

PCA CASE NO. 2013-09

IN THE MATTER OF AN ARBITRATION ARISING UNDER THE AGREEMENT BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS AND THE GOVERNMENT OF THE
REPUBLIC OF INDIA FOR THE PROMOTION AND THE PROTECTION OF INVESTMENTS
ENTERING INTO FORCE JUNE 20, 200 AND THE ARBITRATION RULES OF THE UNITED
NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)

Between:

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

Claimants,

and

THE REPUBLIC OF INDIA

Respondent.

DISSENTING OPINION OF DAVID R. HAIGH Q.C.

The Tribunal

Hon. Marc Lalonde, P.C., O.C., Q.C. (Presiding Arbitrator)

Mr. David R. Haigh Q.C.

Hon. Shri Justice Anil Dev Singh

A. INTRODUCTION

1. Although I concur with many of the findings and determinations in the Award, I have reluctantly concluded that I must register my dissenting opinion with respect to the determinations made by the majority on the "essential security" defence submitted under Article 11(3) of the Agreement between the Republic of India and the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments. (the **Treaty**). I propose to explain my divergent views and, in particular, to develop in some detail the relevant factual findings which, in my opinion, must be considered in order to make a proper determination of the possible applicability of Article 11(3) in this case.
2. I will, therefore, turn firstly to a review of what I consider to be the material events that preceded the decision to terminate the agreement between Devas Multimedia Private Limited (**Devas**), an Indian company, and Antrix Corporation Limited (**Antrix**), an Indian state-owned company. That agreement was entered into by the parties on January 28, 2005 (the **Devas Agreement**). On February 17, 2011, a decision taken by the Cabinet Committee on Security (**CCS**) was announced by the state Press Information Bureau under the heading, "CCS Decides to Annul Antrix-Deal".

B. FACTUAL MATRIX

3. What I consider to be material events are those which lead ultimately to the action taken by the CCS. In my opinion, for an adequate analysis of the objects or purposes of the CCS decision, this background must be well understood. My colleagues appear to agree with the position of the Respondent that,

..[a]n arbitral tribunal may not sit in judgement on national security matters as on any other factual dispute arising between an investor and a state. National security issues relate to the existential core of a State. An investor who wishes to challenge a State decision in that respect faces a heavy burden of proof, such as bad faith, absence of authority or application to measures that do not relate to essential security interests. [Award, ¶ 245].

This presumed deference for state decision making in relation to national security cannot, in my view, over-ride our duty as arbitrators to decide the issues on the whole of the evidence in this case. Although there may be instances in which a state's measures are *ipso facto* essential security matters and no further inquiry would be required to understand them, this case is not one of those instances. The narrative I will outline

shows, strongly in my opinion, that the decision of the CCS was not directed to the protection of India's essential security interests, but simply removed the S-band spectrum from Antrix for commercial use and ordered that the Devas Agreement be annulled forthwith. Annulling the Devas Agreement was momentous, but the CCS did not, at the same time, assign the "precious S-Band" to the Indian military. The decision making as to who would get to use the soon-to-be-available S-Band spectrum was left to other bodies, namely the Insat Co-ordination Committee (**ICC**) and the Technical Advisory Group (**TAG**) which was a subcommittee of it (Tr. 1008). I now turn to a recitation of the events pertinent to understanding the object of the February.17, 2011 announcement.

4. At the end of October, 2009, Dr. Radhakrishnan assumed his responsibilities as Secretary for the Department of Space (**DOS**), Chairman of the Indian Space Research Organisation (**ISRO**), Chair of the Space Commission and, not incidentally, Chairman of Antrix. His simultaneous occupying of all four positions was consistent with the conduct of his predecessors, Dr. Kasturirangan (from April 1, 1994 to August 2003) and Dr. Madhavan Nair (August 2003 to October 2009).
5. A little over a month later, on December 8, 2009, Dr. Radhakrishnan, in his capacity as Chairman, ISRO and Secretary, DOS, constituted a one-man committee composed of a former member of the Space Commission to conduct a comprehensive review of all aspects of the Devas Agreement¹. This inquiry was not publically announced nor was Devas aware of it until after the fact. Dr. Radhakrishnan commissioned Dr. B.N Suresh, who was then the Director of the Indian Institute of Space and Technology, assisted by

¹ Mr. A. Vijay Anand, Joint Secretary, Department of Space, stated in his direct testimony that, "Separately, in November 2009, shortly after I had been appointed Joint Secretary, and prior to the time that I had become aware of the details regarding defence and security needs for S-band capacity, I was informed of certain claimed irregularities in connection with the Devas Contract." [Anand Witness Statement Para. 8]. Following an internal investigation within the department, he asserted, "It was the disclosure of the allegation regarding irregularities and disturbing information resulting from the Department of Space's preliminary investigation that led to my recommendation and the decision of the Department of Space to ask a former member of the Space Commission, Dr. B.N. Suresh, to undertake a review of the Devas Contract." [Anand WS Para. 12]. Based on these assertions, there does not appear to be any basis to think the military's requirements for S-band spectrum, however described at that stage, would be addressed by Dr. Suresh in his report. As I later note, *c.f.* paragraph 17 *infra*, Mr. Anand not only never discussed military requirements with Dr. Suresh, he was not even aware of such requirements until after receipt of Dr. Suresh's report. [Anand Tr. p.p. 882-883].

Mr. SK Jha, the Director of DOS, Mr. S. Sayeenathan, Deputy Director FMO, and Mr. Parameshwara, Director of Business Development (the **Suresh Committee**), to

review and examine the legal, commercial, procedural and technical aspects related to licensing of spectrum/frequency and leasing of transponders with reference to Devas Multimedia Contract. [Joint Chronological Core Hearing Bundle (**JCB**) 133].

Dr. Radhakrishnan initially directed the committee to submit its report to him by December 31, 2009, "relating to the compliance or otherwise of the issues referred to above and remedial measures required, if any."

6. Although dated May, 2010, the Suresh Committee Report was not in fact delivered to Dr. Radhakrishnan until June 7, 2010 (**Suresh Committee Report**, JCB 146). In the meantime, several potentially related events had occurred. On January 25, 2010, confidential minutes were issued in respect of a meeting held on December 15, 2009 between Headquarters Integrated Defence Staff (**HQ IDS**), Ministry of Defence (**MOD**), the Directorate of Integrated Space Cell (**ISC**) and ISRO (JCB 134). Paragraph 7., labeled "S Band", stated various requirements in these terms:

- (i) To cater for requirements up to 2012 – 120 Carriers, 17.5 MHz. Out of which 50 Carriers are being used by the Armed Forces;
- (ii) Additional in 12th Plan – 40 MHz;
- (iii) Additional in 13th Plan – 50 MHz.

7. On March 26, 2010, ISRO wrote to the Director of Satellite Communication and Navigation Programmes (**SCNP**) and to the Managing Director of Antrix, enclosing an application received from a journalist with The Hindu Business Line, in Bangalore, seeking information under the Right to Information Act, 2005 (**RTI Act**) (JCB 138). The recipients were requested to forward the appropriate inputs before April 5, 2010. The application outlined several questions directed to the subject matter of the Devas Agreement.

8. On April 23, 2010, the Joint Director for Joint Communications Electronics Staff for the HQ IDS and MOD wrote to ISRO, enclosing a description of Satellite Bandwidth requirements for Army, Navy and Air Force up to 2022. The letter requested that the "Satellite Bandwidth requirements be factored while allocating/building capacity on

existing Satellite/future Satellites." The attached description of these requirements included bandwidth for S-Band, C-Band, Ku Band, Ka Band and UHF.

9. On May 30, 2010, The Hindu Business Line published an article under the headline, "Devas gets preferential allocation of ISRO's spectrum." (JCB 142). The sub-headline stated, "Bangalore firm had signed lease pact with space agency's commercial arm Antrix in 2005". The author wrote, among other things, that while ISRO had responded to various queries, "It, however, did not say how much spectrum has been given in the coveted S-band segment; nor how much Devas would pay for it." The article also mentioned,

Another question dogging telecom circles is whether Devas Multimedia Ltd. is using the ISRO platform to get a backdoor entry into the telecom space. Devas has only an Internet service provider's (ISP) licence. Its portfolio of services includes streaming video, audio and data as well as Web access, infotainment and social applications.

10. On June 1, 2010, The Hindu Business Line published a further article, in the form of an editorial, headlined, "Another spectrum sold on the quiet." (JCB 143). It began with the comment, "It is time the Government realised that a transparent mechanism is needed to supervise the sale of scarce assets." Directly addressing the Devas Agreement, the editorial stated,

One wonders how the MPs and the Government will respond now, although there really isn't much to think about: the 2005 agreement should be annulled and the ISRO quota should be auctioned so that the Government can raise some more much-needed money.

11. On June 4, 2010, Dr. Ashok Chandra from the Ministry of Communications & DOT wrote to Shri G. Balachandran, the Additional Secretary of ISRO, enclosing copies of the May 30, 2010 news report and the June 1, 2010 editorial published by The Hindu Business Line (JCB 144). The Additional Secretary was requested "to kindly provide your comments on the news reports immediately." For further emphasis, the letter stated, "Kindly look into the matter personally."
12. On June 7, 2010, Dr. Suresh transmitted the Suresh Committee Report to Dr. Radhakrishnan. In that correspondence, Dr. Suresh said that his report on GSAT-6 addressed "all aspects of the agreement like legal, commercial, procedural and technical..." (JCB 145). The face of the transmittal letter bears some handwritten notes from Dr. Radhakrishnan to Additional Secretary DOS, Balachandran, instructing him to

examine the Report in consultation with the Director of SCNP, the Scientific Secretary and the Joint Secretary, DOS, Mr. A. Vijay Anand, who later testified before our tribunal (Tr. 892). In addition, Dr. Radhakrishnan directed, "We need to place this matter to the Space Commission in its Agenda of 117th meeting to be scheduled for the first week of July 2010".

13. The Suresh Committee Report acknowledges that there had been a review by Dr. Radhakrishnan in December 2009 "and also during different phases of discussion". (Suresh Committee Report ¶ 12.0). At the conclusion of the Report, Dr. Suresh wrote,

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. (Suresh Committee Report ¶ 15).

Among the six recommendations in the Report, Dr. Suresh mentions,

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. (Suresh Committee Report ¶ 15. (i)).

One other recommendation should also be noted. It states,

Considering the fact ISRO/DOS has developed GSAAT 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. (Suresh Committee Report ¶ 15.(iv)).

Although the Report refers a few times to "strategic and other essential needs", there is no specific mention of national security or military requirements. I should also note that the Suresh Committee Report appears to uphold the legality of the Devas Agreement and the parties' compliance with existing Indian government policies and regulatory

requirements (see ¶¶s 6. "Approvals for GSAT 6 and GSAT-A", 7. "SATCOM Policy and use of INSAT Capacity by private service providers" and 8. "Procedure followed by Antrix during the finalisation of Devas Contract", JCB 146).

14. On June 14, 2010, Dr. Radhakrishnan received a letter from Mr. P.J. Thomas, Secretary for the Ministry of Communications & Information Technology and Department of Telecommunications (**DOT**) (JCB 149). Referring to the same two press reports from The Hindu Business Line, and quoting their headlines, "Another spectrum sold on the quiet" and "Devas gets preferential allocation of ISRO's spectrum", as well as attaching copies of them, P.J. Thomas then refers to the earlier letter from his department to the Additional Secretary, ISRO, G. Balachandran, requesting the comments of ISRO on these reports, noting that his comments were still awaited. A copy of that letter is also enclosed. P.J. Thomas concluded his letter, "In view of the above, you are requested to kindly look into the matter personally and expedite your comments."
15. On June 14, 2010, G. Balachandran sent a short letter to the managing director of Antrix, Shri KR Sridhara Murthy, asking that he kindly send immediately six copies of the Contract that had been entered between Antrix and Devas. (JCB 150). On that same day, six copies of the Devas Agreement were sent to Shri Balachandran. (JCB 151).
16. Two days later, Dr. Radhakrishnan, as Secretary of DOS sent two practically identical memoranda, one to the Secretary of DOT and the other to Shri T.K. Viswanathan, Advisor to the Law Minister (JCB 153 and JCB 154). The memoranda attached copies of the Devas Agreement and, among other things, posed two issues:
 - (i) With these two satellites blocking a significant portion of our S-band satellite spectrum, we do face crunch for accommodating our strategic needs that has emerged subsequently after signing of ANTRIX-Devas contract.
 - (ii) The satellite based Devas Multimedia services also call for terrestrial supplementation (enclosure 2) wherever there are high rising buildings (that means all major urban areas). Whether this would deny a level playing ground for other service providers using terrestrial spectrum.

Each memorandum asked the recipient almost the identical question. In the memorandum directed to the Advisor to the Law Minister, Dr. Radhakrishnan asked,

In the above context, we seek your legal opinion on whether ANTRIX-Devas contract need be annulled invoking any of the provisions of the contract in order to (i) to preserve the precious S band spectrum for the strategic requirements of the nation and, (ii) to ensure a level playing field for the other service providers using terrestrial spectrum.

17. During his testimony before the tribunal, A. Vijay Anand, Joint Secretary of the DOS confirmed that although he had met with and consulted Dr. Suresh in relation to the Suresh Committee Report, they had never discussed any military needs for the S-Band satellites that were to be leased to Devas (Tr. 883). In fact, he said he had no knowledge of any military needs for an S-Band satellite at any point prior to early June 2010 (Tr. 882). He also volunteered during his cross-examination that sometime either on June 16 or thereabouts (later he said sometime between June 7 and June 10 – Tr. 912), he had participated in a discussion with Dr. Radhakrishnan, G. Balachandran, V.V. Bhat, Member Finance, SK Das, advisor to Dr. Radhakrishnan (Tr. 912) along with Mrs. Geeta Varadhan, Director Special Projects (Tr. 913), about the memoranda that Dr. Radhakrishnan was sending to the Secretary, DOT, and to the legal advisor. He said that they also discussed how to meet the needs of the military and that this contract would come in the way of providing full services to the Armed Forces. (Tr. 901-904). There is no mention of this conversation in his witness statement. When reminded of that omission, Mr. Anand said that the meeting was not minuted (Tr. 902). He further confirmed that he had never mentioned this conversation to his lawyers, even while preparing his witness statement (Tr. 916) nor, he said, had he mentioned this conversation to Mrs. Geeta Varadhan, with whom he met while preparing his witness statement (Tr. 918, lines 1-6). He then seemed to change this testimony to say that he did mention this conversation with Mrs. Geeta Varadhan (Tr. 918, lines 7-21) and then again, that this precise meeting was not in his mind (Tr. 918, lines 22-25). He further recalled that during the conversation with his colleagues, Mrs. Varadhan was asked to look into the military's requirements and submit whatever discussions or papers there were and that she brought forward a lot of minutes in the following few days (Tr. 914-915). Despite all these details, he had to confirm that there was not a shred of documentary evidence to support what he recalled about either the initial discussions or the gathering of documents and their delivery by Mrs. Geeta Varadhan (Tr. 920).

18. On June 18, 2010, T.K. Viswanathan, the advisor to the Minister for Law & Justice, sent a 4 page memorandum to Dr. Radhakrishnan (JCB 156). The second paragraph confirms that Dr. Radhakrishnan personally discussed the matter in Mr. Viswanathan's chambers on June 16, 2010. At the beginning of the memorandum, Mr. Viswanathan wrote:

1. Secretary Department of Space is seeking legal opinion on whether ANTRIX-Devas contract need be annulled invoking any of the provisions of the contract in order to (i) preserve the precious S band spectrum for the strategic requirements of the nation and, (ii) to ensure a level playing field for the other service providers using terrestrial spectrum.

19. Paragraph 4 of the legal advisor's opinion refers to the meeting with Dr. Radhakrishnan and states:

4. During the discussion, it was told to us that after the signing of aforesaid agreement, new strategic needs have been emerged which require accommodation in our S Band spectrum. Department have to provide sufficient space/accommodation in the satellite to meet the demand for strategic needs of BSF, CISF, RPF and CRPF.

These initials stood for the Border Security Force (BSF), the Central Industrial Security Force (CISF), the Railway Police Force (RPF) and the Central Reserve Police Force (CRPF). There is no mention of the Army, Navy or Air Force in the legal advisor's opinion (JCB 156). In paragraph 11, for example, when addressing this question again, the legal advisor says, "The Central government under its sovereign functions is duty bound to take care of its strategic needs in respect of various forces like BSF, CISF, CRPF, RPF etc." Once again, there is no reference to the any branches of the military.

20. In the legal advisor's opinion, Article 7(c) of the Devas Agreement could afford a way in which to terminate the agreement. That provision sets out termination for convenience by Antrix in the event that it is "unable to obtain the necessary frequency and orbital slot coordination..." (JCB 156, ¶ 8). He further referred to the force majeure clause in Article 11 of the Devas Agreement, noting that the satellites referred to in the agreement were the property of the government and that the government and ISRO were not,

...duty bound to provide orbit slot to ANTRIX for commercial activities, especially when there is strategic requirements.

The legal advisor added,

When the Central Government/ISRO deny the orbit slot to ANTRIX in exercise of its sovereign power and function, such event may fall under

the category of Force Measure (sic) as contemplated in Article 11. (JCB 156, ¶ 11).

21. With these factors in mind, the legal advisor offered his opinion:

12. Therefore, the Central Government (Department of space) in exercise of its sovereign power and function, if so desire and feel appropriate, may take a policy decision to the effect that due to the needs of strategic requirements, the Central Govt/ISRO would not be able to provide orbit slot in S band for operating PS1 to the ANTRIX for commercial activities. In that event, ANTRIX in terms of Article 7(c) read with Article 11, of the agreement may terminate the agreement and inform M/s DEVAS accordingly. (JCB 156, ¶ 12).

22. Almost as an afterthought, the legal advisor added,

As far as the second issue relating to terrestrial supplementation and level playing field since the Department of Telecom is administratively concerned that Department may also be consulted. (JCB 156, ¶ 13).

23. For the impending 117th meeting of the Space Commission on July 2, 2010, the Additional Secretary, DOS, G. Balachandran, with the assistance of others in DOS, prepared a NOTE TO SPACE COMMISSION dated both June 30, 2010 and July 2, 2010 (JCB 160, page 1 and page 19). Certain items in this 19 page document should be highlighted:

(a) The stated purpose of the document:

1. The purpose of this Note is to (i) apprise Space Commission on certain concerns that have arisen over a contract signed between ANTRIX Corporation, a public sector unit and the commercial arm of DOS with M/s DEVAS Multimedia Pvt Limited on January 28, 2005 for lifetime lease of 90% capacity of S-band Transponders on two Satellites built by ISRO (GSAT-6 and 6A); (ii) to further apprise on the imperative demand for S-band transponders for strategic and societal applications that have emerged since signing of the above contract; (iii) to seek guidance on the prudent utilization of the S-band spectrum of 150 MHz allocated to ISRO; and (iv) further course of actions to be followed by the Department. (JCB 160, ¶ 1).

Mr. Anand, the Joint Secretary of DOS testified that the reference to "societal applications" included tele-medicine, tele-education, disaster management and the list could go on down to the village level to include agriculture, crop forecasting information, and fisheries information. He added that the list is actually endless. (Tr. 952 and 1000).

(b) Under the heading, "Requirements of Strategic Users and Societal Services for S-Band Transponders", the Note describes:

(8.1) ...the GSAT-7 Satellite and the GSAT-7S satellite, both related to the needs of the Armed Forces.

(8.2) ...the same MOD minutes referred to earlier in this narrative concerning a meeting held on December 15, 2009 (JCB 134).

(8.3) There are also demands for S-band transponders from Internal Security Agencies viz. BSF, CISF, Coast Guard and Police, and further, there are requirements projected by Indian Railways for train-tracking.

(8.4) From societal services point of view, currently the GSAT-2 (MSS) and INSAT-3C (BSS and MSS) have S-band Transponders. There are other national societal requirements for emergency communication dissemination of disaster warnings, tele-education, tele-health and rural communication.

(c) DOS's assessment of the Devas Agreement:

The Note refers to the Suresh Committee Report, implying that "the present contract had not gone through due diligence of financial and legal vetting" (JCB ¶ 13.1). It further states,

Also there are existence on record of a few anomalies that suggest that full information has not been provided to Cabinet and Space Commission; also reasonable surmises are rendered possible that Cabinet and Space Commission have been given incorrect/incomplete information also. Details follow. (JCB 160 ¶ 13.2).

What follows are a number of allegations of incomplete notes during the time of the original review and approval of the Devas Agreement, a suggestion that "proper legal vetting and proper financial due diligence are wanting" and, finally, a note that Devas

which has a large foreign equity, can assign or sell or sub-license any and all of its rights under this agreement without any approvals from ANTRIX, the security implications that can arise as a consequence, would need serious consideration.

(d) Paragraph 14.1 provided,

Considering all these facts, it was decided in the Department of Space that:

(i) in order to give priority to the demand for fulfillment of strategic requirements,

(ii) due to the opaqueness being seen in the preliminary examination of the Devas Agreement which would suggest that the non-exclusiveness to be ensured while allotting S-Band to private players was not observed; and

(iii) considering the fact that DOT had not been consulted over a service that includes terrestrial connectivity and the implications thereon including denial of a level playing field.

it was decided to request Ministry of Law and Justice to give its opinion as to how to annul the contract.

The Note records and attaches the legal advisor's opinion of June 18, 2010, describing it as "their opinion as to how to annul this contract and take further follow up action to face issues that will arise out of annulment of the contract" (JCB 160 ¶14.2). With respect to these points, Mr. Anand was asked to agree that "...a reader of this document would form a view that there were at least three reasons being given for taking a decision to annul the contract?" He said, "That's correct." (Anand TR. 975 and 976).

(e) The Note confirmed that although the DOT's advice had also been sought, it had not yet replied. Mr. Anand agreed that DOT had not responded by the time DOS had taken a decision to move forward and get advice as to how to annul the contract nor had DOT responded by the time of the Note to Space Commission. (Anand Tr. 975) As I will later show, DOT replied only after the Space Commission Meeting on July 2, 2010.

(f) Beside the heading, "Further courses of Action and Implications", the Note in paragraph 15.1 stated:

15.1 **Annulling the Contract:** Considering the need (i) to preserve S-band spectrum for national requirements in strategic sector and for societal applications, (ii) certain concerns on technical, managerial, financial and contractual aspects of ANTRIX-DEVAS contract, and (iii) issues involved in DEVAS obtaining the Spectrum License for the proposed services ...it would be inevitable to annul the ANTRIX-DEVAS contract. (JCB 160 ¶ 15.1).

After referring again to the legal advice from the Law Ministry, the Note added,

"The Department will evolve a revised utilization plan for GSAT-6 and GSAT-6A."

(g) The Note further added that the ICC (constituted in 1977) "will be reconstituted and made to function effectively. So also the TAG." (JCB 160 ¶ 15.2).

(h) Finally, the mode of operation of Antrix would be revisited and "appropriate corrections, as called for, will be implemented. (JCB 160 ¶ 15.3).

24. The Space commission was at this time made up of several significant figures in the Indian government. As mentioned earlier, Dr. Radhakrishnan was the Chairman. He was joined by Shri Prithviraj Chavan, who was Minister of State for the Prime Minister's office, Shri K.M Chandrasekar who was Cabinet Secretary and reported directly to the Prime Minister, as well as Shri T.K.A Nair, Dr. Radhakrishnan's predecessor, Shri Shivshankar Menon, the National Security Adviser, together with a number of others.
25. Agenda item 4 from the minutes of the 117th Meeting of the Space Commission (JCB 161) discloses a thorough canvassing of the Notes which had previously been prepared for the members in relation to the Devas Agreement. The minutes show that in addition to referring to the same December 15, 2009 meeting of the MOD (JCB 134), the members were cognizant that,

There are further demands for S band transponders from internal security agencies viz., BSF, CISF, Coast Guard and Police for meeting their secured communication needs. Indian Railways have also projected S band requirements for train-tracking. (JCB161 ¶ 117.6.3).

This minute is followed by this observation:

117.6.4 Commission noted that, in view of these emerging requirements, there is an imminent need to preserve the S band spectrum for vital strategic and societal applications. Besides this, there were also certain concerns on the technical, commercial, managerial and financial aspects of the Antrix-Devas contract such as, severe penalty clauses for failure/service interruptions, violation of the INSAT Coordination Committee's (ICC) guideline of 'non-exclusiveness' in leasing the capacity, the contract enabling Devas to sub-lease the capacity without any approvals – which could even give rise to security concerns, etc. (JCB 161 ¶ 117.6.4).

26. Paragraph 117.6.6 of the minutes, records:

117.6.6. Expressing specifically that the Commission is being apprised on this contractual arrangement for the first time, and further that the proposals from Department for approval of GSAT-6 and GSAT-6A also did not reflect the conclusion of such an arrangement in January 2005 itself, Commission discussed the various dimensions of the issue in detail. It was noted that Space spectrum is a vital national resource and it is of utmost importance to preserve it for emerging national applications for Strategic uses and societal applications. Given the limited availability of S band spectrum, meeting the strategic and societal needs is of higher priority than commercial/entertainment sectors. (JCB 161 ¶ 117.6.6).

27. After "detailed deliberation", the Space Commission gave the following directions:

- (a) Department, in view of priority to be given to the nation's strategic requirements including societal ones may take actions necessary and instruct Antrix to annul the Antrix-Devas contract.
- (b) Department may revive the ICC mechanism.
- (c) Department may evolve a revised utilization plan for GSAT-6 and GSAT-6A satellites, taking into account the strategic and societal imperatives of the country.
- (d) Department may also review the working of Antrix and restructure it appropriately....
- (e) Department shall take necessary internal actions on the report to be submitted by AS DOS on Suresh Committee Report and issues arising from therein... (JCB 161 ¶¶ 117.6.12 (a) to (e) and JCB 162).

28. On July 6, 2010, after the Space Commission meeting and its decisions had been taken, Mr. P.J. Thomas, Secretary DOT wrote to Dr. Radhakrishnan in reference to his earlier memorandum dated June 16, 2010. (JCB 163). Secretary Thomas made a number of observations, including: (i) the spectrum planned by DOS for strategic use is not to be shared with commercial applications (such as M/s Devas Multimedia); (iii) to date, only FM radio has been privatized by the Ministry of I & B (Information and Broadcasting).

As such views of Ministry of I & B in this regard is required to be obtained in order to maintain the level playing field. Further, if the wireless terrestrial/satellite service is to be provided under any service licence, a separate Wireless Operating Licence is required to be obtained from WPC (Wireless Planning and Coordination Wing of the DOT);

(iv) compatibility in the adjacent band with other services is required to be ensured before implementing the proposed service; (v) recently, auction of BWA (Broadband Wireless Access) spectrum in the frequency band 2300-2400 MHz

fetched Rs 12847.77 for 20 MHz spectrum on pan India basis. Therefore commensurate amount must be levied as spectrum charges for providing any commercial services including digital multimedia.;

(vi) TRAI (Telecom Regulatory Authority of India) had also recommended that spectrum other than 800, 900 and 1900 "should be auctioned"; and, finally,

...it is proposed that the issue may be discussed in the TAG meeting where representatives from DOS, DOT, WPC, Ministry of I & B and IMD are the members. It will be appropriate if a representative from Ministry of Defence is also invited to deliberate on strategic requirement. In case the matter requires decision of ICC the same may be brought before ICC. As regards the regulatory issues such as level playing field, spectrum charges and permission from Ministry of I & B for providing broadcast service by private entity may be discussed separately under the aegis of TRAI. (JCB 163).

29. Two days later, Dr. Radhakrishnan once again sought legal advice, this time from the Additional Solicitor General of India, Shri Mohan Parasaran. (JCB 164). In his correspondence to the Additional Solicitor General, Dr. Radhakrishnan attached copies of the Devas Agreement, the Suresh Committee Report, his memorandum of June 16, 2010 to the Ministry of Law and Justice, the legal opinion of the legal advisor of June 18, 2010, the Note to the Space Commission, the minutes from the 117th Meeting of the Space Commission together with two draft letters. He stated that DOS had been advised by the Space Commission to get these letters vetted by a legal expert. One draft letter was to be written by DOS to Antrix intimating that the required S band spectrum would not be available due to the nation's requirements to utilise it for strategic and societal areas. The second draft letter from Antrix to Devas was to inform them that Antrix was not able to get the relevant clearance from the government for release of spectrum and hence the agreement was terminated. (JCB 164, Flags VII and VIII).

30. The language chosen for the two draft letters is, I believe, revealing about the state of mind of Dr. Radhakrishnan. Both draft letters reference "Termination of Agreement dated 28.01.2005 ...". The first letter, drafted to go from himself to the managing director of Antrix, says, in part:

WHEREAS Government is obliged to fulfill the national requirements in strategic and societal needs of the country when utilising such S Band, Government has decided that the S band capacity made available to the Department of Space shall not be handed over to ANTRIX.

ANTRIX may accordingly inform Devas in terms of Article 7(c)(i) read with Article 11 of the said contract that the said contract is terminated. (JCB 164, Flag VII).

31. The second draft letter, which was intended to go from Antrix to Devas, says:

Government of India in the Department of Space have intimated that the S band spectrum available with the Department of Space is not being made available to Antrix for commercial purpose, hence Antrix hereby intimates Devas that in terms of Article 7(c) read with Article 11 of the Agreement signed on 28.01.2005 between Antrix and Devas is hereby terminated. (JCB 164 Flag VIII).

32. On July 12, 2010, the Additional Solicitor General of India rendered a memorandum of opinion to DOS through its Secretary, Dr. Radhakrishnan. (JCB 165). In the introductory portion of that memorandum, the author tracks the by-now familiar recitation of factual context:

However, after the signing of the said agreement, it has been realized by the Government of India that the Antrix-Devas lease agreement on GSAT-6 and 6-A would take away most of the total S band spectrum available. The S band is crucial for several strategic and societal services. The Integrated Space Cell of IDS, Ministry of Defence have projected a need for 17.5 MHz in S band for meeting the immediate requirements of Armed Forces, another 40 MHz during the 12th plan period and an additional 50 MHz during the 13th plan period. Armed Forces have also projected the need to build S bank (sic) satellite capacity through GSAT-7S, for national security related mobile communications. There are further demands for S bank (sic) transponders from international security agencies viz. BSF, CISF, CRPF, Coast Guard and Police for meeting their secured communication needs. Indian Railways have also projected S band requirements for train tracking.

In view of these emerging requirements, there is an imminent need to preserve the S band spectrum for vital strategic and societal applications. Besides this, there were also certain concerns on the technical, commercial, managerial and financial aspects of Antrix-Devas contract (sic) such as severe penalty clauses for delayed delivery of the spacecraft and for performance failure/service interruptions, violation of ICC guideline of 'non-exclusiveness' in leasing the capacity, the contract enabling Devas to sub-lease the capacity without any approvals which could even give rise to security concerns etc.

33. The Additional Solicitor General wrote,

Opinion has been sought from me as to whether Antrix-Devas contract can be annulled by invoking any of the provisions of the contract in order to (i) preserve precious S band spectrum for strategic requirements of the nation and (ii) to ensure a level playing field for other service providers using terrestrial spectrum.

He added,

The core issue which arises for consideration is as to whether there are justifiable or legal grounds existing for termination of Antrix-Devas contract.

In response to these questions and after adverting to Article 7 of the Devas Agreement,

Mr. Parasaran says,

The modus of termination has been specified in the agreement in clause 7. But I am afraid that the conditions stipulated in this clause cannot be invoked at this stage for the purpose of terminating the contract. The only other relevant provision for seeking recourse to terminate the contract under the given factual scenario viz., national needs and change in government policies, would be Article 11 of the contract, relating to 'Force Majeure'.

He then carefully reviews the force majeure provisions of the Devas Agreement. Mr. Parasaran again recites the "vastly different" circumstances now compared with those in 2005 when the contract was entered into and states,

There can be no dispute whatsoever that the Government of India is the owner of satellite spectrum space and any policy taken by the Government of India with regard to allocation and use of S bandwidth, including those which are subject matter of contractual obligations, would fall within the doctrine of force majeure, as envisaged in the very agreement between Antrix and Devas. (JCB 165).

34. The Additional Solicitor General, however, adds a note of caution to his opinion:

It is always advisable that in the present case, instead of the Department of Space taking a decision to terminate, it would be more prudent that a decision is taken by the Government of India, as a matter of policy, in exercise of its executive power or in other words, a policy decision having the seal and approval of the Cabinet and duly gazetted as per the Business Rules of the Government of India. That would give a greater legal sanctity to the decision to terminate the contract in as much as the contractual provisions expressly stipulate that for the force majeure event, to disable one of the parties to perform its obligations under the contract, the act must be an act by the governmental authority acting in its sovereign capacity. Several reasons exist to resort to this sovereign power for preserving national interest. In my view, instead of the Department of Space directing Antrix to terminate the contract, it will be advisable from a legal perspective that the direction comes from the Department of Space on the basis of a governmental policy decision, as indicated above. I have nothing further to add. (JCB 165).

35. In a letter dated July 2010, the Deputy Secretary of DOS wrote to the managing director of Antrix to say that after a response to the earlier request for information under the Right to Information Act, 2005, Smt. Madhumathi D.S., Special Correspondent, The Hindu Business Line, Bangalore had now appealed, on June 16, 2010, "...seeking information that had not been given/or given incompletely..." A copy of the appeal was attached and "urgent action" from Antrix was requested on or before July 23, 2010. Among the questions raised by the appellant journalist was a request for a copy of the Devas Agreement, as well as other inquiries about how much spectrum ISRO had allocated to Devas, how long the term of the contract was, and whether Devas had a licence to operate its commercial services. Clearly, this journalist's curiosity was not simply going to go away.
36. On July 28, 2010, Dr. Radhakrishnan received a further missive from one Dr. Ashok Chandra, identified as a Wireless Advisor at the DOT. (JCB 169). In this short

memorandum, Dr. Chandra reported current information about the TRAI guidelines for allocation and pricing of spectrum, as well as some recent auctions of spectrum, resulting in the government receiving more than "1 Lakh crores" (lakh = 100,000 and crore = 10 million). DOT was letting DOS know that, in its view, "...all future allocations are to be made through auction." Noted on the face of this memorandum, in handwriting similar to that of Additional Secretary, Balachandran, is a notation, "May kindly see for info. If approved, this may be appropriately mentioned in the Cabinet Note to be put up."

37. On August 1, 2010, India Telecom published a short article under the heading, "Law Ministry says ISRO's 60MHz spectrum-leasing deal with a private firm is illegal." (JCB 170). A brief report stated that,

The Indian Law Ministry has told the DoS (Department of Space) that it can repeal a deal wherein 60MHz spectrum was rented to a private firm approximately five years ago. The DoS had sought the government's legal division's opinion ...The Law Ministry said that the contract is not legal, adding that the government must get back the airwaves. Following the spectrum allotment, the firm—owned by an ex-ISRO executive—sold its holding to overseas investors such as Deutsche Telekom.

38. On August 10, 2010, the Financial Times published a similar article under the heading,

ISRO IN MESS OVER 'ILLEGAL' SPECTRUM SALE TO DEVAS
(MINISTRY OF LAW DESCRIBES THE CONTRACT AS ILLEGAL,
SAYS GOVERNMENT OF INDIA SHOULD TAKE BACK THE
SPECTRUM IN NATIONAL INTEREST).

Although there were some apparent inaccuracies in this reporting, it was evident that considerable adverse attention was being directed to the Devas Agreement.

39. In the meantime, Devas was endeavoring, unsuccessfully, to meet with Dr. Radhakrishnan to determine what would be the expected date for vehicle launch. (JCB 174 – Correspondence from Devas to Dr. Radhakrishnan, August 20, 2010). On August 25, 2010, Dr. Radhakrishnan's private secretary replied that he was "pre-occupied" and suggested that Devas meet with the managing director of Antrix. (JCB 175).
40. By correspondence dated September 2, 2010, from Devas to Shri T.K. Alex, the director of ISRO and a member of the Space Commission, Devas among other things, dealt with these recent press reports (JCB 177). It stated:

In the recent past we have seen several press reports that make incorrect speculations in respect of the Agreement including concerns on

preferential treatment, back door entry, and improper approvals among others. These reports are grossly inaccurate and baseless. We are deeply disappointed by these ill-informed and misleading press reports, which don't acknowledge the history and facts of the matter.

In addition, it has been reported that the Government was reviewing the Devas-Antrix/ISRO/DOS agreement and allegedly considering its annulment. We are surprised by the same, given that the Agreement has all necessary approvals and long standing collaboration with the Government in the project. We have written to Antrix and DOS/TSRO (sic), to discuss and address this and other concerns.

41. In a further letter dated October 29, 2010, from Devas to Shri T.K. Alex, and copied to the Chairman (Dr. Radhakrishnan) and other members of the Space Commission, Devas outlined a number of recent events and features of its programme. In particular, Devas offered a fairly detailed set of "Clarifications" which were obviously directed toward rebutting the recent press reports concerning the background to Devas itself, how it had obtained the contract with Antrix, its technical features, the various governmental approvals that had been sought and secured for the programme, the partnership with Deutsche Telekom and other issues surrounding S-band spectrum (JCB 184).
42. Other contacts with Indian governmental officials were pursued by Devas between October, 2010 and the end of January, 2011, including meeting with Mr. Prithviraj Chavan, the Minister of State in the Prime Minister's Office and a member of the Space Commission (Witness Statement of Ramachandran Viswanathan dated June 29, 2013, ¶¶ 183-184), Dr. Ashok Chandra, the Wireless Adviser with DOT (JCB JCB 185), Dr. Kasturirangan, former Secretary of DOS, head of the Geosynchronous Satellite Launch Vehicle (GSLV) Programme Review, V.V. Bhat, Secretary and Member Finance, DOS and Member of the Space Commission, and Dr. P.S. Goel, Member of the Space Commission. (Viswanathan, *id*, ¶¶ 185-188). There were, in addition, contacts with the new executive director of Antrix, but there was no response from Dr. Radhakrishnan. (Viswanathan, *id*, ¶¶ 188-189).
43. It will be recalled that upon receiving the Suresh Committee Report on June 7, 2010, Dr. Radhakrishnan had directed Additional Secretary Balachandran to report, with assistance from several others, on the Suresh Committee Report. Additional Secretary Balachandran submitted his report on January 9, 2011 (JCB 194). The Additional

Secretary noted in his Introduction that "immediately after" receiving instructions to make this report, he had also been asked to initiate a note to the Space Commission and,

thereafter, the draft Note to Cabinet Committee on Security regarding the same on the basis of the decision taken by the space Commission in its 117th meeting held on July 02, 2010.

He continued:

1.3 The draft Cabinet Note was submitted to Secretary on Aug.26. Thereafter, drafts modified as instructed by Secretary were submitted on Sept.25, Oct.2 and finally on [Oct.09]. The secretariat is awaiting clearance of the draft note by Secretary so that follow-up action on same viz. sending the draft Note for comments of departments of Law, Telecommunications, Finance (Expenditure). Defence may be initiated.

44. Additional Secretary Balachandran's report appears to be fairly critical of the Suresh Committee Report, noting numerous times that certain points "...could have been examined in greater detail" along with several other alleged deficiencies (JCB 194, § 3.1, § 3.2 and § 5). He further outlined a number of what he characterized as acts of commission and omission, referring extensively to a failure to observe financial due diligence in relation to the signing of the contract with Devas, serious deficiencies in procedural aspects, a lack of minutes or other forms of proof of compliance by officials in ISRO/DOS with required procedures, a deficient legal opinion, a failure to intercept the financial penalty clauses and other serious lapses. He recommended that a vigilance committee undertake a full review of all relevant papers to determine who had authored any incorrect statements, particularly in relation to draft Notes for Cabinet. The report concludes with a recommendation that termination of the ANTRIX-DEVAS contract "as ordered by Space Commission in its 117th meeting need be expedited..."
45. Devas sent another letter to Dr. Radhakrishnan on January 24, 2011, reciting recent developments and seeking an appointment. (JCB 197). This letter was not answered. (Viswanathan, *id*, ¶ 188). Devas sent one last letter to the Space Commission on February 4, 2011, seeking to procure a launch of the long-delayed GSAT-6. (Viswanathan, *id*, ¶ 189 and JCB 204).
46. In the meantime, as background to all these events, the government of India was dealing with a growing scandal in relation to serious allegations concerning the conduct of the Minister of Telecommunications, A. Raja. These allegations arose from the granting of 2G Spectrum licenses in September 2008, without the benefit of any auction.

Thereafter, the issuing of these Spectrum licenses became the subject of a probe by the Central Vigilance Committee in November 2008. By October 2009, the Central Bureau of Investigation (CBI) registered a case to investigate which was followed by searches of the Department of Telecommunications and, finally, in November 2010, the resignation of Minister Raja. There was a parliamentary uproar over these events. In December, the former minister, Raja, was questioned by the CBI and again in January, 2011. On February 2, 2011, Mr. Raja along with the former Telecommunications Secretary, Siddhartha Behura, as well as Mr. Raja's former personal secretary, R.K. Chandolia, were arrested by the CBI in connection with what had become known as the 2G Spectrum case. (JCB 200, JCB 201, JCB 202, JCB 201 and JCB 203).

47. Four days later, on February 8, 2011, Dr. Radhakrishnan spoke at a press conference. A verbatim transcript of his remarks was taken from the CNN report (JCB 206). Although his comments are lengthy, given their pertinence to the issues in this arbitration proceeding, I propose to quote them relatively fully. Dr. Radhakrishnan made the following opening statement:

Dr. Radhakrishnan: Thank you very much and good evening to all friends from the media. We have with us Dr. Kasturirangan, Member Science, Planning Commission and former Chairman ISRO, Secretary, DOS. We consider it appropriate and timely to convey to you certain facts about the Antrix-Devas contract that is currently under discussion. You would recall that yesterday the Department of Space had put out a press note which essentially sets and clarifies that the agreement entered into by Antrix, the commercial arm of ISRO and Messrs Devas on January 20, 2005 is already under review by the Department of Space and the government will take whatever steps are necessary to safeguard public interest and a decision on the matter is likely to be taken soon.

This morning, you would have also seen a statement issued by the spokesperson of the Prime Minister's Office. It also clarifies that no decision has been taken by the government to allocate space segment using S-band spectrum to Antrix or Devas. Hence, the question of revenue loss does not arise and any such reports are without basis in the facts.

Now, let me spend a few minutes to just briefly describe the contract and the kind of review that the Department of Space instituted since December 2009. What was the decision of the Space Commission in July 2010 and subsequently what we have been doing to get the necessary formalities, consultations with the concerned agencies?

Basically, the contract between Antrix and Devas Multimedia is for a new and novel service called digital broadcast audio service using the S-band spectrum. In India, we have been using the S-band spectrum for the

INSAT satellites from the early 80s and at some point of time for those broadcasting services, we migrated from S-band to KU band.

...

The second part of it is the S-band spectrum has several advantages and there was an emerging strategic requirement for the S-band spectrum in the country, which became very evident in 2009 and there was specific requirements for the country's national agencies. So, in the year 2009 itself, specifically on December 8, 2009, the Department of Space decided to have a comprehensive review on the Antrix-Devas contract and also on how to meet the emerging strategic requirements of the country taking note of the fact that ISRO had been allocated a bandwidth 150 MHz in the S-band from three orbital locations.

This review process was then carried out and we took up the matter to the Space Commission, which in July 2010 made a few decisions. One of the decisions was there is a high priority for the country's strategic requirements and the societal applications which have to be met using the S-band spectrum that is in the possession of ISRO and we also decided to take actions to annul the contract that we had entered, that Antrix had entered with Messrs Devas Multimedia and also to ensure that the GSAT and GSAT 6A satellites are made and then used to meet the strategic requirements. This was a proactive action taken by the Department of Space as part of our internal review process and the action started in December 2009.

Subsequent to the decisions taken by the Space Commission, of which the Secretary Space is the Chairman and we have very senior members in the commission, we started necessary actions for terminating the contract which required extensive consultations with the concerned agencies in the government. Department of Telecommunications, Department of Law and Justice, all included. The idea is to ensure that a contract that has been entered into has to be now terminated without causing much of embarrassment and damage and financial loss to the government. We had to go through that process and we have been going through that process and soon we expect to complete that process. So, I thought I should bring out this part of it.

48. Following this opening statement, Dr. Kasturirangan made a short statement and the two gentlemen then responded to questions from the journalists present at this press conference. I will reproduce only a few of Dr. Radhakrishnan's answers to questions from the press:

Dr. Radhakrishnan: No, in December 2009, specifically on 8th December 2009, I instituted a committee with a former member of the Space Commission to have a comprehensive review of all aspects of it.

Bhupendra Chaubey: And what was the conclusion of that committee?

Dr. Radhakrishnan: Conclusion was the reason for taking up the subject to the Space Commission.

Bhupendra Chaubey: And was this conclusion conveyed to the Prime Minister. The point that I am getting at is just this. Was the Prime Minister aware of what was really happening with this contract sir?

Dr. Radhakrishnan: See, the contract is finalized by the Antrix Board and that stops here. I took up the matter to the Space Commission and subsequently I required decisions from the government for which I have approached the Prime Minister who is our Minister recently after the consultative process that I had to go through within the government and that is how the Prime Minister's Office, they have conveyed today that this process is on.

In response to another question, Dr. Radhakrishnan said:

But, when you have to terminate a contract, it is very complex and that is the process that we are going through. What are the provisions available in the contract for such a termination, what are the reasons that have to put there, what are the kind of implications of such a termination, all this have to be understood and there are two parties involved and we have to ensure that the government finally does not incur damages in this.

So, this is the process that we have taken up subsequent to. So, when you talk about this a few months, seven months, it is not dilly-dallying, it is application of our minds, applications of the concerned institutions, agencies in the government. This is the first part of it.

Later, Dr. Radhakrishnan said,

As on date as of now, the contract is not terminated, the process for termination is on. The decision to terminate by the Space Commission was taken in July 2010 and we are going through the process of consultations required for this process.

In part of another answer to a press question,

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

Pallava Bagla: But force majeure....

Dr. Kasturirangan: No, I don't think there is finality of how we want to do this. This is under study. What is the best option....

Further on, Dr. Radhakrishnan said:

The 2010 review by the Space Commission and the internal review process that went through between December 2009 and July 2010 indicated as you put it, that there is a large national requirement for

strategic applications and societal services and we need to give obviously priority for such services.

49. As its lead into the press conference by Dr. Radhakrishnan, the report by CNN stated:

The top story we are tracking this hour. The government latest spectrum controversy. The Prime Minister's Office has dismissed reports that it incurred losses in the allocation of S-band spectrum by the ISRO to a private firm. But in an internal audit report of the Department of Space exclusively assessed by CNN-IBN contradicts that claim. The PMO says there has been no decision that was taken to allocate S-band spectrum to Devas Multimedia and since there was no allocation, therefore there is no question of a revenue loss to the government as well. (JCB 206).

50. A Times of India article on February 8, 2011 (JCB 207), stated:

Another spectrum scam has hit the UPA government which is already reeling from the fallout of allegations of corruption in the underpricing of 2G airwaves sold to telecom operators. On Monday, the government scrambled to cancel what appeared to be an improper deal where a private company would have got 70 MHz of spectrum for just 1,000 crore.

Later in the report, the author claimed, "With the deal under attack, ISRO indicated it could be revoked shortly." In a statement, the department of space said,

The agreement entered into by Antrix with Devas is already under review by the department of space and the government will take whatever steps are necessary to safeguard public interest. A decision on the matter is likely to be taken soon.

51. On February 10, 2011, Dr. Radhakrishnan, in his capacity as Secretary, DOS, signed an Order constituting a High Powered Review Committee. (JCB 211) Copies of the Order were sent to Members of the Space Commission and to the PMO. The Committee Members were Shri B.K. Chaturvedi, Member, Planning Commission and former Cabinet Secretary, and Professor Roddam Narasimha, Member, Space Commission. Their mandate was to review the technical, commercial, procedural and financial aspects of the Devas Agreement, "taking into account the report of internal review conducted by the Department of Space." More particularly, the Committee was to suggest corrective measures and to fix responsibility for lapses, if any. The Order also directed that the High Powered Committee would be "serviced by" DOS and "shall submit its recommendations to the Prime Minister, as Minister-in-charge, within one month." (JCB 211, § 4).

52. Also on February 10, 2011, Devas wrote to the Prime Minister to express "deep concern and anguish over the recent press reports" about the Devas Agreement and to rebut any suggestion of impropriety. (JCB 210). Among the points raised in this letter, Devas stated that until Dr. Radhakrishnan's remarks at the press conference on February 8, 2011, it had not been informed that the Devas Agreement was under review.

On the contrary Devas was repeatedly assured that the delays in delivery of the satellite capacity were only on account of technical issues. (JCB 210, page 4 of 5).

The next day, Devas had its legal advocates contact Dr. Radhakrishnan (JCB 212). After reciting a litany of prior events, the letter demanded payment of US\$5 million (in INR terms) for delayed Delivery under the Devas Agreement. Devas also wrote directly to Dr. Radhakrishnan that same day, February 11, 2011 to give notice that his reported remarks during his press conference breached their agreement. Other allegations of being misled and falsely induced to forebear were also expressed.

53. On February 11, 2011, The Hindu published a relatively full account of the legal opinion of the Additional Solicitor-General on "the Antrix-Devas deal." (JCB 213). The news report contained several full paragraph quotations from the opinion that had originally been provided to Dr. Radhakrishnan on July 12, 2010 (JCB 165). In introducing the quoted part of the opinion, The Hindu stated:

The core of the legal advice is to invoke force majeure to terminate the agreement, with the direction coming from the Department of Space on the basis of a decision 'taken by the Government of India, as a matter of policy, in exercise of its executive power or in other words, a policy decision having the seal and approval of the Cabinet and duly gazetted as per the Business Rules of the government of India'.

54. A further demand letter was sent by Devas on February 14, 2011 to Dr. Radhakrishnan, in his capacity as Chairman of Antrix. (JCB 216). The letter, copied to Members of the Space Commission, required a written assurance, within one week that Antrix would observe and perform the Devas Agreement.
55. On February 16, 2011, The Hindu published an account of Prime Minister Manmohan Singh's interaction in New Delhi with Editors of the Electronic Media. (JCB 218). This publication appears in the form of a transcript, including the Prime Minister's opening remarks as well as his responses to questions put to him by journalists. Most of the subject matter seems to be related to the recent arrest of the former Minister of

Telecommunications, Mr. A. Raja, as well as a couple of his officials and the 2G spectrum case. In one of the questions, he was asked about the Devas deal, delayed action and possible backroom talks in the PMO. The Prime Minister's answer was quite lengthy. I will quote most, but not all of it, as follows:

There have been no backroom talks. I think I have not met anybody myself and the decision of the Space Commission to annul the deal was taken on 2nd July 2010. Space Commission took a number of decision of which annulment of the contract was one of them. The Dept of Space was asked to take action on all the five decision points that emerged from the Space Commission meeting. The issue of how to annul the contract required consideration by legal experts and the Law Ministry was consulted. A decision had to be taken on whether to annul the contract using article 7(c) or Article 11 or both read together. Eventually it has been decided that the Government should take a sovereign policy decision regarding the utilization of Space Band capacity which uses S Band spectrum having regard to the country's strategic requirements.

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

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

After describing a meeting with the German Minister of Foreign Affairs and certain meetings between Devas and the Department of Space, ISRO and Antrix, the Prime Minister continued:

The fact is the contract was not operational in any practical sense and there was no question of diluting in any way the recommendations of the Space Commission. All the consultations are now almost complete. The Ministries concerned have all had the opportunity to express their views as is required before having policy decisions taken by the Government at

the level of the Cabinet, and also because this issue concerns many other Ministries apart from the Dept. of Space. These include Dept of Telecommunication, Defence, Home, Finance, and Law. The matter is expected to be put before the Cabinet Committee on Security for its final decision. That's the state of the affairs. There have been no effort in the Prime Minister's office to dilute, in any way the decision taken by the Space Commission in July 2010. On that I would like to assure you and through you I would like to assure the country.

56. On February 16, 2011, the same day as the Prime Minister's interaction with the editors of the electronic media, the "NOTE FOR THE CABINET COMMITTEE ON SECURITY" was delivered. (JCB 219). The subject line referred to

Annuling the Agreement for the LEASE OF SPACE SEGMENT CAPACITY ON ISRO/ANTRIX S-Band SPACECRAFT BY DEVAS MULTIMEDIA PVT Ltd.

The purpose of the Note was expressed in this way:

The purpose of this note is to seek approval of Cabinet Committee on Security for Annuling the "AGREEMENT FOR THE LEASE OF SPACE SEGMENT CAPACITY ON ISRO/ANTRIX S-Band SPACECRAFT BY DEVAS MULTIMEDIA PVT Ltd" ...in view of priority to be given to nation's strategic requirements including societal ones.

57. What follows this introduction is a 24 page document with some 13 Annexes. Under the heading, "S-BAND SPECTRUM FOR STRATEGIC AND SOCIETAL SERVICES", the Note sets out a description, as follows:

19) The GSAT-7 Satellite being built by ISRO for Indian Navy with launch targeted in mid-2011 has S-band transponders for MSS applications with 15 MHz band width each for up-linking and down-linking. Further, Armed Forces and ISRO are finalising configuration of a S-band multibeam Satellite GSAT-7S, for national security related mobile communications.

20) The integrated Space cell of Integrated Defence Staff, Ministry of Defence have projected, in December 2009, need for a bandwidth of 17.5 MHz in S-band for meeting the immediate requirements of Armed Forces; another 40 MHz during the 12th plan period; and an additional 50 MHz during the 13th plan period.

21) There are further demands for S-band transponders from internal security agencies viz. Border Security Force, Central Industrial Security Force, Central Reserve Police Force, Coast Guard and Police for meeting their secured communication needs.

22) Indian Railways have also projected S band requirements for train-tracking. In view of these emerging requirements, there is an imminent need to preserve the S band spectrum for vital strategic and societal applications.

58. The Note sets forth in considerable detail the whole history of events beginning with the constitution of the Suresh Committee in December 2009, the consultation with the Department of Law and Justice in June, 2010, the Note for the Space Commission and the substance of the 117th Meeting of the Space Commission on July 2, 2010. The decision of the Space Commission in relation to annulling the Antrix-Devas Agreement is set out verbatim. The Note then reviewed the opinion of the Additional Solicitor-General, the recent constitution of the High Powered Committee and turned, finally, to what are called, "INTER-MINISTERIAL CONSULTATIONS". These notes reflect the views of various ministries on the draft note to the CCS which had previously been circulated. Two of these ministerial notes are especially relevant to the issues in this arbitration. One is from the Ministry of Defence and the other is from the Ministry of Telecommunications. I propose to review each of them.
59. The response of the Ministry of Defence is recorded in paragraph 44.2 of the Note, followed by "Comments of DOS". I reproduce those here:

44.2) Ministry of Defence: The Ministry has not raised any objection to the proposals contained in the draft Note.

The Ministry has indicated that there is a requirement of S Band capacity for strategic uses which is already addressed in this Note. It has also been stated that the Defence Services have extensive existing as well as planned usages in the S-Band. The barest minimum requirement of Services is projected as 120 MHz. Further, they have also suggested that any planned release of S Band capacity may be done in consultation with Ministry of Defence/Services. A copy of the communication received from the Ministry is placed at **Annexure-8 (Page 128)**.

Comments of DOS: The comments/suggestions in respect of allocation of S Band capacity are noted and would be placed before the INSAT Co-ordination Committee and the Technical Advisory Group, which are empowered to take decisions in the matter.

60. The response of the Ministry of Telecommunications is recorded in paragraph 44.3 of the Note, followed by "Comments of DOS". I reproduce those here:

44.3) Ministry of Telecommunications: The Ministry has not raised any objection to the proposals contained in the draft Note.

However, they have made a number of suggestions in respect of the usage of the S Band and recommended that the present and future strategic requirements for national security related mobile communications and societal applications may be discussed in the meetings of the INSAT Co-ordination Committee (ICC) where representatives of Department of Space, Department of

Telecommunications, Ministry of Information and Broadcasting, Ministry of Finance, Department of Science and Technology and even Ministry of Defence could be invited to attend. A copy of the communication received from the Ministry is placed at **Annexure-9 (Page 129-131)**.

Comments of DOS: The comments/suggestions in respect of allocation of S Band capacity are noted and would be placed before the INSAT Co-ordination Committee and the Technical Advisory Group, which are empowered to take decisions in the matter.

61. Annexure 9 to the Note contains a letter to Dr. Radhakrishnan dated February 11, 2011, signed by R. Chandrasekhar, Secretary DOT, as well as comments from DOT on the draft note for the CCS. From the letter, it appears that the draft Note for the CCS was sent only on February 9, 2011. DOT responded:

The Draft Cabinet Note has been examined and DoT is of the view that utilization of S-band shall be considered by ICC and Technical Advisory Group (TAG) as per the provisions of Radio Regulations of ITU and National Frequency Allocation Plan (NFAP).

Further detailed views were attached to this letter in the form of an Annex. I reproduce two of those views from DOT:

Para. 18. (This paragraph in the Note sets out a detailed description of the S-Band spectrum held by ISRO) DOT says:

It is true that 80 MHz in the frequency band 2555-2635 MHz for BSS and 70 MHz in the frequency bands 2500-2535/2655-2690 MHz for MSS have been coordinated with ITU. However, WPC Wing does not have any information on strategic requirements of Defence Services, Indian Railways and Safety services as stated in the para. Therefore, the usage of this band (150 MHz) needs to be discussed and decided in INSAT Coordination Committee (ICC).

It should be noted that the WPC Wing is the body that is in charge of frequency management in India. (Anand Tr. 1013).

Para. 19 – 22 (These paragraphs in the Note set out supposed requirements for S band, including defence and other societal ones). DOT says:

The present and future strategic requirement for national security related mobile communications, Central Reserve Police Force (CRPF), Border Security Force (BSF), Central Industrial Security Force (CISF), Police and Societal applications are required to be discussed in ICC meetings where representatives from DOS, Department of Telecommunications, Ministry of I & B, Ministry of Finance, Department of Science & Technology. In this case Ministry of Defence could also be invited to participate in the meeting.

62. At the end of the Note for the CCS, Dr. Radhakrishnan set out the "APPROVAL SOUGHT FROM THE CABINET COMMITTEE ON SECURITY" in the following terms:

45.1) Taking note of the fact that government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for the allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix for commercial activities including for those which are the subject matter of existing contractual obligations for S Band.

45.2) In the light of this policy not providing orbit slot in S Band to Antrix for commercial activities, the "Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd." entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith.

46) Further, Department of Space may take action to implement the decisions of the Space Commission referred to in paragraph 42 of the Note.

63. As noted at the beginning of my dissent, the CCS did decide to annul the Devas Agreement in exactly the terms proposed in the Note to the CCS. On February 17, 2011, the Press Information Bureau for the Government of India issued a release, (JCB 220), as follows:

CCS Decides to Annul Antrix-Devas Deal

Cabinet Committee on Security (CCS) has decided to annul the Antrix-Devas deal. Following is the statement made by the Law Minister, Shri M. Veerappa Moily on the decision taken by the CCS which met in New Delhi today:

Taking note of the fact that Government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix for commercial activities, including for those which are the subject matter of existing contractual obligations for S band.

In light of this policy of not providing orbit slot in S Band to Antrix for commercial activities, the "Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd." entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith.

64. On February 23, 2011, the Deputy Secretary of DOS wrote to the Executive Director of Antrix, (JCB 221) as follows:

I am directed to convey that, on account of increased demand for allocation of spectrum for national needs, such as Defence, para-military forces, Railways and the country's strategic requirements, the Government will be unable to provide orbit slot in S-Band to Antrix for commercial activities including those which are the subject matter of existing agreements. Consequently, Antrix would be unable to lease any transponders in the S-Band.

In the light of the above, the "Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd." executed by Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith.

You are hereby directed to take necessary actions immediately and report compliance.

65. Accordingly, on February 25, 2011, the Executive Director of Antrix duly wrote to Devas (JCB 223) to say:

The Central Government has communicated that it has taken a policy decision not to provide orbital slot in S-Band to our Company for commercial activities including those which are the subject matter of the existing agreements.

In accordance with Article 7(c) of the Agreement, it is declared that Antrix is unable to obtain the necessary frequency and orbital slot coordination as stipulated in the Agreement.

Without prejudice to the inability expressed under Article 7(c), notice of force majeure as defined in Article 11, is expressed. The policy decision of the Central Government acting in its sovereign capacity is the event of force majeure which has occurred on 23rd February 23, 2011. The force majeure commenced on 23rd February 2011. The scope and duration of the said decision cannot be anticipated. It is likely to be indefinite. It is not possible for Antrix to take any effective step to resume the obligations under the Agreement. The event of force majeure is beyond the reasonable control of Antrix and is clearly covered by Article 11(b) of the Agreement and, in particular, 11(b)(v) "...act of governmental authority in its sovereign capacity...". Any possibility of resumption of obligations by Antrix under the Agreement stands excluded. The subject Agreement, ...therefore, is terminated with immediate effect.

66. Following the decision of the CCS, on February 17, 2011, there were a number of further letters between Devas and Antrix which do not seem particularly pertinent to our issues. There were also a number of other events, however, which did reflect what had and what had not been decided by the CCS.

67. In March 2011, the GEOSAT Programme Management Office had prepared an agenda item described as "GSAT-6 Potential Usage". (JCB 225). From that material, it is evident that GSAT-6 could be considered for any number of possible uses, including "Army/Navy/Air force/BSF/Police" as well as Coast Guards and Railways.
68. On April 12, 2011, K.M Chandrasekhar, Cabinet Secretary as well as Member of the Space Commission, rendered a written report to the Prime Minister. (JCB 229). Secretary Chandrasekhar had been asked to review the report of the High Powered Review Committee composed of B.K. Chaturvedi, a former Cabinet Secretary, and Professor Roddam Narasimha, a member of the Space Commission, which had reported on March 12, 2011 (JCB 227). Mr. Chandrasekhar noted that the "ICC met 78 times between 1978-2004; it has not met since." (JCB 229, §3). Having regard for the various criticisms directed to the process by which the Devas Agreement had been approved and entered into, Mr. Chandrasekhar said,

[t]he responsibility for approving an agreement with major financial and commercial weaknesses lies with Secretary, DOS and Member (Finance), Space Commission, who have the responsibility to oversee financial matters. (JCB 229, § 11 iv).

He noted the High Powered Review Committee's recommendation that,

Since the launch of GSAT 6/6A is likely to be delayed, the orbital slot earmarked for these satellites, which expires in May 2011, should be renewed so that it is not lost forever.

And further noted their recommendation that,

An expert group should be set up (either under Chairman, TRAI or Secretary, DoS) to develop strategies for long term efficient use of orbit-spectrum resources, including for mobile multimedia services. (JCB 229, § 12).

69. Among his conclusions, Mr. Chandrasekhar noted several concerns, including that 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 578 crore as premia as against a modest share capital of 18 lakhs.

He continued,

On the other hand, since the agreement has now had to be cancelled on account of reasons related to non-transparence and one-sided skew in

risk sharing arrangements, ISRO/DOS are left with a satellite (on which a sum of nearly 250 crore has been invested till date) which has no immediate commercial application. Moreover, there is also the impending danger of a lawsuit by Devas and its promoters, where damages up to US \$ 10 million can be claimed for non-delivery of the satellite. (JCB 229, § 36 vii and viii).

70. Mr. Chandrasekhar proposed that the Cabinet Secretariat would issue a notification re-constituting the ICC, composed of various Departments, to be represented at the level of Secretaries. These would include DOS, Department of Expenditure and Economic Affairs, Ministry of Information and Broadcasting, DOT, Planning Commission, MOD, and, Department of Science and Technology. Chairman of TRAI could be asked to nominate a suitable representative of requisite seniority on the ICC. And finally, concerned Additional Secretaries/Joint Secretaries in the Prime Minister's Office and Cabinet Secretary could also be included. (JCB 229, § 45). He recommended that,

The re-constituted ICC may be asked to urgently consider the various uses of the "S" band currently available with the DoS and recommend strategies for suitable utilization thereof. (JCB 229, § 46).

Secretary Chandrasekhar's report concluded:

The aforesaid recommendations are being submitted for the kind consideration and further directions of the Prime Minister.

The Prime Minister's mark is noted following the signature of the author, indicating that he had received this report.

71. During his cross-examination, Joint Secretary, DOS, A. Vijay Anand confirmed that the Prime Minister must have received this document. (Tr. Anand 1057-1058). He further confirmed that the ICC was in fact reconstituted and, at the date of the hearing in September 2014, continued to debate the use of the S-band. (Tr. Anand 1059). In his re-examination, Mr. Anand was briefly shown a Report of INSAT Coordination Committee (ICC) Sub-Committee on S-band Utilization Plan (JCB 269). This report confirms:

1. Introduction

ICC-72 during its meeting held on July 27, 2012 constituted the ICC Sub-Committee to prepare S-band Utilization Plan (2500 MHz – 2690 MHz) with the members from Department of Space (DOS), Department of Telecommunications (DOT), Ministry of Defense (MOD) and Telecom Regulatory Authority of India (TRAI).

The committee had three meetings (Nov 16, 2012, Jan 18, 2013 and March 08, 2013) to discuss and finalise the task assigned. Members participating in the meetings are attached in Annexure – 1.

2. Deliberations

Members of the committee deliberated current and future usage of S-band (2500 MHz – 2690 MHz) in the country. After the first meeting, attempts were made to prepare a draft report. However consensus could not be reached and members provided separate inputs to the Sub-Committee.

(a) DOS/ISRO (enclosed in Annexure – 2)

(b) WPC/DOT (enclosed in Annexure – 3)

(c) MOD (enclosed in Annexure – 4)

(d) TRAI (enclosed in Annexure -5)

While DOS and MOD is in favor of using 80 MHz of S-BSS and 70 MHz of S-BSS for satellite based services, WPC/DOT and TRAI is not in agreement with the approach. The committee could not converge on the final recommendation with regard to the utilization plan and use of S-band by terrestrial and satellite services.

3. Conclusions

Opinion of each Department/Ministry is attached as an Annexure and is submitted for the consideration of ICC for further directives.

72. Mr. Anand was also shown a copy of a Note to the Space Commission prepared on March 28, 2014 in contemplation of a meeting of that body on April 12, 2014. (JCB 287). The purpose of that note was to seek the approval of the Space Commission for revised costs estimates for GSAT-6 and GSAT-6A and revised utilization plans for GSAT6/6A for "strategic/societal applications". In ¶ 4.1, the author states:

Space Commission had deliberated on the requirement of S-band satellite based services for strategic and societal purposes including Defense, Para military Forces and Indian Railways during its 117th meeting held on 2nd July 2010. (para 117.6.3 in Appendix-A) and accordingly directed the Department to evolve a Revised utilization Plan for GSAT-6 and 6A satellites. (JCB 287).

73. On May 16, 2014, in his capacity as Secretary to the Commission, Mr. Anand wrote to the members of the Space Commission with the minutes of the 128th Meeting held on April 12, 2014. (JCB 288). In his introductory remarks to that meeting, the Chairman, Dr. Radhakrishnan, reported that,

...there is an issue of spectrum (BSS) for GSAT-6/6A. DoT wants ISRO to vacate the spectrum and auction it. The subject matter was discussed in EGoM (Empowered Group of Ministers) and ISRO was asked to provide S-BSS usage to DoT. S-BSS utilization plan is being addressed by a ICC Sub-Committee.

Later comments reported in those minutes reflect that DOS would be proposing a different revised plan, utilising

...the space segment capacity of GSAT-6 and GSAT-6A to meet the communication needs (Broadcast and Mobile Applications) of strategic sector including Defense, Paramilitary forces and societal sector including Disaster Management Support and Indian Railways. (JCB 288, ¶ 128.6.1).

74. In his Supplemental Direct Testimony, dated June 30, 2014, Mr. K. Sethuraman, Associate Director, Indian Space Research Organisation (ISRO), described the differences between DOS and DOT with respect to the potential use of the S-band capacity that was now available after nullification of the Devas Agreement. After referring to the impasse between those two ministries, in particular, he stated, in part,

Since ultimate decisions in India are reached by consensus where possible, and since the concerned agencies in this case have been unable to reach a consensus, the resolution of the question of whether the S-band will be used for satellite services or terrestrial services will be finally decided in due course by action at a higher level within Government. (Sethuraman, 2nd, ¶ 11).

75. Although the Tribunal was made aware of other on-going developments in relation to the debate within India as to how the S-Band capacity formerly committed to the Devas Agreement might be assigned and used, I do not consider those developments to be relevant in any way to the determination of what was decided by the CCS on February 16, 2011. The events I have described that followed that date are relevant, in my opinion, only to the extent that they cast light upon what was and what was not decided by the CCS on that occasion. The ultimate outcome of that debate, particularly the on-going disagreement between DOS and DOT, does not afford us any additional insight into the nature of the CCS decision. At best, such information would tell us who putatively won the debate, an event that would be completely separate from and, in my view, unrelated to the CCS action, itself.

C. THE "ESSENTIAL SECURITY INTERESTS" PROVISION

76. The Respondent's Statement of Defence says, in part,

The record shows that, notwithstanding Claimant's allegations, there have been competing demands for S-band capacity from the military and other security agencies since even before the Devas Contract was entered into. Those demands continued to escalate until they were crystallised in December 2009, after extensive discussions among all governmental departments concerned demonstrating that, given the limited S-band spectrum available to India, there was no way of satisfying the national security needs of the nation if the Devas Contract were to proceed. (Statement of Defence, ¶ 7).

77. The Respondent says that by virtue of Article 11(3) of the Treaty,

...the host State is entitled to take measures directed to the protection of its essential security interests without incurring responsibility under any substantive provision of the Mauritius Treaty otherwise providing protection to investors. (Statement of Defence, ¶ 76).

78. Article 11(3) of the Treaty provides:

(3) The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pests and animals.

79. I concur with what appears to be the opinion of my colleagues that this provision is not self-judging. (Award, ¶ 242). In my view, to preclude a determination by the Tribunal on whether the defence pleaded has been proven, Article 11(3) would have to contain express language to that effect. It plainly does not do so. Article 31 of the Vienna Convention on the Law of Treaties provides that a treaty

shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

In the absence of any wording indicating that the propriety or legality of invoking Article 11(3) is for the state alone to decide, I would hold that this clause is not self-judging.

80. Moreover, Article 8 of the Treaty allows an investor to submit "any dispute" to arbitration. In this case, the possible applicability of Article 11(3) is disputed. Accordingly, I would find that it is for this Tribunal to decide, on a proper evaluation of the evidence in this case, whether the actions of the CCS on February 17, 2011, annulling the Devas Agreement, were "directed to the protection of" India's "essential security interests...".

81. My colleagues have concluded that upon examining the announced decision of the CCS in the form of a press release and statement by the Law Minister on February 17, 2011,

(JCB 220) they can discern "a mix of objectives" (Award ¶ 354). The majority continue with their determination by stating that,

...the Tribunal has no difficulty concluding that the reservation of spectrum for the needs of defence and para-military forces can be classified as 'directed to the protection of its essential security interest', coming under the exclusion covered in Article 11(3) of the Treaty; however, the same cannot be said when it comes to taking over the spectrum allocated to the Claimants for 'railways and other public utility services as well as for societal needs, and having regard to the country's strategic requirements,' as stated in the CCS decision. (Award ¶ 354).

82. With great respect, I must disagree with this conclusion. Firstly, even *prima facie*, the press release announcing the CCS decision shows that what that body decided was that it would not be able to provide an orbital slot in S band to Antrix for commercial activities and, accordingly, the Devas Agreement "shall be annulled forthwith." What was not decided was how to allocate the now about-to-be available S-band. While I accept, for the sake of argument, my colleagues' view that defence and possibly para-military forces would ordinarily be the sorts of interests to which concerns for a state's essential security could be directed, in this case the CCS stopped short of reserving the S-band for any of the various potential users, including specifically defence or para-military forces. Thus, the wording of the announcement of the CCS decision is plain that the CCS did not decide to reserve the S-band for the military or para-military forces. That body did not reserve the S-band for anyone, but instead referred the determination of that issue to the soon-to-be revived ICC and TAG.

83. Confirmation of what the CCS was focussing its attention on can be found in the NOTE FOR THE CABINET COMMITTEE ON SECURITY (JCB 219). The subject line of that Note says, plainly:

Subject: Annuling the "AGREEMENT FOR THE LEASE OF SPACE SEGMENT CAPACITY ON ISRO/ANTRIX S-Band SPACECRAFT BY DEVAS MULTIMEDIA PVT Ltd."

The Note itself states that its purpose "is to seek approval of Cabinet Committee on Security for Annuling..." the Devas Agreement "in view of priority to be given to nation's strategic requirements including societal ones." (JCB 219, ¶ 1).

84. Likewise, the approval sought from the CCS at the end of the Note, which is ultimately reflected almost verbatim in the Law Minister's subsequent press release, purports to recite a variety of broad grounds for the change in policy by which orbital slot in S band

can no longer be given to Antrix for "commercial activities". (JCB 219 ¶ 45.1). Based on no longer "providing that orbital slot in S band to Antrix", the CCS is asked to direct that the Devas Agreement "shall be annulled forthwith". It is quite clear that the CCS did what the drafters of the Note asked it to do, that is, to decide as a matter of policy, that the S-band spectrum would no longer be available to Antrix for commercial applications and that the contract with Devas was to be annulled forthwith.

85. Beyond the formulaic public announcement of the CCS decision, I have grave doubts about relying solely upon the wording of such a press release accurately reflecting the substance of the decision of the CCS. It is important to keep in mind the broader context of these events. As the Prime Minister had noted the day before the CCS decision was announced, DOS, presumably Dr. Radhakrishnan and his Additional Secretary, G. Balachandran, had made "six revisions of the note before finally submitting it for approval." (JCB 218). This statement is corroborated by what G. Balachandran stated in his earlier report, on January 9, 2011, to the effect that the draft note for the Cabinet

was submitted to Secretary on Aug. 26. Thereafter, drafts modified as instructed by Secretary were submitted on Sept. 25, Oct. 2 and finally on [Oct. 09].

86. Throughout the period from mid-June, 2010 to mid-February, 2011, Dr. Radhakrishnan is the person who over-saw and directed the pursuit of either terminating or annulling the Devas Agreement. While he was consistent in that objective, there was no such consistency in the reasons being advanced to support such an action. Those reasons are expressed in a multitude of ways, identifying, among other things, concerns with the manner in which that contract was obtained, procedural lapses by DOS and Antrix, as well as many other general references to various potential national uses.
87. In my opinion, Dr. Radhakrishnan was at all relevant times endeavoring to ensure that he faithfully followed the legal advice he had previously received, particularly the advice from the Additional Solicitor-General. In his pursuit of his objective of ending the Devas Agreement, it was no doubt considered necessary to refer to broad public purposes, but in the end none of those purposes was specifically served by the CCS decision. My conclusion is reinforced in light of the remarks made by Dr. Radhakrishnan during his press conference on February 8, 2011. He acknowledged that, after deciding to take action to annul the contract,

The idea is to ensure that a contract that has been entered into has to be now terminated without causing much of embarrassment and damage and financial loss to the government (JCB 206).

A few days later, on February 16, 2011, the Prime Minister, who was also the Minister responsible for DOS, spoke to the Editors of the Electronic Media. He said,

The issue of how to annul the contract required consideration by legal experts and the Law Ministry was consulted. A decision had to be taken on whether to annul the contract using article 7(c) or Article 11 or both read together.

88. Dr. Radhakrishnan and the Prime Minister were simply adhering to the advice of the Additional Solicitor General to make a decision of the Government "in its sovereign capacity" so that Antrix could be instructed to terminate the Devas Agreement pursuant to Articles 7(c) and 11, together, thereby invoking the termination and force majeure provisions of that contract. Having regard for their public acknowledgements and for what our record shows about the background events preceding February 16, 2011, it is important not to be misled by what was a contrived effort to annul the Devas Agreement so as to either avoid or minimise damages payable to Devas. Instead, in order to understand the CCS decision, we are obliged to look at the full picture of the events culminating in the CCS decision.
89. Within the Note to the CCS, the section entitled INTER-MINISTERIAL CONSULTATIONS describes the positions of both the Ministry of Defence and the Ministry of Telecommunications as of mid-February, 2011 (JCB 219). While MOD continued to express its requirements for S-band, as reflected in Annexure 8 to the Note, DOS commented,

The comments/suggestions in respect of allocation of S Band capacity are noted and would be placed before the INSAT Coordination Committee and the Technical Advisory Group, which are empowered to take decisions in the matter. (emphasis added). (JCB ¶ 42.2)

The position of DOT is even more pointed, saying, in part,

However, they have made a number of suggestions in respect of the usage of the S Band and recommended that the present and future strategic requirements for national security related mobile communications and societal applications may be discussed in the meetings of the INSAT Co-ordination Committee (ICC) where representatives of Department of Space, Department of Telecommunications, Ministry of Information and Broadcasting, Ministry

of Finance, Department of Science and Technology and even Ministry of Defence could be invited to attend. (JCB ¶ 42.3).

This view is reinforced in the correspondence from DOT attached at Annexure 9. The Secretary of DOT wrote,

The Draft Cabinet Note has been examined and DoT is of the view that utilization of S-band shall be considered and decided by ICC and Technical Advisory Group (TAG) as per the provisions of Radio Regulations of ITU and National Frequency Allocation Plan (NFAP). (JCB 219, Annexure 9).

DOS under Dr. Radhakrishnan apparently agreed, because DOS commented on the position of DOT in exactly the same terms as it had in response to the MOD position,

The comments/suggestions in respect of allocation of S-Band capacity are noted and would be placed before the INSAT Coordination Committee and the Technical Advisory Group, which are empowered to take decisions in the matter.

90. In his report on April 12, 2011, Cabinet Secretary K.M Chandrasekhar recommended to the Prime Minister that the reconstituted ICC should be asked

to urgently consider the various uses of the 'S' band currently available with the DoS and recommend strategies for suitable utilization thereof. (JCB 229, ¶ 46).

Mr. Chandrasekhar attended the 117th Space Commission meeting in July, 2010 as a Member (JCB 161). In his capacity as Cabinet Secretary, he also reported directly to the Prime Minister who, as already noted, also served as Minister responsible for DOS. Mr. Anand confirmed at our hearing that following the CCS decision, the ICC had indeed been reconstituted and was still deliberating about the possible assignment of S-band spectrum even in September 2014. (Anand Tr. 1059). Mr. Anand agreed that the Cabinet Secretary, based on his report to the Prime Minister, "didn't believe that the contract had been cancelled for military use." (Anand Tr. 1056).

91. The Report of the INSAT Coordination Committee (ICC) Sub-committee on S-band Utilization Plan (JCB 269) helpfully tells us that in July 2012, the ICC constituted the ICC Sub-Committee

to prepare S-band Utilization Plan (2500 MHz – 2690 MHz) with the members from the Department of Space (DOS), Department of Telecommunications (DOT), Ministry of Defense (MOD) and Telecom Regulatory Authority of India (TRAI).

The Report added,

The committee had three meetings (Nov 16, 2012, Jan 18, 2013 and march 08, 2013) to discuss and finalise the task assigned.

Finally, the Report stated,

Members of the committee deliberated current and future usage of S-band (2500 MHz – MHz) in the country. After the first meeting, attempts were made to prepare a draft report. However, consensus could not be reached and members provided separate inputs to the Sub-Committee.

92. It should be recalled that the S-band spectrum described in this report, 2500 MHz – 2690 MHz, was the exact spectrum that had been the subject matter of the lease by Antrix to Devas. Thus, for at least three and a half years after the CCS made its decision to withdraw this spectrum from Antrix and to annul the Devas Agreement, there was still no decision on who would get to use that spectrum. What was obviously occurring was a contest between two groups. DOS and MOD were seeking one set of uses, including strategic and societal applications. DOT and TRAI were seeking another form of uses, principally involving the potential auction of spectrum.

93. My colleagues have determined that,

...the fact that the CCS did not make a specific allocation of the spectrum cannot be considered as a deciding element in considering whether the CCS decision was taken for the protection of the Respondent's essential security interests. (Award ¶¶ 335).

Their reasoning is that

...such function came under the authority of the ICC. This fact does not restrict the power of the CCS to decide that any particular activity be "directed to the protection of (the) essential security interests" of the State. In the present case, if such a decision was taken, there was nothing inappropriate in leaving it to the proper administrative authorities to decide how the spectrum would be allocated between the various interested parties. (Award ¶¶ 335).

94. I have a number of difficulties with this reasoning. Firstly, as I have earlier noted, Article 11(3) is not self-judging, so it is not for the CCS to decide that any particular activity is directed to the protection of the essential interests of the state. Rather, it is for this Tribunal to make such a determination on a proper weighing of the whole of the evidence in this case.

95. Secondly, the CCS obviously did not make a decision as to who would get to use the S-band spectrum that they were going to take back from Antrix and Devas. Instead, that spectrum allocation was left to be decided by a reconstituted ICC. As already noted, that body then referred the issue to a sub-committee which included the very military that was supposedly the beneficiary of the CCS decision. It is equally clear that that subcommittee had become stalemated. Neither the DOS/MOD side nor the DOT/TRAI side of the debate had prevailed. As the Report of the Sub-Committee stated,

While DOS and MOD is in favor of using 80 MHz of S-BSS and 70 MHz of S-BSS for satellite based services, WPC/DOT and TRAI is not in agreement with the approach. The committee could not converge on the final recommendation with regard to the utilization plan and use of S-band by terrestrial and satellite services. (JCB 269).

96. In these circumstances, it is impossible to say that the decision of the CCS was directed towards the "essential security interests" of India. The question of S-band spectrum allocation remained open in February 2011 and the debate as to where that S-band spectrum could have gone could just as readily have favoured DOT's preference for public auction by terrestrial users as it could have gone to DOS and or MOD to be used for military purposes or disaster management or railway tracking. As long as these various potential uses remained under consideration and subject to debate, there was no identified purpose for the CCS decision. There were only possible uses and until it was determined, there was no action directed at the protection of essential security interests or the military interests no matter what the MOD or its several different arms may have requested or wished for.
97. The potential allocation of the S-band remained a moot point for years after the CCS decision. Since no decision was made at that time as to what to do with the "precious S-band", we must find that all that was decided was to take the S-band spectrum away from commercial use by Antrix and, as a result, Devas. That finding simply places us back into considering the application of Article 6 of the Treaty (Expropriation) which, in my respectful opinion is where we ought to be in relation to the taking of the S-band spectrum.
98. The term, "essential security interests" itself requires us to determine whether the objective of the CCS decision was directed to protecting an *essential security interest*. As these words are defined by numerous English language dictionaries, we are required

to determine whether what was decided was "absolutely necessary". "indispensably requisite", or "unavoidable" (Award ¶ 243). In mid-February 2011, the eventual purpose for taking the S-band spectrum was either undetermined or, alternatively, it was for any number of various, potential national uses. Given these facts, we cannot find that the CCS decision was directed at something absolutely necessary at that time.

99. Merely asserting that the MOD or military armed forces had identified their requirements in various meetings simply does not achieve the purpose of the exemption in Article 11(3). I acknowledge, of course, that there were some clearly expressed objectives for military needs as the military groups saw them. But those expressed requirements were not identified by the CCS on anything other than a purely differential basis. In DOT's response to DOS in February, 2011, it noted that the Wireless Planning and Coordination Wing of DOT (WPC), the body in charge of frequency management in India, (Anand Tr. 1013), had commented that

WPC Wing does not have any information on strategic requirements of Defence Services, Indian Railways and Safety services as stated... (JCB 219, Annexure 9, para. 18).

In my view, the broad references to strategic interests or even references to certain defence needs were nothing more than another competing departmental demand which would, as we have seen, have to be considered by the ICC.

100. The highly crafted language developed by Dr. Radhakrishnan and his Additional Secretary, Balachandran, from mid-June, 2010 on through to mid-February 2011, seldom strayed beyond vague references to such things as

...spectrum for national needs, including the needs of defence, para-military forces, railways and other public utility services as well as societal needs and having regard to the needs of the country's strategic requirements.

Even on its face, such language falls far short of what is required to successfully invoke the "essential security interests" provision. In a list such as this, "needs of defence and para-military forces" are not distinguishable from the rest of the listed items. The *ejusdem generis* rule compels us to find that all items in the list are of a piece with one another and rest on the same common ground, namely, they are just possible eventual uses and no more than that.

101. When the whole provenance of the Note for the CCS, is examined, it is apparent that there is a welter of phrases used to describe the objective for terminating the Devas Agreement. In his notes to the legal advisor at the Ministry of Law and Justice and to DOT, Dr. Radhakrishnan said he was seeking their opinions on whether the contract needed to be annulled in order to preserve the "precious S band spectrum for the strategic requirements of the nation" and to ensure "a level playing field for the other service providers using terrestrial spectrum." (JCB 153 and JCB 154). These descriptions are fed back to Dr. Radhakrishnan in the legal advisor's opinion as well as his adding in a description of "strategic needs". He said,

new strategic needs have been emerged which require accommodation in our S-Band spectrum. Department have to provide sufficient space/accommodation in the satellite to meet the demand for strategic need of BSF, CISF, RPF and CRPF. (JCB 156) ¶ 4).

Notably, there is no reference to military or defence needs at that time.

102. By the time Additional Secretary Balachandran completed drafting the Note for the 117th Space Commission meeting in early July, 2010, he had identified several "Requirements" for S-band usage, including MOD, internal Security Agencies, viz. BSF, CISF, CRPF, Coast Guard, Police and Indian Railways for train-tracking as well as

other national societal requirements for emergency communication, dissemination of disaster warnings, tele-education, tele-health and rural communication. (JCB160, ¶¶ 8.2, 8.3, and 8.4).

103. The decision of the Space Commission explicitly directed that in addition to reviving the ICC, DOS should "evolve a revised utilization plan For GSAT-6 and GSAT 6-A." (JCB 162). The Prime Minister assured the Editors of the Electronic Media that there had been no effort "...in the Prime Minister's office to dilute, in any way the decision taken by the Space Commission in July 2010. On that I would like to assure you and through you I would like to assure the country." (JCB 218, page 8).

104. Dr. Radhakrishnan's letter to the Additional Solicitor General in mid-July, 2010, simply stated,

...the Government has received a lot of demands from various wings of the Government for allocation of S band spectrum to them to meet up the strategic and societal requirements of the nation. (JCB 164).

105. After Dr. Radhakrishnan and Additional Secretary Balachandran had finished re-drafting the Note to the CCS, some six different times, they had refined their description of the objective that is reflected in the press release on February 17, 2011. (JCB 220). Even then, the wording is relatively broad and open-ended. It refers to

...an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard for the country's strategic requirements, the Government will not be able to provide orbit slot in S band to Antrix for commercial activities... (JCB 220).

106. Having regard for these myriad ways of describing the objective for taking the S-band spectrum away from Antrix and Devas, I would find that the only settled objective was to see that the Devas Agreement would be annulled or terminated with as little cost to the government as possible. The ultimate use for the S-band that would be re-acquired from that action would be for whatever the ICC would eventually decide it would be used for. This broad, open-ended pattern shows conclusively that the CCS decision was taken with no particular purpose or "essential interest" in mind, but rather simply the general objective of removing the S-band spectrum from commercial use and placing it back into the government's control. The actual use remained to be determined. In these circumstances, there simply cannot be a determination that the state directed its decision towards protecting an essential security interest. Nothing of the sort occurred.

107. I am compelled to note, as well, that the surrounding political climate concerning the G2 spectrum sales, the charges brought against the former minister for DOT and his colleagues in February 2011, along with the public statements made by Dr. Radhakrishnan and the Prime Minister just before the CCS decision was taken, all contribute to my impression that there were other motives behind their actions. I do not ascribe any bad faith to them, but I cannot avoid the conclusion that the prevailing political conditions required them to deflect any suggestion that the government would allow commercial use of the S-band spectrum. As for who would be the eventual user of that spectrum, that question was left to be determined another day. In fact, it was left for several years.

108. As I had earlier noted, the direction found in Article 31 of the Vienna Convention on the Law of Treaties, requires us to interpret a treaty not only in accordance with the ordinary meaning to be given to the terms of the treaty in their context, but also in light of the

object and purpose of the treaty. Here, the recitals at the beginning of the Treaty state that the parties, India and Mauritius, desired to create "favourable conditions for greater flow of investments made by investors" and recognising

that the promotion and protection of such investments will lend greater stimulation to the development of business initiatives and will increase prosperity in the territories of both Contracting Parties.

It is inimicable to these objectives for there to be easy or simply convenient ways for the state to avoid the solemn promises of protection and security which investors may legitimately expect from that state under a Treaty such as this. In order to invoke the exemption from responsibility for actions taken in the name of protecting essential security interests, India was required to show by a preponderance of the evidence that the CCS decision was directed fundamentally and absolutely to protecting such an interest. No such case, in my opinion, has been demonstrated in this arbitration.

109. Finally, my colleagues have made a determination that

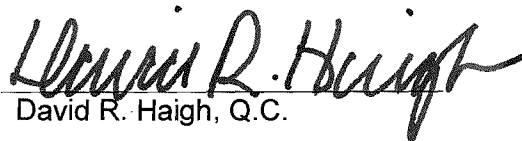
...a reasonable allocation of spectrum directed to the protection of the Respondent's essential security interests would not exceed 60% of the S-band spectrum, the remaining 40% being allocated for other public interest purposes and being subject to the expropriation conditions under Article 6 of the Treaty. (Award ¶ 373).

I disagree with this determination. For all the reasons I have already described, above, there was no "allocation of spectrum" in 2011, nor for many years afterwards. Regardless of what interests the CCS may have broadly alluded to in the press release language adopted from the Note prepared by Dr. Radhakrishnan and Mr. Balachandran, the CCS made no determination whatsoever concerning the S-band spectrum, other than to take it away from Devas and Antrix, thereby creating the legal conditions to invoke the termination and force majeure provisions of the Devas Agreement. I do not accept that there was any purported allocation of the S-band spectrum, as my colleagues seek to do, whether 60% or any other percentage. There is simply no legal basis for such a finding and certainly no evidence to support any such conclusion. Moreover, I am compelled to add that the parties have not addressed us on any such apportionment in their submissions.

D. CONCLUSIONS

110. For the reasons I have expressed and based on a fair reading of both the Treaty provision and the evidence in our case, I would find that the defence pleaded by the Respondent pursuant to Article 11(3) has not been made out. On February 17, 2011, the CCS made a decision directed toward a change in policy by withdrawing S-band spectrum previously leased by Antrix to Devas from commercial use by Antrix. The CCS further directed that the Devas Agreement was to be annulled. The whole purpose of that agreement was to enjoy and exploit that spectrum and it was removed by this decision. The manner chosen to achieve this result was directed at either avoiding altogether or mitigating as much as possible any damages that might flow from this action.
111. The CCS did not make any decision as to how to allocate the spectrum that it had taken and which was now about-to-be available for India's use. The decision on that allocation was left for the reconstituted ICC and, later, its sub-committee. In these circumstances, the taking of the S-band spectrum was simply an expropriation for a public purpose, which should be evaluated under Article 6 of the Treaty. That would require India to pay "fair and equitable compensation" to the investors in this case for the whole of what was taken and not some other unsupportable percentage.
112. With great respect, I disagree with my colleagues' determination by which they have assessed and apportioned percentages to reflect what they say are "reasonable" allocations of spectrum directed to "essential security interests" and "other public interest purposes". (Award ¶ 373). I most respectfully disagree with their conclusion. In my opinion, there is no evidentiary or legal basis for such a determination in this case.

Issued at the place of arbitration, The Hague, Netherlands, as of the date of the Award on Jurisdiction and Merits.


David R. Haigh, Q.C.