

[17] Article 38 and 40 of the UNCITRAL Rules empowers an arbitral tribunal to order, among other things, that a party be compensated for "costs of expert advice and of other assistance required by the arbitral tribunal," "travel and other expenses of witnesses" and "[t]he costs for legal representation and assistance of the successful party " if determined to be "reasonable." Ex. 20, art. 38(c), (d), (e), 40.

> and other expenses incurred by witnesses, costs of expert advice and other assistance," plus interest on that amount at a rate of the six-month USD LIBOR + 2 percentage points compounded semi-annually from the date of the Quantum Award until the date of full payment (*id.* ¶¶ 660, 663(f)-(g).)

56. The Quantum Award further ordered that India may not seek to reduce these amounts by any means. Specifically, it ordered that India: (1) "may not withhold or offset any portion of the award based on a claim that such amount is subject to taxation or other deductions" (*id.* ¶ 663(i)); and (2) "shall indemnify the [Petitioners] with respect to any Indian taxes, charges, or other set-offs imposed on the compensation awarded" (*id.* ¶ 663 (i), (j)).

57. The Quantum Award also directed Petitioners to undertake that "they will not seek double recovery in relation to their investment, and will take appropriate steps to ensure that they are not compensated twice in the event that any damages were to be paid by Antrix Corporation Limited to Devas Multimedia Private Limited pursuant to the ICC Award." (*Id.* ¶ 663(k); *see also infra* ¶¶ 66-71.)

THE TRIBUNAL'S CRITICISM OF INDIA'S CONDUCT IN THE ARBITRATION

58. In limiting damages to 40% of Petitioners' interest in the expropriated business of Devas, the Quantum Award adhered to the ratio of 60%/40% that, as noted above, had been established in the 2016 Merits Award. (*See supra* ¶¶ 47-48.) The rationale for the 60%/40% ratio was that, in its 2016 Merits Award, the Tribunal had determined, by majority, that "part" of the February 17, 2011 CCS decision appeared to be "'directed to the protection of [India's] essential security interests'" (*i.e.* the military's alleged "requirements" for S-Band spectrum) – and that the "evidence" showed that these "essential security interests would not exceed 60% of the S-Band spectrum allocated" under the Devas-Antrix Agreement. (*See* 2016 Merits Award ¶¶ 336, 373.)

59. The 2016 Merits Award's findings in this regard drew in significant part upon the evidence of India's witness Mr. A.V. Anand, and in particular upon a purported minute of a

December 15, 2009 Indian inter-governmental meeting, as produced in redacted form by Mr. Anand and marked "Exhibit VA-10." Specifically, the 2016 Merits Award cited Exhibit VA-10 (the redacted December 15, 2009 minute), as being "uncontroverted" evidence that the Indian defense authorities had "set forth their requirements for S-band" for 2012 and that this had amounted to "17.5 MHz." plus "40 MHz." plus "50 MHz." (*Id.* ¶¶ 336, 347.) This led the Tribunal to conclude, by majority, that the CCS decision – and, by extension, the ensuing Space Commission decision of July 2, 2010 and CCS decision of February 17, 2011 – were motivated in part by military requirements that had, by then, crystallized. (*Id.* ¶¶ 369-71.)

60. It later transpired that an *unredacted* version of Exhibit VA-10 was produced to the tribunal hearing DT's treaty claims against India. And in the 2017 DT Merits Award issued in December 2017, based on its review of the *unredacted* Exhibit VA-10, the DT tribunal completely rejected India's "essential security" defense outright, holding that:

(i) the unredacted text of the December 15, 2009 minutes (Exhibit VA-10) negated the essential security defense because there was ***"no suggestion in these minutes that military needs were irreconcilable with the Devas[-Antrix] Agreement"***; on the contrary, the defense authorities' position ***"appear[ed] to be that its existing demands may be satisfied by exploring future avenues"*** (Ex. 11 ¶ 244 (emphasis added));

(ii) thus, "there is no indication that the CCS at [February 2011] allocated the 'precious S-Band' to the military or the MOD or otherwise earmarked that spectrum for security interests" (Ex. 11 ¶ 273);[18] and

(iii) India had thus "failed to establish that the CCS Decision was necessary to protect . . . essential security interests." (*Id.* ¶ 285.)

[18] The DT Tribunal noted in this respect that the CCS decision was only "directed at taking away the relevant S-band spectrum from Antrix-Devas, thereby creating the legal conditions for Antrix to invoke *force majeure* and effect termination." (Ex. 11 (2017 DT Merits Award) ¶ 286.) The CCS decision left the future use of the S-band undetermined and thus was not "targeted" towards essential security interests. (*Id.*) The DT Tribunal's findings in this regard aligned with those of Arbitrator Haigh in his Dissenting Opinion on merits. (*See* Ex. 4 ¶¶ 81-97.)

61. The DT tribunal also stated that its own conclusions on this issue (which differed from the majority in the arbitration commenced by Petitioners) were informed by the DT tribunal's review of ***"certain unredacted portions of documents which may not have been available to the Mauritius BIT tribunal"*** – including in particular the December 15, 2019 memorandum/Exhibit VA-10. (*Id.* ¶ 288 (emphasis added).)

62. Consequently, and only *after* the issuance of the 2017 DT Merits Award, the full unredacted text of Exhibit VA-10 was produced to Petitioners and the Tribunal in May 2018, and marked as "Exhibit C-252" in the arbitration. (Quantum Award ¶ 80.)

63. The Quantum Award did not revisit its prior merits findings, or alter its decision to adopt a 60%/40% ratio in awarding compensation. However, it noted, in the course of allocating the fees/costs of the arbitration, that the unredacted text of Exhibit VA-10 differed materially from the description that India had given it during the merits phase of the arbitration. To quote the Tribunal:

> The Claimants have also argued that there are other circumstances that the Tribunal should take into account when exercising its discretion in fixing costs. The Tribunal notes two of those, in particular. The first concerns the Respondent's reliance on certain minutes of a December 15, 2009 meeting between ISRO and defence officials. The Respondent submitted a redacted version of these minutes as Exhibit VA-10, urging that the un-redacted language demonstrated the "needs" of the Indian military as they were said to have crystalized at the time. The Respondent also submitted a privilege log which purported to describe the redacted portions of Exhibit VA-10. ***The Tribunal relied on this exhibit and the testimony of Mr. A. Vijay Anand, in the Jurisdiction and Merits Award.*** Subsequently, in 2018, during the quantum phase of this case, an un-redacted version of Exhibit VA-10 became available as a result of its production in the DT Arbitration, another investor-state claim against India in relation to these events. The un-redacted minutes were expressly relied upon in the DT Arbitration case where the tribunal rejected India's defence based on essential security.
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> . . . .
>
> ***. . . [T]he Tribunal is bound to express its grave concern in relation to the redacted document, Exhibit VA-10. International arbitration proceedings such as this***

> ***depend for their fairness and efficiency on a proper regard for trustworthy conduct and candour by parties and their counsel.***

(Quantum Award ¶¶ 653, 659 (emphasis added).) This is a clear repudiation of the tactics used by India in the course of the arbitration.

PROCEEDINGS BY INDIA IN THE NETHERLANDS CONCERNING THE 2016 MERITS AWARD

64. India petitioned the courts of The Netherlands to set aside the Jurisdiction and Merits Award. By decision dated November 14, 2018, The Hague District Court denied India's challenge and upheld the Jurisdiction and Merits Award. (Ex. 6 (Dutch 11.14.2018 decision).)

65. India appealed the Hague District Court's decision to The Hague Court of Appeal. India's appeal has been argued and the Court of Appeal has advised the parties that it is likely to issue its decision in February 2021. (*See* Hellmann Decl. ¶ 7.)[19]

RELATED PROCEEDINGS AGAINST ANTRIX AND UNDERTAKING AGAINST DOUBLE RECOVERY

66. As noted above, after the CCS decision of February 17 2011, Antrix purported to terminate the Devas-Antrix Agreement by a notice dated February 25, 2011. (*See supra* ¶ 6; 2016 Merits Award ¶ 146.) Later in 2011, Devas commenced an arbitration (the "Devas-Antrix ICC Arbitration") against Antrix pursuant to the arbitration clause in the Devas-Antrix Agreement, which provides, inter alia, for arbitration of disputes under the rules of the International Chamber

[19] The mere pendency of proceedings in the seat of the arbitration to set aside an arbitration award does not prevent Petitioners from seeking recognition and confirmation, nor does it prevent the Court from granting the Petition. *See, e.g., Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 71-73 (D.D.C. 2013) (enforcing final damages award rendered by Dutch arbitral tribunal pursuant to bilateral investment treaty despite the pendency of set-aside proceedings in the Netherlands and noting that "[t]he [U.S.-Ecuador] BIT, the UNCITRAL Rules, and the New York Convention all require immediate satisfaction of arbitral awards"), *aff'd*, 795 F.3d 200 (D.C. Cir. 2015).

of Commerce ("ICC"). (*See* 2016 Merits Award ¶¶ 59, 161.) The Devas-Antrix ICC Arbitration resulted in a unanimous final award of September 14, 2015 (the "ICC Award") in favor of Devas, concluding that Antrix wrongfully repudiated the Devas-Antrix Agreement and ordering Antrix to pay Devas, awarding $562.5 million in contractual damages, plus pre-award and post-award interest. (*Id.* ¶¶ 60, 161.). Post-award interest on the ICC Award runs at the Indian statutory rate of 18% per annum. (Ex. 7 (ICC Award).)

67. The ICC Award was promptly disclosed to the Tribunal in the arbitration that is the subject of this action, which considered its relevance to Petitioners' claims. (*See* 2016 Merits Award ¶¶ 61, 161-66.) The Tribunal held that the ICC Award does not alter the Petitioners' entitlement to compensation from India for breaches of the Treaty, which rests on separate legal grounds and involves a different respondent (*see id.* ¶ 166) – while providing that Petitioners must, prior to collecting amounts due under the Quantum Award, provide an undertaking to prevent double compensation. (Quantum Award ¶ 663(k).)

68. On October 27, 2020, the United States District Court for the Western District of Washington ("WD WA") issued an Opinion and Order recognizing and enforcing the ICC Award. (Ex. 9.) On November 4, 2020, the WD WA entered a judgment against Antrix on the ICC Award for $1,293,993,410.15. (Ex. 10 (Judgment on ICC Award).)[20] Antrix has since appealed the WD WA judgment to the United States Court of Appeals for the Ninth Circuit.

69. As at the date of this Petition, Antrix has not paid the ICC Award, nor has it offered any security for the award amount.

[20] The ICC Award also has been confirmed in the courts of France and the United Kingdom. (Hellmann Decl. ¶ 9.) The ICC Award is also the subject of pending set-aside proceedings in the courts of India.

70. Pursuant to Paragraph 663(k) of the Quantum Award, Petitioners confirm that, in the event that: (i) Devas collects any sum of money payable under the ICC Award (or any judgment entered thereupon, including the WD WA judgment); and (ii) at or following the time of such receipt, Devas is able to distribute such sum to its shareholders in freely convertible currency without any form of legal impediment, monetary offset or charge (howsoever characterized) being imposed by Indian governmental authorities (the "Devas Received Sum"); then, as and from the date on which Devas is able to so distribute the Devas Received Sum to all of its shareholders (including Petitioners):

(a) Each Petitioner will treat a pro rata portion of the Devas Received Sum corresponding to its holding in Devas (*i.e.* 17.06% for CC/Devas, 3.48% for DEMPL, and 17.06% for Telcom Devas) (in each case an "MBIT Pro Rata Portion") as constituting partial satisfaction of the damages and interest then payable to such Petitioner by India under the Quantum Award or any judgment entered by this Court upon such amounts;

(b) For the avoidance of doubt, no Devas Received Sum shall be credited against the amount payable by India to the Petitioners pursuant to paragraph 663(f) of the Quantum Award (*i.e.* amounts payable pursuant to Article 38(c), (d), and (e) of the UNCITRAL Rules and any interest accrued thereon) or any judgment entered upon such amounts by this Court.

71. Petitioners stand ready to further memorialize the above commitment in such form as the Court may direct.

INDIA'S RETALIATION AND HARASSMENT CAMPAIGN AGAINST PETITIONERS AND DEVAS

72. In retaliation for the Petitioners' and Devas's exercise of their legal rights, and to discourage the Petitioners and Devas from seeking to enforce any arbitral awards, India has caused various of its ministries and organs to bring regulatory and criminal actions against Devas and its employees, directors and investors.

73. In 2015, after the ICC Award had been issued, it was reported that India was conscious of the size of the award, and was intending to use its investigative authorities to try to undermine the award and avoid payment:

> Worried over the negative impact of the US $672 million arbitration award in favour of Devas Multimedia and its shareholders and against ISRO's marketing arm Antrix Corporation, ***the NDA government . . . ha[s]. . . decided to nudge the Central Bureau of Investigation (CBI) to speed up the ongoing criminal investigation in connection with the [Devas-Antrix Agreement]. . . . The government hopes to prove in court that the deal was scrapped . . .due to illegalities and irregularities in the contract between Antrix and Devas.*** It is also likely to involve senior lawyers in the two other international arbitrations – under Bilateral Investment Treaties . . . . Lawyers are learnt to have told the Prime Minister's Office that unless a 'clear case of malafide' can be made out against Devas, the Antrix case for annulment of [the ICC] arbitration award will be weak.

Ex. 15 (*Antrix-Devas Deal: Government to Field Top Lawyers in Delhi High Court*, Indian Express (Oct. 9, 2015), *available at* http://indianexpress.com/article/india/india-news-india/antrix-devas-deal-government-tofield-top-lawyers-in-delhi-high-court/).

74. Of course, the idea that "irregularities" associated with the Devas-Antrix Agreement could be "prove[n]" at that time, when neither India nor Antrix had ever suggested – during the two arbitrations – that any impropriety had occurred[21] – is patently absurd. This, however, did not deter India's government from pursuing this pathway.

75. The advent of the CBI was an extremely ominous sign that India was prepared to engage in politically-inspired retaliation. India's CBI has been criticized in the past for acting for political purposes and for being a "handmaiden" of the government.[22]

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[21] Furthermore, no allegation of impropriety was made at any time during the DT Arbitration. That makes three international arbitral proceedings in which India declined to allege any impropriety by Devas, its directors, officers or shareholders in connection with the Devas-Antrix Agreement.

[22] Vinod Rai, *CBI Can't Be as Autonomous or Independent as CAG*, The Economic Times (Sept. 12, 2014), *available at* http://articles.economictimes.indiatimes.com/2014-09-

76. In June 2016 – after the parties had been informed to expect the Jurisdiction and Merits Award in the Arbitration – India's Enforcement Directorate ("ED") purported to issue a show cause notice against Devas and twenty of its current/former directors and foreign investors (including Petitioners), claiming massive penalties. The allegations were brought under the Foreign Exchange Management Act, 1999 ("FEMA") and are premised on the theory that the investments made by non-Indian entities into Devas somehow violated India's foreign exchange laws, despite the fact that the investments were approved by India's Foreign Investment Promotion Board.

77. Even when confronted with the 2016 Merits Award, and its *unanimous* finding of unlawful expropriation and breaches of good faith (and even though one of the Tribunal members was a former senior Indian judge), the Indian Government's approach was defiant. On July 26, 2016, the Press Information Bureau of India issued a press release about the Mauritian BIT Award which, while acknowledging the negative outcome, also stated that: (i) the ED was "further investigating the case under the Prevention of Money Laundering Act, 2002"; and (ii) that a CBI "investigation" was underway. (Ex. 18.)

78. There was, however, no sincere belief among Indian officials that Petitioners or Devas had committed any wrongdoing. On the contrary, just two days after the Jurisdiction and

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12/news/53851124_1_vinod-rai-ranjitsinha-the-cbi. For example, in connection with an unrelated scandal involving the grant of spectrum licenses to 2G cellular operators, the CBI charge-sheeted several individuals, including the former Chairman, Telecom Commission and Secretary, Department of Telecommunications, with criminal conspiracy and corruption for allocating spectrum at undervalue during the prior government's tenure. A judge later lambasted the CBI's charge-sheet as "a distorted and fabricated document, based on deliberately redacted and garbled facts" and discharged the accused. (Ex. 16 (*CBI v. Shyamal Ghosh*, CBI Special Court Decision ¶ 278 (Oct. 15, 2015)).)

Merits Award was issued, a "top source" candidly revealed the Indian government's strategy behind the ED action:

> The idea is to recover from Devas the amount it hopes to earn through international arbitration. The possible course of action may include imposition of penalty on Devas, and prosecution of the company and all its directors under PMLA, a top source said.

ED Moves to Prosecute Devas Under PMLA for FEMA Violation, Times of India, July 27, 2016, available at http://timesofindia.indiatimes.com/india/ED-moves-to-prosecute-Devas-under-PMLA-for-Fema-violation/articleshow/53407579.cms.[23]

79. Later in 2016, the CBI issued a so-called "charge-sheet" outlining possible charges being investigated against a range of persons, including Devas and certain of its officers and former employees – all on the flimsiest of theories.[24] In an opportunistic action, India then moved for an adjournment of the quantum phase on the grounds that the CBI was investigating the Devas-Antrix Agreement. Petitioners opposed this, reminding the Tribunal that India had never made any competent allegation of impropriety by a Devas director, officer or founder regarding the Devas-Antrix Agreement (much less any claim of wrongdoing by the Petitioners) – and that even the CBI "charge-sheet" had failed to identify any such wrongdoing.

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[23] *See also ISRO's Antrix vs Devas: Countering ED Probe on FEMA, Multimedia Firm Moves Karnataka HC*, Firstpost (July 27, 2016), *available at* http://www.firstpost.com/business/antrix-devas-case-isro-may-face-1-bn-fine-for-cancelling-deal-2916004.html (investigatory actions would "allow the government to recover from Devas, 'the amount [Devas/the Investors] hope[] to earn through international arbitration.'" (citation omitted)).

[24] The "charge-sheet" floated the absurd theory that, because (in the CBI's view) the Devas-Antrix Agreement, in hindsight, was not as advantageous to India as it could have been, the Indian officials signing it must have committed an offense. On that pretext, the CBI then theorized that, in also signing the agreement, Devas should be treated as some sort of accessory.

80. In a ruling issued in December 2016, the Tribunal denied India's stay request, holding (among other things) that there had been no competent allegations of wrongdoing against Petitioners and, further, that "although Messrs. Viswanathan, Chandrasekhar and Venugopal [all directors of Devas] were witnesses in the present arbitration, the first two having been the subject of cross-examination by [India], ***no evidence of wrongdoing on their part or on the part of Devas Multimedia Private Ltd. was adduced."*** (Ex. 17 (Dec. 20, 2016 Procedural Order No. 7 in the Arbitration) ¶ 17 (emphasis added).)

81. Despite failing to stop the Arbitration, the retaliatory campaign has continued. As but a few examples:

- In early January 2017, India (through the ED) froze the bank accounts and mutual funds in India of Devas and several of its personnel. India's actions plainly were intended to financially cripple the ability of Devas to defend itself from the continued harassment by India.
- In addition, on January 23, 2017, three officials from the ED stormed into Devas's offices and conducted an illegal search and seizure. The ED seized various original documents and Devas's checkbook. The ED also detained four Devas employees, three of whom were questioned for over 15 hours with no communication with the outside world or access to counsel, and then pressured them – under threat of arrest – into signing statements prepared by the ED officers as well as summonses to appear at the ED. The summonses were created after the ED had already hauled in the Devas employees, and then backdated to make them appear as though they were legitimate.
- On January 30, 2019, the ED – without having heard Devas, its investors, or its present and former directors/officers – purported to issue a penalty order of approximately USD 220 million against Devas, its investors (including Petitioners), and present and former directors/officers.

82. During the proceedings to confirm the ICC Award as a judgment, Judge Thomas S. Zilly of the WD WA had occasion to review certain of these "investigations" and other proceedings launched by Indian regulators, in the context of Antrix's plea to dismiss those proceedings on *forum*

non conveniens grounds.[25] In rejecting that plea, His Honor concluded that "[a]ctive investigations and proceedings against Petitioner and its officers and agents in India—including both civil and criminal proceedings—raise additional concerns about the neutrality of proceedings in India." (Ex. 8 (April 16, 2019 Order of WD WA at 2).)

83. Nevertheless, the retaliatory campaign – including the release of disinformation falsely designed to make it look as if there are bona fide investigations into the Petitioners – is likely to intensify in light of the Quantum Award. This is evidenced by the recent formation (spearheaded by India's Finance Minister) of an Inter-Ministerial Monitoring Committee to expedite all of the proceedings against Devas and the investors "on a war footing," including tax proceedings that appear designed to generate large tax bills, penalties, and interest large enough to offset the Quantum Award (and other awards). (Ex. 19 (Nov. 4, 2020, letter from Subashree Anantkrishnan, Chief Commissioner of Income-tax Bengaluru-1, Bengaluru, to Vice-President, Income-tax Appellate Tribunal).)

84. Petitioners reserve their right to seek appropriate relief to safeguard their right to confirm the Quantum Award in this jurisdiction and to safeguard against political interference with their rights.

REQUEST FOR RELIEF: RECOGNITION AND CONFIRMATION OF THE QUANTUM AWARD

85. Petitioners repeat and reallege paragraphs 1 through 84.

[25] Significantly, in argument in the WD WA on whether the ICC Award should be confirmed as a judgment, U.S. counsel for Antrix *never* suggested that Devas, its employees or officers (or Petitioners) engaged in any misconduct as regards the negotiation or performance of the Devas-Antrix Agreement.

86. The arbitration agreement set forth herein at paragraphs 36 through 38 constitutes an "agreement in writing" for purposes of Article II of the New York Convention.

87. The Quantum Award was made in The Netherlands, a country that is party to the New York Convention, and which is a country other than the country in which recognition and enforcement is sought hereby.

88. Mauritius, India and the United States each also are parties to the New York Convention.

89. The Quantum Award is final and binding within the meaning of the New York Convention and Chapter 2 of the FAA.

90. None of the grounds for refusal or deferral of recognition and enforcement of the Quantum Award are or should be applicable.

91. The Quantum Award is required to be recognized, and judgment upon it enforced (with pre- and post-award interest) pursuant to the New York Convention and 9 U.S.C. § 207. As regards interest:

(a) As noted above, the Quantum Award awards damages to each Petitioner plus interest thereupon at the rate of the six-month USD LIBOR + 2 percentage points, compounded semi-annually from February 17, 2011, until the date of full payment (and, to the extent LIBOR is replaced, at SOFR + 2 percentage points).[26] Accordingly, Petitioners request that the judgment upon the Quantum Award include pre-judgment interest on the damages components at the rates ordered by the Tribunal from February 17, 2011, up to and including the date of judgment.

(b) The Quantum Award further provides for interest to accrue on the amount of $10,000,000 at the rate of the six-month USD LIBOR + 2 percentage points, compounded semi-annually from February 17, 2011, until the date of full payment (and, to the extent LIBOR is replaced, at SOFR + 2 percentage points) from October

[26] Quantum Award ¶ 663(d). "SOFR" stands for the "Secured Overnight Financing Rate." *See* https://www.investopedia.com/secured-overnight-financing-rate-sofr-4683954. Petitioners stand ready to supply the Court with any needed calculations of pre-judgment interest, including LIBOR or SOFR calculations, prior to entry of final judgment.

13, 2020, up to and including the date of payment. Accordingly, Petitioners request that the judgment upon the Quantum Award include pre-judgment interest on the amount of $10,000,000 at such rate, up to and including the date of judgment.

92. In addition, Petitioners are entitled to post-judgment interest at the federal statutory rate. Accordingly, Petitioners request that the judgment specify that post-judgment interest shall accrue on all of the sums specified therein at the rate applicable under 28 U.S.C. § 1961.

WHEREFORE, Petitioner respectfully requests that, pursuant to Article III of the New York Convention and 9 U.S.C § 207, this Court:

1. Enter an order recognizing and confirming the Quantum Award;

2. Enter judgment for each Petitioner individually and against Respondent in an amount equal to the full amount of damages and interest thereupon in the Quantum Award as to each Petitioner, namely (a) damages to each Petitioner in the sums specified therein (such sums totaling $111,296,000); and (b) pre-judgment interest to each Petitioner on such damages at the rate, and from the dates, specified therein (and described in paragraph 91(a) above).

3. Enter judgment for Petitioners jointly and severally and against Respondent in the sum of $10,000,000, with pre-judgment on such sum at the rate, and as and from the dates, specified therein (and described in paragraph 91(b) above).

4. Direct that post-judgment interest shall accrue at the rate applicable under 28 U.S.C. § 1961.

5. Grant such other relief as the Court may deem just and proper.

DATED: January 13, 2021

By: /s/ Bradley A. Klein

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