IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(I) 7

Originating Summons No 8 of 2022 (HC/Summonses Nos 155 and 720 of 2022 and SIC/Summonses Nos 24 and 45 of 2022)

Between

Deutsche Telekom AG

… *Plaintiff*

And

The Republic of India

… *Defendant*

JUDGMENT

[Arbitration — Award — Recourse against award]
[Arbitration — Conduct of arbitration — Waiver of objections]
[Arbitration — Enforcement — Foreign award]
[Arbitration — Stay of court proceedings — Grounds]
[Res judicata — Applicable principles]
[Res judicata — Extended doctrine of res judicata]
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Deutsche Telekom AG
v
The Republic of India

[2023] SGHC(I) 7

Singapore International Commercial Court — Originating Summons No 8 of 2022 (HC/Summonses Nos 155 and 720 of 2022 and SIC/Summonses Nos 24 and 45 of 2022)
S Mohan J, Roger Giles IJ, Anselmo Reyes IJ
30 June, 1 July, 12 August 2022

30 January 2023 Judgment reserved.

Anselmo Reyes IJ (delivering the judgment of the court):

Introduction

1 The plaintiff investor ("DT") is a multinational corporation incorporated under the laws of the Federal Republic of Germany. Through its wholly-owned subsidiary, Deutsche Telekom Asia Pte Ltd ("DT Asia"), it was a shareholder in an Indian company, Devas Multimedia Private Limited ("Devas").

2 The defendant State ("India") is the Republic of India and was the respondent in the relevant arbitration proceedings that took place as detailed below between the plaintiff and the defendant (the "Arbitration").

3 A key player in the dispute between DT and India is Antrix Corporation Ltd ("Antrix"), an Indian state-owned entity. Antrix is the commercial arm of

the Indian Space Research Organisation ("ISRO") and administratively controlled by India's Department of Space ("DOS").[1]

4 The Arbitration arose out of India's annulment of an agreement dated 28 January 2005 (the "Devas-Antrix Agreement") between Devas and Antrix for the lease to Devas of S-Band electromagnetic spectrum on two satellites to be manufactured and launched by the ISRO.[2] The Devas-Antrix Agreement contemplated (among others) the offering of mobile multimedia and information services to the Indian market via a hybrid satellite-terrestrial communications platform.[3]

5 DT commenced the Arbitration in Switzerland and obtained an Interim Award (the "Interim Award") on 13 December 2017 (dealing with jurisdiction and liability) and a Final Award (the "Final Award") on 27 May 2020 (dealing with quantum) in its favour. DT sought to enforce the Final Award in Singapore and was granted leave to do so on 3 September 2021. India opposes the Singapore enforcement proceedings. India has also since applied for the Federal Supreme Court of Switzerland (the "Swiss Federal Supreme Court") to review its decision to refuse to set aside the Interim Award. India contends that the Singapore court should stay DT's enforcement proceedings pending the Swiss Federal Supreme Court's decision on India's revision application (the "Swiss Revision Application"). Alternatively, India says that the Singapore court should not recognise or enforce the Final Award. There are consequently four applications before us:

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1 Mr Mandakolathur Subramaniam Krishnan's 1st affidavit dated 11 January 2022 ("Krishnan's 1st affidavit") at Exhibit MSK-30, p 1604.

2 Krishnan's 1st affidavit at paras 18–19 and Exhibit MSK-10.

3 Krishnan's 1st affidavit at Exhibit MSK-3, p 236.

(a) HC/SUM 155/2022 ("SUM 155") which is India's application to set aside the order of the General Division of the High Court of Singapore dated 3 September 2021 (the "Leave Order") granting leave to enforce the Final Award.

(b) HC/SUM 720/2022 ("SUM 720") which is DT's application to strike out parts of India's affidavit evidence in SUM 155.

(c) SIC/SUM 24/2022 ("SUM 24") which is India's application to stay SUM 155 and SUM 720 pending the determination of the Swiss Revision Application.

(d) SIC/SUM 45/2022 ("SUM 45") which is India's application for leave to adduce further evidence in support of SUM 24.

Background

The arbitration generally

6 On 10 July 1995, India and Germany entered into a bilateral investment treaty entitled the Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments (the "BIT").[4]

7 DT commenced the Arbitration against India on 2 September 2013, claiming that India's annulment of the Devas-Antrix Agreement violated the BIT.[5] The Arbitration was governed by the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules 1976 and seated in Geneva. On 22 May 2014, a tribunal comprising Prof Gabrielle Kaufmann-

4 Krishnan's 1st affidavit at Exhibit MSK-1, pp 67–80.

5 Krishnan's 1st affidavit at para 53 and Exhibit MSK-2, pp 91–93.

Kohler, Mr Daniel M Price and Prof Brigitte Stern (the "Tribunal") issued Procedural Order No 1 in the Arbitration, which bifurcated the Arbitration into an initial phase on jurisdiction and liability followed by a second phase on damages.[6] The hearing of the first phase took place between 6 April 2016 and 11 April 2016.[7]

8 On 24 October 2016, India wrote to the Tribunal, enclosing a Charge Sheet dated 11 August 2016 (the "CBI Charge Sheet") issued by India's Central Bureau of Investigation (the "CBI"), and a Complaint dated 31 May 2016 (the "FEMA Complaint") filed by the Directorate of Enforcement in India's Ministry of Finance ("ED") under section 16(3) of India's Foreign Exchange Management Act, 1999 ("FEMA").[8] The CBI brought criminal charges against several government officials, Devas, and certain Devas officers, as reflected in the CBI Charge Sheet.[9] India claimed that the CBI Charge Sheet showed that DT's investment had not been in accordance with Indian law. India accordingly sought to suspend the Arbitration pending the resolution of those charges.

9 On 14 November 2016, DT emailed the Tribunal stating that it was too late for India to: (a) object to jurisdiction or admissibility based on the CBI Charge Sheet, (b) seek a suspension of the Arbitration pending resolution of the criminal charges in the CBI Charge Sheet, and (c) introduce new evidence in the form of the CBI Charge Sheet and the FEMA Complaint.[10] DT observed that "India has had knowledge of the key allegations contained in the CBI Charge

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6 Dr Ina Roth's 4th affidavit dated 23 February 2022 ("Roth's 4th affidavit") at Tab 27, p 731.

7 Krishnan's 1st affidavit at para 63.

8 Plaintiff's Bundle of Documents Vol 3 ("PBOD3") at Tab 31, pp 203–209.

9 Krishnan's 1st affidavit at Exhibit MSK-28, pp 1506–1596.

10 PBOD3 at Tab 32, pp 210–232.

Sheet for years" and the "alleged facts underlying the accusations in the CBI Charge Sheet are already contained in the evidence before th[e] Tribunal".[11]

10 On 20 February 2017, the Tribunal refused India's application to suspend the Arbitration and deferred its determination on India's submissions in relation to the CBI Charge Sheet to its forthcoming award on jurisdiction and liability.[12]

11 On 13 December 2017, the Tribunal issued its Interim Award on jurisdiction and liability.[13] The Tribunal dismissed India's objections to jurisdiction and found India liable for breach of India's fair and equitable treatment ("FET") obligation under the BIT. India's submissions on the CBI Charge Sheet were also addressed in the Interim Award (see [159] below). The Tribunal then proceeded to the quantum phase of the Arbitration.

12 India applied to the Swiss Federal Supreme Court to set aside the Interim Award on 29 January 2018. India's grounds were that: (a) the Tribunal lacked jurisdiction because DT's investment had been indirectly made through DT Asia, (b) in refusing India's request to admit the *travaux préparatoires* of the 1995 India-Netherlands bilateral investment treaty (the "India-Netherlands BIT") into evidence, the Tribunal had denied India a reasonable opportunity to present its case, (c) the Tribunal lacked jurisdiction to rule on DT's claims since DT had not made an investment in India but had merely engaged in pre-investment activities which are not protected by the BIT, (d) the Tribunal lacked jurisdiction as the challenged measures were necessary to protect India's

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11 PBOD3 at Tab 32, p 216 at para 7.

12 PBOD3 at Tab 36, p 269.

13 Case Management Bundle Vol 1 ("CMB1") at Tab 19, pp 464–609.

"essential security interests" and thus fell outside the Tribunal's subject-matter jurisdiction under the BIT, and (e) the Tribunal lacked jurisdiction as the Devas-Antrix Agreement was contrary to Indian law and DT's investment being based on that agreement was therefore likewise tainted by illegality.[14]

13 On 11 December 2018, the Swiss Federal Supreme Court rejected India's application to set aside the Interim Award. It held that: (a) the fact that DT's investment had been made through DT Asia did not mean that the Tribunal lacked jurisdiction, (b) the Tribunal was entitled to refuse India's application to introduce the *travaux préparatoires* of the India-Netherlands BIT, (c) the Tribunal had correctly concluded that the BIT did not contain what India described as an "admission clause" capable of depriving pre-investment activities of substantive protection and, in any event, that DT's investment was not simply pre-investment activity, (d) India was precluded from raising the issue of essential security interests, and (e) India was precluded from arguing that DT's investment was purportedly unlawful on the basis of the illegality of the Devas-Antrix Agreement.[15]

14 Following India's failure to set aside the Interim Award, the Arbitration's quantum phase took place between 29 April 2019 and 3 May 2019. The Tribunal rendered its Final Award on 27 May 2020. In the Final Award, the Tribunal ordered that:[16]

> (a) [India] shall pay to [DT] the amount of USD 93.3 million, together with interest on such amount at a rate of 6-month USD LIBOR (or any other comparable rate in case LIBOR were to be discontinued in the future) plus 2% p.a.,

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14 PBOD3 at Tab 38, pp 292–361.

15 CMB1 at Tab 20, pp 610–650 (Judgment of the First Civil Law Court of the Swiss Federal Tribunal).

16 CMB1 at Tab 21, pp 651–776 (Final Award).

> compounded semi-annually, from 17 February 2011 until payment in full;
>
> (b) The costs of [the Arbitration] are fixed at EUR 1,460,544.64;
>
> (c) [India] shall pay to [DT] the amounts of EUR 730,272.32 as reimbursement of the costs of the arbitration, as well as GBP 5,250,011.70 and EUR 33,977.00 and USD 10,000.00 as reimbursement of part of [DT's] legal fees and other expenses, together with interest on such amounts at a rate of 6-month USD LIBOR (or any other comparable rate in case LIBOR were to be discontinued in the future) plus 2% p.a., compounded semi-annually, starting to run 30 days after the date of the Final Award until payment in full;
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> (d) Except as stated in subparagraph (c) above, each party shall bear the legal fees and other expenses which it incurred in connection with [the Arbitration];
>
> (e) The Tribunal takes note of [DT's] undertaking that it does not seek double recovery in relation to its investment, and will take appropriate steps to ensure that it is not compensated twice in the event that any damages were to be paid by [Antrix] to [Devas] pursuant to the ICC Award; and
>
> (f) All other claims and requests are dismissed.

For context, the ICC Award named in subparagraph (e) refers to a Final Award dated 14 September 2015 that was issued in related arbitral proceedings.[17] Those proceedings had been commenced by Devas against Antrix in or around June/July 2011, for breaches of the Devas-Antrix Agreement (see [31] below).

15 The Civil Court of Geneva certified that the Final Award was enforceable and declared the Final Award to be legally binding on 20 August 2020.[18] Thereafter, DT commenced enforcement proceedings in the United States ("US") and Singapore. As to the US proceedings, on 19 April 2021, DT

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17 Roth's 4th affidavit at Tab 17, pp 285–388.

18 Roth's 4th affidavit at Tab 41, p 1679.

filed a Petition to Recognize and Confirm Foreign Arbitral Award before the US District Court for the District of Columbia.[19] As to the Singapore proceedings, on 2 September 2021, DT applied *ex parte* for leave to enforce the Final Award and the Leave Order was granted on the next day. On 11 January 2022, India applied to set aside the Leave Order. On 25 July 2022, the US District Court for the District of Columbia stayed the US enforcement proceedings pending the outcome of India's Swiss Revision Application.

The Devas-Antrix Agreement

16 Since 1983, India's DOS has been responsible for allocating India's S-band electromagnetic spectrum.[20] In 1997, India's Cabinet approved a policy framework for satellite communication aimed at attracting foreign investment and encouraging private sector investment in the space industry.[21] In 2000, the Indian Government approved a policy document entitled "Norms, Guidelines and Procedures for Implementation of the Policy Frame-work for Satellite Communications in India" (the "SATCOM Policy"). The SATCOM Policy authorised the DOS to allocate S-band spectrum for commercial use.[22]

17 After the SATCOM Policy was issued, Forge Advisors LLC ("Forge Advisors") (a US consultancy) negotiated with the DOS, the ISRO, and Indian Space Commission on a potential collaboration to commercialise some of India's S-band spectrum. On 15 April 2004, Forge Advisors submitted a proposal to Antrix and the ISRO for the implementation of a "DEVAS System". DEVAS was short for "Digitally Enhanced Video and Audio Services". In

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19 Roth's 4th affidavit at Tab 42, pp 1685–1720.

20 Roth's 4th affidavit at para 14.

21 Plaintiff's Bundle of Documents Vol 1 ("PBOD1") at Tab 1, Exhibit C-4 pp 8–11.

22 PBOD1 at Tab 2, Exhibit C-54, pp 12–28.

particular, Forge Advisors proposed a hybrid (satellite-terrestrial) communications platform offering two principal services: (a) an interactive audio-visual service that would deliver television and cable programming to hand-held and mobile terminals, and (b) a broadband wireless access service that would provide internet access to fixed (homes) and nomadic users (PCs, laptops, tablets and mobile devices) in urban areas.[23]

18 India instructed a committee to review the feasibility of the Devas project, including its technical feasibility, risk mitigation, time schedule and financial and organisation aspects. The committee (the "Shankara Committee") was headed by Dr K N Shankara, the Director of the Space Applications Centre (the "SAC"), who has since passed away on 17 July 2017. On 14 May 2004, the Shankara Committee issued a report (the "Shankara Report"), concluding that the concept was "attractive" and provided a "significant opportunity to ISRO and Antrix in the development of a new, state-of-the-art satellite application and technology as well as in the broader participation in the international commercial satellite market".[24]

19 Based on the Shankara Report, in July 2004, Antrix's Board of Directors (the "Antrix Board") approved entry into a partnership with Forge Advisors. The Antrix Board approved the Devas-Antrix Agreement in December 2004. On 17 December 2004, Devas was incorporated in Karnataka, India, for the purpose of entering into the Devas-Antrix Agreement with Antrix.[25]

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23 Plaintiff's Supplementary Bundle of Documents ("PSBOD") at Tab 2, Exhibit C-58, pp 60–63; CMB1 at Tab 19, pp 481–482, para 54 (Interim Award).

24 CMB1 at Tab 19, p 482, para 55 (Interim Award); Case Management Bundle Vol 2 ("CMB2") at Tab 24, p 599, para 12.8(iv) (Judgment of the Supreme Court of India).

25 CMB1 at Tab 19, pp 482–483, paras 56–58 (Interim Award).

20 On 28 January 2005, the Devas-Antrix Agreement was signed. It provided for the lease of 70 MHz of S-band capacity on two satellites to be manufactured and launched by Antrix/ISRO. Antrix wrote to Devas on 2 February 2006 confirming that, the necessary approvals having been received, the Devas-Antrix Agreement had come into effect.[26]

DT's investment in India

21 On 2 February 2006, Devas applied to the Indian Foreign Investment Promotion Board (the "FIPB") for approval of a proposed acquisition of 38% of its shares by Telcom Devas Mauritius Limited and CC/Devas (Mauritius) Ltd, Mauritius affiliates of Telecom Ventures LLC and Columbia Capital LLC respectively.[27] The FIPB approved the application on 18 May 2006.[28]

22 As described in more detail below at [62]–[64], in 2008, DT invested into Devas through DT Asia. On 19 March 2008, DT Asia signed a share subscription agreement with Devas for 17.2% of Devas' paid-up share capital in exchange for a US$75m equity contribution (the "Share Subscription Agreement").[29] On 1 May 2008, Devas applied (through a letter authored by Dua Consulting Private Limited) to the FIPB for approval of DT Asia's subscription of up to approximately 17% of Devas' share capital and the possible later acquisition by DT Asia of up to 26% of Devas' share capital.[30] By way of a letter dated 7 August 2008, the FIPB approved the application.[31]

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26 CMB1 at Tab 19, pp 483–484, paras 59–62 (Interim Award).

27 PBOD1 at Tab 4, pp 83–94.

28 PBOD1 at Tab 5, pp 95–100.

29 Krishnan's 1st affidavit at Exhibit MSK-14, pp 590–773.

30 Krishnan's 1st affidavit at Exhibit MSK-15, pp 774–783.

31 Krishnan's 1st affidavit at Exhibit MSK-16, pp 784–786.

23 The Share Subscription Agreement was completed on 18 August 2008. DT Asia then appointed two nominee directors (Mr Alugappan Murugappan and Mr Kevin Copp) to Devas' Board of Directors (the "Devas Board").[32]

24 In 2009, DT Asia and Devas entered into an agreement for DT Asia to make a further equity contribution to Devas. The requisite government approval (through the FIPB) was sought on 14 September 2009.[33] On 17 September 2009, the FIPB approved the increase in Devas' proposed foreign equity participation, including an increase in DT Asia's shareholding in Devas to 20.73%.[34]

India's termination of the Devas-Antrix Agreement

25 On 8 November 2009, Mr Vijay Anand (Joint Secretary of the DOS) received an anonymous complaint that the S-band spectrum had been leased to Devas as a result of corrupt practices. Representatives of the Space Commission, the DOS and the ISRO met on 8 December 2009 to discuss the anonymous complaint.[35] At this time, Dr K Radhakrishnan had recently become Chair of the Space Commission, Secretary of the DOS, Chairman of the ISRO and Chairman of Antrix.[36] Following the meeting, Dr Radhakrishnan constituted a single-person committee (the "Suresh Committee") consisting of the Director of the Indian Institute of Space and Technology, Dr B N Suresh. The Suresh Committee was asked to review the "legal, commercial, procedural and technical aspects" of the Devas-Antrix Agreement.[37]

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32 Roth's 4th affidavit at para 24.

33 Krishnan's 1st affidavit at Exhibit MSK-18, pp 790–798.

34 Krishnan's 1st affidavit at Exhibit MSK-18, p 799.

35 CMB1 at Tab 19, p 489, paras 75–76 (Interim Award).

36 CMB1 at Tab 19, p 544, para 247 (Interim Award).

37 CMB1 at Tab 19, pp 489 and 544, paras 76 and 247 (Interim Award).

26 In June 2010, the Suresh Committee sent a report (the "Suresh Report") to the ISRO and the DOS. The Suresh Report found that there was "absolutely no doubt on the technical soundness" of the Devas System as proposed and that "Antrix ha[d] been following the policy guidelines for leasing the transponder services to private service providers as per the [SATCOM Policy]". But the report noted that the Devas-Antrix Agreement brought "limitations on spectrum availability for essential strategic and social sectors applications in future". It therefore recommended that the Devas-Antrix Agreement be "re-visited taking into account all issues" such as the Indian National Satellite System ("INSAT") Coordination Committee guidelines, the importance of preserving spectrum for essential national needs and international standards, with due weight given to Devas' upfront payment.[38]

27 As a result of media reports and public interest in the Devas-Antrix Agreement, Dr Radhakrishnan instructed Mr G Balachandhran, Additional Secretary of the DOS, to prepare a note on annulment of the Devas-Antrix Agreement. On 30 June 2010, Mr Balachandhran issued a Note (the "Balachandhran Note") identifying concerns with the Devas-Antrix Agreement and recommending its annulment.[39] The Balachandhran Note annexed the Suresh Report and the minutes of a meeting among the Integrated Defence Staff ("IDS"), the Ministry of Defence ("MOD") and the ISRO dated 15 December 2009. Based on the Suresh Report, Mr Balachandhran prepared a report titled "Report on Dr Suresh Committee Report on ANTRIX-DEVAS Agreement & Issues arising from Therein" (the "Balachandhran Report") dated 9 January 2011. The Balachandhran Report noted that the Government of India did not have complete information about the Devas-Antrix Agreement at the time of its

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38 Krishnan's 1st affidavit at Exhibit MSK-21, pp 912–913.

39 Krishnan's 1st affidavit at Exhibit MSK-5, pp 357–375.

conclusion and that the Devas-Antrix Agreement did not leave enough spectrum for ISRO/DOS use if required.[40]

28 At a press conference on 8 February 2011, Dr Radhakrishnan and Dr Krishnaswamy Kasturirangan, a former ISRO Chairman and the Secretary of the DOS, announced India's decision to terminate the Devas-Antrix Agreement.[41] On 16 February 2011, Dr Radhakrishnan finalised a secret note (the "CCS Note") to the Cabinet Committee on Security ("CCS"), seeking approval for annulling the Devas-Antrix Agreement.[42] The CCS approved annulment on the next day.[43]

29 On 25 February 2011, Antrix notified Devas of the termination of the Devas-Antrix Agreement. Antrix stated that termination was due to *force majeure*, Antrix being unable to obtain the necessary frequency and orbital slot clearance.[44]

The ICC arbitration

30 In response to the termination of the Devas-Antrix Agreement, Devas and its Mauritius shareholders filed several arbitrations against Antrix and India.

31 In or around June/July 2011, Devas initiated an Indian-seated ICC arbitration (the "ICC arbitration") against Antrix. Devas sought specific performance or alternatively approximately US$1.6 billion in damages.[45] The

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40 PBOD1 at Tab 14, pp 200–227.

41 Roth's 4th affidavit at Tab 12, Exhibit C-26, pp 235–251.

42 PBOD1 at Tab 15, pp 228–253.

43 Krishnan's 1st affidavit at Exhibit MSK-24, pp 960–961.

44 Roth's 4th affidavit at Tab 16, Exhibit C-32, pp 277–280.

45 Roth's 4th affidavit at para 59.

ICC arbitration tribunal issued its Final Award (the "ICC Award") on 14 September 2015. The ICC Award ordered that Antrix pay damages of US$562.5 million with simple interest at 18% per annum to Devas for wrongful repudiation of the Devas-Antrix Agreement.[46]

32 On 19 November 2015, Antrix applied to the Indian courts to set aside the ICC Award.[47] On 4 November 2020, the Supreme Court of India ordered that the ICC Award be held in abeyance pending determination of Antrix's setting-aside application.[48]

33 On 27 October 2020, the US District Court for the Western District of Washington recognised the ICC Award and on 4 November 2020 entered judgment against Antrix for the full amount of the ICC Award.[49] We have not been apprised of further developments in either the Indian or US proceedings pertaining to the ICC Award.

Indian investigation of the Devas-Antrix Agreement

34 On 10 February 2011, the Prime Minister of India constituted a High Power Review Committee (the "Chaturvedi Committee") to look into the decision to enter into the Devas-Antrix Agreement. The Chaturvedi Committee issued its report on 12 March 2011.[50]

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46 Roth's 4th affidavit at Tab 17, Exhibit R-42, pp 285–388.

47 Roth's 4th affidavit at Tab 49, pp 2210–2329.

48 Roth's 4th affidavit at Tab 49, pp 2414–2416.

49 Roth's 4th affidavit at Tab 18, pp 389–408.

50 Roth's 4th affidavit at Tab 31, Exhibit C-190, pp 1039–1129.

35 On 12 April 2011, the Indian Cabinet Secretary, Mr K M Chandrasekhar, submitted his recommendations (the "Chandrasekhar Note") to the Prime Minister. He proposed that Devas be investigated for possible violations of the FEMA and India's Prevention of Money Laundering Act, 2002 ("PMLA").[51]

36 Subsequently, a committee headed by Mr Pratyush Sinha, a former Chief Vigilance Commissioner, submitted a "Report of the High Level Team on the Agreement between M/s Antrix Corporation Limited and M/s Devas Multimedia Private Limited" (the "Sinha Report"). The Sinha Report was released by the Government of India on 2 September 2011.[52]

37 On 1 May 2014, the CBI commenced a Preliminary Enquiry into allegations that Antrix officers had defrauded the Government of India.[53] On 16 March 2015, a First Information Report was made by Mr Sushil Dewan, CBI Inspector of Police. The report implicated certain officers and officials of Devas, Antrix, the ISRO and the DOS in wrongdoing.[54] On 11 August 2016, the CBI issued a Final Report and through the CBI Charge Sheet raised criminal charges against several government officials, Devas, and various Devas officers (the charges are referred to in greater detail at [85] below). On 8 January 2019, the CBI issued a Supplementary Charge Sheet.[55]

38 On 31 May 2016, the ED filed a complaint under section 16(3) of the FEMA against Devas, its current and former directors and foreign investors,

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51 PBOD1 at Tab 17, pp 345–364.

52 PBOD1 at Tab 19, pp 368–447.

53 Roth's 4th affidavit at para 126.

54 Plaintiff's Bundle of Documents Vol 2 ("PBOD2") at Tab 25, pp 328–337.

55 Krishnan's 1st affidavit at Exhibit MSK-32, pp 2074–2127.

including DT Asia.[56] On 6 June 2016, the ED issued a show-cause notice to the accused persons.[57] Based on the charges, the ED issued a penalty order on 30 January 2019 against the accused persons amounting to INR1,585.08 crores.[58]

39 On 14 January 2021, Antrix requested authorisation from the Indian Ministry of Corporate Affairs to commence winding-up proceedings against Devas under section 271(*c*) of the Indian Companies Act, 2013, essentially on the ground of fraud in the conduct of its affairs.[59] On 18 January 2021, Antrix was authorised to file a winding-up petition against Devas.[60] Antrix thereafter commenced winding-up proceedings before India's National Company Law Tribunal (the "NCLT"). Having heard Antrix's winding-up petition, the NCLT appointed a provisional liquidator to take over Devas' affairs on 19 January 2021.[61] The provisional liquidator issued a First Report on 3 February 2021,[62] and on 25 May 2021, the NCLT ordered that Devas be wound up.[63] The NCLT also dismissed a joinder application by Devas Employees Mauritius Private Limited ("DEMPL"), a Devas shareholder, for lack of standing.

40 On 8 September 2021, India's National Company Law Appellate Tribunal ("NCLAT") upheld the NCLT's winding-up order and its dismissal of

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56 PBOD3 at Tab 28, pp 8–90.

57 PBOD3 at Tab 29, pp 91–111.

58 Roth's 4th affidavit at Tab 47, pp 1990–2068.

59 Roth's 4th affidavit at para 144.

60 Krishnan's 1st affidavit at Exhibit MSK-30, pp 1632 and 1696.

61 Roth's 4th affidavit at Tab 51, pp 2420–2437.

62 Krishnan's 3rd affidavit dated 6 April 2022 ("Krishnan's 3rd affidavit") at Exhibit MSK-78, pp 585–622.

63 CMB2 at Tab 22, pp 5–119.

DEMPL's joinder application.[64] On 17 January 2022, the Supreme Court of India issued its judgment (the "SCI Judgment") dismissing Devas' and DEMPL's appeals against the NCLAT's decision, thereby affirming the decision to wind up Devas.[65]

Discussion

41 We will deal with the applications that are before this court (as summarised at [5] above) in the following order: (a) SUM 155 (setting aside of leave order), (b) SUM 24 (stay), (c) SUM 45 (adduction of further evidence) and (d) SUM 720 (striking out).

SUM 155 – application to set aside leave order

Jurisdictional objections

42 In SUM 155, the central issue is whether, as a sovereign state, India is immune from the jurisdiction of the Singapore courts. By section 3(1) of the State Immunity Act 1979 (2020 Rev Ed) (the "SIA"), sovereign states are immune from this court's jurisdiction unless an exception to state immunity applies. DT contends that the case falls within an exception in the SIA, namely section 11(1): "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration". India argues to the contrary.

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64 CMB2 at Tab 23, pp 120–477.

65 CMB2 at Tab 24, pp 478–612.

43 DT relies on the offer to arbitrate in Article 9 of the BIT. Article 9 reads:

> (1) Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Parry shall, as far as possible, be settled amicably through negotiations between the parties to the dispute. The party intending to resolve such dispute through negotiations shall give notice to the other of its intentions.
>
> (2) If the dispute cannot be thus resolved as provided in paragraph 1 of this Article within six months from the date of notice given thereunder, then the dispute may be referred to conciliation in accordance with the United Nations Commission on International Trade Law Rules on Conciliation, 1980, if both parties agree. If either party does not agree to conciliation or if conciliation fails, either party may refer such dispute to arbitration in accordance with the United Nations Commission on International Trade Law Rules on Arbitration, 1976 ...

44 In response, India says that DT's investment falls outside the scope of Article 9, and contends that there are four reasons for this. First, DT's investment was not in accordance with India's national laws (the "illegality argument"). Second, DT's investment merely amounted to pre-investment expenditure (the "pre-investment expenditure argument"). Third, DT did not make a direct investment but rather an indirect investment, the latter not falling within the ambit of the BIT (the "indirect investment argument"). Fourth, the subject matter of the parties' dispute falls within the "essential security interests" carve-out in Article 12 of the BIT (the "essential security interests argument").

(1) The illegality argument

45 Article 1(b) of the BIT defines "investment" as follows:

> "Investment" means every kind of asset invested *in accordance with the national laws of the Contracting Party where the*

> *investment is made* and, in particular, though not exclusively, includes:
>
> (i) movable and immovable property as well as other rights such as mortgages, liens, or pledges;
>
> (ii) shares in, and stock and debentures of, a company, and any other forms of such interests in a company;
>
> (iii) right to money or to any performance under contract having a financial value;
>
> (iv) intellectual property rights, including patents, copyrights, registered designs, trade marks, trade names, technical processes, know-bow and goodwill in accordance with the relevant laws of the respective Contracting Party;
>
> (v) business concessions conferred by law or under contract, including concessions for mining and oil exploration.
>
> [emphasis added]

46 Article 9(2) of the BIT therefore only confers jurisdiction on an arbitral tribunal if DT's investment was invested in accordance with India's national laws. If DT's investment was not invested in accordance with India's laws, DT's investment would not be protected by the BIT. Neither Article 9 nor the exception in section 11(1) of the SIA would then apply and India would thereby be immune from the Singapore court's jurisdiction by virtue of section 3(1) of the SIA.

(A) INDIA'S CASE ON ILLEGALITY

47 India raises five reasons for why it contends that DT's investment was contrary to India's national laws.

48 First, India says that, in the negotiations leading to the Devas-Antrix Agreement and in the agreement itself, Devas and its original investors fraudulently misrepresented to the ISRO that Devas could deliver technology which in fact did not exist then and has never existed. India alleges that Devas

and its investors also fraudulently misrepresented that Devas held intellectual property rights which it did not actually have. India accepts that, when the alleged misrepresentations were made, DT was not an investor. But, according to India, when DT invested in Devas in 2008 (via DT Asia), DT conducted detailed due diligence. That due diligence (India says) would have examined whether Devas had the technology and intellectual property rights to deliver the promised services under the Devas-Antrix Agreement. India infers from this premise that DT must have known that Devas had neither the technology nor the intellectual property rights which Devas purported to have. Nonetheless, DT proceeded with its investment, despite knowing that the same was tainted with fraud and not in accordance with India's national laws. DT must consequently be regarded as having become complicit in or tainted by the fraud perpetrated by Devas and its original investors on Antrix and India.

49 In support of its case on fraud, India relies on Devas' representations in Article 12 of the Devas-Antrix Agreement. Article 12 reads:

> **Article 12. Representations and Warranties**
>
> a. ANTRIX hereby represents and warrants to DEVAS as under:
>
> i) ANTRIX has the capacity and power to enter into and perform this Agreement in terms thereof;
>
> ii) ANTRIX, through ISRO/DOS, will be responsible for obtaining clearances from National and International agencies (WPC [*ie*, the Wireless Planning and Coordination Wing of the Department of Telecommunications], ITU [*ie*, the International Telecommunications Union], etc) for use of the orbital slot and frequency resources so as to ensure that the spacecraft is operated meeting its technical characteristics and provide the Leased Capacity as specified;
>
> iii) ANTRIX through ISRO has the ability to make/build, manufacture, launch and operate the Satellites, and provide the Leased Capacity as provided in this Agreement;

iv) ANTRIX will fulfill its obligations under this Agreement according to any applicable Law;

v) ANTRIX, though ISRO, has the ownership and right to use the Intellectual Property used in the manufacture and launch of the satellites and provision of Leased Capacity under this Agreement; and

vi) ANTRIX may offer another satellite to other parties provided, in due recognition of DEVAS seniority, it:

(i) Provides DEVAS with prior intimation in case it does not infringe upon any confidentiality agreements

(ii) Does not affect any DEVAS schedules or deliverables.

b. DEVAS hereby represents and warrants ANTRIX as under:

i) DEVAS has the capacity and power to enter into and perform this Agreement in terms thereof;

ii) DEVAS has the ability to design Digital Multimedia Receivers ("DMR");

iii) DEVAS has the ability to design Commercial Information Devices ("CID");

iv) DEVAS has the ownership and right to use the Intellectual Property used in the design of DMR and CID;

v) The fulfillment of DEVAS' obligations under this Agreement by DEVAS will not violate any Laws;

vi) DEVAS shall assign, transfer and/or sub-let its rights and obligations hereunder in accordance with Law.

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.

50 India focuses in particular on Devas' representations in Articles 12(b)(i) to (iv). As evidence that those representations were fraudulent (that is, made

dishonestly without any belief in their truth), India cites various passages from the NCLAT's and the Supreme Court of India's judgments.

51 From the NCLAT's judgment, India relies on the following passages (at [66]–[70]):

> 66. Similar to Article 12(a), which dealt with the representations and warranties of Antrix, Article 12(b) dealt with the representations and warranties of Devas. In Article 12(b)(ii) and (iii), Devas represented it 'has the ability to design Digital Multimedia Receivers (DMR) and Commercial Information Devices (CID) and in Article (12)(b)(v), Devas represented 'it has the ownership and right to use the intellectual property used in the design of DMR and CID.
>
> 67. The Ld. ASG [*ie,* the Learned Additional Solicitor General] compared Article 12(a) and 12(b) and rightly pointed out to this Tribunal that the expressions 'has the ability and 'has the ownership and right to use the intellectual property is appearing in both Articles 12(a) and 12(b). It was contended that when these expressions are interpreted in the present tense under Article 12(a), the same interpretation should also extend to Article 12(b). Based on this contention, it was argued by the Ld. ASG that on 28.01.2005, when the parties signed the agreement, Devas did not have the ownership and right to use the intellectual property in the design of DMR and CID.
>
> 68. However, to counter this submission of Antrix, Ld. Sr. Counsel for Devas contended that Clause 21 of the annexure to the Agreement dated 28.01.2005 contained the definition of 'intellectual property. Under the definition of intellectual property, according to the Ld. Counsel for Devas, discoveries and ideas, know-how and concepts are considered to be intellectual property. So on 28.01.2005, since the ability/capability of Devas to design DMR and CID is covered under the definition of Intellectual property under the agreement dated 28.01.2005, Devas had correctly represented, and there are no fraudulent representations.
>
> 69. We are not convinced with the submissions of the Ld. Counsel for Devas because by pressing this ground, Devas concedes that the design of DMR and CID was at a conceptual level and were to be developed at a future date. It is also not disputed that DMR and CID are

> portions of the Devas' Device and not the Devas' Device itself. Based on the record available before us, we have already held that even in 2021 and especially during 2005-2011, Devas' did not develop the Devas Device and has failed to convince this Tribunal otherwise. Devas have not produced any material to show that the Devas' Device was successfully developed.
>
> 70. When the Devas' Device was not developed, and portions of it, DMR and CID, were to be developed at a future date, they do not have a bearing on the present case. On the contrary, it only shows the lack of intention of Devas to develop even portions of the Devas' Device, if not the Devas' Device itself. This finding has a direct bearing on the representation made by Devas under Article 12(b)(ii), (iii) and (iv).

52 From the SCI Judgment, India relies on the following passages (at [12.8]):

> 12.8 The following undisputed facts emerge from the documents placed before the Tribunal. The authenticity of these documents were never in question or denied:
>
> …
>
> (vi) Therefore, the finding of the Tribunal, … (b) that Devas enticed Antrix/ISRO to enter into an MoU followed by an Agreement by promising to provide something that was not in existence at that time and which did not come into existence even later; (c) that the licenses and approvals were for completely different services; and (d) that the services offered were not within the scope of SATCOM Policy etc. are actually borne out by records;
>
> (vii) There is no denial of the fact that Devas offered a bouquet of services known as (a) Devas Services through a device called (b) Devas device in a hybrid mode of transmission, which is a combination of satellite and terrestrial transmissions, and which is called (c) Devas Technology but none of which existed at the relevant point of time or even thereafter;
>
> (viii) Devas did not even hold necessary intellectual property rights in this regard though they claimed to have applied;

…

53 India does not allege any other fraudulent representations by Devas.[66]

54 Second, India says that the Devas-Antrix Agreement was illegal because it was entered into without a tender or auction process. India says that this was unusual for the allocation of spectrum rights as its national law requires the allocation of natural resources to be conducted in a fair, non-arbitrary and transparent manner. India having found out that there had been irregularities in the allocation of spectrum rights to Devas, formal charges for criminal conspiracy were brought on 11 August 2016 against government officials as well as directors and other officers of Devas. In relation to DT, which only came onto the scene in 2008, India makes the same point (as made in [48] above). DT, having conducted detailed due diligence, must have known that spectrum had been allocated to Devas in contravention of national law. As DT nonetheless proceeded with its investment in Devas shares, it follows (India submits) that DT's investment in Devas became tainted with illegality.

55 In support of its case on the illegality in the allocation of spectrum, India cites the following passage from the SCI Judgment (at [12.8]):

> 12.8 The following undisputed facts emerge from the documents placed before the Tribunal. The authenticity of these documents were never in question or denied:
>
> (i) An agreement of a huge magnitude, for leasing out five numbers of CXS transponders each of 8.1 MHz capacity and five numbers of SXC transponders each of 2.7 MHz capacity on the Primary Satellite-I (PS-I), was surprisingly and shockingly entered into by Antrix with Devas, without same being preceded by any auction/tender process. It appears from the letter dated 27.09.2004 sent by DEVAS LLC,

[66] Transcript for 30 June 2022, p 32 at lines 10–26; p 47 at lines 9–12.

> USA to Shri K.R. Sridhara Murty, Executive Director of Antrix with copies to Dr. G. Madhavan Nair, Chairman, ISRO and others that Shri Ramachandran Viswanathan, met the then Chairman of ISRO and other officials in Bangalore in April 2003 and they met once again in Washington D.C. during the visit of the then Chairman of ISRO. These meetings, which were not preceded by any invitation to the public for any Expression of Interest, culminated in a Memorandum of Understanding dated 28.07.2003. Though it is not clear where the MoU was signed, there are indications that it was signed overseas;
>
> …
>
> (vi) Therefore, the finding of the Tribunal, (a) that a public largesse was doled out in favour of Devas, in contravention of the public policy in India … are actually borne out by records.

56 Third, India says that the Devas-Antrix Agreement was illegal because it contravened India's SATCOM Policy. Contrary to what the Devas-Antrix Agreement purportedly authorised Devas to carry out, India's SATCOM Policy at the material time prohibited a party from engaging in both telecommunications and broadcasting services. In support, India cites the following from the SCI Judgment (at [12.8]):

> 12.8 The following undisputed facts emerge from the documents placed before the Tribunal. The authenticity of these documents were never in question or denied:
>
> …
>
> (xi) SATCOM Policy perceived telecommunication and broadcasting services to be independent of each other and also mutually exclusive. Therefore, a combination of both was not permitted by law. It is especially so since no deliberation took place with the Ministry of Information and Broadcasting. Moreover, unless ICC allocates space segment, to a private player, the same becomes unlawful. This is why the conduct of the affairs of the company became unlawful;

…

57 Again, India submits that, having conducted due diligence prior to its investment, DT would have known that the Devas-Antrix Agreement was contrary to India's SATCOM Policy and hence illegal. Because DT nevertheless decided to proceed with its investment in Devas despite such knowledge, DT's investment was also illegal.

58 Fourth, according to India, the FIPB approved DT's investment in Devas subject to several conditions, including that Devas would be operating as an Internet Services Provider ("ISP"). India says that, as the services to be provided by Devas under the Devas-Antrix Agreement were different in nature from ISP services, DT's investment was contrary to the conditions of the FIPB approval and hence not in accordance with India's national law.

59 On 2 February 2006, Devas applied for FIPB approval to operate as an ISP. Devas' application stated:

> Sub: FIPB Approval for setting up Internet Service Provider (ISP) services (not providing gateways)
>
> Dear Sir,
>
> Devas Multimedia Pvt Ltd was incorporated in December 2004. With the objective of developing technology and software for delivering multimedia services through various systems. The company objectives were further extended to deliver multimedia and information services (ISP) via landline, satellite, and terrestrial wireless systems to a variety of fixed, portable, and mobile terminals. The Company so far has engaged in research and development of advanced technologies and is now in the process of implementing them with the creation of required infrastructure and infusion of funds. With diverse geographic reach across India, the Company shall be substantially contributing to the Internet / Broadband subscriber targets set by the Government of India. Highlights of the Company's plan and programs are given below for your reference.

1. Background

In the recent past. India has been witnessing unprecedented economic growth. The Internet Mobile Telecommunications, Entertainment, and Automobile industries are all set to grow exponentially and exploit the bourgeoning consumer class. Accessing information and entertainment through the Internet and in particular Broadband platforms is becoming prevalent and is an important national goal in order for India to retain its global competitive edge.

Recognising the pressing need for appropriate technologies. Platforms, and service packages to realize the Internet and Broadband growth targets. As set out by Government of India a group of experienced entrepreneurs with requisite expertise came together with a view to develop advanced technologies and established Devas Multimedia Pvt Ltd. The Company will now be pursuing the technology development and commercialization of state-of-the-art services which include multimedia terminals and associated transmit equipments for delivering multimedia information and Internet content and interactive services from different media sources via landline, satellite, and terrestrial wireless systems to a variety of fixed, portable and mobile terminals.

....

2. Services

The Company shall be providing basic and value added Internet services. The Company clearly recognizes that last mile solution and reaching remote areas across the country are key issues in the adoption of Internet and Broadband. Hence the Company will deploy a flexible and appropriate combination of technologies and systems to over come these impediments for availability arid rapid growth. Landline, satellite, and terrestrial wireless systems along with advanced mobile and wireless technologies shall be adopted to provide effective and high quality service. Small, portable, and mobile terminals (that can be embedded in a variety of devices) with built in small displays are under development for reception of the Company's portfolio of services.

3. Scope of Operation/ Proposed Activities

The Company shall be involved in developing fixed, mobile, and wireless technologies, development of appropriate terminals, establishment of required infrastructure for delivery of Internet services, and tie up with multimedia – audio, video, and data – content providers, and subscriber acquisition. The revenue to the Company is mainly from subscription fees for the services.

....

10. Advantages and Benefits of the Project

a. Technology

All the technologies for providing the services are developed indigenously in India. The technologies are contemporary and will compete with the state-of-the-art services in the world. The satellites and terrestrial infrastructure shall be of superior design to facilitate pan-India coverage, on a commercially competitive basis. The terminals will be PCs and multimedia terminals that can be installed in fixed, portable and mobile adopters for internet access and data downloads. Majority of technologies are developed locally in India.

b. Services

The Company will provide various services packages from basic internet services to value add services such as audio, video and data services, Agri-based information, Vocational training, Health & Hygiene, Education, Map Navigation, Matrimonial, Weather, Stocks, etc. are delivered through broadband information download channel. A thin return link facilitates interaction. The services content shall address all Indian markets and demographic profiles, with languages customised to specific regions across India.

c. Reach and Penetration

To ensure that the services are delivered "wherever you want, whenever you want" within India, satellite systems along with landline and terrestrial wireless systems will be used. The adoption of latest technologies would substantially reduce the price barriers of one time hardware acquisition. The services are packaged in such a way that the consumer has a lot of choice in picking his bouquet of services.

...

...

12. FDI [*ie*, Foreign Direct Investment] Inflow

Preliminary investment of US$15 million shall accrue in the form of FDI. Further investment of US$35 million shall get induced in a phased manner, majority of which may be through FDI route.

> FIPB Approval
>
> The Company seeks approval for 100% FDI investment for ISP (not providing gateways). The service shall cover delivering internet services including multimedia, information services via landline, satellite and terrestrial wireless system to fixed, portable and mobile terminals, tailored to the needs of various market segments. The immediate FDI inflow shall be approximately [INR 67 Crores, *ie*, 670 million] to commence the preliminary operations.
>
> …
>
> [emphasis added in underline]

60 The FIPB approval dated 18 May 2006 (FC.II.107(2006)/43(2006)) stipulated:

> 2. Item(s) of manufacture/ activity covered by the foreign collaboration:
>
> (Existing): Engaged in development of software relating to multimedia services.
>
> The company shall undertake the following activities:
>
> Development of software and conduct requisite research and development activities in the areas of multimedia content creation, multimedia terminals and associated transmit equipments for receiving multimedia content from different media including internet, satellite and terrestrial broadcasting. Delivering internet services including multimedia, information services via landline, satellite and terrestrial wireless system to fixed, portable and mobile terminals, tailored to the needs of various market segments.
>
> [emphasis added in underline]

61 According to India, on its terms, the FIPB approval was confined to Devas only providing internet services.

62 On 1 May 2008, Dua Consulting Private Limited wrote to the FIPB on Devas' behalf, stating that:

> Devas seeks the approval of the Foreign Investment Promotion Board ("FIPB") for permitting Deutsche Telekom Asia to

> subscribe to up to approximately 17% of the total paid up share capital of Devas and acquire by way of subscription and/or transfer further shares up to approximately 26% in the total paid up capital of Devas. The said proposal has been described in greater detail in the attached submission.

63 A letter dated 27 April 2008 from Devas and DT Asia to the FIPB explained DT's investment in Devas through DT's wholly-owned Singapore subsidiary DT Asia. Initially, DT Asia would acquire up to approximately 17% of Devas' paid-up share capital. Thereafter, it would have the option, in accordance with a shareholders' agreement among Devas, some of Devas' existing shareholders and DT Asia, to acquire up to 26% of Devas' paid-up share capital at a consideration "not less than that determined as per the prevailing RBI [*ie*, Reserve Bank of India] guidelines". In any event, the aggregate non-resident shareholding of Devas would not exceed 74% of Devas' total paid-up share capital.[67]

64 By letter dated 7 August 2008, the FIPB approved DT Asia's acquisition of 17.2% of Devas' paid-up capital. The letter referred to the FIPB approval of 18 May 2006 "read with amendment letter of even number dated 19.5.2008" and stated:[68]

> 2. It is further noted that Deutsche Telekom Asia Pte Ltd Singapore (WoS within the Deutsche Telecom group of companies (DT Asia) would acquire by way of subscription and/or transfer, from time to time, further shares up to approximately 26% of the total paid up share capital of Devas Multimedia Pvt Ltd.
>
> 3. The approval is subject to the following conditions:-
>
> i) …
>
> ii) License condition.

---

67 Krishnan's 1st affidavit at Exhibit MSK-15, pp 777–783.

68 Krishnan's 1st affidavit at Exhibit MSK-16, pp 785–786.

> iii) The non-resident shareholding of Devas Multimedia Pvt Ltd would not exceed 74% of the total paid-up share capital.
>
> 4. All other terms & conditions of the letters referred to above shall remain unchanged.

65 India's case is that condition 4 of the letter means that DT's investment in Devas' shares was approved subject to Devas complying with the conditions in the earlier FIPB approval of 18 May 2006. As Devas purported to provide more than just internet services, Devas was in breach of the conditions in the FIPB approval of 18 May 2006. In consequence, DT's investment in Devas must likewise have breached the conditions imposed by the FIPB approval letter of 7 August 2008.

66 Fifth, India says that the FIPB approved of money coming *into* India for Devas' ISP business. But 85% of that money (India complains) was promptly transferred by Devas to Devas Multimedia America Inc ("Devas Delaware") in the US. India submits that the money which was approved to come into India had to be used there, *ie*, within the jurisdiction. DT must have known that the moneys were transferred out, because by then DT had two nominee directors on the Devas Board. The transfer out of funds was thus contrary to the FIPB's conditions, and was therefore an illegal act by Devas. DT through its nominee directors would have been party to this illegality.

67 In support, India observes that Devas' 2 February 2006 application letter and the letter dated 27 April 2008 from Devas and DT Asia (at [59] and [63] above) stated that the technologies for the ISP services to be provided by Devas would be developed indigenously in India. India argues that the FIPB approval was given on that basis, which would consequently also have been a condition of DT's investment in Devas shares. On the illegality of the transfer out of the

moneys, India relies on the NCLAT's judgment where the tribunal stated (at [195]–[197]):

> 195. Third, Devas represented before the FIPB in its application dated 02.02.2006 that it would be developing all its technology and systems indigenously in India. After describing the same, we find it surprising that DMAI [*ie*, Devas Multimedia America Inc], an American entity, was incorporated to develop hardware and software and development in terms of technology.
>
> 196. Above all, Devas conceded before this Tribunal that it had paid the amounts to DMAI to satisfy the obligations under the agreement dated 28.01.2005 through their written submissions.
>
> 197. Based on the above discussion, this Tribunal finds that after bringing in an amount of INR 579 Crores for ISP services and not rendering any ISP services and instead diverting vast portions of the same for non-ISP purposes amounts to illegal diversion of funds and financial fraud that attracts the ingredients of Section 271(c) Companies Act, 2013.

68 It will be seen from the foregoing summary that India's entire case on illegality, in essence, hinges on an inference that DT knew or must have known about Devas' alleged fraud by reason of the due diligence which DT conducted prior to making its investments and, in respect of the fourth and fifth illegality submissions, because DT had two nominee directors on the Devas Board. By way of tying up its case, India refers to the following passage from the SCI Judgment (at [13.5]–[13.6]):

> 13.5 .... If as a matter of fact, fraud as projected by Antrix, stands established, the motive behind the victim of fraud [*ie*, Antrix], coming up with a petition for winding up, is of no relevance. *If the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the [Devas-Antrix] Agreement, the disputes, arbitral awards etc., are all infected with the poison of fraud.* A product of fraud is in conflict with the public policy of any country including India. The basic notions of morality and justice are always in conflict with fraud and hence the motive

> behind the action brought by the victim of fraud can never stand as an impediment.
>
> 13.6 We do not know if the action of Antrix in seeking the winding up of Devas may send a wrong message, to the community of investors. But allowing Devas and its shareholders to reap the benefits of their fraudulent action, may nevertheless send another wrong message namely that by adopting fraudulent means and by bringing into India an investment in a sum of INR 579 crores, the investors can hope to get tens of thousands of crores of rupees, even after siphoning off INR 488 crores.
>
> [emphasis added in italics]

69 India submits that the passages quoted above amount to a finding of fraud on the part of DT (among others) by India's highest court and should therefore be regarded by this court as conclusively establishing DT's complicity in the fraud perpetrated on Antrix and India.

(B) DT'S CASE ON ILLEGALITY

70 In essence, DT's response is that the alleged illegality does not concern DT's making of its investment, namely the acquisition of shares in Devas. When the Devas-Antrix Agreement was concluded in 2005, DT did not have any investment in Devas, nor did it have plans for any. DT (through DT Asia) only acquired shares in Devas from 2008, after: (a) extensive negotiations with Devas and representatives from the ISRO and the DOS; (b) due diligence on the advice of Indian counsel; and (c) the receipt of requisite approvals (including those of the FIPB). According to DT, there is no evidence that DT had any knowledge of the alleged illegality when it acquired the shares in 2008 and 2009.

71 DT contends that India's arguments are therefore entirely speculative. That DT performed due diligence into aspects of Devas' business did not mean

that it learnt about Devas' prior negotiations with Antrix. That DT had two nominee directors on the Devas Board also did not mean that those directors managed to obtain information about Devas in a complete and timely manner, and in turn that DT had full knowledge of all of Devas' dealings and operations.

72 Further, some of India's allegations (such as India's fifth objection that money was being transferred abroad) concern the performance of the investment and not its making, and as such do not fall foul of the legality requirement in Article 1(b) of the BIT.

73 Other allegations (such as India's fourth objection that the FIPB only approved the provision of ISP services) would, in any event, only constitute trivial breaches that would not deprive DT of substantive protection under the BIT.

(C) ANALYSIS OF INDIA'S CASE ON ILLEGALITY

74 We are not persuaded by India's case on illegality.

75 First, we are unable to draw the inference upon which India's first three submissions depend. We are prepared to proceed on the footing that Devas engaged in fraudulent misrepresentation. We are, however, unable to infer that, merely because DT undertook due diligence of Devas prior to its investment, DT must have known of Devas' fraud so that, by proceeding with its investment in Devas, DT must be taken to be complicit in the deceit on Devas' part. The evidence is that DT and India both conducted due diligence on Devas. If India (as seems to have been the case) was nonetheless deceived by Devas, it is difficult to see why DT was not or could not have been likewise taken in by Devas, especially where government officials were (according to India) acting in concert with Devas' original investors.

76 That India itself scrutinised Devas' proposed investment, not just once, but several times over the years, is evident from the chronology of events.

77 As stated above at [18], in May 2004, a High Power Committee (the Shankara Committee) was constituted to evaluate the technical feasibility, risk mitigation, time schedule, and financial and organisational aspects of the then proposed Devas-Antrix Agreement. In June-July 2004, the Antrix Board, having reviewed the findings of the Shankara Committee, accorded in-principle approval to the proposed Devas-Antrix Agreement. In October 2004, there was a presentation in Vancouver to the chairperson of the ISRO, a director of the ISRO Satellite Centre ("ISAC") and Antrix (among others) about Devas, the competitive landscape, international trends, Devas' technological developments, receiver pricing aspects and other matters. Between August and December 2004, the Shankara Committee reviewed and recommended terms for the proposed Devas-Antrix Agreement. A briefing to the Technical Advisory Group took place in November 2004. It was only thereafter that the draft Devas-Antrix Agreement was approved by the Antrix Board at its 57th meeting on 24 December 2004.[69]

78 In June 2010, the Suresh Report was submitted to the chairperson of the ISRO, who was also the secretary of the DOS (see [26] above). In his review, Dr Suresh was assisted (among others) by Mr K R Sridhara Murthi and Mr S Parameswaran of the Antrix Board, and Mr Vijay Anand and Mr S K Jha

[69] PBOD1 at Tab 10, pp 131–132.

of the DOS. The Suresh Report commented extensively on the Devas-Antrix Agreement. The following are excerpts:

> **1. Introduction**
>
> M/s Antrix Corporation Ltd entered into a commercial contract with M/s Devas for the multimedia services in the country. Chairman, ISRO, took a review on various aspects of contract of GSAT-6 on 7th December 2009, at ISRO Headquarters and a single member Committee was constituted to review and examine the legal, commercial, procedural and technical aspects of this contract. …
>
> Detailed discussions were held with Antrix, SCPO and DOS officials on all aspects stipulated in the above office order. All applicable documents were also scrutinized in detail. Based on all such inputs, scrutiny of various applicable documents and further discussions on specific issues with all concerned groups this report is finalized which summarizes the findings and recommendations of the Committee.
>
> …
>
> **5. The Technical Soundness of the Concept**
>
> The High Power Committee with Dr K N Shankara, the then Director, SAC as chairman has reviewed the proposal in detail. The application envisaged for GSAT-6 are in the areas of digital multimedia such as IP based data and video delivery to small hand sets. The satellite transmission is augmented by terrestrial transmission so as to reuse the signals seamlessly in Indian environment. The committee has concluded that the concept is technically sound and reliable. Committee also noted that this proposal of utilising a relatively small spacecraft enabled by innovative collaboration of space and ground equipment is quite attractive. While the project has a potential to succeed, there is considerable risk involved during the realisation phase. Certain limited field trials using S-band transmission of INSAT-3C Satellite was also suggested to prove the concept. The present Director, ISAC also confirmed the technical soundness of the Project during the review held by Chairman, ISRO in December 2009.
>
> **6. Approvals for GSAT6 and GSAT GA**
>
> After obtaining the Space Commission approval in its 104th meeting in May 2005, Cabinet approval was obtained in December 2005. The total cost for the satellite is Rs 269 Crores (FEC 102 Crores) with Rs 170 Cr for Spacecraft, Rs 34 Cr for Insurance and Rs 65 Cr for Pre-investment for critical components of Ground Spare. It may be noted that the Cabinet

note submitted for approval does not indicate the specific user. I was informed that this has been the practice all along in earlier Cabinet notes submitted for approval since the satellite is owned by ISRO. The approval for GSAT 6A was obtained in 114th Space Commission held in October 2009 with a cost of Rs 147 Cr. Both these satellites will be launched by GSLV and the launch cost is Rs 175 Cr per launch.

7. SATCOM Policy and use of INSAT Capacity by private service providers

The SATCOM policy is decided by the INSAT Coordination Committee (ICC) which was constituted for the overall management of INSAT system. …

The Policy guidelines for INSAT capacity augmentation and use of INSAT capacity by private service providers have been discussed in detail during the 61st-63rd ICC meetings held in February to November 2000 and have been firmed up. The broad guidelines so framed and approved for non-governmental sector are as given below:

[Guidelines omitted]

It may be noted that INSAT Coordination Committee has approved the augmentation of INSAT Capacity for Private Users on "Non-exclusive basis". Since the year 2000 till today the Satellite capacity lease agreements for all INSAT/GSAT satellite by Antrix/DOS have been based on the above framework approved by ICC. Antrix has followed the same procedures with respect to Devas agreement for building of GSAT-6 and 6A satellites and transponders capacity leasing.

It may also be noted that there have been no discussions in any of the forums to revisit these policy guidelines framed by ICC in 2000.

8. Procedure followed by Antrix during the finalisation of Devas Contract

The procedure followed by Antrix during the finalization of this contract was thoroughly scrutinised by closely tracking the chronology of events listed in Section-4. Further detailed discussions were held with all concerned and close scrutiny of all relevant documents was carried out. Signing an MOU between FA and ISRO/Antrix in July/Aug 2003 to explore the mutually beneficial opportunities during the visit of ISRO delegation led by the then Chairman, ISRO to Washington DC was the starting point for the project. This matter was pursued subsequently and the idea of JV partnership was initiated in April 2004. The proposal on interactive digital multimedia where in ISRO to invest in space segment and FA in ground

segment was suggested during the detailed review held by the High Power Committee to evaluate the technical feasibility, financial and market aspects, time schedule, risk mitigation etc. The Committee included all specialists from communication area from different ISRO Centres and also Additional Secretary and Joint Secretary of DOS. Based on the recommendations of the High Power Committee, Antrix Board accorded in-principle approval to proceed with processing of JV and for entering into agreement with M/s Forge in June 2004. The details of the agreement and pricing were again reviewed in detail by the High Power Committee.

As described in Para 6 there has been an established procedure from 2000 in place for leasing the transponders in ISRO satellites by private sector service providers. The procedure as approved by ICC is that satellite is fully owned by ISRO at the designated orbital slot and only the services of satellites via transponders are commercially made available. The charges for the allotted spectrum at the prevailing rate are being paid by the customer directly to WPC.

The practice followed all along for hiring the Satellite services is that the private service providers book the needed capacity on satellite prior to launch at the prevailing lease rate at that time and the commercial operation is started only after obtaining the necessary leases and clearances from concerned regulatory authorities. In the case of GSAT-6 also Antrix followed similar procedure and there was no query or discussion on any other possible modes.

The pricing strategy has been reviewed by the High Power Committee considering only the existing policy guidelines framed in 2000. They have examined the pricing taking into account the prevailing standards for transponder fee for leasing purposes. Additionally, the cost of satellite, launch cost, in orbit insurance, orbital operations and a reasonable margin were also considered.

During this period the subject of entering into contract with M/s Forge which is essentially an US company was discussed. I was informed that at that time it was felt advantageous to register a separate Indian company by M/s Forge so that the new Indian Company is bound by Indian law and regulations. Accordingly, FA promoters registered an Indian company Devas Multimedia Pvt Ltd (Devas) with dedicated resource commitments. They also included a few additional investors while registering the company Devas at India. This proposal was accepted by competent authorities from Antrix and DOS.

9. The Experimental Trials to Demonstrate the Concept

During the review held in June 2007 by the then Chairman, ISRO it was decided to carry out the technical trials to demonstrate the proof of concept on an end to end basis using the available INSAT satellite (INSAT-3C) before the actual high power GSAT-6 is launched. The need was endorsed and it was also decided that these trials would be conducted jointly by ISRO and M/s Devas. Subsequently in 2008 M/s Devas approached ISRO requesting S band transponder capacity from INSAT 3C for conducting the trials. The technical scope of the trials includes uplinking from MCF Hassan to INSAT 3C satellite the required carriers at the identified frequencies, receiving the same by S band earth station temporarily established by M/s Devas, feeding the same signal to terrestrial repeater stations established for the trial purpose, receiving the signals by different types of consumer devices and evaluating the end to end performance of the transmit-receive chain and the quality of the received signal. This involved identification of specific frequencies for the trials, arranging for unlinking to satellite in C band, reception of satellite signals in S band, installation of terrestrial repeaters (Complementary Ground Segment), arranging prototypes of different types of handheld, vehicular devices and laptop computers to be used by consumers and setting up the trial set up. For this, responsibility of ISRO was to identify the test frequencies and to provide satellite uplink from MCF Hassan. Setting up all other experiments and conducting the experiments with the required coordination with ISRO were the responsibilities of M/s Devas. M/s Devas was also to obtain the necessary import clearances for importing the equipments for the trials arid to obtain the experimental license from Wireless Planning and Coordination Wing (WPC Wing) of DOT.

....

12.2 Why only single party is considered

The prevailing ISRO procedure till today for the lease of satellite capacities (built/to be built by ISRO) is as per the procedure outlined in 2000. Even when multiple users approach, the practice has been to accommodate all bonafide users and gain acceptance of users. All capacity leases from Antrix/ISRO have been done on this basis. It may be noted that this is treated more as a marketing process and till today, Antrix and ISRO have been following only one procedure for leasing the transponder services to the private operators and in this case too same procedure is followed.

At this point it is important to examine this transponder leasing procedure considering the recommendation of INSAT Coordination Committee in 2000 which states that the augmentation of INSAT Capacity for Private Users should be on "Non-exclusive basis".

12.3 Financial Returns are not ascertained

All details including commercial aspects of the contract have been reviewed by a high power committee and approved by Board of Antrix. ... The returns are based on satellite leasing as has been done all along for all INSAT/GSAT class satellites. In case of GSAT-6 there are certain risks involved due to developmental nature of the project and a few unproven technologies which are keys to the performance. The particular aspect of financial return was discussed in high power committee and a decision was made to increase the leasing charges from US$9 million to US$11.25 million per annum once the Devas becomes cash positive and to continue till the end of contract period.

....

15. Recommendations

Overall review of GSAT-6, which is a state of the art satellite, in conjunction with the ground segment which is in the process of development by the service provider reveals a significant step for bringing a new satellite based service to India. This review also brings out that there is scope to reexamine some of the aspects which have been highlighted under specific review observations in the earlier section (14) and accordingly the following specific recommendations have been made for consideration.

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

(ii) Antrix has been following the policy guidelines framed by ICC in 2000 for leasing the satellite services to non-governmental service providers. It is worthwhile for Antrix/ISRO/DOS to reexamine these guidelines with all other agencies considering the changed scenario for spectrum demands.

(iii) Whenever Antrix enters into agreements with customers in future for provision of space segment services from ISRO's satellites, a formal MOU with ISRO/DOS may be entered into in order to ensure, interalia, that the relevant terms of the lease contract and the obligations towards customers are accepted by ISRO/DOS.

(iv} Considering the fact ISRO/DOS has developed GSAT 6 Satellite with complex technologies to start a new service in the national interest it is important that the agreement includes appropriate clauses to give explicit preference to ISRO in case of a demand for use of this service under emergent conditions for strategic or any other essential applications. As on today 47 months have elapsed from the payment date of first installment i.e. June 2006. As per the agreement a delay of 12 months in delivery attracts a penalty of US$5 million. This clause looks severe considering the fact that the satellite demands development of a few complex technologies for the first time. In view of these factors, the agreement needs to be re-visited taking into account all issues like ICC guidelines, importance of preserving the spectrum for essential national needs, international standards, and also due weightage for the upfront payment made by Devas.

(v) Present practice of leasing satellite capacity by Antrix is based on first come first serve basis. However, this practice needs to be examined by a competent team with terms of reference to evolve appropriate procedure to suit rational and efficient use of the spectrum as well as serving overall interests of economy and national service objectives.

(vi) On such important agreement/s which also attracts penalty clauses it is recommended to constitute a well structured Standing Review Forum with members drawn from Antrix, ISRO/DOS and all other concerned agencies to review the status and criticalities in a formal way and suggest corrective actions wherever necessary for implementation by appropriate authorities.

79 Despite in-depth scrutiny of the arrangements between Devas and Antrix (including the technical and financial aspects) and extensive interviews of those involved, neither the Shankara Committee in 2004 nor the Suresh Report in 2010 detected fraud on the part of Devas or its original investors. At most, the Suresh Report advised a review of India's then policy of allocating spectrum on a "first come first served" basis in order to come up with a procedure which was more "rational and efficient" and responsive to national objectives. We acknowledge that paragraph 15(iv) of the report recommended that the Devas-Antrix Agreement be revisited. However, the apparent reason for that recommendation had nothing to do with suspected fraud. From the context of the report, the recommendation stemmed from concerns with delays in the performance of the agreement and the consequent financial costs. In those circumstances, it would not be appropriate for us to deduce, from the solitary fact that DT had conducted due diligence on Devas, that DT would have become aware of any fraud being perpetrated by Devas and its original investors on Antrix and India.

80 India initiated other reviews of the Devas-Antrix Agreement. It was not until 30 June 2010, when the Balachandhran Note was produced (as described at [27] above), that India identified irregularities in the arrangements between Devas and Antrix. The Balachandhran Note was then considered by the Space Commission at its 117th meeting on 2 July 2010, and the Commission resolved that the DOS "may take actions necessary and instruct Antrix to annul the Antrix-Devas Agreement". Further investigation led to the decision, announced in a press conference on 8 February 2011, to revoke the allocation of spectrum to Devas and annul the Devas-Antrix Agreement.

81 On 12 March 2011, the Chaturvedi Committee issued its report on aspects of the Devas-Antrix Agreement (see [34] above). In the Chandrasekhar

Note dated 12 April 2011 commenting on that report (see [35] above), Mr K M Chandrasekhar (India's Cabinet Secretary) observed:

> 33. The shareholding pattern of Devas has undergone a substantial change and it [has] 17 shareholders now, as compared to 2 when it was originally founded. … [It] is obvious that the FA-USA team, which was responsible for originally floating the company, has divested its original shareholding, most particularly in the case of James Fox. The largest shareholders now are Deutsche Telecom, Columbia Capital, Telecom Ventures and MG Chandrasekhar. …
>
> 34. In 2007-08, shares were allotted by the company to Columbia Capital and Telecom Ventures at premia of [rupees] 25,505 per share. In this period, the original promoters from FA-USA also transferred their shares to these companies in substantial quantities. If the transfer also took place at the same premium, which is a reasonable assumption, the shareholders stood to gain a large amount of profit. …
>
> 35. Since the company has no asset base (it operates from a two storey house in Bangalore), and also has no IPR or patent in the relevant technology till date, it is reasonable to presume that the huge premium it has collected is due to the agreement with Antrix; this also seems to have benefitted the shareholders in a personal capacity.
>
> <u>Conclusions</u>
>
> 36. The broad conclusions that seem to emerge from the analysis of the HPRC report and other evidences is captured in the following points:
>
> ….
>
> (vii) The fact of the agreement was used by Devas (which had no other assets or IPR) to sell its shares at huge premium and collect a sum of [rupees] 578 crore as premia as against a modest share capital of [rupees] 18 lakhs. The individual shareholders seem to have been benefitted by dilution of their equity, presumably at equally huge premia.
>
> ….

82 The Chandrasekhar Note suggests that, far from being *parties* to fraud, new investors in Devas (such as DT) were themselves the *victims* of the fraud by Devas' original investors, the latter having offloaded their shares (at a "huge premium") onto the newcomers despite Devas' alleged shallow asset base.

83 The next report in the chronology, the Sinha Report (see [36] above), concluded (among other matters):

> 6.10 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 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. …
>
> 6.11 We, therefore, conclude that there have been not only serious administrative and procedural lapses but also suggestion of collusive behaviour on the part of certain individuals and accordingly, responsibilities have to be fixed for taking action under relevant service rules. Further, in order to get a clear picture of the changing pattern of ownership of Devas, the economic interest of various individuals in Devas and the extent to which the increase in share value has been encashed by individuals, the shareholding pattern of the company and of the Mauritius based entities needs to be looked into by an appropriate investigative agency.
>
> 6.12 There is no doubt that in this matter the responsibility is spread over a number of officials and many have been negligent in attending to their responsibility in steering and guiding the entire decision making.

84 The Sinha Report recommended that disciplinary action be taken against certain individuals, including Mr G Madhavan Nair, Mr A Bhaskaranarayana,

Mr K R Sridhara Murthi, and Dr K N Shankara. The Sinha Report then stated in its final paragraph:

> In order to get a clear picture of the changing pattern of ownership of Devas, the non-legitimate financial/pecuniary interest, if any, of various individuals and officials concerned, the extent to which the increase in share value has been encashed by individuals, the share holding of the company and of the Mauritius based entities and any possible illegitimate financial gain by officials concerned needs to be looked into by an appropriate investigative agency.

85 On 11 August 2016, in the CBI Charge Sheet, the following individuals were charged in connection with the Devas-Antrix Agreement: Mr K R Sridhara Murthi (former Managing Director of Antrix), Mr Ramachandran Viswanathan (Devas' President and Chief Executive Officer), Mr Muthgadahali Gangarudaraiah Chandrasekhar (a director of Devas, and a different individual from the Indian Cabinet Secretary referred to at [35] and [81] above), Mr G Madhavan Nair (former DOS Secretary and chairperson of the ISRO and of Antrix), Mrs Veena Ram Rao (former Additional Secretary of the DOS), Mr Appana Bhaskarnarayana (former Director of the Satellite Communication & Navigation Programme Office of the ISRO), Mr Desaraju Venugopal (a director of Devas), and Mr Marike Umesh (a chartered accountant). Despite the Sinha Report's recommendation that Dr Shankara be investigated, no charges were ever levied against him prior to his death in mid-2017.[70] No charges have ever been brought against Dr Suresh either.[71] By way of summary of the crime committed by those charged, the CBI Charge Sheet stated at paragraph 16(2):[72]

> The allegations in brief are that during the period from 2004 to 2011, Sri K. R. Sridhara Murthi, the then Executive Director

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70 Transcript for 1 July 2022, p 5 at lines 6–9; p 159 at lines 17–24.

71 Transcript for 1 July 2022, p 8 at lines 8–10.

72 Krishnan's 1st affidavit at Exhibit MSK-28, p 1517.

> M/s Antrix Corporation Ltd in criminal conspiracy with Sri R. Viswanathan & Sri M. G. Chandrashekhar, both Advisors to M/s Forge Advisors LLC, USA and other officials of DoS/ ISRO/Antrix Corporation Ltd, gave rights for delivery of Video, Multimedia and Information Services to Mobile receivers in vehicles and mobile phones via S-Band through GSAT-6 and GSAT-6A Satellites and Terrestrial systems in India, to ineligible company M/s Devas Multimedia Pvt. Ltd in violation of the laid down guidelines pertaining to leasing of INSAT capacity and thus caused wrongful gain of Rs.578 Crores to M/s Devas Multimedia Pvt. Ltd and thereby cheated Government of India.

86 The gain of Rs 578 crores mentioned in paragraph 16(2) just quoted is the total of what Devas received for allotting shares to new investors (including DT). Of these Rs 578 crores, DT paid up Rs 325,25,00,000 and 106,53,81,167 on 18 August 2008 and 29 September 2009 respectively into Devas' account.[73] The CBI Charge Sheet then set out (at paragraphs 16(152) and (153)):[74]

> The leasing of INSAT Transponder by M/s Antrix Corporation Ltd in favour of M/s Devas Multimedia Pvt. Ltd vide agreement dated 28.01.2005, facilitated receipt of funds to the tune Rs.579,07,42,505/- by M/s Devas Multimedia Pvt. Ltd from foreign investors in the form of FDI and thus caused pecuniary gain to M/s Devas Multimedia Pvt. Ltd and other accused persons.
>
> In furtherance of the criminal conspiracy Sri Ramchandran Viswanathan (A-2) and Sri M G Chadrasekhar (A-3) joined M/s Devas Multimedia Pvt Ltd after execution of agreement and got allotted shares of M/s Devas Multimedia Pvt Ltd at face value, when the shares to other investors were being given at huge premium. Over a period of time they became major share holders of M/s Devas Multimedia Pvt Ltd and took control over the affairs of M/s Devas Multimedia Pvt Ltd. Thus they obtained pecuniary gain for themselves. Subsequently, they transferred funds of M/s Devas Multimedia Pvt Ltd into foreign accounts.

87 Devas and certain of its officers and shareholders were essentially accused of allotting Devas shares to foreign investors (such as DT) at inflated

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73 Krishnan's 1st affidavit at Exhibit MSK-28, p 1567.

74 Krishnan's 1st affidavit at Exhibit MSK-28, pp 1577–1578.

premiums and then pocketing the funds so injected into Devas by remitting the same into their foreign accounts. If so, DT would be the victim, rather than a perpetrator, of fraud. It is telling in this respect that India has never brought charges against DT. Indeed, with several high-ranking government officials in the ISRO and the DOS and certain members of Devas' management apparently involved in fraud, on the material before us, we cannot rule out the real possibility that, much as was apparently the case with India, DT was also duped by Devas' original shareholders, notwithstanding the due diligence which DT carried out. We are therefore not satisfied that DT was complicit in any fraud.

88 Second, we are not persuaded that DT would have known through its nominee directors on the Devas Board that:

(a) the ISP services which Devas was supposed to provide pursuant to the FIPB's approvals were different from the Devas services to be supplied under the Devas-Antrix Agreement, or

(b) the funds invested in Devas were transferred abroad for purposes not in accordance with the FIPB approvals.

The gist of India's complaint in relation to the Devas services was that all that the FIPB had approved for Devas to provide were ISP services and those would not have required use of a satellite. The Devas services were, however, purporting to provide satellite-related services. Our difficulty is that, on its face, the FIPB plainly approved the provision of satellite-based services also. We have highlighted above (at [59] and [60]) explicit references to the delivery of internet services (including multimedia and information services) via landline, satellite, and terrestrial wireless systems in Devas' application for FIPB approval and in the FIPB's approval itself. In its oral submissions, India invited us to take judicial notice that ISP services can be provided without resort to

satellite systems.[75] That may possibly be so. But that proposition begs the question whether internet services can also be provided by satellite. In the absence of technical evidence to the contrary (of which none was placed before us), we do not accept that, by definition, ISP services are limited *only* to non-satellite systems of delivery. It is difficult to see why, reading Devas' application to the FIPB and the FIPB's approval, DT or its nominee directors ought to have realised that, in contracting to provide ISP services by satellite, Devas was purporting to act in a way which it had not been authorised to.

89 India has suggested that the FIPB's approval for DT's investment was contingent on Devas meeting the conditions imposed by the FIPB on Devas' investment. But we are unable to read the FIPB's approval of DT's investment as importing such a condition. We explain further below.

90 In relation to the remittance by Devas of funds abroad, as already pointed out (at [75]–[87]), it can be surmised from various reports as well as the CBI Charge Sheet that the remittance, if done in fraud, was done as much in fraud of Devas' new investors (including DT) as it was in fraud of India. In those circumstances, it is difficult to see how DT could have been complicit in a fraud against itself. What is more plausible is that, at the highest, DT and its nominee directors were duped by those involved. In any event, given the gravity of the accusations being levied against DT and its nominee directors (*ie*, fraud), far more evidence, and cogent evidence, is required. India cannot rely on a tenuous inference based on the presence of nominee directors on the Devas Board.

91 We would also add these observations:

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[75] Transcript for 30 June 2022, p 61 at lines 26–28.

(a) India suggests, in connection with the Devas services, that Devas never actually acquired the right to use satellite spectrum. This is because (India says) Devas never obtained the WPC licence needed to use spectrum terrestrially. It is alleged that Devas never even applied for a WPC licence. It is suggested that DT ought to have realised this, either because of its due diligence or the presence of nominee directors on the Devas Board. In fact, according to the Suresh Report (at p 11):[76]

> M/s Devas wrote a letter to ISRO on 20th October 2008 … requesting IPO / ISRO for identification of specific frequency segment available for trials since this information was to be provided to WPC for obtaining experimental license from WPC. INSAT Programme Office of ISRO identified the specific frequency segments for the trials and wrote a letter to WPC on 11th November 2008 requesting WPC to grant the experimental license to M/s Devas. …
>
> The WPC request for license was examined and granted experimental license to M/s Devas for the terrestrial transmission. The experimental license was issued by Regional Licensing Office of WPC in Chennai on 7th May 2009 and was valid up to 30th June 2009 … Subsequently based on the request of M/s Devas on 11th July 2009 WPC issued the letter on 15th July 2009 extending the validity of the experimental license up to 30th September 2009. …

The Interim Award picks up the story (at para 386):[77]

> Thereafter, … DT and Devas continued work to prepare for the launch of GSAT-6 and GSAT-6A satellites over the second half of 2010. In particular, Devas submitted a draft WPC licence to Antrix and communicated with ISRO's frequency management office to finalize the application. DT also conducted a successful second round of experimental trials in Germany (August 2010) and China (October 2010). Dr. Larsen testified at the hearing that these trials would not have happened if the

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76 Krishnan's 1st affidavit at Exhibit MSK-21, p 908.

77 Krishnan's 1st affidavit at Exhibit MSK-2, p 215.

> annulment decision had been communicated to Devas/DT.

It is clear to us that no final WPC licence application was ever made by Devas for the simple reason that before any such step was taken, India annulled the Devas-Antrix Agreement in February 2011.

(b) We have assumed in India's favour that its arguments on the illegality of the fund transfers abroad go towards the Tribunal's jurisdiction. That is, the contention is that the alleged illegality meant that DT's investment was not invested in accordance with India's national laws and so outside of the scope of the offer to arbitrate in Article 9 of the BIT. However, in our view, India's arguments concern the *performance or use* of DT's investment and not the making of it. As we note below (at [97]), DT's investment was the purchase of Devas' share capital through DT Asia. That investment was within the terms of the BIT and so within the scope of the offer to arbitrate (and in turn, the arbitration agreement). At best, the question of the illegality or otherwise of the fund transfers abroad and DT's complicity (if at all) in such illegality only involves the performance of a covered investment under the BIT or the use to which that investment is put.

92 Third, in respect of India's second and third reasons for asserting illegality (as described at [54] and [56] above), we find that these lack any evidential foundation. The norms, guidelines and procedures for satellite communications approved by India in 2000, and thus constituting the SATCOM Policy at the time of the Devas-Antrix Agreement, stipulated:[78]

> **ARTICLE 1: NORMS, GUIDELINES AND PROCEDURES CONCERNING ALLOWING INDIAN PARTIES TO PROVIDE**

[78] Roth's 4th affidavit at Tab 3, pp 124–138.

SERVICES INCLUDING UPLINKING OF TV SIGNALS WITH INDIAN SATELLITES

Government of India has decided that the Satellite Communications Policy should be implemented in such a manner that while operations from Indian soil may be allowed with both Indian and foreign Satellites, proposals envisaging use of Indian Satellites will be accorded preferential treatment. The norms for operating with satellites from Indian soil shall be formulated by the respective Administrative Ministry/Department in accordance with the above directive and also in accordance with the Articles-2, 3 and 4 of this Satellite Communications Norms, Guidelines and Procedures. For instance, in case of Broadcasting (TV and Sound) the conditions will be governed by the Broadcast Bill as may be passed by the Parliament. Similarly in case of GMPCS [*ie*, Global Mobile Personal Communication by Satellite], the operating license conditions will be as determined by the GMPCS policy being piloted by the Department of Telecommunications. However, in respect of establishment and operations of Indian Satellite Systems the Articles of this Satellite Communications Norms, Guidelines and Procedures shall apply.

ARTICLE 2: NORMS, GUIDELINES AND PROCEDURES REGARDING USE OF INSAT CAPACITY BY NON-GOVERNMENTAL PARTIES

2.1 The Satellite Communications Policy Frame-work for India as approved by the Government states:

(i) "**Authorise INSAT capacity to be leased to non-government (Indian and foreign) parties following certain well defined norms**

(ii) "**Allow Indian parties to provide services including TV uplinking through Indian Satellites, subject to certain terms and conditions which are to be spelt out**;"

…

2.4 CLASSIFICATION OF USE

2.4.1 The user sectors can be broadly classified as:

(a) Telecommunications

(b) Broadcasting

(c) Education and developmental communications

(d) Security Communications for Defence Ministry/Services

…

2.5 ALLOCATION OF CAPACITY

….

2.5.2 ICC [*ie*, the INSAT Coordination Committee] shall earmark at least a certain percentage of capacity for use by the non-governmental users who have been authorized by law to provide various telecommunications services including broadcasting.

…

2.6 COMMERCIAL AND CONTRACTUAL FACTORS

2.6.1 All the commercial activities of INSAT space-segment shall be carried out by the Department of Space/INSAT. Department of Space/INSAT means the organisation created in Department of Space for this purpose or the corporate structure meant for operating INSAT system if and when such an organisation is created.

2.6.2 Once capacity is earmarked by ICC for non-governmental users, Department of Space/INSAT is authorised to provide this capacity to the non-governmental users for services other than telecommunications, following its own procedures. It may enter into bilateral agreements with other agencies for marketing this capacity. In case the demand is more than the available capacity, the Department of Space/INSAT may evolve suitable transparent procedures for allotting the capacity. *This procedure may be in the form of auction, good faith negotiations, first come first served or any other equitable method.* In so far as telecommunications is concerned any use of INSAT capacity for users in India will be based on the existing provisions/arrangements. ICC may review this arrangement at any time as required.

2.6.3 The INSAT capacity may also be made available to foreign parties for operation in India or abroad.

…

[emphasis in original in bold; emphasis added in italics]

93 In respect of India's second objection (that the Devas-Antrix Agreement was illegal because it was entered into without a tender or auction process), paragraph 2.6.2 of the SATCOM Policy clearly contemplates the

possibility of satellite capacity being allocated to commercial users on a "first come first served" basis. In respect of India's third objection (that the SATCOM Policy prohibited an entity like Devas from engaging in both telecommunications and broadcasting services), the document does not on its face proscribe a party from engaging in both telecommunications and broadcasting services. Accordingly, it is not apparent to us how, solely by reason of it having conducted due diligence, DT would have become aware that Devas' engagement in both telecommunications and broadcasting services was contrary to the national laws of India at the time the investment was made. This would especially be the case as, to all intents and purposes, Devas' proposals had received FIPB approval for, among others, the provision of satellite services.

(2) The pre-investment expenditure argument

94 Article 3(1) of the BIT provides: "Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party and also admit investments in its territory in accordance with its law and policy."

(A) INDIA'S CASE ON PRE-INVESTMENT EXPENDITURE

95 India says that by virtue of Article 3(1), the BIT is an "admission clause" treaty. That means that mere pre-investment activity is outside the scope of the BIT and consequently outside of the Tribunal's jurisdiction. Execution of the Devas-Antrix Agreement (India submits) was only the first of many steps to Devas' investment being admitted as a covered investment within the terms of the BIT. For instance, Devas had to obtain numerous approvals and authorisations before it could implement the Devas Services. It failed to do so. It never acquired the right to use the S-band spectrum. It never obtained the

requisite WPC licence for terrestrial use of such spectrum. Nor did it ever receive approval for the frequency and orbital slot coordination required to operate a satellite. Under Article 7 of the Devas-Antrix Agreement, Devas and Antrix could respectively terminate their agreement if the other failed to obtain requisite regulatory approvals. It follows (so India argues) that DT's acquisition (through DT Asia) of shares in Devas amounted at best to pre-investment activity falling outside the scope of the BIT. DT's acquisition of shares constituted nothing more than "corporate activities surrounding the formation of Devas". According to India, the shares "could only become eligible for protection under the BIT if and when Devas had obtained the requisite licences and approvals to offer Devas Services (which it failed to do)".[79]

(B) DT'S CASE ON PRE-INVESTMENT EXPENDITURE

96 DT observes that this is the third time India is re-litigating the same arguments on pre-investment expenditure, having already done so (unsuccessfully) before the Tribunal and the Swiss Federal Supreme Court. DT disagrees that Article 3(1) makes the BIT an "admission clause" treaty. Even if it was, DT's investment was duly admitted by India.

(C) ANALYSIS OF INDIA'S CASE ON PRE-INVESTMENT EXPENDITURE

97 We respectfully disagree with India's submissions. In our judgment, Article 3(1) of the BIT is not a permissive clause authorising India to decide whether to "admit" something as an investment protected by the BIT. Article 3(1) instead obliges India and Germany as contracting states to the BIT to admit investments into their territories subject only to their respective laws and policies. Here DT's investment fell within the definition of "investment" in

[79] India's written submissions dated 7 June 2022 at para 159.

Article 1(b) of the BIT. DT (through DT Asia) bought shares in Devas, an Indian company. DT made an investment in "shares in ... a company" and thereby acquired an interest in that company. There was nothing more that needed to be done to qualify as an "investment" within the meaning of Article 1(b) of the BIT. If (contrary to our view) an official "admission" of DT's investment was required, such "admission" came in the form of the FIPB's approval of DT's purchase of 26% of Devas' paid-up share capital (see [62]–[64] above).

(3) The indirect investment argument

98 Article 2 of the BIT defines its scope: "This Agreement shall apply to all investments made by the investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the coming into force of this Agreement".

(A) INDIA'S CASE ON INDIRECT INVESTMENT

99 India says that DT's investment did not fall within Article 2 of the BIT.[80] This is because it was not DT, but DT Asia (DT's wholly-owned subsidiary), which acquired the Devas shares. DT Asia, as a Singapore company, was not entitled to protection under the BIT. India refers, in support, to its treaty practice as evidenced in the *travaux préparatoires* of the India-Netherlands BIT (which was later terminated on 1 December 2016). The *travaux* include the following communiqué dated 26 October 1994 from India to the Dutch embassy in India in relation to the draft Article 2 of the India-Netherlands BIT:[81]

> We note the stand point of the Netherlands Government. Hitherto, the issue of providing protection for indirect

[80] Transcript for 30 June 2022, p 106 at lines 8–15.

[81] Krishnan's 1st affidavit at Exhibit MSK-48, pp 3221–3222.

> investments has not been raised by most of the other Governments that we have been negotiating with. For reasons discussed by you it can also create complications depending on the relationships with other countries through which the investments are routed. There is also the theoretical [*sic*] possibility of investments being routed through territories where money laundering or narcotics funds exist, and for protection then being claimed under the Indo-Netherlands Agreement (though we have not examined the reality of this occurring). We would therefore prefer not to include indirect investments. If, however, the Netherlands stand on this turns out to be rigid, we would be agreeable to providing protection to indirect investments by fully owned subsidiaries incorporated in the ultimate country of investment but not otherwise. Thus, if a Netherlands company sets up a fully owned company incorporated in India which then invests in and controls a third company in India, we can consider extending protection. If, however, a Netherlands company sets up a subsidiary, say in Singapore, which then invests and controls a company in India, we would not be agreeable in providing protection.

(B) DT'S CASE ON INDIRECT INVESTMENT

100 As with India's arguments on pre-investment expenditure, DT observes that this is the third time India is re-litigating the same arguments on indirect expenditure. India had failed before the Tribunal and the Swiss Federal Supreme Court, and rightly so, because nothing in the definition of "investment" and "investor" in Article 1 of the BIT excludes indirect investments.

(C) ANALYSIS OF INDIA'S CASE ON INDIRECT INVESTMENT

101 We disagree with India's position. Nothing in the wording of Article 2 of the BIT, or of Article 1(b) under which "investment" and "investor" are in turn defined, limits investors to those making direct investments, as opposed to indirect investments through wholly-owned subsidiaries incorporated in a third country. There is no basis for reading such a limitation into the plain words of Article 1(b) in the absence of words to that effect. The communiqué is also of little help in construing Article 1(b). It is difficult to see how a bilateral instrument such as the BIT can be construed by only looking at one contracting

state's position. Further, it is not apparent to what extent the contents of the communiqué were public knowledge when the BIT was being negotiated. It is more likely that at the time, the communiqué was a confidential note between India and the Netherlands. In fact, Article 2 of the India-Netherlands BIT that was eventually concluded provided:

> **Article 2. Scope of the Agreement**
>
> This Agreement shall apply to any investment made by investors of either Contracting Party in the territory of the other Contracting Party *including an indirect investment made through another company, wherever located,* which is fully owned by such investors, whether made before or after the coming into force of this Agreement.
>
> [emphasis added]

If anything, that outcome suggests that, despite the communiqué, India was amenable to foreign investments being made indirectly irrespective of where the investor's direct investing company was located. India invites us to infer from the express mention of indirect investment in Article 2 of the India-Netherlands BIT that the absence of a similar reference in the BIT means that indirect investments were excluded from the latter. In our view, the available material does not justify us drawing such a conclusion.

(4) The essential security interests argument

102 Article 12 of the BIT provides:

> Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.

(A) INDIA'S CASE ON ESSENTIAL SECURITY INTERESTS

103 India says that, by Article 12, the BIT is inapplicable where India's "essential security interests" are invoked and therefore an arbitral tribunal has

no jurisdiction under the arbitration agreement stemming from the BIT over claims touching on those interests. Further, according to India, it must be for India to determine what its "essential security interests" are and when those interests are at risk or in jeopardy. In February 2011, India concluded that, given India's military and security needs, Devas should not be allocated an orbital slot in the S-band for commercial purposes. Antrix accordingly terminated the Devas-Antrix Agreement based on those security needs. In the circumstances, the termination of the Devas-Antrix Agreement came within the scope of the carve-out from the BIT in Article 12.

(B) DT'S CASE ON ESSENTIAL SECURITY INTERESTS

104 As with the preceding arguments on pre-investment expenditure and indirect investment, DT points out that India had failed to persuade the Tribunal and the Swiss Federal Supreme Court on its arguments concerning its essential security interests. Those arguments were moreover couched as *substantive* objections before the Tribunal, not *jurisdictional* ones. The Swiss Federal Supreme Court decided that they could not be improperly recast as jurisdictional objections, and DT urges this court to decide the same. In any event, on the facts, the Tribunal found that the Devas-Antrix Agreement had not been annulled with a view to protecting India's essential security interests.

(C) ANALYSIS OF INDIA'S CASE ON ESSENTIAL SECURITY INTERESTS

105 We reject India's submission.

106 First, we agree with DT that India advanced its "essential security interests" argument in the arbitration as a *substantive* objection, not a *jurisdictional* one. This is apparent from the Tribunal's summary of India's position on "essential security interests" at paragraph 201 of the Interim Award:

> For all these reasons, [India] requests the Tribunal to defer to India's policy decision to reserve S-band for non-commercial use and to refrain from assessing the compliance of this measure with the substantive provisions of the BIT, the application of which is excluded pursuant to Article 12 of the BIT.

107 There was good reason for India taking such an approach in the arbitration. That is because the question of whether "essential security interests" are involved in a dispute and (if so) with what consequence, does not go towards jurisdiction. To the contrary, where essential security interests are at stake and it is established pursuant to Article 12 of the BIT that India only acted "to the extent necessary for the protection" of those interests, India would have a complete answer to claims that it breached a *substantive obligation* under the BIT. Where the conditions in Article 12 are met, India's substantive obligations under the BIT yield to the interest protected by Article 12. In other words, India's "essential security interests" trump any substantive rights that DT might otherwise have enjoyed under the BIT. This does not mean that the Tribunal's jurisdiction was ousted in relation to matters said by India to constitute "essential security interests". The Tribunal remained duty-bound to assess (as it did) whether the conditions in Article 12 had been met, in particular whether India had acted in a manner which was no more than necessary to protect the interests invoked.

108 Before us, India referred to *Continental Casualty Company v The Argentine Republic* ICSID Case No ARB/03/9, Award (5 September 2008) ("*Continental Casualty*") in support of its contention that Article 12 goes towards jurisdiction. In *Continental Casualty*, Argentina invoked Article XI of the 1991 Argentina-US BIT, the equivalent of Article 12 of the BIT. Article XI of the Argentina-US BIT provided:

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the

> fulfilment of its obligations with respect to the maintenance or the restoration of international peace or security, or the protection of its own essential security interests.

109 The ICSID award in *Continental Casualty* stated (at [164]):

> The ordinary meaning of the language used, together with the object and purpose of the provision (as here highlighted and interpreted under Article 31 of the Vienna Convention on the Law of Treaties) clearly indicates that either party would not be in breach of its BIT obligations if any measure has been properly taken because it was necessary, as far as relevant here, either "for the maintenance of the public order" or for "the protection of essential security interests" of the party adopting such measures. The consequence would be that, under Art. XI, such measures would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision. A private investor of the other party could therefore not succeed in its claim for responsibility and damages in such an instance, because the respondent party would not have acted against its BIT obligations since these would not be applicable, provided of course that the conditions for the application of Art. XI are met. *In other words, Art. XI restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met.* In fact, Art. XI has been defined as a safeguard clause; it has been said that it recognizes "reserved rights," or that it contemplates "non-precluded" measures to which a contracting state party can resort. [emphasis added]

110 The italicised sentence in the foregoing paragraph was footnoted as follows:

> **Footnote 236**
>
> This Tribunal is thus minded to accept the position of the *Ad Hoc* Annulment Committee in the ICSID case *CMS v. Argentina*, where it states: "Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 [of the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts* or "ARSIWA"] is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations" (*CMS Annulment Decision*, para. 129). On the one hand, <u>if Art. XI is applicable because the measure at issue was necessary in order to safeguard essential security interest, then the treaty is inapplicable to such measure.</u> On the other hand, if a State is

> forced by necessity to resort to a measure in breach of an international obligation but complying with the requirements listed in Art. 25 ILC, the State escapes from the responsibility that would otherwise derive from that breach. [emphasis added in underline]

For completeness, Article 25 of the ARSIWA, which addresses the circumstance precluding wrongfulness of necessity, states:

> **Article 25. Necessity**
>
> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) the international obligation in question excludes the possibility of invoking necessity; or
>
> (b) the State has contributed to the situation of necessity.

111 India cited the underlined words from footnote 236 in support of the argument that Article 12 of the BIT deals with jurisdiction. But, read in their proper context, the words do not, in our judgment, support that contention. Significantly, Argentina advanced jurisdictional challenges in *Continental Casualty*. However, those challenges were *not* premised on Article XI. Just as India before the Tribunal, Argentina relied on Article XI as a substantive defence and the award in *Continental Casualty* was consequently addressing that substantive defence in the passage cited above. The award concluded that, where interests protected by Article XI were rightly invoked (as the award found

was potentially the case), Argentina's *substantive* obligations under the Argentina-US BIT had to be construed as *limited* by Article XI. None of this meant that Argentina ceased to be bound by its *procedural* obligations under the Argentina-US BIT (including the obligation to resolve disputes with US investors through arbitration). The tribunal in *Continental Casualty* therefore had jurisdiction to evaluate (as it did) whether, in relation to each of the investor's specific complaints, Argentina had acted proportionately (that is, in a manner that was no more than necessary to protect its essential interests).

112 The net result of the foregoing analysis is that the "essential security interests" argument having been mounted (as it had to be) by way of a substantive defence in the arbitration and that defence having been rejected by the Tribunal, India is bound by the Tribunal's determination that the conditions of Article 12 have not been met. There is no basis upon which this court can review the merits of the Tribunal's substantive determination on the issue.

Other grounds relied on by India

113 In addition to state immunity, India submits that the leave granted to enforce the Final Award should be revoked:

> (a) pursuant to the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"), specifically sections 31(2)(*b*) and 31(2)(*d*), as the Tribunal lacked jurisdiction for the reasons canvassed in [42]–[112] above;
>
> (b) pursuant to section 31(4)(*b*) of the IAA, as enforcement of the Final Award would be contrary to the public policy of Singapore due to the fraud and illegality identified in [47]–[69] above; and

(c) because DT did not make full and frank disclosure when applying to court *ex parte* for leave to enforce the award.

114 On the latter ground on disclosure, India complains that, despite DT's duty when applying *ex parte* to disclose India's potential arguments against enforcement, DT failed to make such disclosure. In particular, DT did not mention India's claim to state immunity or the NCLT's adverse findings against DT as a shareholder in Devas. To this, DT's response is that the duty to provide full and frank disclosure only extends to facts which it could reasonably ascertain and potential defences that it could reasonably anticipate. In this regard, for instance, DT could not have reasonably anticipated India's arguments based on the NCLT decision, since DT's position has always been that the NCLT, NCLAT and Supreme Court of India's decisions are irrelevant to the present proceedings. In any case, even if there had been a breach, DT invites us to exercise our discretion not to set aside the leave order.

115 In our view, none of the additional grounds has merit. We have already rejected India's jurisdictional challenges and the submission that DT must be treated as complicit in Devas' fraud. Recasting those allegations as grounds to set aside the leave order or to refuse enforcement of the Final Award under the IAA does not alter the analysis. Nor do we believe that there is substance to the complaint of non-disclosure. Dr Ina Roth's 1st Affidavit filed with DT's *ex parte* application referred to India's Swiss setting aside application.[82] It mentioned the Swiss Federal Supreme Court's finding that the Tribunal had jurisdiction and had conducted the arbitration proceedings fairly. Dr Roth exhibited the Swiss Federal Supreme Court's Judgment which (among others) dismissed India's submissions on state immunity. It would have been evident

[82] Roth's 1st affidavit dated 2 September 2021 at para 22.

from a perusal of the Swiss Federal Supreme Court Judgment that India was likely to raise (as it has done) similar submissions on immunity and DT's complicity in fraud before the Singapore courts.

Estoppel, res judicata and waiver

116 We have so far considered India's illegality arguments on their merits *de novo* in light of the evidence before us, without reference to what other *fora* have previously determined. We have concluded on that basis that India's arguments should be rejected. However, there were extensive arguments advanced before us by Ms Koh Swee Yen SC (for DT) and Mr Cavinder Bull SC (for India) on the extent to which DT or India was estopped or precluded:

(a) from raising matters contrary to findings in:

(i) the judgments of the NCLT, the NCLAT and the Supreme Court of India; or

(ii) the judgment of the Swiss Federal Supreme Court; or

(b) from raising arguments not previously made before the Tribunal.

For completeness, we will now address the parties' respective submissions and assess the preclusive effects, if any, of the various determinations in these *fora*.

(1) The NCLT, NCLAT and Supreme Court of India judgments

117 On 18 January 2021, pursuant to section 271(*c*) of the Indian Companies Act, 2013, Antrix applied before the NCLT to wind up Devas based on allegations of fraud (see [39] above). The NCLT allowed the application and accordingly ordered Devas to be wound up. The NCLT, the NCLAT and the Supreme Court of India disallowed Devas' application to cross-examine

witnesses. It is to be noted that neither DT nor its subsidiary DT Asia were parties to the proceedings before the three tribunals/courts. On appeal by Devas, the NCLAT and the Supreme Court of India upheld the NCLT's decision that Devas should be wound up.

118 India does not say that the three judgments should formally be recognised by this court. Nor does India claim that the three judgments have *res judicata* effect before us. India instead submits that the three judgments constitute a compelling basis for this court to conclude that DT's investment was not in accordance with India's national laws by reason of fraud or illegality. In any event, India argues that the common law rules for recognition of a foreign *in rem* judgment are met in this case. By *in rem* judgment, India means a judgment that by its nature is binding on the whole world.[83] In particular, India says that the SCI Judgment is final and conclusive. India further suggests that there are no valid defences to recognition.

119 India also submits that we should accord not just weight, but binding effect, to passages in the SCI Judgment (such as those quoted in [52], [55] and [56] above) as *findings* that DT was involved in Devas' fraud. For the alleged *in rem* effect of the SCI Judgment, India relies on the following evidence of its Indian law expert:[84]

> 24. As the Supreme Court has held, a judgment *in rem* is the "conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided" and "binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence". Indeed, proceedings that may lead to a judgment *in rem* can only be held in a public fora, so that any third parties (which

83 Transcript for 30 June 2022, p 92 line 25 to p 93 line 24.

84 Mr Sudipto Sarkar's 3rd affidavit dated 6 April 2022 at Exhibit SS-4 (Reply Opinion), paras 24–30.

are not already a party to the action) that may be affected by the judgment would have the opportunity to apply to the court to make its representation and be heard.

25. A judgment on winding-up matters is an example of a judgment *in rem*. The Supreme Court and various High Courts have consistently confirmed that winding-up proceedings are proceedings *in rem* having a binding effect on the rights of people in general, including the company's entire body of shareholders, creditors, contributories, etc.

26. After any final and binding judgment is rendered, under the principle of *res judicata*, the ultimate decision in a judgment, together with any findings of fact or law on which that decision is based, cannot be re-opened between the parties in another proceeding. This principle of *res judicata* applies with greater force to judgments *in rem*, which operate as *res judicata* not only against the parties to the original proceedings but also against the world.

27. The proceedings in this case – as before the NCLT, the NCLAT, and the Supreme Court – were winding-up proceedings, which are considered *in rem* proceedings under Indian law. This position is also affirmed in the Supreme Court Judgment. Consequentially, the findings made by the NCLT and the NCLAT in such an *in rem* action would bind not just the parties to the winding-up petition but also "the entire world".

28. Since these determinations are *in rem* under Indian law, they will bind even those parties (such as DT and DT Asia) who were not present before the NCLT and the NCLAT. As the Supreme Court Judgment remains final, conclusive and binding, it is not permissible under Indian law for any parties (including DT and DT Asia) to re-open the Indian Decisions and challenge the merits of the same (except on the very limited grounds as described in Section A above [*ie*, by way of a review or recall petition]).

29. For completeness, I am also instructed that DT has suggested that the determinations of fraud and illegality in the Indian Decisions, which I had highlighted in my First Opinion and Supplemental Opinion, are collateral and/or incidental to the sole and central issue in the Winding-up Proceedings, which is whether Devas should be wound up pursuant to Section 271(c) of the Indian Companies Act, 2013.

> 30. I disagree. In my opinion, given the nature of the winding-up proceedings, it is expected that the NCLT and the NCLAT would decide issues of fact and law that are central to the question whether Devas should be wound-up or not. Under Section 271(c) of the 2013 Act, a company may be wound-up by the NCLT if the NCLT "is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up". Accordingly, the determinations of fraud and illegality in the Indian Decisions were "necessary" to and formed the very basis of a winding-up order made and affirmed in the Indian Decisions, and thus are not merely "collateral and/or incidental" findings.

120 In response, DT contends that the three judgments do not have legal effect in the present proceedings. Among other reasons, they do not satisfy the requirements for the recognition of foreign judgments, because there is neither identity of parties nor identity of issues with the present proceedings. Crucially, DT was not a party to those proceedings. There are also concerns that questions of fraud had been determined in a manner that cannot be regarded as being final and conclusive. Even if they are, there are limits to whether findings of fact would bind non-parties to the proceedings.

121 DT also contends that the judgments were obtained in breach of natural justice, because (among others) Devas was deprived of the opportunity to cross-examine Antrix's witnesses despite the serious allegations made of fraud and illegality, and further as the NCLT had rushed the appointment of the provisional liquidator (a government employee) without affording Devas an opportunity to be heard on the same. Recognising these decisions would be a contravention of Singapore's public policy.

122 We are not persuaded by India's submissions for a number of reasons.

123 First, DT was not a party to the proceedings that resulted in the three judgments and took no part in them. We therefore do not see how they can constitute evidence of fraud or illegality on the part of DT. The three judgments concern whether Devas should be wound up for fraud, and are not judgments in criminal proceedings. Granted, the judgments contain remarks about fraud and illegality on the part of Devas' shareholders and directors. But these are, in our judgment, at best broad-brush *obiter* remarks (as opposed to actual findings of fact) which, especially in the absence of DT as a party, can hardly be regarded as binding on DT before this court. To proceed as if those remarks were binding and conclusive as findings of fact involving fraud and illegality on DT's part for the purposes of these proceedings, would, in our judgment, constitute a denial of elementary notions of natural justice and due process. In civil proceedings, persons accused of fraud and serious illegality normally have a right to be heard before being found liable.

124 It cannot be gainsaid that a finding of fraud against a party is a very serious finding and one which requires cogent evidence to be brought to the fore to undergird it. It has not escaped our attention that none of the judgments in fact implicates DT in any way. Having carefully examined the SCI Judgment in particular, we do not consider the Supreme Court of India's comment (see [68] above) that if "the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the [Devas-Antrix] Agreement, the disputes, arbitral awards, *etc*, are all infected with the poison of fraud" to be a specific finding directed at DT, DT's investment in Devas, or the Final Award obtained by DT against India.

125 India argues that DT could have applied to be joined as a party to the proceedings before the NCLT, the NCLAT and the Supreme Court of India.

That submission is, in our view, untenable. DT had no prior notice that it (as opposed to Devas) stood accused of fraud as part of the winding-up proceedings and that DT risked being found by the relevant tribunals/courts to have acted criminally in its absence. In those circumstances, it is unclear why DT would be under an obligation to apply to be joined as a party. In any event, neither the Indian Companies Act, 2013, nor the Indian Companies (Winding Up) Rules, 2020 ("Winding Up Rules") gives a shareholder of a company which is the subject of winding-up proceedings the right to intervene or participate in those winding-up proceedings. The NCLT dismissed the impleadment (joinder) application brought by DEMPL, another shareholder of Devas, for lack of *locus standi* because "[it] has no grievance against the affairs of Devas and its Directors".[85] DEMPL's appeal to the NCLAT was dismissed as "not at all maintainable" because Devas' "shareholders have no role in the instant proceedings at the present stage, as their liability is limited to their share-holding".[86] In contrast, the SCI Judgment stated (at [11.9]) that "the dismissal of the appeal filed by DEMPL, by NCLAT on the ground of maintainability may not be correct" because "[t]o say that DEMPL cannot be taken to be a person aggrieved, may be farfetched". But, regardless of the position on "maintainability", the Supreme Court of India refused the appeal against the rejection of DEMPL's impleadment application on the ground that "there is no scope either in the [Companies] Act or in the [Winding Up] Rules for the impleadment of any shareholder as a respondent to the petition for winding up" (at [11.3]).

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85 Krishnan's 1st affidavit at MSK-30, p 1713.

86 Krishnan's 1st affidavit at MSK-31, p 1722.

126 Second, in any event there are significant difficulties in taking the remarks within the three judgments as final and conclusive findings of fraud on DT's part for the purpose of the Singapore proceedings.

127 The NCLT decided the winding-up petition on a summary basis by reference to documents alone, without cross-examination of witnesses. It stated in its judgment (at [19(12)]):

> With regard to the contention that the Tribunal is having only summary jurisdiction, as per law, it cannot decide the issues/allegations made in the instant Petition, as those issues are purely triable issues to be decided by competent Civil courts, after adducing evidence etc, are concerned, it is to mentioned here that, as stated supra, the Tribunal alone is the Competent Court to entertain a Petition for Winding up of a Company and to decide it finally, however, subject to final supervisory and constitutional jurisdiction of Hon'ble High Courts and the Hon'ble Supreme Court of India. Therefore, the Tribunal can entertain the instant Company Petition and consequently order to Wind-up Devas, however, subject to fulfilling the circumstances as mentioned under the provisions of Section 271 of Companies Act, 2013. The facts and circumstances leading to the filing of instant Company Petition, as detailed supra, do not require any evidence to be adduced. Moreover, the ICC Court [*ie*, in the ICC arbitration seated in Delhi commenced by Devas against Antrix] has already taken ample evidence about the basic facts of the case and the relevant observations and finding of Arbitral Tribunal [*ie*, ICC tribunal] are already taken into consideration by the Tribunal in the instant case. Therefore, the issue can be decided based on the sufficient rather voluminous documentary evidence produced by the Parties. Therefore, the plea to call for evidence is un-tenable and baseless.

For context, under section 271(*c*) of the Companies Act, 2013, a company may be wound up on three grounds, namely that: (a) the affairs of the company have been conducted in a fraudulent manner; (b) the company was formed for a fraudulent and unlawful purpose; or (c) persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith.

128 On appeal on this issue, the NCLAT held as follows (at [238] of the concurring judgment of Mr V P Singh):

> The documents relied on by Antrix were not disputed either before the NCLT or before this Tribunal by Devas. On the contrary, both the parties before us relied on the same documents and offered their interpretations. The fact that fraud has been committed is apparent on the face of every record available before this Tribunal. As far as this Tribunal is concerned, the scope of adjudication is whether there is fraud for which perusal and interpretations of the documents are enough, wildly when Devas has not disputed the documents but has relied on the same set of documents substantially or relied on similar documents. A trial would indicate who was responsible for committing the fraud with which this Tribunal is not concerned. This Tribunal has exercised its fact-finding powers under Section 271(c) of the Companies Act, 2013. It has rendered elaborate findings on fraud purely based on undisputed documents; therefore, Devas's ground on triable issues is rejected.

129 In the ordinary course, it would be a matter of some significant concern to this court, that parties accused of fraud or analogous conduct imputing serious criminality were not allowed to adduce oral evidence or cross-examine witnesses on what is stated in documents. To find a party guilty of fraud without affording that person an opportunity to adduce oral evidence or cross-examine witnesses, including as to the contents of allegedly incriminating documents would, in the absence of compelling reasons, constitute a breach of natural justice and due process.

130 It appears from the foregoing passages that the NCLT and the NCLAT regarded themselves as exercising a summary jurisdiction to determine whether, on the face of what were described as undisputed documents, there was a case for winding up Devas on one or more of the grounds in section 271 of the Indian Companies Act, 2013. Having found that there was such a case, the NCLT ordered that Devas be wound up and the NCLAT upheld that decision. As Mr V P Singh of the NCLAT stated in the passage quoted, the question of "who

was responsible for committing the fraud" was *not* one with which the NCLT or the NCLAT were concerned. That understanding of the effect of the NCLT and NCLAT judgments is seemingly confirmed by M Venugopal J's lead judgment in the NCLAT (at [331]):

> Be that as it may, on a careful consideration of respective contentions, in the light of detailed qualitative and quantitative discussions, this 'Tribunal' taking note of the entire gamut of the facts and circumstances of the present case, keeping in mind the origin and the whole object/purpose of the incorporation of the 1st Respondent/Company on 17.12.2004 as a 'Corporate entity', just a little one month before the Agreement dated 28.01.2005, the Agreement being in violation of 'SATCOM Policy' of India, the resultant action(s) of the said 'Company' including the obtaining of 'fraudulent'/'distorted FIPB Approvals', the illegal/foreign investments brought into India and then, taken out of India into United States of America, entering into an illegal Agreement dated 28.01.2005 'for services' which were not in trend, utilising technologies, not in the ownership of the 1st Respondent/Company, by way of suppression/concealment of material facts, coupled with the act of conspiracy indulged with the 'officials of 1st Respondent'/Company, 'Department of Space', and others, *make out a prima-facie, genuine/reasonable ground/ circumstances for the invocation of 'Winding up Proceedings' before the 'Tribunal'* by filing of necessary Petition by the 1st Respondent/'Antrix Corporation Ltd.' against the 'Appellant'/ 'Devas Multimedia Pvt. Ltd.' (after termination of the Agreement is not carrying on its Business operations) as per Law (duly authorised by the Central Government) and to seek passing of necessary 'winding up orders'. [emphasis added]

131 The fact that no cross-examination of witnesses had been allowed was again raised before the Supreme Court of India as a ground of appeal. The Supreme Court of India reasoned:

> 10.2 Therefore, it is contended on behalf of the appellants that (i) allegations of fraud, as a rule, warrant a full-fledged trial and proof; (ii) that in the light of the specific bar of jurisdiction of Civil Courts under Section 430 of the Companies Act, 2013, NCLT was obliged to scan the allegations of fraud very carefully, by allowing parties to lead evidence and cross-examine the witnesses; (iii) that the Tribunal is conferred with the same powers as are vested in a Civil Court under the Code of Civil Procedure,

> 1908, in respect of the summoning and enforcing of the attendance of any person and examining him on oath, under Section 424(2) of the Companies Act, 2013; (iv) that Rules 52 and 135 of the National Company Law Tribunal Rules, 2016 make it clear that the Tribunal has the power to summon the appearance of any witness, cross-examine him on oath and even issue commission for the examination of witnesses; and (v) that the Tribunals committed a gross error of law in recording findings on serious allegation of frauds, solely on the basis of affidavits and documents. Reliance is placed in this regard by the learned senior counsel for the appellants, on the decisions of this Court in *Standard Chartered Bank vs. Andhra Bank Financial Services Ltd. and Ors*; *Svenska Handelsbanken vs. Indian Charge Chrome and Ors* and *V. Ravi Kumar vs. State, Rep. by Inspector of Police, District Crime Branch, Salem & Ors*.

....

10.6 The Tribunal classified the allegations made by Antrix into eight categories. In sum and substance, they revolve around, (i) the offer of a non-existent technology; (ii) misrepresentation about the possession of intellectual property rights over a device; (iii) violation of SATCOM policy; (iv) securing of an experimental licence fraudulently; (v) manipulation of the minutes; and (vi) the trail of money brought in through FIPB approvals.

10.7 All the averments forming the foundation of the allegations of fraud, from the point of view of the Indian Evidence Act, would fall under only two categories, namely, (i) positive assertions requiring persons making those assertions to prove them; and (ii) negative assertions.

10.8 A party alleging the nonexistence of something, cannot be called upon to prove the non-existence. It is the party who asserts the existence or who challenges the assertion of non-existence, who is liable to prove the existence of the same.

10.9 In the case on hand, Antrix asserted that Devas offered services which were non-existent, through a device which was not available and that even the so-called intellectual property rights over the device were not available. Therefore, obviously Antrix cannot lead evidence to show the non-existence or non-availability of those things, either by oral evidence or by subjecting their officials to cross-examination by Devas. Devas

> never produced before the Tribunals any device nor did they demonstrate the availability to Devas services. All that Devas wanted was, the cross-examination of the officials of Antrix. Any amount of cross-examination of the officials of Antrix could not have established the existence of something that was disputed by Antrix.

132 The reference in M Venugopal J's judgment to only a *prima facie* case for winding up having been made out was also brought to the Supreme Court of India's attention. On that, the Supreme Court commented:

> 12.7. Technically speaking, *the appeal before us which is under Section 423 of the Companies Act, 2013, is only on a question of law. When two forums namely NCLT and NCLAT have recorded concurrent findings on facts, it is not open to this Court to reappreciate evidence.* Realising this constraint, the learned Senior Counsel for the Appellant sought to project the case as one of perversity of findings. But we do not find any perversity in the findings recorded by both the Tribunals. These findings are actually borne out by documents, none of which is challenged as fabricated or inadmissible. Though it is sufficient for us to stop at this, let us go a little deeper to find out whether there was any perversity in the findings recorded by the Tribunals and whether such findings could not have been reached by any reasonable standards. [emphasis added]

133 Then, having reviewed what it referred to as the "undisputed facts" which emerged from the documents before the NCLT and the NCLAT, the Supreme Court of India continued:

> 12.9 An argument was advanced by the learned senior counsel for the appellants, on the basis of a statement contained in the order of NCLAT that the allegations are *prima facie* made out, that a company cannot be ordered to be wound up on the basis of *prima facie* findings. The standard of proof required for winding up of a company cannot be *prima facie*.
>
> 12.10 But we do not think that the appellants can take advantage of the use of an inappropriate expression by NCLAT. The detailed findings recorded by the Tribunal show that they are final and not *prima facie*. Merely

> because NCLAT used an erroneous expression those findings cannot become *prima facie*.

134 While the Supreme Court of India considered that M Venugopal J had mischaracterised the findings of the NCLT and the NCLAT, the Supreme Court of India did not explain how a judge who expressly described his finding as *prima facie* can nonetheless be treated as having come to a final conclusion. For the purposes of the proceedings before us, we do not think that M Venugopal J's description of what he believed he was doing can be so readily disregarded. Nor did the Supreme Court of India say anything about Mr V P Singh's observation that the NCLT and the NCLAT judgments were not concerned with who was responsible for fraud. Even if Mr V P Singh's remark is also treated as erroneous, we would, with respect, be uncomfortable using the view expressed (*ie*, that cross-examination would have been pointless) as justification for us to accept the three judgments as providing the necessary compelling evidence of DT's complicity in fraud for the purposes of the proceedings before us – that would require us to take a quantum leap that we are not prepared to. In light of the problems with India's case against DT highlighted in [42]–[112], it seems to us that oral evidence from DT as to what it knew or did not know at any given time and cross-examination of the makers of the documents adduced before the NCLT as to their precise ambit and underlying circumstances, would be material in establishing fraud (if any) on DT's part. The documentary evidence adduced may have been final and conclusive for the purposes of *winding up Devas* on the ground of fraud as a matter of India's national law. But we do not think that the three judgments can be regarded as sufficient evidence, compelling or otherwise, of fraud and illegality for the purposes of the proceedings before us.

135 Given our conclusion on the evidentiary effect of the three judgments as far as these proceedings are concerned, it is unnecessary for us to examine

whether and (if so) the extent to which the SCI Judgment operates *in rem* under India's national law. It suffices for us to register our difficulty with accepting the proposition that the SCI Judgment, even if it were regarded as containing a finding of fraud in which DT was complicit, would operate *in rem* to bind DT as to that matter before us.

(2) The Swiss Federal Supreme Court judgment

136 DT submits that India is precluded from now raising arguments on fraud and illegality that were rejected by the Swiss Federal Supreme Court. DT further maintains that India is estopped from raising arguments in these proceedings that could have been (but were not) raised before the Swiss Federal Supreme Court.

137 India contends to the contrary. India says that its arguments on fraud and illegality were not fully canvassed before the Tribunal and the Swiss Federal Supreme Court did not make final and conclusive findings from which estoppel on those issues may arise. India suggests that the Swiss Federal Supreme Court was constrained by the facts established by the Tribunal in the Interim Award which India was then challenging. Consequently, the Swiss Federal Supreme Court did not have the benefit of the findings of fraud in the NCLT, NCLAT and Supreme Court of India judgments. The Swiss Federal Supreme Court explicitly noted (India argues) that the criminal allegations relied on by India "were not yet decided" and a different outcome may be justified where a final criminal decision has been issued. According to India, we are consequently fully entitled to reconsider India's jurisdictional objections based on fraud and illegality, despite the Swiss Federal Supreme Court's refusal to set aside the Interim Award on those grounds.

138 More particularly, cause of action estoppel (India argues) does not arise because an application to enforce an award in one country is a different cause of action from an application to enforce the same award in another country. It follows *a fortiori* that an application to set aside an interim award before the seat court is a different cause of action from an application to resist enforcement of the final award in another jurisdiction. Nor (India reasons) does issue estoppel arise. This is because, for a foreign judgment to give rise to issue estoppel, the decision on the specific issue must be final and conclusive under the foreign law (here, Swiss law). The Singapore Court of Appeal recognised that "in certain jurisdictions, binding effect might be accorded to the result arrived at in a judgment, but not to the reasons, intermediate steps or other elements that led to that result even if they are stated in the judgment": see *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 at [43]. India suggests that Switzerland is such a jurisdiction and cites in support the expert evidence of its Swiss law expert. The latter takes the view that in Swiss law there is "no equivalent to the common law doctrine of issue estoppel, whereby a finding by a court on a specific issue may bind a future court" and "the general principle is that only the operative part of a decision, to the exclusion of the reasoning, has *res judicata* effect".[87] This means that the factual findings and legal considerations underlying the Swiss Federal Supreme Court's judgment do not constitute its operative part. All that is operative is the Swiss Federal Supreme Court's conclusion that "[t]he appeal is rejected insofar as the matter is capable of appeal".[88]

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87 Prof Christoph Müller's 1st affidavit dated 6 April 2022 ("Müller's 1st affidavit") at Exhibit CM-2, paras 36 and 42.

88 Müller's 1st affidavit at para 54.

139 Even if issue estoppel is pertinent, India submits that it should not be precluded from raising arguments of illegality, because of the *Arnold* exception to issue estoppel. The *Arnold* exception as identified in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 (referencing *Arnold v National Westminster Bank plc* [1991] 2 AC 93) applies where material relevant to the correct determination on the issue of illegality has become available. India says that, because of the three judgments and evidence discovered after the Swiss Federal Supreme Court's judgment, none of which could reasonably have been adduced earlier, it is plain that the Swiss Federal Supreme Court's judgment was wrong on illegality and fraud.

140 India lastly asserts that there would be great injustice if it were precluded from arguing illegality and the Final Award were enforced.

141 We accept that, for the reason highlighted by India, cause of action of estoppel does not arise here. The issue is whether the Swiss Federal Supreme Court's judgment gives rise to issue estoppel or (if not) some other form of preclusion.

142 India raised the indirect investment, the pre-investment expenditure and the "essential security interests" arguments before the Swiss Federal Supreme Court. All were rejected on reasoning similar to that of the Tribunal.

143 India additionally argued the illegality of the Devas-Antrix Agreement as it has done before us. The Swiss Federal Supreme Court summarised India's submissions on illegality thus:[89]

> *4.2.1*
>
> Contrary to this argument, the Appellant [*ie*, India] argues, first of all, that it acted "in time and in a perfectly appropriate manner by raising its objection after the issuance of the indictment" (Appeal, no. 193). As to the allegedly incomplete statement of reasons for this objection, the complainant asserts that it clearly demonstrated the principle that there can be no investment that could be protected if the investment claimed is unlawful according to the law of the host State. That alone, in its view, would matter to the exclusion of the number of sentences it devoted to that question.
>
> While conceding that the charges at issue had not yet been brought to the attention of the relevant Indian criminal court at the time it raised its objection of wrongfulness, the Appellant denies any relevance to this circumstance on the ground that the temporary absence of confirmation of the veracity of its statements by an Indian criminal authority did not mean that there was no illegal investment. Therefore, in its opinion, the Arbitral Tribunal had breached its right to be heard by refusing to suspend the arbitral proceedings – which amounted to prejudging the outcome of the criminal proceedings – and later, by rejecting, in its interim award, the evidence that it had submitted to it with a view to establishing the unlawful nature of the investment in question.
>
> Moreover, according to the Appellant, the criminal trial had started since then, a first hearing having taken place on December 23, 2017, after the approval to prosecute the last four officials involved in this case was issued in August 2017.
>
> Finally, the Appellant, unlike the Arbitral Tribunal, does not attach importance to the fact that the charges do not relate to acts performed by the organs or employees of X._____ itself, but those of A._____. In fact, it would be obvious that if Contract A._____ were unlawful, the German company could not have availed itself of a lawful investment, even if it had not been involved in the wrongdoings referred to in the charge sheet.
>
> Therefore, for the Appellant, the rejection by the Arbitral Tribunal of the jurisdictional defense on the basis of the

[89] CMB1 at Tab 20, p 643.

> unlawfulness of Contract A and its unjustified refusal to admit the evidence relating to that argument fall foul, respectively, of (b) and (d) of Art. 190(2) PILA.

For context, Article 190(2) of the Swiss Private International Law Act ("PILA") (cited in the extract's last sentence) provides that:

> An arbitral award may be set aside only: … (b) where the arbitral tribunal wrongly accepted or denied jurisdiction; (c) where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims; (d) where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated; (e) where the award is incompatible with public policy.

144 The Swiss Federal Supreme Court found (at [4.4.1]) that, in the absence of contrary indication, whether an investment complied with India's national laws was "a condition relating to the jurisdiction of the Arbitral Tribunal". It followed that the Swiss Federal Supreme Court "may, in principle, freely review the relevance of the reasons given on this point by the arbitrators".

145 However, referring back to [3.2.3.3.1] of its judgment (which is set out more fully at [170] below), the Swiss Federal Supreme Court held at [4.4.2] that India "ha[d] forfeited the right to argue … lack of jurisdiction … in connection with the compliance clause, unless it could [not] reasonably have raised such an objection before the time when it did so". The Swiss Federal Supreme Court was not persuaded by India's "assertion" that it had raised the non-compliance objection at the earliest moment that it reasonably could have done. The Swiss Federal Supreme Court stated:[90]

> *4.4.2*
>
> This Court is not persuaded by this assertion. It should be noted that, according to the findings of the Arbitral Tribunal, on November 8, 2009, U_____, one of the secretaries of the

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90 CMB1 at Tab 20, pp 647–649.

DOS, apparently received an anonymous report that the spectrum of the S-band had been leased to A_____ on the basis of corruption, a complaint which was followed by discussions among the representatives of the Indian space authorities, then the constitution of the so-called Committee V_____, named after its sole member, the director of the Indian Institute of Space and Technology, which published its report on June 6, 2010. The Indian media had also been interested in Contract A_____, claiming that the lease was too advantageous for this company, and they called on the government to cancel the contract. This was followed by a series of reports and memoranda in the Indian administration.

Some senior officials of this administration had been arrested in early February 2011, before A_____ saw its contract with B_____ terminated, on the 25th of the same month, for an alleged case of *force majeure*. Therefore, it is difficult to understand why the Appellant did not mention these circumstances – which were revealing, at least, of suspicions of commission of criminal offenses – in its submissions in the arbitration, or during the hearing of April 2016, or in its post-hearing brief of June 10, 2016, preferring instead to wait until October 24, 2016, to inform the Arbitral Tribunal. This is all the less understandable that the CBI had already sent its Charge Sheet to whom it may have concerned on August 11, 2016.

As the aforesaid reservation is no longer subject to the conclusion of this examination, it follows that the jurisdictional defense based on Arts.1(b) and 3(1) of the BIT is forfeited.

4.4.3

Would it not then be that the argument in the alternative developed by the Arbitral Tribunal on the merits should then be ratified?

First, the reading of the letter that the Appellant sent on October 24, 2016, to the Arbitral Tribunal confirms that the content of this document was so excessively ethical that the recipient was unable to draw clear conclusions as to the desire expressed in general and imprecise terms by the author of the missive.

Second, the charge sheet, following the CBI's initiation of an investigation in March 2015, contained only allegations and charges that were not yet decided. Admittedly, as the Appellant rightly pointed out, that did not exclude that the accusations made in this document could prove to be well-founded in the end. However, in the face of vague accusations, it was also necessary to take into account the interests of the investor in ensuring that the settlement of the dispute with the host State took place within an acceptable period of time and was not postponed for several years because of a suspension of arbitral

> proceedings until the criminal law was decided. On the basis of the legal opinion extract reproduced below, one may wonder whether the existence of a pending criminal investigation was such as to affect the Arbitral Tribunal's jurisdiction over Arts. 1(b) and 3(1) of the BIT: "Nevertheless and despite this focus on the host State's domestic law, the arbitral tribunal, as an international forum, is not bound by any prior assessments made by national courts under such relevant national law; rather it is required to make its own legal determination" … The question may remain open, in any event, such as that of the right of the host State to invoke the criminal behavior of some of its officials in an attempt to evade its responsibility under the BIT … This is the place to recall, moreover, that grievances articulated in relation to promises of bribes are admitted by the Federal Tribunal only if corruption is established …
>
> In any event, if by chance a final, criminal decision, likely to affect the final award not yet issued as of this date, was to be taken after the pronouncement of the award, the Appellant may attempt to obtain, if necessary and all other conditions being met, the review of that award …
>
> Finally, it is not self-evident, *a priori*, that by indirectly acquiring part of the shares in an Indian company, without its opponent finding anything to challenge, the Respondent, as an investor, must allow itself to be blamed for the fact that, by alleged misconduct by its organs, this company located in the territory of the host State obtained from a company controlled by the same State advantages qualified as unlawful by the latter. This, however, is another debate that there is no need to have here.

146 India lastly argued that its right to be heard in relation to illegality had been prejudiced due to the Tribunal's refusal to admit the CBI Charge Sheet as evidence. The Swiss Federal Supreme Court likewise rejected this argument.

147 Having disposed of all of India's contentions, the Swiss Federal Supreme Court pronounced that India's "appeal [is] rejected insofar as the matter is capable of appeal".

148 It will be seen that, by reason of Article 186(2) of the PILA, which governed the Arbitration, the Swiss Federal Supreme Court viewed India as having forfeited (that is, waived) the right to raise non-compliance with India's

national laws and "essential security interests" as jurisdictional objections. The effect of Article 186(2) of the PILA is further discussed below, from [156]. For present purposes, the focus is on the extent to which India is estopped or precluded from raising (a) jurisdictional objections that the Swiss Federal Supreme Court rejected and (b) jurisdictional arguments that it did not raise before the Swiss Federal Supreme Court.

149 The Swiss Federal Supreme Court itself explained the juridical effect of its decision:[91]

> *2.1*
>
> ....
>
> The civil law remedy provided for in Art. 77(1) [of the Federal Statute of June 17, 2005, organising the Federal Tribunal, RS 173.110, or "LTF"] is generally only of an annulling nature (see Art. 77(2) LTF, ruling out the applicability of Art. 107(2) LTF insofar as the latter provision allows the Federal Tribunal to rule on the merits of the case). However, this exception is made when the dispute concerns, as in this case, the jurisdiction of the Arbitral Tribunal. In such a case, the Federal Court, if it allows the appeal, may itself determine the jurisdiction or lack of jurisdiction of the arbitral tribunal (ATF 136 III 605 at 3.3.4, page 616). The Appellant's submission that the Court of First Instance itself should find that the Court of Arbitration lacked jurisdiction is therefore admissible.
>
> ....
>
> *2.3.*
>
> The Federal Tribunal adjudicates on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement of its own motion the findings of the arbitrators, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). As well, when seized of a Civil law appeal against an international arbitral award, does its mission not consist of deciding with full power of review, like an appellate jurisdiction — but only to consider whether the admissible grievances

[91] CMB1 at Tab 20, pp 616–617.

> raised against the award are justified or not? Allowing the parties to state facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would no longer be compatible with such a mission, even though these facts may be established by evidence contained in the arbitration file. However, the Federal Tribunal retains the ability to review the facts underlying the award under appeal if one of the grievances mentioned in Art. 190(2) PILA is raised against this fact or new facts or evidence are exceptionally taken into account in the Civil appeal procedure (ATF 138 III 29 at 2.2.1 and the judgments cited).

150 Given that explanation, we conclude that the Swiss Federal Supreme Court's judgment *does have* negative *res judicata* effect to the extent that it rejected the grounds of review raised by India. That negative effect precludes India from raising the same grounds of review in later proceedings. In other words, India may not later challenge the Tribunal's jurisdiction on the indirect investment, pre-investment expenditure and "essential security interests" grounds that it unsuccessfully raised before the Swiss Federal Supreme Court. On illegality, India is, in our judgment, likewise precluded by negative *res judicata* from later challenging the Tribunal's jurisdiction on grounds of illegality, that is, non-compliance of DT's investment with India's national laws. But the Swiss Federal Supreme Court left open the possibility of a challenge to the Interim Award in the circumstance of "a final, criminal decision, likely to affect the final award not yet issued as of this date, ... taken after the pronouncement of the award, ... if necessary and all other conditions being met". Although not elaborated upon, that is presumably a reference to the possibility of revision under Swiss law. Under Article 190*a*(1)(a) of the PILA, an applicant may seek revision where it becomes aware of significant facts or uncovered decisive evidence (which it could not have produced in the earlier proceedings despite exercising due diligence) after the relevant award was rendered.

151 The foregoing conclusions we have reached are consistent with the evidence of India's Swiss law expert, Professor Christoph Müller. He stresses (and we accept) that Swiss law has "no equivalent to the common law doctrine of issue estoppel, whereby a finding by a court on a specific issue may bind a future court".[92] He distinguishes instead between formal and substantive *res judicata* in Swiss law. Formal *res judicata* means that "no ordinary means of recourse can be brought against [a] decision", leaving only extraordinary means such as a request for revision. Substantive *res judicata*, on the other hand, means that "the matters decided in a decision cannot become the object of later proceedings between the same parties which concern the same subject-matter".[93] In so far as the Swiss Federal Supreme Court's judgment is concerned, he takes the view that, whether looked at substantively or procedurally, it can at best only give rise to negative *res judicata*. He writes:

> 36. The (negative and positive) *res judicata* effects of a decision of the Federal Supreme Court in general are as follows:
>
> As a dispute is deemed to have been adjudicated to the extent of the judgment, a new appeal on the same grounds is not admissible due to the lack of a protected legal interest ("*intérêt juridiquement protégé*" in French, "*Rechtsschutzinteresse*" in German) (negative effect).
>
> …
>
> …
>
> 72. As explained above (see para. 36), the negative *res judicata* effect of a decision of the Federal Supreme Court is that a renewed application for setting aside is inadmissible. Hence, in the present case, a renewed application to set aside the Interim Award pursuant to Article 77 LFT would not be admissible, as well as an application to set aside the Final Award pursuant to Article 77 LFT on the grounds of Articles 190(2)(b) and (d) PILA (to the extent that the argument in relation

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92 Müller's 1st affidavit at para 42.

93 Müller's 1st affidavit at paras 27–28.

> to Article 190(2)(d) would concern the same alleged violation of the right to be heard). Consequently, the effect of the Federal Supreme Court's rejection of India's Application against the Interim Award is simply that India cannot file another application in Switzerland to set aside the Interim Award or the Final Award on the same grounds as traversed in India's Application against the Interim Award.

152 Accordingly, apart from an application for revision under Swiss law based on material evidence that could not previously have been adduced, India is precluded from challenging the Tribunal's jurisdiction on the grounds that the Swiss Federal Supreme Court rejected. This is by operation of the doctrine of *res judicata*, rather than because it is estopped by the Swiss Federal Supreme Court's findings on discrete issues. As Prof Müller stated: "Consequently, the effect of the Federal Supreme Court's rejection of India's Application against the Interim Award is simply that India cannot file another application in Switzerland to set aside the Interim Award or the Final Award on the same grounds as traversed in India's Application against the Interim Award."[94]

153 Applying *res judicata* principles under Singapore law (and specifically, those relating to issue estoppel), we take the view that India must now be treated as barred from raising the very jurisdictional objections that the Swiss Federal Supreme Court has already rejected. Considering the elements of *res judicata* under Singapore law (see *BAZ v BBA and others and other matters* [2020] 5 SLR 266 (*"BAZ v BBA*") at [30]): (a) the Swiss judgment is final and conclusive in respect of its rejection of the arguments run before the Swiss Federal Supreme Court; (b) there is identity between the parties in the Singapore and Swiss proceedings; and (c) the subject matter of both proceedings is the same, namely, the Tribunal's jurisdiction under the BIT. It follows from propositions (a), (b)

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94 Müller's 1st affidavit at para 72.

and (c) that India is now bound by the outcome of the Swiss Federal Supreme Court (that is, the rejection of India's jurisdictional objections) and the same arguments cannot be re-ventilated before us. The rationale underpinning *res judicata* generally (including the doctrine of issue estoppel) is that a party should not be twice troubled on the same matter: *BAZ v BBA* at [32]. It would be contrary to the public policy of finality if, India's jurisdictional objections having been rejected by the seat court, India should nonetheless be permitted to resurrect the same objections in an application to resist enforcement (see also *BAZ v BBA* at [39] and *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [75]).

154 India relies on *MAD Atelier International BV v Manès* [2020] 3 WLR 631 ("*MAD Atelier*") as support for its case that it is not so barred. In that case, MAD sued Manès in England on claims analogous to those brought against Manès' companies in France. The Paris Commercial Court had decided the latter claims against MAD. But the evidence in the English proceedings was that French law had no equivalent to the doctrine of issue estoppel and that *res judicata* under French law only attaches to the operative part of a decision. Thus, if a fact found by the Paris Court did not appear in the *dispositif* of its judgment, "the relitigation of that fact is not prevented by the preclusive effect of that judgment" (*MAD Atelier* at [89]). It followed that, if MAD "were to bring a new civil claim in France against [Manès] claiming a different remedy or based on a different cause of action, [it] would not be prevented from relitigating any of the issues in the new proceedings" (*MAD Atelier* at [91]). There was the additional difficulty that the parties to the French and English actions were not the same so that the French decision could not be final and binding anyway as between the parties to the English action (*MAD Atelier* at [105]). As a result, it seems to us that *MAD Atelier* involved a different factual situation and is of little

assistance here. In *MAD Atelier* there was neither issue estoppel nor *res judicata* in the cause of action estoppel sense. In contrast, there is here negative *res judicata* in the issue estoppel sense, subject only to the possibility of revision based on material evidence that was not available at the time of the setting aside application before the Swiss Federal Supreme Court. On whether the three judgments constitute such new material evidence, see our discussion at [156]–[171] below.

155 Finally, on the assumption that the *Arnold* exception applies to cases of cause of action *res judicata* in the same way that it applies to issue estoppel *res judicata*, for the reasons discussed at [117]–[135] above, we do not think that the NCLT, the NCLAT and the Supreme Court of India's judgments constitute any evidence (let alone compelling evidence) of fraud or illegality in respect of DT's investment.

(3) The Interim and Final Awards

156 DT submits that India is precluded from raising arguments that could have been (but were not) raised before the Tribunal. DT observes that, as the Arbitration was seated in Geneva, it was subject to chapter 12 of the PILA, and in turn, Article 186(2) of the same. Article 186(2) of the PILA provides: "Any objection to [the tribunal's] jurisdiction must be raised prior to any defence on the merits." The upshot (DT argues) is that a party which did not raise a jurisdictional objection which it could have raised to the tribunal in a Swiss arbitration, has forfeited (waived) its right to raise that objection in later enforcement proceedings. Reference may also be made to Article 30 of the UNCITRAL Arbitration Rules 1976 which governed the Arbitration. Article 30 stipulates:

> **Waiver of rules**
>
> A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

157 India contends that an enforcement court is "entitled, indeed obliged, to undertake a fresh examination" of whether grounds for refusing enforcement (including lack of jurisdiction) have been established.[95] This court is therefore not bound (India says) by the Tribunal's conclusions on India's jurisdictional challenges. It follows (India contends) that there can be no bar to introducing new arguments not previously raised before the Tribunal.

158 As described at [7]–[11] above, the Arbitration between DT and India commenced on 2 September 2013 with the filing of a Notice of Arbitration. The Tribunal issued the Interim Award on 13 December 2017. By its Procedural Order No 1 dated 22 May 2014 the Tribunal had bifurcated the Arbitration into an initial phase on jurisdiction and liability followed by a second phase on damages. The Interim Award thus addressed all issues of jurisdiction and liability. There was the prior ICC arbitration (seated in Delhi) between Devas and Antrix which started in or around June/July 2011 and concluded on 14 September 2015 with the issue of a final award (the ICC Award). The ICC Award ordered (among other matters) that Antrix pay damages of US$562.5 million (with simple interest at 18% per annum) to Devas for the wrongful repudiation of the Devas-Antrix Agreement. Antrix filed an action before the Indian courts for annulment of the ICC Award. In the Arbitration, the Tribunal's position was that, in the absence of a compelling reason to the contrary, it "should accord deference to the findings of the ICC tribunal, being

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95 India's written submissions dated 7 June 2022 at para 101.

the forum entrusted with the settlement of contract disputes" (at [114] of the Interim Award).

159 By letter dated 24 October 2016, India attempted to adduce the CBI Charge Sheet into the Arbitration as an important recent development. In the Interim Award, the Tribunal commented as follows on the CBI Charge Sheet (at [115]–[119]):

> 115. In a letter dated 24 October 2016, the Respondent [*ie*, India] brought to the Tribunal's attention 'certain recent developments in the Devas matter', including the filing by India's Central Bureau of Investigation (CBI) of criminal charges against a number of Government officials, Devas and certain of Devas' officers and directors. According to the Respondent, these criminal charges 'if upheld, would constitute additional grounds for dismissal [of the claims], as the alleged investment will not have been made in accordance with Indian law'. The Respondent further 'note[d] that the filing of such charges would warrant suspension of these proceedings pending resolution of the charges, as important issues of public policy are implicated'. …
>
> 116. In its reply of 14 November 2016, the Claimant [*ie*, DT] argued that it was too late and improper for the Respondent to (i) advance a new jurisdictional objection of alleged 'illegality' based on the CBI Charge Sheet; (ii) seek a suspension of the arbitration pending resolution of the CBI charges; and (iii) unilaterally file new factual evidence without seeking leave from the Tribunal. In this latter respect, the Claimant asked the Tribunal to reject the Respondent's submissions and requests and decline the admission of the documents submitted by the Respondent.
>
> 117. In its letter of 20 February 2017, the Tribunal denied the Respondent's request to stay these proceedings and deferred its determination on the Parties' other requests in relation to the CBI charges to its forthcoming Award [*ie*, the forthcoming Interim Award].
>
> 118. The Tribunal first notes that it is not clear whether, in its letter of 24 October 2016, the Respondent sought to raise a new jurisdictional or admissibility objection based on an alleged illegality in the making of the investment. To the extent that this was the case, the

> Tribunal finds that such objection is untimely and contrary to the procedural calendar established in this arbitration. Indeed, such purported objection was raised well after the Parties' written submissions and the Hearing. The Tribunal likewise denies the introduction of new evidence into the record, as untimely and not in accordance with the procedural rules, which require prior leave.
>
> 119. In any event, even if the illegality objection were deemed timely, the Tribunal would deny it on its merits. Indeed, the Respondent has not sufficiently substantiated its objection, if it was one. It only devoted a few sentences in its letter of 24 October 2016 arguing that, if upheld, the criminal charges in question would be grounds for dismissal of the claims, as the investment would not have been made in conformity with Indian law. Second, and more importantly, the CBI Charge Sheet on which the Respondent relies was issued in the context of an investigation commenced by the CBI in March 2015 and contains mere allegations that have not yet been tried, let alone upheld, in court. Third, none of the allegations contained in the CBI Charge Sheet relate to actions or conduct of DT. The Respondent has not explained how, as a result of the CBI Charge Sheet, *DT*'s investment (made through the acquisition of shares in Devas) would have been contrary to Indian law. For all of these reasons, the Tribunal cannot follow the Respondent's argument that the claims should be dismissed for reasons of illegality.
>
> [emphasis in original]

160 The Tribunal then considered India's three preliminary objections to the Tribunal's jurisdiction. Those were that (a) the investment had been made indirectly through DT Asia and so was not covered by the BIT, (b) DT's investment was effectively only a pre-investment expenditure, and (c) the BIT was inapplicable because the dispute concerned India's essential security interests. Much as this court and the Swiss Federal Supreme Court have done, the Tribunal rejected all three arguments on their merits. We note in passing that there was a belated application by India on 14 March 2017 to introduce the *travaux* underlying the India-Netherlands BIT. The Tribunal denied that application on 20 March 2017. Having rejected the jurisdictional objections, the

Tribunal went into the question of liability and concluded that there was a breach of India's obligation of fair and equitable treatment.

161 In brief, of the four grounds raised by India as placing the parties' dispute outside of the BIT, three (indirect investment, pre-investment expenditure, and essential security interests) were argued before the Tribunal. Of India's illegality grounds, three illegality allegations (namely that: (a) DT was complicit in Devas' fraudulent misrepresentations, (b) DT's investment was contrary to FIPB approval conditions, and (c) DT's investment was contrary to India's SATCOM Policy) were not raised before the Tribunal. It is those three allegations that DT claims that India is now estopped from raising by reason of Article 186(2) of the PILA. DT also complains that India is precluded from running its "essential security interests" argument as a jurisdictional objection. We have already dealt with the substantive nature of the "essential security interests" argument (see [102]–[112] above), so there is no need for us to consider whether there is preclusion as far as concerns the re-packaging of that argument as a jurisdictional objection.

162 In our view, the failure to raise the three illegality allegations before the Tribunal has the consequence that India must be deemed to have waived the same as jurisdictional objections.

163 Article 186(2) of the PILA is analogous to Article 16(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (the "Model Law"), which applies in Singapore (by virtue of section 3 of the IAA) and states:

> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the

> appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

164 As the Court of Appeal held in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 at [51], the drafters of the Model Law intended Article 16(2) to have preclusive effect. As to the nature of this preclusive effect, in *BAZ v BBA*, Belinda Ang Saw Ean J (as she then was) contrasted the extended doctrine of *res judicata* with that of waiver. She stated (at [63]–[64]):

> 63. More importantly, in my view, the concept of the extended doctrine of *res judicata* is wholly inapplicable to a court's review of an arbitral award. Strictly speaking, the doctrine applies to preclude points in a second set of litigation proceedings on the merits of the dispute between the same parties where the points could have been brought in the earlier proceedings on the same dispute. In contrast, an enforcement proceeding or a setting aside proceeding of an arbitral award involves the *review of the outcome* of the arbitration proceedings. The court would not be concerned with the merits of the substantive claims between the parties. The points brought before the court would address the grounds for refusal to enforce or grounds for setting aside, instead of the merits of the dispute. Thus, the concept of the extended of doctrine of *res judicata*, which encourages parties to settle all their claims on their merits in one single litigation to prevent a party from being vexed by subsequent litigation, is extraneous to the role of the court in reviewing arbitral awards.
>
> 64. ***Without the extended doctrine of* res judicata*, a court can, in a proper case, dismiss an objection in a setting-aside proceeding or an enforcement proceeding on the basis that the party had plainly made a decision not to raise it before the tribunal when it ought to have done so.*** One such case is *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and others* [2000] 1 QB 288, a case involving enforcement proceedings of an arbitral award. The English Court of Appeal upheld the lower court's

> decision to disallow the application seeking leave to amend the defence to allege that the arbitral award was obtained by fraud because a number of witnesses called at the arbitration had given perjured evidence. In giving the reasoning on this point, with which Mantell LJ and Hirst LJ agreed, Waller LJ held that a party would not usually be allowed to adduce additional evidence to make good such a claim unless the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators and where perjury is the fraud alleged, the evidence was so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result (at 309). The evidence of perjury was available during the arbitration and should have been raised then, to alert the tribunal to the untruth of the evidence presented to it before coming to a decision on the merits. The evidence of perjury would have had a material impact on the decision-making of the tribunal, going towards the merits of the claim.
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> [emphasis in original in italics; emphasis added in bold italics]

165 The question is therefore not one of preclusion by estoppel, but of preclusion due to waiver. The issue is whether a party should be treated as having waived the right to raise a jurisdictional objection by failing to raise it in an arbitration. As a matter of fairness, waiver will only apply if a party was aware of the matters underlying the jurisdictional objection so that it could have objected in a timely fashion during the arbitration. As Belinda Ang J observed in *BAZ v BBA* at [59], "waiver by a party under Art 16(2) only applies if the objection was clear to the party and the party knew of the objection". Given the similarity in the wording of Article 16(2) of the Model Law and Article 186(2) of the PILA, it would be odd if the two provisions functioned differently and it has not been suggested by either party that they do function, or should be interpreted, differently. In the present context of the Arbitration, we are also fortified in our view by Article 30 of the UNCITRAL Arbitration Rules 1976, which likewise requires an objection to be made promptly.

166 India disagrees with this analysis. India submits that Article 16(2) should only be engaged when a party raises no plea at all that the tribunal lacks jurisdiction but instead participates in the arbitration on the merits. In contrast, India did not accept DT's invocation of arbitration but pleaded that the Tribunal lacked jurisdiction from the outset. In any event, Article 16(2) (India submits) is "considerably tempered" as a tribunal may "admit a later plea if it considers the delay justified". Such discretion (India suggests) may also be exercised by an enforcement court. India contends that its actions in relation to its illegality objection were justified because, when it filed its Counter-Memorial in the Arbitration in February 2015, it was still carrying out confidential investigations and had yet to uncover evidence that only came to light later. India moved to bring the CBI Charge Sheet to the Tribunal's attention as soon as it was published. The facts are now known as a result of the Supreme Court of India's conclusive ruling on DT's involvement in pervasive fraud.

167 We do not accept India's submissions.

168 It is not apparent why Article 16(2) of the Model Law or the analogous Article 186(2) of the PILA should be read as being limited to the situation where a party does not object to jurisdiction at all and simply proceeds with an arbitration. On their plain and ordinary meaning, the two provisions are categorical in requiring a party to raise an objection or plea against jurisdiction prior to defending an arbitration on the merits. If the party fails to do so, then it will be deemed to have waived the unargued jurisdictional point in the absence of valid justification. There is no reason why a party should be allowed to keep some jurisdictional objections up its sleeve, for later deployment in setting aside or enforcement proceedings if it should lose the arbitration. The *raison d'etre* of provisions like Article 16(2) is to have parties raise their jurisdictional objections at the earliest possible time: *Hunan Xiangzhong Mining Group Ltd v*

Oilive Pte Ltd [2022] SGHC 43 at [42]–[45]. They are indicative of an "up-front" or "cards on the table" approach to dispute resolution whereby a party participating in an arbitration is required to put forward its entire case on the lack of jurisdiction at the outset to enable a tribunal to rule comprehensively on all objections.

169 Nor do we think that India had good reason for holding back on the three allegations due to lack of evidence and still-ongoing investigations. As we have pointed out (at [74]–[93] above), India's illegality case against DT hinges on nothing more than a tenuous inference that DT was complicit in the fraud because it conducted due diligence and had two nominees on the Devas Board. We have queried the validity of such an inference. But, even taking India's case at face value, it is difficult to see why it could not have adduced the facts and matters said to support such an inference by the time of its Counter-Memorial in February 2015. We have seen that by the time of the Sinha Report in September 2011, all facts underlying the alleged fraud and the charges in the 2016 CBI Charge Sheet were already known. Certainly, all facts said to support the inference that we are invited to draw were already manifest. It was known that Devas and its original investors had offloaded their shares at substantial premiums to new investors. It was known that moneys had been transferred abroad. It was known that Devas lacked the technology and intellectual property rights that it claimed to have. It was known that several high-level government officials had engaged in serious irregularities and failed to observe proper procedures. It was known that the SATCOM Policy had not been observed in a transparent fashion. Yet none of these matters was deployed before the Tribunal as part of a jurisdictional objection premised on fraud and illegality that also implicated DT and its investment. All that India did was to adduce the CBI Charge Sheet, belatedly, in October 2016. But the CBI Charge Sheet was at best (as the Tribunal observed in the Interim Award at [119]) a series of allegations.

India could have (but did not) adduce the underlying facts and matters to the Tribunal (all of which had by then been reviewed on several occasions by various committees) (see [80]–[84] above) in support of a jurisdictional objection. India relies heavily on the NCLT, NCLAT and Supreme Court of India judgments as material evidence. For the reasons discussed above at [122]–[135], we disagree that the three judgments provide any evidential basis for finding that DT was complicit in fraud or that *its* investment was illegal. However, similarly taking India's case in respect of the three judgments at face value, the facts and matters underlying those judgments were available and known to India as early as the Sinha Report in September 2011. It could therefore have drawn the Tribunal's attention to those matters in support of a jurisdictional objection, but for whatever reason decided not to do so.

170 We note further in support of our reading of the effect of Article 186(2) of the PILA, the following passage from the Swiss Federal Supreme Court judgment:

> *3.2.3.3.1*
>
> It must first be noted with the Respondent [*ie*, DT] that the Appellant [*ie,* India] never argued once before the Arbitral Tribunal that Art. 12 of the BIT concerned the jurisdiction of the Tribunal. Indeed, under no. 147 of its response to the appeal, the Respondent, without being contradicted by its opponent, cites five examples, four taken from passages of the Appellant's briefs in the arbitration file and, the fifth from the opening arguments of the latter, in order to show that the Appellant has supported, from the beginning to the end of the arbitration proceedings conducted so far, that the objection inferred from the BIT clause relating to the question of the essential security interests of the host State constituted a defense on the merits which, if admitted, would preclude the application of the substantive provisions of the treaty in question.
>
> Anyone involved in the proceedings must comply with the rules of good faith (see Art. 52 CPC; RS 272). The principle of good faith, laid down for ordinary civil proceedings, is of general application, so that it also governs arbitral proceedings, both in

> the field of domestic arbitration and in international arbitration. By virtue of this principle, it is not permissible to reserve procedural grievances which could have been corrected immediately in order to raise them only in the event of an adverse outcome of the arbitral proceedings (judgment 4A_247/2017 of April 18, 2018, at 5.1.2 and the case-law cited). With regard to jurisdiction, the PILA contains, in addition, a specific provision – Art. 186(2) – based on the same principle, according to which "the objection to lack of jurisdiction must be raised prior to any defense on the merits". From this angle also, it seems difficult to admit that a party having several objections of lack of jurisdiction up its sleeve, as is the case of the Appellant, should not raise them all in the arbitral proceedings but keep one aside, only to raise it in case of an appeal against the award that has rejected the objections that were relied upon. Moreover, as early as 2002, the Federal Tribunal pointed out that, when the objection of lack of jurisdiction is raised, it must be fully reasoned, as a party may not keep arguments in reserve, for it is not for the arbitrators to seek *ex officio* whether circumstances exist unrelated to those relied on in support of an argument of lack of jurisdiction might require them to decline jurisdiction (ATF 128 III 50 at 2c/ bb/ ccc p. 61; in the same sense, see, among others: Schott/ Courvoisier, in *Commentaire bâlois, Internationales Privatrecht*, 3rd ed. 2015, no 96 to Art. 186 PILA, p. 1929).
>
> It follows from these considerations that the Appellant is precluded from raising, before the Federal Tribunal, the arguments of lack of jurisdiction of the Arbitral Tribunal in connection with Art. 12 of the BIT. …

171 In those premises, we do not think that India's failure to raise the three illegality allegations in the Arbitration was justified or excusable. In our judgment, India is to be treated as having waived its right to raise the three allegations pursuant to Article 186(2) of the PILA, which governed the Arbitration.

Conclusion on SUM 155

172 In summary, none of India's illegality grounds is tenable. Neither are its arguments on pre-investment expenditure, indirect investment, or essential security interests. India's jurisdictional objections to the Final Award being enforced are thus rejected. In our judgment, the exception to state immunity in

section 11(1) of the SIA applies and the Final Award is enforceable against India. None of the grounds for refusing to enforce the Final Award under the IAA applies. As such, we dismiss SUM 155 in its entirety.

SUM 24 – application to stay hearing of summonses

173 By SUM 24, India submits that we should stay our determination of SUM 155 and SUM 720 pending the outcome of the Swiss Revision Application. It framed its application as a case management stay, grounded upon the court's inherent jurisdiction and section 18I(1) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) (the "SCJA") (read with section 18(2) and paragraph 9 of the First Schedule to the SCJA). India says that the Swiss Revision Application has a realistic prospect of success. A stay (it is contended) will save judicial resources and avoid potentially inconsistent judgments between the Swiss and Singapore courts, as the same arguments being run before us by India are essentially also being pursued in the Swiss Revision Application. India claims only to have become aware of significant facts or uncovered evidence recently, so that it could not have raised those matters earlier. In particular, India points out that the findings of fraud by the Supreme Court of India, India's highest court, were only handed down on 17 January 2022. Within the stipulated time limit for applying for revision, India took out the Swiss Revision Application following the handing down of the SCI Judgment.

174 We are not persuaded by India's submissions.

175 First, as the Supreme Court of India noted (see [132] above), it does not find facts. Its role is constrained to considering whether the NCLT and the NCLAT erred in the application of the law to the facts as found by those two tribunals. Therefore, all relevant facts would have been known to India by

8 September 2021 at the latest, when the NCLAT handed down its judgment. The contention that India only became aware of relevant material facts or evidence through the SCI Judgment therefore does not withstand scrutiny.

176 To bolster its case, India refers to an extract from a 2021 report by Devas' provisional liquidator. According to the report, Devas Delaware contracted "to internally develop product design which will be transferred to [Devas] for use in production of satellite system to support telecom in India" and Devas Delaware was "actually retaining control" of Devas, rather than Devas controlling Devas Delaware (the subsidiary).[96] India suggests that the fraud by Devas' shareholders was thereby only revealed with clarity at that juncture, such that "the fraud was finally pieced together with the benefit of fresh evidence, leading the Supreme Court to hold that Devas' shareholders could not 'feign ignorance and escape the allegations of fraud'".[97] To this, DT argues that the 2021 report does not present new evidence, but merely observations from a provisional liquidator who had been appointed under "highly unusual circumstances".[98] Leaving the circumstances aside, we are unable to discern how the 2021 report comes anywhere near to demonstrating DT's involvement in fraud. In any event, India did not take out a revision application before the Swiss Federal Supreme Court at any point in 2021 following the provisional liquidator's report. The reality is that India's case before us and the evidence adduced in support of it have essentially remained as those that were before the Tribunal and the Swiss Federal Supreme Court. We are asked to infer DT's culpability from the slender facts that DT conducted due diligence before making its investment and thereafter had nominee directors

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96 Krishnan's 3rd affidavit at Exhibit MSK-79, pp 650 and 659.

97 India's reply submissions dated 21 June 2022 at para 11.

98 DT's written submissions dated 7 June 2022 at para 61.

on the Devas Board. As we have already explained, it is not possible to do so without more. But nothing more has been forthcoming by way of material new evidence, whether through the three judgments or otherwise.

177 Consequently, in our assessment, the Swiss Revision Application has minimal prospect of success before the Swiss Federal Supreme Court. As explained above at [150], under Article 190*a*(1)(a) of the PILA, for an applicant to succeed on revision, it must demonstrate that it became aware of significant facts or uncovered decisive evidence (which it could not have produced in the earlier proceedings despite exercising due diligence) after the relevant award was rendered. A revision application must be taken out within 90 days (excluding holidays) of a party becoming aware of new facts or evidence. India has known of the relevant facts and matters, and the evidence that it says supports the same, from 2011 onwards. For the reasons discussed at [122]–[135] above, the SCI Judgment is not fresh material evidence in respect of alleged fraud on DT's part. It follows that the threshold requirement in Article 190*a*(1)(a) has not been met.

178 For completeness, we note that there are two other grounds for revision under Article 190*a*(1) of the PILA, but India has not suggested that they are pertinent in this case nor advanced any arguments on those grounds. They are namely that the award was influenced by a felony or misdemeanour, and that a ground for challenging a tribunal member's independence or impartiality only came to light after the arbitration proceedings.

179 Second, there has been no saving of judicial resources. That is largely due to India having only belatedly issued its stay application on 17 May 2022. This is despite India being aware of the SCI Judgment since its handing down in January 2022. By the time that SUM 24 was issued, SUM 155 and SUM 720

had been fixed for substantive hearing on 30 June and 1 July 2022. The result was that this court heard SUM 24, SUM 155 and SUM 720 together.

180 Third, given our view on the minimal prospects of the Swiss Revision Application succeeding, we are also of the view that the risk of inconsistent conclusions being reached by the Singapore and Swiss courts is likewise low at best.

181 For these reasons, we decline to exercise our discretionary case management powers to stay SUM 155 and SUM 720 pending the determination of the Swiss Revision Application. SUM 24 is accordingly also dismissed.

182 At the hearing of SUM 24, India's counsel, Mr Bull, informed us that in the event of the rejection of SUM 24, India would immediately apply for leave to appeal against such refusal. Mr Bull submitted that we should not proceed to deal substantively with SUM 155 as that would render nugatory any application for leave to appeal against the refusal of a stay. We disagree. A decision on the merits of the stay application requires this court to form a view on, *inter alia*, the prospects of the Swiss Revision Application. That in turn involves consideration of counsel's submissions before us on SUM 155 so far as relevant to the prospects of the Swiss Revision Application, the two having been heard together in consequence of India's belated filing of SUM 24. Nor do we believe that any application for a stay would necessarily be rendered nugatory if SUM 24 and SUM 155 are decided together. In the worst case scenario from India's point-of-view, it would be open to India, if so advised, to appeal against the dismissal of SUM 155, apply for a stay of execution of any enforcement order in relation to the Final Award pending such appeal, and to apply to the Court of Appeal for a stay of the substantive hearing of the appeal pending the

outcome of the Swiss Revision Application. India's concern on the alleged nugatory effect on SUM 24 is thus, in our view, overstated.

SUM 45 – application to submit further evidence

183 Three weeks after the substantive hearing of SUM 155 and SUM 24 had concluded on 1 July 2022, the US District Court for the District of Columbia granted a stay of proceedings brought by DT in the US for the enforcement of the Final Award. The stay of US proceedings was granted pending the outcome of the Swiss Revision Application. By SUM 45, India sought leave to adduce the US court's stay order and the papers filed in the US stay application as fresh evidence that will assist us in deciding SUM 24. It says that the decision forms part of the circumstances of the case, which includes the "overall shape of the proceedings worldwide to enforce the Awards".[99] India notes that the US court held that a stay "avoids the possibility of expensive and duplicative litigation to unwind the arbitral award", and had observed that the Swiss Federal Supreme Court was expected to decide within six to ten months, with no possibility of appeal. In response, DT's principal argument is that the US court's decision is not relevant to the exercise of our discretion.[100]

184 Having considered the parties' submissions, we dismiss SUM 45.

185 First, the US stay application papers were available *before* the hearing of SUM 24 and SUM 155. India chose not to adduce them in connection with SUM 24 or SUM 155. Thus, the stay application papers do not constitute evidence or events that only arose after the hearing before us.

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99 India's written submissions dated 12 August 2022 at paras 6–7.

100 DT's written submissions dated 12 August 2022 at paras 8–13.

186 Second, the fact that the US court granted a stay may be a factor that we can consider in deciding whether to grant a stay of SUM 155, but the fact that a stay was granted by the US court does not, whether considered alone or in all the circumstances, necessitate that we also exercise our discretion in favour of granting a stay. Further, the reasons underpinning the US court order are not evidence of facts or matters to be considered in the exercise of our discretion on whether to grant a stay. The reasons are simply submissions advanced by India in the US proceedings which found favour with the US court. It was open to India to make similar arguments (as it did) before us at the substantive hearing of SUM 24. How the US court weighed India's arguments is not, in our judgment, pertinent to how we should exercise our discretion whether to grant a stay in light of the totality of evidence and submissions before us. Thus, in so far as India wished to adduce the US court order as evidence of the reasons underpinning the US court's decision, we found that evidence to have no relevance or probative value to our deliberations on SUM 24.

SUM 720 – application to strike out affidavit evidence

187 Finally, SUM 720 is DT's application to strike out, *inter alia*, parts of India's expert affidavit evidence on Indian law referring to the NCLT, the NCLAT and the Supreme Court of India's judgments. DT's argument was that, since the three judgments have no binding or legal effect and should not be recognised nor given weight, India's Indian law expert's evidence on the legal effect of the three judgments should be struck out as irrelevant.

188 At a Case Management Conference on 10 May 2022, we pointed out that, in practical terms, there was no need for SUM 720. The parties could simply make their submissions on the relevance or irrelevance of the Indian law

expert evidence, and we would then decide whether such evidence was material and to what extent we would accept or reject the evidence so adduced.

189 DT accepted our indication. But SUM 720 was not withdrawn and remained live, as the parties could not agree on who should bear the costs of SUM 720. In correspondence exchanged between the parties' solicitors, DT offered to withdraw SUM 720 with no order as to costs. The proposal was subject to two conditions. One was that India would not raise any technical objections on the need for a summons to make arguments on irrelevance. The other was India's agreement that, in the absence of SUM 720, this court could disregard parts of the Indian law expert evidence found to be irrelevant. India refused the conditions and insisted that DT bear the costs of SUM 720.

190 In our view, the proper course is to dismiss SUM 720 with no order as to costs, and we so order.

Conclusion

191 For the reasons detailed in this judgment, SUM 155, SUM 24, SUM 45 and SUM 720 are dismissed. DT having prevailed, there will be an order that India bears DT's costs of SUM 155, SUM 24 and SUM 45. There will be no order as to the costs of SUM 720.

192 The parties are to agree on the quantum of costs payable in respect of SUM 155, SUM 24 and SUM 45 within 14 days from the date of this judgment. If the parties cannot agree, DT is to file and serve its submissions on costs and accompanying costs schedule as per the SICC's Practice Directions within 28 days from the date of this judgment. DT's costs submissions, by way of a letter from its solicitors, are not to exceed ten pages (excluding the costs schedule and any accompanying authorities). India is to file and serve its response to DT's

costs submissions within 14 days thereafter by way of a letter from its solicitors not exceeding ten pages (excluding any accompanying authorities and, if India considers appropriate, any schedule of its costs for items corresponding to those in DT's costs schedule). DT is at liberty to respond to India's submissions within a further 14 days thereafter. DT's reply submissions are not to exceed five pages (excluding authorities). No further submissions are to be tendered by either party unless otherwise directed or permitted by the court. We will then assess DT's costs based on the parties' submissions.

S Mohan
Judge of the High Court

Roger Giles
International Judge

Anselmo Reyes
International Judge

Koh Swee Yen SC, Quek Yi Zhi Joel, Axl Rizqy and Andrea Seet Sze Yuen (WongPartnership LLP) for the plaintiff;
Cavinder Bull SC, Lin Shumin, Lee Zhe Xu and Sam Yi Ting (Drew & Napier LLC) for the defendant.
