

May 6, 2021

VIA COURIER AND E-MAIL

His Excellency Shri Narendra Modi
Prime Minister of India
South Block, Raisina Hill,
New Delhi, India-110 101

The Hon'ble Minister of External Affairs
South Block, Raisina Hill,
New Delhi, India -110101

The Hon'ble Minister of Law and Justice
South Block, Raisina Hill,
New Delhi, India -110101

The Hon'ble Minister of Home Affairs
North Block, Raisina Hill,
New Delhi, India -110101

Re: Notice of Intent to Initiate Arbitration for BIT Claims Arising From India's
Treatment Of CC/Devas (Mauritius) Ltd., Telcom Devas Mauritius Limited and
Devas Employees Mauritius Private Limited

Hon. Prime Minister:

I am writing on behalf of our clients CC/Devas (Mauritius) Ltd. ("**CC/Devas**"), Telcom Devas Mauritius Limited ("**Telcom Devas**"), and Devas Employees Mauritius Private Limited ("**DEMPL**") (together, the "**Investors**") to inform you of a dispute between the Investors and the Republic of India ("**India**"). This dispute arises out of certain measures taken by India in breach of the Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments, which entered into force on June 20, 2000 (the "**Treaty**" or "**BIT**").

India has engaged in an improper campaign to prevent the enforcement of multiple arbitration awards against India and its wholly-owned company, Antrix Corporation Limited ("**Antrix**"). Those awards arise out of the repudiation by Antrix of a contract to lease space segment capacity on two satellites to Devas Multimedia Private Ltd. ("**Devas**"), which is owned by the

Investors (“**Devas-Antrix Agreement**”). India effected the annulment itself. Multiple arbitral tribunals already have found that this conduct was unlawful, and the present dispute arises from India’s efforts to evade paying the awards these arbitral tribunals have imposed.

After Antrix repudiated the contract, Devas sought relief in an arbitration under the auspices of the International Chamber of Commerce (“**ICC**”) and prevailed, with the ICC tribunal awarding Devas USD 562.5 million in damages, plus interest, on September 14, 2015. This award was confirmed by the United States District Court for the Western District of Washington, which entered judgment of approximately USD 1.3 billion, including interest accrued prior to judgment, on November 4, 2020.

The Investors also sought relief against the Republic of India in an arbitration pursuant to the BIT under the rules of the United Nations Commission on International Trade Law (“**UNCITRAL**”). The Investors prevailed, with the UNCITRAL tribunal awarding them USD 110 million plus interest on October 13, 2020. The Investors currently seek confirmation of the UNCITRAL award before the U.S. District Court for the District of Columbia and in other fora around the world, and intend to collect the award sum in full. Without diminishing in any way their entitlement to enforce the award, the Investors describe the new treaty claim arising out of India’s improper conduct post-dating its annulment of the Devas-Antrix Agreement that has resulted in additional, separate damages not covered by the UNCITRAL award.

India has abused its sovereign powers in attempting to discourage Devas and the Investors from rightfully seeking relief, by pursuing multiple, baseless investigations against Devas, its officers, and employees. Among other things, Indian officials have attempted to close down Devas, raided Devas’s offices, detained Devas officials overnight for interrogation without access to counsel, opened criminal investigations into Devas and its employees, and subjected Devas to unfounded requests from tax authorities for information.

India escalated this wrongful and abusive conduct after it lost the UNCITRAL arbitration and the U.S. court confirmed the ICC award. Indian officials created an “Inter-Ministerial Monitoring Committee” (“**IMMC**”) specifically charged with “*expediting*” proceedings against Devas and its principals, and placing the country “*on a war footing*” against enforcement of the ICC and UNCITRAL awards. On the same day that the U.S. court confirmed the ICC award, India even purported to change its law, with retrospective effect, to allow award-debtors to stay arbitration enforcement proceedings without posting security on the basis of “*prima facie*” fraud allegations—which Antrix promptly invoked.

Most surprisingly, Antrix, with the assistance of the Indian government, now has taken steps to **liquidate** Devas, in an attempt to make it impossible for Devas to enforce the ICC award and the U.S. judgment. With express leave from the Indian government, on January 18, 2021,

Antrix—a **judgment debtor** of Devas—asked a provincial companies tribunal in India (the National Companies Law Tribunal, or the “NCLT”) to “*wind up*” Devas on the basis of purported “*fraud*.” These newly-minted allegations of fraud against Devas supposedly relate to the Devas-Antrix Agreement, yet neither India nor Antrix ever raised them in nearly a decade of arbitration and litigation. None other than the Solicitor General of India and his deputy appeared in court to argue the “wind up” proceedings against Devas. Further, less than 24 hours after receiving Antrix’s request, and without giving Devas any meaningful opportunity to respond, the companies tribunal granted Antrix’s request, and appointed a “*Provisional Liquidator*”—an Indian government employee—to take control of Devas.

The Provisional Liquidator has declined to protect Devas’s or its shareholders’ interests or assets, including its USD 1.3 billion judgment against India’s fully-owned company, Antrix. Instead, the Provisional Liquidator began doing the bidding of Antrix and the Indian government. Days after he was appointed, the Provisional Liquidator fired all of Devas’s counsel worldwide—including counsel in the U.S. federal court proceeding that had resulted in confirmation of the ICC award. The Provisional Liquidator, moreover, has accepted wholesale Antrix’s allegations of fraud, and found purported “*support*” for them in consequences of the harassment to which India has subjected Devas for nearly a decade, namely an absence of records in Devas’s office due to the fact that the Indian government raided those offices years ago.

In short, rather than pay its debts, India has engineered an occupation of the very company to which its wholly-owned subsidiary owes nearly USD 1.3 billion. These actions by India violate its obligations under the Treaty and entitle the Investors to seek further compensation.

The purpose of this letter is to summarize the nature of the dispute between the Investors and India and invite India to resolve the dispute amicably under Article 8 of the BIT.¹ This letter is expressly made without prejudice to any positions the Investors may adopt in any subsequent international arbitral or other proceeding should the parties fail to reach an amicable resolution of this matter. Additionally, the contents of this letter are illustrative rather than exhaustive, and the Investors expressly reserve their right to assert claims based on any misconduct by India in the course of an eventual arbitration proceeding.

¹ According to the Indian government website, the Treaty was “terminated” by India in 2017. The Investors’ investments, however, were approved and/or made prior to the date of termination. Under Article 13(3) of the Treaty, therefore, the provisions of the Treaty (including its substantive protections and dispute resolution provisions) “remain in force” with respect to the Investors’ investments for a further period of ten (10) years, *i.e.* at least until 2027.

1. Background

Following almost two years of negotiations involving a series of proposals and counter-proposals, in 2005, Devas entered into the Devas-Antrix Agreement. In that contract, Devas agreed to pay Antrix to lease transponder capacity on two governmental satellites that Antrix would build, launch, and operate. Devas planned to use the leased capacity to provide multimedia services (including broadband wireless access) to the Indian people. The deal was a momentous achievement and an opportunity to bring sophisticated and much-needed multimedia services to the entirety of India—including both its teeming megalopolises and its rural countryside. Devas was precisely the right company to do this: its officers and directors had decades of experience in telecommunications, having overseen the development of other highly successful telecommunications ventures such as XM Satellite Radio and Verizon.

Following execution of the Agreement, the parties diligently fulfilled their contractual obligations. To fund the upfront costs for leasing each satellite, with Antrix/ISRO's knowledge, Devas sought and obtained highly qualified additional investors. From 2006 onwards, the Investors made substantial investments in Devas that enabled it to make the required payments under the Devas-Antrix Agreement, triggering Antrix's obligation to launch the contemplated satellites and lease spectrum to Devas.

Concurrently, Devas also sought and received licenses and approvals to provide a portfolio of services in India. From 2008 onwards, Devas planned and conducted successful experimental trials and demonstrations of its planned technology, including providing mobile multimedia and broadband wireless services.

Between February 2006 and February 2011, Devas performed its obligations under the Devas-Antrix Agreement, with the apparent support and cooperation of Antrix and the Indian government. Unbeknownst to Devas, however, from 2009 onwards, as the spectrum space it had allocated to Devas became more valuable, the Indian government began finding ways to terminate the Devas-Antrix Agreement. In July 2010, the Indian Space Commission adopted a resolution favoring the termination of the Devas-Antrix Agreement. On February 17, 2011, the Cabinet Committee on Security purported to annul the Devas-Antrix Agreement.

On February 25, 2011, Antrix notified Devas that the Devas-Antrix Agreement was terminated by reason of "force majeure." Antrix did not dispute the validity of the Devas-Antrix Agreement or argue fraud, mistake, duress or raise any similar contract defense.

2. Devas and Investors Initiate Arbitrations and Win Awards

Following Antrix's repudiation of the Devas-Antrix Agreement to which it had devoted years of effort and substantial investment, on July 1, 2011, Devas commenced arbitration under the terms of the Devas-Antrix Agreement. The arbitration was seated in New Delhi, India. On July 3, 2012, the Investors also commenced arbitration proceedings against India under the BIT pursuant to the UNCITRAL Arbitration Rules.

Ultimately, the ICC tribunal—composed of three esteemed arbitrators, including the former Chief Justice of the Supreme Court of India, the Honorable Adarsh Sein Anand—rejected Antrix's defense of force majeure and held that Antrix had wrongfully repudiated the Agreement. On September 14, 2015, the ICC tribunal awarded Devas USD 562.5 million in damages plus 18% interest per annum.

The UNCITRAL tribunal also ruled against India in favor of the Investors. On July 25, 2016, the tribunal found that India had breached its obligations under the BIT by unlawfully expropriating the Investors' investments and by failing to accord the Investors fair and equitable treatment. On October 13, 2020, the tribunal awarded the Investors over USD 110 million plus interest and USD 10 million in attorneys' fees plus interest as compensation for the expropriation of 40% of the Investors' interests in the satellite/terrestrial communications business owned by Devas.

Almost immediately after Devas filed its ICC claim, and continuing to the present day, India launched a campaign to harass Devas and its officers, and smear them with false allegations. India's campaign has included the following:

1. On August 11, 2011, just a month after Devas commenced ICC arbitration against Antrix, India's Office of the Registrar of Companies ("**ROC**") instructed Devas to provide its books and records for inspection as part of an investigation into unspecified "violations." The ROC continued to harass Devas with inspections and demands for documents until the Delhi High Court itself enjoined the ROC from continuing its harassment. The ROC also attempted multiple times to close Devas down but failed. After a decade of inaction, the ROC has recently swung back into action, citing Devas's efforts to enforce the ICC award outside of India and the fact that India had formed the IMMC.
2. In December 2011, the Directorate of Enforcement, Ministry of Finance, Department of Revenue ("**ED**"), opened a series of sham investigations into Devas. The ED froze Devas's investments and bank accounts and issued a massive penalty of over USD 220 million against Devas, the Investors, and present/former officers and directors of Devas. The ED even raided Devas's Bangalore offices, detaining Devas's officials overnight for

interrogation. Devas's officials were denied access to counsel and were coerced (under threat of arrest) into signing false written statements, which they retracted after being released. A "top source" within the Indian government has revealed that the government strategy behind these actions is to recover from Devas in penalties what Devas and its shareholders are owed under the arbitral awards.²

3. In 2015, when it became clear that the ICC tribunal was likely to issue an award in favor of Devas, India's Central Bureau of Investigation ("CBI")—whose powers normally are reserved for serious fraud, "economic crimes" and "[s]pecial crimes" like terrorism, not the repudiation of commercial contracts—opened a case against Devas, its officers, and some employees of Antrix and Indian governmental agencies. The CBI filed a falsity-ridden "charge sheet" against Devas, its employees, and a group of governmental employees. It also filed an application for the issuance of non-bailable warrants against two former Devas officers and requested the judge to issue these warrants so that the officers may be put on Interpol's red corner notice list. Notably, the charge sheet does not allege bribery or corruption by Devas, the Investors, or anyone associated with them, including the Devas officers named in the charge sheet. Sources within India have been frank with the media about the government's improper agenda to use the CBI, and the rest of India's legal and regulatory apparatus, to interfere with the arbitral process and avoid paying the arbitration awards. In fact, the rationale recently offered by the CBI to frame charges against the accused on an urgent basis was to influence the enforcement proceedings going on before various jurisdictions.
4. Indian tax authorities also joined the government's retaliatory efforts, questioning Devas's right to pay fees to its arbitration counsel and making harassing and unfounded demands for information from Devas. They also have issued notices to several of Devas's present/former directors threatening them with personal liability for "huge tax arrears" allegedly owed by Devas. The Chief Commissioner of Income Tax recently reported that it is a member of the IMCC and demanded that all proceedings related to Devas be put on a "fast track" on account of "commercial arbitration disputes" with the Investors and another Devas investor under bilateral investment treaties.

India and Antrix had ample opportunity to, and did, defend themselves in both of the arbitration proceedings. Yet, despite ongoing investigations by the CBI, ED and other Indian agencies, neither India nor Antrix *ever* argued that the Devas-Antrix Agreement was the product of

² *ED Moves to Prosecute Devas Under PMLA for FEMA Violation*, Times of India, July 27, 2016, available at <http://timesofindia.indiatimes.com/india/ED-moves-to-prosecute-Devas-underPMLA-for-Fema-violation/articleshow/53407579.cms>.

fraud, nor did Antrix or India ever contend that the contract had been repudiated because of concerns regarding the Devas-Antrix Agreement's formation. Plainly, India and Antrix did not want their harassing and wrongful sham investigations exposed to impartial examination. Meanwhile, Devas has been forced to expend substantial resources to defend against these proceedings (all of which remain ongoing) as they threaten not only the company but also individuals with potential bankruptcy and imprisonment. Indeed, Devas's shareholders and officers have suffered substantial personal and reputational harm due to India's harassing measures.

At the same time, very much alive to the fact that the ICC award is enforceable outside its borders, India has implemented a parallel strategy to strip Antrix of its assets with the goal that even a successful enforcement action will not yield any monetary results for Devas. In 2019, India formed a new company, NewSpace India, to assume the functions of Antrix and act as a "safety net" given the arbitration losses faced by Antrix and India. It has been reported in the press that Antrix is being hollowed out and that Antrix's business is being diverted to other entities.³ These matters were put before the U.S. federal court in the United States in 2019 and 2020 and Antrix made no attempt to explain why NewSpace had been created or to deny that Antrix's operations effectively have been transferred to NewSpace.

3. India Launches Liquidation Proceedings

Devas initiated proceedings to confirm the ICC award before the United States District Court for the Western District of Washington. On October 27, 2020, the Court confirmed the ICC award and on November 4, 2020, the Court issued a nearly \$1.3 billion judgment in favor of Devas (*i.e.*, the amount of the arbitration award plus interest that had accrued up to that point).

Upon the U.S. court's confirmation of the ICC award, India accelerated and amplified its efforts to harass Devas and its officers and ultimately subvert the award. India has not been shy about its intentions. In a letter to the income tax tribunal, the Chief Commissioner of Income Tax in Bengaluru noted that India's Finance Minister had approved the constitution of an Inter-Ministerial Monitoring Committee to expedite proceedings against Devas as India was now "*on a war footing*" against the company.

Moreover, on November 4, 2020, India enacted a special ordinance amending the Indian Arbitration and Conciliation Act such that a stay of enforcement of an arbitration award can be obtained without posting security when there is a *prima facie* case of fraud or corruption in

³ See e.g. S. Singh, *Antrix stuck with \$1-billion payout, but India's busy building a Newspace*, The Ken, April 9, 2019, available at <https://the-ken.com/story/antrix-stuck-with-1-billion-payout-but-indias-busy-building-a-newspace/>.

the underlying agreement. Two months later, on January 12, 2021, armed with the new amendment to the Arbitration Act, Antrix applied to the Delhi High Court to amend its petition to set aside the ICC award with newly-minted allegations of fraud against Devas—allegations that Antrix scrupulously avoided raising before independent tribunals in nearly a decade of arbitration and litigation.

Two days later, Antrix requested the Government of India grant permission to file a petition against Devas in the NCLT to “*wind up*” Devas on the same new-found fraud allegations that it was seeking to add to its set-aside petition. This proceeding was highly irregular: the wind-up process is designed to allow **creditors** to wind up insolvent **debtors** that cannot pay what they owe. Here, the circumstances are the other way around: a USD 1.3 billion **debtor** is seeking to dissolve its **creditor** to avoid the debt altogether.

On January 18, 2021, the Indian government granted Antrix’s request to file the wind-up petition. **That very afternoon**, Antrix filed a wind-up petition numbering over 2,000 pages before the NCLT. The NCLT scheduled a hearing for **the very next morning**. The Solicitor General of India argued for Antrix at the hearing. Within hours of the hearing, the NCLT appointed a “*Provisional Liquidator*” to take control of Devas. The Provisional Liquidator is an Indian governmental employee.

Since his appointment, the Provisional Liquidator’s principal focus and goal has been to undermine Devas. Days after he was appointed, the Provisional Liquidator fired all of Devas’s counsel, including Devas’s counsel appearing in US courts to confirm its arbitral awards. Plainly, if the Provisional Liquidator had been working in the interest of Devas or its shareholders, he would not have fired the counsel that were successfully representing Devas to enforce its rights. The Provisional Liquidator has yet to appoint replacements.

Then, less than two weeks after his appointment, the Provisional Liquidator issued an interim report accepting, without any independent analysis, Antrix’s allegations that the Devas-Antrix Agreement had been procured by fraud. He has since issued additional reports that likewise accept Antrix’s bogus allegations, wholesale and at face value.

The Provisional Liquidator has not taken any steps to secure Devas’s most significant asset—its USD 1.3 billion judgment. Rather, he has done everything in his power to frustrate Devas’s interests. For example, the Provisional Liquidator represented Devas in a special court arising from investigations launched by the CBI. At the court hearing, the Provisional Liquidator came on record for Devas and stated that he was abandoning Devas’s long-pending application—which is based on overwhelming Supreme Court precedent—that trial commence only after the CBI has completed its investigation, meaning that the CBI’s case against Devas may now proceed even though the CBI may bring additional charges.

The Investors moved quickly to defend their interests. On March 2, 2021, the NCLT allowed one of the Investors—DEMPL—to intervene to oppose the winding-up proceedings. On March 22, 2021, DEMPL filed an application before the Karnataka High Court challenging the government’s approval of Antrix’s NCLT petition. The Karnataka High Court denied DEMPL’s petition, which DEMPL has since appealed. Meanwhile, Devas’s liquidation is proceeding at breakneck pace, as the Additional Solicitor General has urged the NCLT to make haste on the grounds that the Investors are seeking to enforce their rights under the arbitral awards worldwide. The NCLT appears poised to liquidate Devas any day now in a transparent effort to pause Devas and its shareholders’ enforcement efforts.

4. India Has Breached Its Obligations under the BIT

From the moment that Devas filed its ICC claim in 2011, the government of India in various guises has launched a plethora of unlawful and groundless attacks against Devas. India and its agencies have made false accusations before courts and tribunals in India in order to subvert Devas’s ICC award. These sham investigations, false allegations, and efforts to subvert the ICC award by liquidating its duly recognized creditor constitute clear breaches of India’s obligations under the BIT. These breaches have caused substantial losses to the Investors. The Treaty obligations that India has breached include (but are not limited to) the following:

- a) To grant the investments of Investors fair and equitable treatment under Article 4(1).
- b) To refrain from impairing by “*unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of*” the Investors’ investments under Article 4(1).
- c) To refrain from “*nationalisation or expropriation*” of Investors’ investments except for “*public purposes under due process of law, on a non-discriminatory basis and against fair and equitable compensation*” under Article 6 of the BIT.
- d) To provide Investors treatment which shall not be less favourable than that accorded to domestic investors or investors of any third State in accordance with Article 4(2).
- e) To provide Investors and their investment full protection and security as provided under Article 3(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments, and Article 3(2) of the Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments imported via the “*most favored nation*” clause in Articles 4(2) and 4(3) of the Treaty.

- f) To allow Investors “to freely transfer[], without unreasonable delay and on a non-discriminatory basis” the funds related to Investors’ investments pursuant to Article 7 of the BIT.
- g) To “honour any obligation it may have entered into” with regard to investments made by nationals of contracting states pursuant to Article 11(4) of the BIT.

India’s actions, cumulatively and individually, including prosecuting a campaign of unwarranted harassment against Devas, culminating in its efforts to liquidate the company, are in violation of the protections afforded under the BIT and are, *inter alia*, arbitrary, inconsistent, disproportionate, discriminatory, not transparent, in breach of the Investors’ legitimate expectations and threaten the legal security of their investments.

5. Notice of Dispute under BIT

The Investors reserve all of their rights with respect to the facts and events described herein, including the right to submit this dispute to international arbitration for resolution. In this regard, the Investors hereby give notice of the existence of this dispute, accept India’s offer to arbitrate, and request consultations and negotiations with the government in an attempt to amicably settle this dispute as contemplated in Article 8 of the BIT. The Investors’ invocation of their BIT remedies are without prejudice to bring the above matters before human rights bodies and tribunals, and to seek relief from individuals within the Indian government who have participated in the above-described harassment campaign.

The Investors prefer to resolve this dispute amicably. To this end, the Investors emphasize their willingness to work towards a mutually acceptable resolution, and request a meeting with you, or appropriate representatives of the government of India. Please let us know when you are available to engage in these discussions, and we would be pleased to facilitate such a meeting. In advance of any such meeting, please let us know if you require any additional information with respect to the claims raised by the Investors in order to facilitate discussions. Any response to this invitation by India should be directed to our attention, as the legal representatives of the Investors for this matter.

Given the urgency of this matter, we ask that you respond to us within two weeks. In the event that Investors do not receive a response from you or appropriate representatives of the government of India within that timeframe, Investors reserve their rights to initiate arbitration under the BIT immediately, on the assumption that India does not wish to engage in negotiations with the Investors to resolve this matter amicably. Indeed any further delay would cause significant harm to the Investors given the ongoing actions of the government as discussed herein.

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Finally, the Investors request that India refrain from engaging in any other conduct that would aggravate the existing dispute between the parties. Should India fail to do so, the Investors expressly reserve their right to request relief (including emergency or provisional relief) from an international arbitral tribunal or relevant court. If forced to resort to international arbitration, the Investors will seek the full measure of damages, including any non-pecuniary and moral damages, they are entitled under the BIT and international law.

Sincerely,

A handwritten signature in black ink, appearing to read 'Rahim Moloo', with a horizontal line underneath.

Rahim Moloo