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Court	The Hague Court of Appeal
Judgment Date	16-02-2021
Publication date	10-06-2021
Case number	200.259.875/01
Formal relationship	First instance: ECLI:NL:RBDHA: 2018:15532,
Upheld/Affirmed Practice areas	Civil law
Particulars	Appeal
Summary	

The Republic of India is seeking the annulment of an arbitration award concerning the expropriation of investments in a telecommunications network in India. Claim rejected because annulment grounds under Article 1065 Civil Procedure Code not met.

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Judgment

THE HAGUE COURT OF APPEAL

Civil Law Department

Case number: 200.259.875/01

District Court case number: C/09/529140 / HA ZA 17-315

judgment of 16 February 2021

in the matter of:

The Republic of India, having its seat in New Delhi, India, appellant, hereinafter: the Republic of India, advocate: mr. T.L. Claassens of Rotterdam,

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against:

1. CC/Devas (Mauritius) Ltd.,

2. Devas Employees Mauritius Private Limited,

3. Telcom Devas Mauritius Limited,

all having their seat in Port Louis,

Mauritius, appellees,

hereinafter: Devas *et al*,

advocate: mr. G.J. Meijer in Amsterdam.

1 The appeal proceedings

1.1 By summons of 12 February 2019, the Republic of India appealed against the judgment rendered among the parties by The Hague District Court on 14 November 2018. In its appeal memorial with exhibits, the Republic of India has raised nine pleas. Devas *et al* have disputed the pleas in their counter-memorial with exhibits.

1.2 Thereafter, on 3 December 2020, the parties pleaded the case, whereby the Republic of India was represented by her advocate, and Devas *et al* - by their advocate and mr. Van der Plas-Hoebeke, advocate in Amsterdam; the oral pleadings were based on skeleton arguments submitted in advance. The Republic of India submitted a number of additional exhibits. One such exhibit (exhibit 163, letter from the Additional Solicitor General of India dated 30 November 2020) was not admitted because it had not been timely despatched to the Court of Appeal and the other party in advance of the hearing. Finally, the Court of Appeal fixed the date for rendering judgment.

2 Factual background

2.1 The facts established by the District Court in its 14 November 2018 judgment are not in dispute. The Court of Appeal will therefore proceed based thereon. The present case concerns the following.

2.2 On 20 June 2000, a bilateral investment treaty (hereinafter: the Treaty) between the Republic of India and the Republic of Mauritius (hereinafter also: the Contracting States) entered into force. The object of the treaty is to promote the investments of Mauritian investors in India and of Indian investors in Mauritius. Article 8 of the Treaty provides for

an arbitration procedure for the settlement of disputes between an investor of one of the Contracting States and the other Contracting State.

2.3 In Article 1(1)(a) of the Treaty, defines the notion of 'investment' as follows:

"investment" means every kind of asset established or acquired under the relevant laws and regulations of the Contracting Party in whose territory the investment is made, and in particular, though not exclusively, includes:

(i) *movable and immovable property as well as other rights* in rem *such as mortgages, liens or pledges;*(ii) *shares, debentures and any other form of participation in a company*

(iii) *claims to money, or to any performance under contract having an economic value;*

(iv) *intellectual property rights, goodwill, technical processes, know-how, copyrights, trade-marks, trade-names and patents in accordance with the relevant laws of the respective Contracting Parties*

(v) *business concessions conferred by law or under contract, including any concession to search for, extract or exploit natural resources"*

2.4 Article 11(3) of the Treaty provides the following with respect to "essential security interests":

"*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 (...)."

2.5 Devas *et al* are (indirect) shareholders of Devas Multimedia Private Limited, an Indian company (hereinafter: Devas Multimedia). Devas *et al* are companies established in Mauritius. Antrix Corporation Limited (hereinafter: Antrix) is a commercial entity of the Indian Space Research Organisation (hereinafter: ISRO) and is engaged in the commercial exploitation of Indian satellites. The investments of Devas *et al* in Devas Multimedia have been approved by the Indian Foreign Investment Promotion Board.

2.6 On 28 January 2005, Devas Multimedia entered into an agreement with Antrix regarding the lease of 70 MHz capacity in S band for a period of twelve years with the possibility of extension (hereinafter: the Devas Agreement). For this purpose, transponders were to be placed on two satellites yet to be developed. Devas Multimedia wanted to use the satellites and the corresponding spectrum, together with a network of cell towers that it intended to develop, to provide wireless audio-visual broadcasts and broadband access to its customers in India (hereinafter: the Devas Services).

2.7 In the period 2005-2010, Devas Multimedia collaborated with, among others, Antrix and ISRO to prepare those services. In that context, Devas Multimedia made payments of around USD 13 million to reserve capacity on the two satellites. The payments were financed with capital contributions from Devas *et al* in Devas Multimedia in the amount of approximately USD 32 million. In addition, Deutsche Telekom Asia (hereinafter: DT Asia) invested approximately USD 75 million in Devas Multimedia, for which it acquired a 20%

stake in Devas Multimedia.

2.8 On 17 February 2011, the Cabinet Committee on Security, consisting of the Prime Minister and the Ministers of Defence, Home Affairs, Foreign Affairs and Finance of the Republic of India (hereinafter: the CCS), decided to terminate the Devas Agreement. This decision was preceded by consultations with various government agencies and committees. The press release issued on the CCS decision on the same date reads 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 (...) 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 [Devas Agreement, added by the Court of Appeal] shall be annulled forthwith."

2.9 On 25 February 2011, Antrix formally informed Devas Multimedia of the termination of the Devas Agreement.

2.10 On 3 July 2012, Devas *et al* brought an arbitration against India under Article 8 of the Treaty (hereinafter referred to as the Arbitration Proceedings). The place of the arbitration was The Hague.

2.11 By arbitral award of 25 July 2016 (hereinafter: the Partial Award), the arbitral tribunal decided as follows:

- i) *Unanimously, that the Claimants' claims relate to an "investment" protected under the Treaty;*
- ii) *Unanimously, that the notice of termination of the Devas Agreement sent by Antrix to Devas*

constituted an act of State attributable to the Respondent.

- iii) *By majority, that the Tribunal lacks jurisdiction over the Claimants' claims insofar as the Respondent's decision to annul the Devas Agreement was in part directed to the protection of the Respondent's essential security interests;*
- iv) *By majority, that the Respondent has expropriated the Claimants' investment insofar as the Respondent's decision to annul the Devas Agreement was in part motivated by considerations other than the protection of the Respondent's essential security interests;*
- v) *By majority, that the protection of essential security interests accounts for 60% of the Respondent's decision to annul the Devas Agreement, and that the compensation owed by the Respondent to the Claimants for the expropriation of their investment shall therefore be*

limited to 40% of the value of that investment;

- vi) *Unanimously, that the Respondent has breached its obligation to accord fair and equitable*

treatment to the Claimants between July 2, 2010 and February 17, 2011;

- vii) *Unanimously, that the Claimants' other claims shall be dismissed;*
- viii) *Unanimously, that any decision regarding the quantification of compensation or damages, as well*

as any decision regarding the allocation of the costs of arbitration, shall be reserved for a later stage of the proceedings."

The Arbitration Proceedings were then continued with respect to quantum of damages.

2.12 On 28 July 2016, the Partial Award was filed with The Hague District Court.

2.13 On 11 August 2016, the Indian Central Bureau of Investigation (hereinafter: CBI) filed at court a so-called 'charge sheet' with a view to initiating criminal proceedings against the former Indian officials who had approved the Devas Agreement, as well as against Devas Multimedia and some of its former and current directors. A 'supplementary charge sheet' was filed on 8 January 2019. (The 'charge sheet' and the 'supplementary charge sheet' shall hereinafter be referred to together as the "Criminal Complaint").

2.14 On 13 October 2020, the arbitral tribunal issued a final award determining the value of Devas Multimedia on 17 February 2011 at USD 740 million and ordering the Republic of India to pay damages to each of Devas *et al* in the amount equivalent to 40% of USD 740 million multiplied by the percentage held by each of Devas *et al* in Devas Multimedia.

3 The First Instance Proceedings

3.1 At first instance, the Republic of India requested the annulment of the Partial Award under Article 1065 Civil Procedure Code and an order of costs against Devas *et al*. Devas *et al* put forward a defence. By judgment of 14 November 2018, the District Court rejected the Republic of India's claim and ordered the Republic of India to pay the costs of the proceedings. The central findings of the judgment can be summarised as follows.

3.2 At first instance, the Republic of India claimed that the arbitral tribunal had wrongly accepted jurisdiction over the claims of Devas *et al* (Article 1065(1)(a) Civil Procedure Code) because Devas *et al* did not make an 'investment' within the meaning of the Treaty and because the decision to annul the Devas Agreement was justified on the basis of "essential security interests". With regard to whether there was an 'investment' within the meaning of the Treaty, the Republic of India argued that the activities of Devas *et al* consisted exclusively of preparatory steps ("pre-investments"), partly in view of the fact that Devas Multimedia did not have a license to provide telecommunications services of "Wireless Planning and Coordination Wing" of the Indian Department of Telecommunications (hereinafter: WPC Licence). The District Court did not accept this defence. In the District Court's opinion, Devas Multimedia's right to a part of the S band in itself represented significant value. In addition, Devas Multimedia made advance payments of USD 13 million for the reservation of satellite capacity and Devas *et al* obtained the permission from the Indian authorities for its investment in Devas Multimedia. According to the District Court, there is therefore an 'investment' within the meaning of the Treaty even



without the WPC Licence.

3.3 The Republic of India further argued that the arbitral tribunal has not complied with its mandate (Article 1065(1)(c) Civil Procedure Code), failed to provide (sufficient) reasoning for its award (Article 1065(1)(d) Civil Procedure Code) and/or violated the fundamental right of the Republic of India to be heard and to present its case (Article 1065(1)(e) Civil Procedure Code) by failing to discuss a number of key allegations and defences put forward by the Republic of India with respect to the absence of an 'investment', or by rejecting them without (sufficient) reasoning. That position was also rejected by the District Court, which held that the arbitral tribunal did, in fact, sufficiently reason its decisions on the Republic of India's essential allegations and defences. The District Court considered that it lacked the power under Article 1065 Civil Procedure Code to review that reasoning on the merits.

3.4 Furthermore, the Republic of India argued at first instance that the Treaty did not permit the arbitral tribunal to accept jurisdiction in part (Article 1065(1)(a) Civil Procedure Code). The District Court rejected this argument on the ground that the existence of "essential security interests" did deprive the arbitral tribunal of jurisdiction, but, rather, could have the consequence that Devas *et al* could not rely on the Treaty to resist the termination of the Devas Agreement. The District Court likewise rejected the Republic of India's argument that the arbitral tribunal had failed to comply with its mandate (Article 1065(1)(c) Civil Procedure Code) by accepting the "essential security interests" objection for 60% of the S band spectrum. The District Court held that the arbitral tribunal did not thereby award more than was claimed. The District Court also rejected the Republic of India's arguments that the arbitral tribunal's decision to allow the "essential security interests" defence for 60% of the S band spectrum was not sufficiently reasoned (Article 1065(1)(d) Civil Procedure Code), and that the arbitral tribunal therefore wrongly faced the parties with a surprise decision (Article 1065(1)(e) Civil Procedure Code).The District Court held that the Partial Award did contain reasoning, the merits of which the court could not review, and that the arbitral tribunal was not bound to hear the parties on its intention not to allow this defence for 100% of the S band spectrum.

3.5 The Republic of India further based its first instance claim for the annulment of the Partial Award on the Criminal Complaint. It requested the District Court to stay the proceedings pending an Indian criminal court's decision on the Criminal Complaint. The District Court rejected this request on the grounds that it was not clear at what time such a decision was to be expected, and the interests of due process therefore weighed against a stay in the circumstances. The Republic of India further argued there was no legitimate "investment" because the alleged criminal conduct rendered the Devas Agreement void (Article 1065(1)(a) Civil Procedure Code). However, the District Court held that the Criminal Complaint had no legal consequences as long as it has not led to a (final) criminal conviction, and nullity of the Devas Agreement could not be accepted in connection with the alleged criminal offences. The District Court likewise rejected the Republic of India's contention that the Partial Award suffered from a reasoning defect because the arbitral tribunal had failed to address the Republic of India's argument that Devas Multimedia misrepresented that it held the required intellectual property rights at the time of the Devas Agreement. The District Court held that, given that this contention only appeared in a footnote in the Republic of India's submissions in the arbitration proceedings, it could not be regarded as an essential defence which the arbitral tribunal was obliged to address. Finally, the District Court rejected the Republic of India's argument that the Partial Award

was contrary to public policy and good morals because the arbitral tribunal assumed that the Devas Agreement was valid although its conclusion had been accompanied by criminal conduct. According to the District Court, this has not been established, and the Republic of India has not sufficiently demonstrated the alleged criminal offences.

4 The appeal

4.1 On appeal, the Republic of India requests that the District Court's judgment be annulled and its first instance claim be granted, with an order of costs, including post-judgment costs, increased by statutory interest. To this end, the Republic of India has raised nine grounds of appeal against the District Court's judgment, which can be summarized as follows.

4.2 Grounds 1 and 2 are directed against the District Court's findings relating to the existence of 'investment' falling within the scope of the Treaty. According to the Republic of India, the arbitral tribunal and the District Court have wrongly treated as the subject matter of the arbitration proceedings the Devas Agreement instead of the entire Devas Multimedia project. The Devas Multimedia project could not be carried out without the required permits; because such permits were not granted, there could not be an 'investment' within the meaning of the Treaty. In addition, according to the Republic of India, the arbitral tribunal and the District Court adopted far too broad a definition of the notion of 'investment', and made several errors in applying that notion (Article 1065(1)(a) Civil Procedure Code). Furthermore, the Republic of India argues that the District Court overlooked the arbitral tribunal's failure to comply with its mandate and its duty to state reasons by failing to engage (with reasons) with the eight essential defences of the Republic of India regarding the notion of 'investment' (Article 1065(1)(c) Civil Procedure Code).

4.3 The Republic of India's grounds of appeal 3, 4 and 5 target the District Court's findings with respect to the issue whether the termination of the Devas Agreement could be justified based on "essential security interests". On appeal, the Republic of India no longer argues that the existence of "essential security interests" deprived the arbitral tribunal of jurisdiction to decide on the claims of Devas *et al*. It, does, however, argue that the arbitral tribunal has, in several respects, failed to comply with its mandate (Article 1065(1)(c) Civil Procedure Code) (which the District Court overlooked). The arbitral tribunal should have examined whether the decision of the Republic of India to terminate the Devas Agreement could be justified based on "essential security interests", instead of proceeding based on the enquiry of the extent to which the S band spectrum would be used for "essential security interests". By proceeding in this manner, the arbitral tribunal misunderstood the dichotomous nature of the "essential security interests" exception, and wrongly engaged in a full review of that exception. Furthermore, by making an *ex aequo et bono* determination as to what part of the S band spectrum was intended for the protection of "essential security interests", the arbitral tribunal applied a standard not presented by the parties and supplemented the facts. In addition, the Republic of India's argues that the arbitral tribunal's decision to allow the "essential security interests" defence for 60% of the S band spectrum was not (sufficiently) reasoned (Article 1065(1)(d) Civil Procedure Code)(which the District Court allegedly overlooked), and that this constituted an unacceptable surprise

decision (Article 1065(1)(d) and (e) Civil Procedure Code).

4.4 Grounds 6 to 9 relate to the Criminal Complaint and the Republic of India's allegation that Devas Multimedia misrepresented that it held intellectual property rights. The Republic of India argues that the District Court wrongly assumed that the (facts underlying) the Criminal Complaint could or would only have legal consequences for the validity of the Devas Agreement once there was a final criminal conviction. According to the Republic of India, the Devas Agreement is void as a result of the offences committed, and, accordingly, does not constitute an 'investment' within the meaning of the Treaty from which the arbitral tribunal may derive its jurisdiction (Article 1065(1)(a) Civil Procedure Code). The Republic of India further argues that the Partial Award is not (sufficiently) reasoned because the Arbitral Tribunal failed to address the alleged inaccuracy of the warranties given by Devas Multimedia in relation to intellectual property rights (Article 1065(1)(d) Civil Procedure Code). The District Court is said to have wrongly ignored this annulment ground on the basis that this was evidently not a matter of essential defence given that the Republic of India only invoked the incorrectness of such warranties in a footnote. Finally, the Republic of India considers that the Partial Award is contrary to public order and good morals because the arbitral tribunal assumed that the Devas Agreement was valid despite the offences committed (Article 1065(1)(e) Civil Procedure Code). The Republic of India accuses the court of disregarding these offences on the ground that it has not been established that the directors and officers of Devas *et al* were guilty of such offences. The Republic of India requests that the proceedings of the matter be stayed in so far as they relate to the annulment ground based on the Criminal Complaint pending the final verdict concerning the alleged offences by the Indian Court. The Republic of India states that the criminal proceedings against the persons charged are to begin at the end of 2019.

4.5 Devas *et al* raise defences which shall, to the extent necessary, be addressed below, and request the dismissal of the claims and an order that the Republic of India pay the costs of the proceedings including post-judgment costs, increased by statutory interest.

5 The court's assessment

Preliminary remarks

5.1 Given that the arbitration proceedings commenced before 1 January 2015, they are governed by the provisions of the Fourth Book of the Civil Procedure Code as it in force before 1 January 2015. References in this judgment to Articles of the Civil Procedure Code are reference to those provisions.

5.2 The place of arbitration is The Hague, such that the District Court and, on appeal, the Court of Appeal, have jurisdiction to hear the Republic of India's claim under Article 1064 Civil Procedure Code. Pursuant to Article 1073(1) Civil Procedure Code, the claim for annulment is governed by the provisions of Title 1 of the Fourth Book of the Civil Procedure Code

5.3 According to Article 1065(1) Civil Procedure Code, an arbitral award may be set aside on *inter alia* one of the following grounds:

a. there is no valid arbitration agreement;

b. (...)
c. the arbitral tribunal has not complied with its mandate;
d. the award is (...) not reasoned;
e. the award, or the manner in which it came about, is contrary to public order or good morals.

5.4 In accordance with Article 1057(4)(e) Civil Procedure Code, the arbitral tribunal must provide the reasons for its decision. If reasoning is lacking, the arbitral award can be set aside on the basis of Article 1065(1)(d) Civil Procedure Code. The absence of reasons is equated with the case where reasons were given, but provide no possibility to discern any plausible explanation for the decision.

5.5 The starting point for the application of Article 1065 Civil Procedure Code is that the State court must exercise its power to set aside an arbitral award with restraint. The required restraint is related, among other things, to the fact that a procedure on the basis of Article 1065 Civil Procedure Code may not be used as a disguised appeal, because of the public interest in an effectively functioning arbitral procedure. This is different insofar as the dispute concerns the existence of a valid arbitration agreement (Article 1065(1)(a) Civil Procedure Code) and the question whether the arbitral award is contrary to public order and good morals as referred to in Article 1065(1)(e) Civil Procedure Code), which would, *inter alia*, be the case if the making of the arbitral award was accompanied by a violation of the fundamental principle of due process. With respect to these questions, the arbitral award is subject to a full review. The Court of Appeal does not follow the view of Devas *et al* that a full review of the arbitral tribunal's jurisdiction is not appropriate when a jurisdictional objection is raised by a State. That view is based on the mistaken assumption that a State is not entitled to rely on the fundamental nature of the right of access to justice. The fundamental nature of this right also applies vis-à-vis states. This fundamental nature has the effect that the arbitral tribunal's jurisdiction must be reviewed in full (*cf* Supreme Court 26 September 2014, ECLI:NL:HR: 2014:2837).

5.6 The Court of Appeal will first deal with the grounds of appeal relating to the notion of 'investment' under the Treaty (grounds 1 and 2), then the grounds relating to the protection of "essential security interests" (grounds 3, 4 and 5) and finally the grounds of appeal concerning the Criminal Complaint and the (alleged) misrepresentations by Devas *et al* as to intellectual property rights (grounds 6, 7, 8 and 9).

'Investment' within the meaning of the Treaty; jurisdiction of the arbitral tribunal

5.7 The Republic of India's grievances relating to the notion of 'investment' concern the jurisdiction of the arbitral tribunal and its assessment of what the Republic of India sees as its essential defences.

5.8 The Court of Appeal agrees with the District Court that the arbitral tribunal correctly assumed that there was an 'investment' for the purposes of the Treaty, such that it had jurisdiction to consider the claims brought by Devas *et al*. Devas *et al* acquired shares in the Indian company Devas Multimedia. This falls under "shares, debentures and any other form of participation in a company" as referred to in paragraph (ii) of the definition of "investment" in Article 1 of the Treaty. The shares were issued against capital contributions by Devas *et al* of approximately USD 32 million, which had been approved by the Indian Foreign Investment Promotion Board. The investments made by Devas et al were thus

implemented in accordance with the "relevant laws and regulations" of the Republic of India, as required by paragraph (a) of the definition of "investment". As a shareholder in Devas Multimedia, Devas *et al* indirectly own a number of "assets" which can also be viewed as "investment" for the purposes of the Treaty, such as the rights under the Devas Agreement with Antrix. Under this contract, Devas Multimedia leased capacity on two satellites for a period of 12 years, for which it made prepayments of USD 13 million per satellite. The Treaty includes "claims to (...) any performance under contract having an economic value" and "business concessions conferred (...) under contract" as examples of "investments". The investments of Devas *et al* represent(ed) significant value, as evidenced by the fact that, in March 2008, DT Asia paid around USD 75 million for a 20% stake in Devas Multimedia. Against this background, the Republic of India's argument that the arbitral tribunal should have considered the Devas Project rather than the Devas Agreement lacks relevance. The cancellation of the Devas Agreement certainly had implications for the Devas Project, but that does not detract from the nature of the investments identified above. Its arguments that there had merely been "pre-investment" fails at this juncture. This was not a case of "pre-investment" given that Devas *et al* have made actual investments within the meaning of the Treaty.

5.9 The Republic of India argues that the arbitral tribunal has applied far too broad a definition of the notion of 'investment'. According to the Republic of India, in addition to the definition of "investment" in the Treaty, there must be met five criteria of the autonomous concept of 'investment', which it derives from arbitral decisions based on the ICSID Convention: (i) a contribution to the host state in terms of (financial) resources, (ii) a certain duration of the activity in question in the host state, (iii) an acceptance of risks by the investor, (iv) the expectation of profit or revenue, and (v) if mentioned in the preamble to the relevant treaty, a contribution to the economic development of the host country. I doesn't need to be decided whether the arbitral tribunal was required to apply this autonomous concept because, as Devas *et al* correctly argued, the capital contributions of Devas *et al* and their use by Devas Multimedia alone were sufficient to meet five of the criteria referred to by the Republic of India; specifically, the capital contributions and the advance payments for the reservation of satellite capacity constitute a contribution to the host state, the lease of satellite capacity has a duration of at least 12 years, the investments involve risk and are capable of providing significant returns, given the amounts that DT Asia was willing to pay for a 20% stake in Devas Multimedia. While the Treaty's preamble recognises that investments can contribute to the host country's economic development, but does not make such a contribution a requirement ("*RECOGNISING that the promotion and protection of such investments will lend greater stimulation (...)*"). In any case, investments in telecommunications infrastructure of this magnitude can be expected to contribute to the economic development of the Republic of India. The fifth criterion is thus also satisfied. For that reason alone, while the District Court applied the Vienna Treaties Convention correctly, the Republic of India's discussion on this matter can be omitted. For the sake of completeness, the Court of Appeal considers that India failed to put forward sufficiently convincing arguments why the arbitral tribunal was required to depart from the clear wording of Article 1 of the Treaty in favour of applying the notion developed within the framework of the ICSID Convention.

5.10 Nor does the Court follow the Republic of India in its contention that an 'investment' within the meaning of the Treaty could only exist after all the permits required for the performance of the Devas Services had been granted. There is no basis whatsoever for such a requirement. Possible uncertainty about the granting of a WPC License or other necessary

operational and service permits can, at most, imply that the investment of Devas *et al* involved certain risks. As the arbitral tribunal rightly assumed, this can affect the value of the investment that the Republic of India may have to compensate, but it cannot mean that there is no investment in the first place. This could be different if Devas *et al* had been refused the necessary project permits, or if it were clear in advance that the required permits could not be obtained. However, at the time when the Republic of India annulled the Devas Agreement, no required permits had been refused, and the Republic of India has failed to provide sufficient evidence to be able to assume that such permits would have been refused. It stated merely that the acquisition of a WPC Licence, in particular, would have been an "extensive procedure" (Statement of Appeal, 214).

5.11 The doctrine of "general unity of an investment operation" which the Republic of India invoked in this regard does not lead to any other conclusion. The essence of the doctrine is that a transaction that does not itself qualify as an investment within the meaning of the applicable investment treaty can nonetheless be treated as such if it forms part of an operation that qualifies as an 'investment' viewed as a whole (see decision of 24 March 1999 in *CSOB v Slovakia*, which the article by Schreuer and Kriebaum, *At What Time Must Legitimate Expectations Exist?*, Liber Amicorum Thomas Wälde, p 271 (Devas *et al* exhibit G-59), quotes as the standard-setting case in this field). The arbitral tribunal held that the capital contributions of Devas *et al* and the advances for the reservation of satellite capacity in themselves qualify as 'investments' within the meaning of the Treaty. In such a case, the "general unity of an investment operation" doctrine is not necessary to qualify these investments as such. The Republic of India wrongly relies on this doctrine to argue that an 'investment' for the purposes of the Treaty can only exist once the entire investment operation is completed and all the required permits for the realisation of that investment's objective have been obtained.

5.12 For these reasons, the grounds of appeal relating to the arbitral tribunal's jurisdiction fail.

Essential defences with regard to the notion of 'investment'

5.13 The Republic of India further contends that the arbitral tribunal has not complied with its mandate (Article 1065(1)(c) Civil Procedure Code) and breached its obligation to state reasons (Article 1065(1)(d) Civil Procedure Code) by not addressing with reasons or not deciding with reasons on five essential defences in relation to the notion of 'investment' (subdivided into two groups of three and five essential defences). The Court of Appeal must approach these annulment grounds with restraint. The Court of Appeal may only annul the Partial Award on one of these grounds if the arbitral tribunal failed to decide on an essential defence or failed to provide any reasoning for its decision.

- *The first group of three essential defences*

5.14 The Republic of India argues that the arbitral tribunal failed to address its defence that only the Devas project as a whole, and not the shareholding of Devas *et al* or assets such as the Devas Agreement, could qualify as an 'investment' for the purposes of the Treaty. The District Court rejected this argument with reference to paragraphs 199 through 210 of the Partial Award. The Court of Appeal concurs with the District Court's judgment that the arbitral tribunal has addressed this defence in those paragraphs. In paragraphs 199 through 210 of the Partial Award, the arbitral tribunal found that the shareholding of Devas

et al in Devas Multimedia and the indirect ownership by Devas *et al* of the Devas Agreement qualified as 'investments' within the meaning of the Treaty. The arbitral tribunal held in this regard: "*(...) the Tribunal finds deficient the Respondent's argument that the Claimant's activities were "only pre-investment activities" because their investment was the alleged right to proceed with the Devas project pursuant to the Devas Agreement and because said project could not proceed without the WPC License, which Devas had no right to receive under the Devas Agreement*". This holding was further explained in the following paragraphs. The arbitral tribunal thus did, in fact, address this defence of the Republic of India. The court cannot review the arbitral tribunal's substantive assessment in an annulment proceeding. The court may only verify whether the arbitral tribunal has addressed an essential defence. In this case, the arbitral tribunal did so. The arbitral tribunal's reasoning is not so incomprehensible as to be tantamount to no reasoning at all.

5.15 The second essential defence allegedly left unaddressed by the arbitral tribunal concerns the arbitral decisions cited by the Republic of India. The Republic of India argues that the District Court misinterpreted its position. The Republic of India is not concerned with those decisions as such, but, rather, with the defence supported by those decisions, namely that only the Devas project as a whole can qualify as an 'investment'. If so, the Republic of India's objection targets the treatment of the same essential defence as discussed in paragraph 5.14, such that it suffices for the Court of Appeal to refer to that paragraph. In any event, the Court of Appeal subscribes to the District Court's view that the arbitral tribunal was not required to substantively discuss the case law cited by the Republic of India.

5.16 The Republic of India also alleges that the arbitral tribunal has not paid sufficient attention to its defence that Devas Multimedia could not have rolled out satellite-only services without a WPC Licence. The Republic of India claims that the arbitral tribunal rejected this defence without any reasoning. That is not correct. The arbitral tribunal held: *"[o]n the basis of the evidence received by the Tribunal, it is satisfied that, even without a WPC license, Devas could have rolled out satellite-only services*" (Partial Award, paragraph 209). The evidence marshalled in the arbitration proceedings was mentioned by the arbitral tribunal in paragraph 181 of the Partial Award. The arbitral tribunal also took note of the documents which the parties had provided with respect to this matter after the hearing (see Partial Award, paragraphs 46 to 54). It appears from the cited paragraph that the arbitral tribunal based its decision, among other things, on that evidence. Pursuant to Article 1065 Civil Procedure Code, the arbitral tribunal's evidentiary assessment is not subject to judicial review. This is compounded by the fact that the question whether Devas Multimedia would have been able to roll out satellite-only services without a license is not determinative for the arbitral tribunal's conclusion that there has been an 'investment' within the meaning of the Treaty.

- *The second group of five essential defences*

5.17 According to the Republic of India, the arbitral tribunal failed to address the essential defence that the shareholding of Devas *et al* and the indirect ownership of Devas Multimedia's assets were not expropriated by the Republic of India, and Devas *et al* cannot rely on the Treaty in relation to those assets. That objection is unfounded. In paragraph 411 of the Partial Award, the arbitral tribunal concludes that there has been an expropriation of Devas *et al*'s property within the meaning of Article 6(1) of the Treaty. In doing so, the

arbitral tribunal refers to its conclusion in paragraph 210, which is based on the findings set out in paragraphs 199 through 209. The arbitral tribunal evidently considered that the Republic of India's decision to annul the Devas Agreement as a result of which Devas Multimedia lost its rights to the spectrum on both satellites was tantamount to an expropriation of the investments of Devas *et al* in Devas Multimedia. That finding, which did address the relevant defence, is not so incomprehensible as to be treated as though it lacked reasoning.

5.18 Furthermore, the Republic of India states that the arbitral tribunal failed to address its essential defences that the Devas Agreement did not, as such, constitute an 'investment', and that the amount of the investments of Devas *et al* could not affect their nature, where by the Republic of India again refers to the (arbitral) case law cited by it. This amounts to a repetition of the statements made by the Republic of India which have already been rejected for this purpose in paragraphs 5.14 and 5.15.

5.19 The last two essential defences that the arbitral tribunal, according to the Republic of India, failed to deal with relate to the (lack of) WPC Licence. The Republic of India reproaches the arbitral tribunal for providing no explanation for its view that the lack of entitlement to a WPC Licence could be relevant to the value of the investment, but not to the question whether there was an investment as such. That is not a fair reproach given that the arbitral tribunal based the relevant view on the finding that a WPC Licence was not required for satellite-only services and that the right to the spectrum, as such, already represented value since it excluded the use of that spectrum by others (see Partial Award paragraph 209). Finally, the Republic of India criticises the arbitral tribunal's finding that Devas Multimedia was able to roll out satellite-only services without a WPC Licence. That reproach has already been discussed and rejected in paragraph 5.16 above.

5.20 In view of the above, the grounds of appeal relating to the issue of whether there is an 'investment' within the meaning of the Treaty (Republic of India's grounds of appeal 1 and 2) fail.

"*Essential security interests*"

5.21 Article 11(3) of the Treaty provides that the Treaty shall not limit the right of a Contracting Party (in this case: the Republic of India) to take any action which is directed to the protection of its "essential security interests". The Republic of India did not raise an objection to the arbitral tribunal's jurisdiction under this provision in the arbitration proceedings. Neither did the arbitral tribunal understand the invocation of that provision as such in the findings of the Partial Award (see paragraphs 293 *et seq* of the Partial Award). Only in the Partial Award's dictum did the arbitral tribunal state: "(…) *that the Tribunal lacks jurisdiction over the Claimants' claims insofar as the Respondent's decision to annul the Devas agreement was in part directed to the protection of the Respondent's essential security interests*." Unlike the District Court, the Court of Appeal does not conclude from this that the arbitral tribunal construed the Republic of India's claims concerning "essential security interests" as a jurisdictional objection. Rather, the Partial Award's dictum must be interpreted in the light of its findings, wherein the arbitral tribunal did not treat this as a jurisdictional objection. Be that as it may, it is no longer in dispute between the parties in these appeal proceedings that Article 11(3) of the Treaty does not concern the arbitral tribunal's jurisdiction, but, rather, an exception to the Treaty's provisions aimed at protecting "essential security interests".

5.22 Accordingly, the Republic of India's grounds of appeal with regard to the protection of "essential security interests" do not concern the arbitral tribunal's jurisdiction. According to the Republic of India, the District Court disregarded that the arbitral tribunal's assessment of this exception was contrary to the arbitral tribunal's mandate (Article 1065(1)(c) Civil Procedure Code), that the arbitral tribunal failed to support its findings with reasons (Article 1065(1)(d) Civil Procedure Code), and that the arbitral tribunal's decision is in breach of public policy and good morals (Article 1065(1)(e) Civil Procedure Code). As explained above, the court must exercise its power to annul on the first two grounds with restraint. The court may only engage in a full review of the arbitral tribunal's decision in the event of a breach of public policy and good morals.

- *The arbitral tribunal's mandate*

5.23 The Republic of India argues that the arbitral tribunal acted in breach of its mandate by applying the "essential security interests" provision to the S band spectrum instead of to the decision to terminate the Devas Agreement. The Court of Appeal cannot share this view of the Republic of India. Having analysed the need for the use of the S band spectrum for strategic/military purposes, the arbitral tribunal, in paragraph 351 of the Partial Award, found as follows: "*But this is not the end of the matter. While the events related above provide helpful information concerning the administrative process followed both before and after the CCS decision, what is the determinant factor for the Tribunal is that decision itself and whether it was directed to the protection of the Respondents essential security interests*". The arbitral tribunal thus did, in fact, take the decision to terminate the Devas Agreement as the starting point.

5.24 The Republic of India further argues that the arbitral tribunal misunderstood the dichotomous character of the "essential security interests" provision. When referring to the dichotomous character of the provision, the Republic of India means that "essential security interests" either exist or they do not. The Court of Appeal cannot follow this argument either. It is established that different parts of the S band spectrum can be used for different purposes. The District Court established that this possibility already followed from the Devas Agreement, wherein Devas Multimedia and Antrix agreed that 90% of the spectrum would be used for civil/commercial purposes, while the remaining 10% would be used for strategic/military purposes (paragraph 4.50 of the District Court judgment). This has not been contested by the Republic of India on appeal. The "essential security interests" may well be viewed as "dichotomous" in so far as it might exclude the use of the same part of the S band spectrum both for the protection of "essential security interests" and for other purposes at the same time. However, the use of a part of the S band spectrum for the protection of "essential security interests" does not exclude the use of a different part of the S band spectrum for other purposes. Either way, the record was capable of supporting that conclusion of the arbitral tribunal.

5.25 The Republic of India also argues that the arbitral tribunal had gone *ultra petita* by engaging in a full rather than deferential review of the "essential security interests" objection. This objection is unfounded given that the arbitral tribunal did, in fact, apply a deferential standard of review, which follows, *i.a.,* from the arbitral tribunal's following findings:

"*243. While, in the present case, the Respondent does not have to demonstrate necessity in the sense that the measure adopted was the only one it could resort to in the*

circumstances, it still has to establish that the measure related to its essential security interests; it cannot therefore be any security interest but it has to be an essential one (…)

244. In performing this analysis, however, the Tribunal has also no difficulty in recognizing the "wide measure of deference" mentioned by the Respondent."

5.26 The Republic of India maintains that the arbitral tribunal did not comply with this deferential review standard because it ultimately itself decided that the protection of "essential security interests" did not require the full S band spectrum. In addition, according to the Republic of India that this decision is based on an incorrect allocation of the burden of proof whereby the Republic of India was required to prove the validity of its reliance on "essential security interest".

5.27 This objection is likewise unfounded. The arbitral tribunal found that the protection of "essential security interests" did not require the full S band spectrum, based on the decision of the CCS. In this regard, the arbitral tribunal relied on the press release of 17 February 2011 in which this decision was communicated. In that press release, the decision to terminate the Devas Agreement was justified by a reference to "increased demand for allocation of spectrum for national needs, including the needs of defence, para-military forces, railways and other public utility services as well as for societal needs". That press release, on which the arbitral tribunal had to rely given that it was the only notice of the CCS decision, was capable of supporting the arbitral tribunal's conclusion that the decision to terminate the Devas Agreement was not exclusively intended for the protection of "essential security interests".

5.28 The deferential standard of review of the Partial Award under Article 1065(1)(c) Civil Procedure Code leaves no scope for a substantive assessment of the arbitral tribunal's allocation of the burden of proof. In any event, the Court of Appeal considers the arbitral tribunal's judgment that it was incumbent on the Republic of India to establish that the decision to terminate the Devas Agreement was related to "essential security interests" (see paragraph 242 of the Arbitral Award) to be understandable. After all, the Republic of India relied on a provision that contains an exception to the protection of investments under the Treaty. In this regard, the arbitral tribunal took into account the discretionary power ("wide measure of defence") of the Republic of India by setting a high threshold for the defence of Devas *et al* (see paragraph 245 of the Arbitral Award).

5.29 The Republic of India further argues that the arbitral tribunal failed to comply with its duty to decide in accordance with "the rules of law" by making an *ex aequo et bono* determination of the part of the spectrum intended for the protection of "essential security interests" at 60%. This objection lacks factual basis. In view of the reasoning provided by the arbitral tribunal for its decision, it decided in accordance with the "rules of law". The relevant ruling (paragraph 373 of the Partial Award) does not support the view that, in determining the part of the spectrum intended for the protection of "essential security interests", the arbitral tribunal applied a different (*ex aequo et bono*) decision-making standard than that applicable under the Treaty. The mere fact that the arbitral tribunal speaks of a "reasonable allocation of spectrum" in this paragraph is not enough to support such a conclusion, given that reasonableness also plays a role when deciding under the "rules of law".

5.30 Finally, the Court of Appeal rejects the Republic of India's argument that the arbitral

tribunal added to the facts by basing its finding that no more than 60% of the S band spectrum was intended for the protection of "essential security interests" on the finding (paragraph 370 of the Partial Award) that*:"(...) All around the world, governments are faced every year with very large demands for funds for various projects from their military establishment and, just as regularly, governments grant only a percentage of such requests*." That argument is based on an incorrect reading of the Partial Award. As stated in the first sentence of paragraph 373 of the Partial Award, the arbitral tribunal found that up to 60% of the S band spectrum was intended for the protection of "essential security interests" "[o] n the basis of the evidence submitted to it as described above and bearing in mind that the Respondent had already reserved to itself 10% of the spectrum in question (...)" in the Devas Agreement. The arbitral tribunal's conclusion is therefore not, or, in any case, not exclusively, based on the finding referred to by the Republic of India.

- *Reasons*

5.31 According to the Republic of India, the arbitral tribunal failed to state the reasons for its decision that no more than 60% of the S band spectrum was intended for the protection of "essential security interests". That is not correct. As explained above, as apparent from paragraph 373 of the Arbitral Award based on "the evidence submitted to it as described above and bearing in mind that the Respondent had already reserved to itself 10% of the spectrum in question (...)" in the Devas Agreement. Whether this reasoning is substantively accurate is outside the scope of the Court of Appeal's assessment under Article 1065(1)(c) Civil Procedure Code. The same applies to the additional reasoning defects alleged by the Republic of India (Statement of Appeal, paras 457 *et seq*). There is no need to decide whether 100% of the S band spectrum is currently being used for military and paramilitary purposes given that the Court of Appeal is not required to provide a substantive decision on the application of the "essential security interests" defence, but only needs to verify whether the arbitral award must be set aside. The Republic of India's offer of proof regarding the current use of the S band spectrum therefore lacks relevance and will be disregarded.

- *Surprise decision*

5.32 Like the District Court, the Court of Appeal considers that the arbitral tribunal's decision that no more than 60% of the S band spectrum was intended for the protection of "essential security interests" cannot be viewed as a surprise decision. In the arbitration proceedings, the Republic of India has been given (ample) opportunity to substantiate its position that 100% of the S band spectrum was necessary for the protection of "essential security interests". It is not clear why the arbitral tribunal should have separately heard the Republic of India with respect to its intention to accept the Republic of India's reliance on the "essential security interests" provision for less than 100% of the spectrum. The Republic of India does not indicate what arguments it could have put forward against that intention that it could not have put forward to support the use of 100% of the S band spectrum for the protection of "essential security interests". This could have been different had the arbitral tribunal been required to take into account the possibility that the use of different parts of the S band spectrum for different purposes would lead to problems. However, the arbitral tribunal was not required to take this into account given that the Devas Agreement itself already provided that 90% of the spectrum would be used for civil/commercial purposes and the remaining 10% – for strategic/military purposes.

5.33 The grounds of appeal relating to the "essential security interests" defence (grounds 3, 4 and 5) thus fail for these reasons.

The Criminal Complaint and misrepresentation regarding intellectual property rights

5.34 As the first ground for annulment in this context, the Republic of India has argued, with reference to the Criminal Complaint, that the Devas Agreement was concluded under the influence of criminal acts, with the consequence that no valid 'investment' had been made and the arbitral tribunal was not competent to decide on the claims of Devas *et al* (Article 1065(1)(a) Civil Procedure Code). According to the Republic of India, the District Court wrongly disregarded the facts mentioned in the Criminal Complaint on the grounds that they have not yet resulted in a (final) criminal conviction.

5.35 The Court of Appeal notes, first and foremost, that the two parts of the Criminal Complaint (the "charge sheet" and the "supplementary charge sheet") do not, under Indian law, constitute an official indictment. The "charge sheets" are submitted to the court, and only when the judge determines that the recorded complaints are *prima facie* well-founded can such complaints be included in an official indictment. The "charge sheets" were submitted to the Indian judge quite some time ago (the "charge sheet" dates from 11 August 2016 and the "supplementary charge sheet" from 8 January 2019). During the appellate pleadings, Devas *et al*'s attorneys alleged that the judge had meanwhile rejected the request to proceed in the matter. However, Devas *et al* did not submit a copy of that decision or any other document proving that the judge thus decided. When asked, the Republic of India's attorney was unable to confirm whether or not a decision on the Criminal Complaint had been taken.

5.36 Even if the Criminal Complaint is still pending, it cannot be assumed that the Devas Agreement was concluded under the influence of criminal acts. Whether, as the District Court assumed, that would require a (final) court decision need not be decided. As long as the Indian court has not granted permission to include the allegation mentioned in the Criminal Complaint in an official indictment, it cannot be assumed that such complaints are founded even *prima facie*. Apart from referring to the Criminal Complaint, the Republic of India has stated only in the broadest terms what the alleged offences consist of (Statement of Appeal, para 505). The Republic of India has thus failed to sufficiently substantiate its claim that the Devas Agreement was concluded under the influence of criminal offences.

5.37 In its Statement of Appeal, the Republic of India also referred to an enquiry into Devas Multimedia under the "Prevention of Money Laundering 2002" and another enquiry under the "Foreign Exchange Management Act" that had resulted in the imposition of fines on Devas Multimedia, its directors and officers, as well as DT Asia. However, the Republic of India only mentioned these investigations "for the sake of completeness" (Statement of Appeal, para 508), and has not referred to them as the basis of its annulment claim; the Court of Appeal will not, therefore, take these enquiries into consideration.

5.38 The Republic of India further argues that the Partial Award must be annulled for lack of reasoning because the arbitral tribunal did not address the Republic of India's argument that, at the time the Devas Agreement was entered into, Devas Multimedia wrongly represented that it held certain intellectual property rights (Article 1065(1)(d) Civil Procedure Code). The District Court rejected this annulment ground because that argument

only appeared in a single footnote in the arbitration proceedings, such that the arbitral tribunal was not required to treat it as an essential defence. The Republic of India counters this by stating that it had requested the documents relating to intellectual property rights in the "document production phase" of the arbitral proceedings, and that the arbitral tribunal had ordered Devas *et al* to produce such documents. Devas *et al* failed to produce those documents, allegedly because they were not in its possession. However, that could not have prevented the Republic of India to develop this argument further and to back up its significance for its defence. The Republic of India failed to do so. Devas *et al* argued unopposed that the Republic of India did not raise this argument anywhere in the arbitration proceedings other than the footnote in question; not in any other procedural document, not during the hearing and not in the examination of the various witnesses appearing for Devas *et al*. In view of this positioning, the arbitral tribunal was not required to comprehend that this was an essential defence of the Republic of India's on which it had to expressly decide. The Court of Appeal thus endorses the District Court's decision with respect to this annulment ground.

5.39 Finally, the Republic of India argues that the arbitral tribunal "remedied" Devas Multimedia's criminal conduct in the Partial Award by treating the Devas Agreement as valid and binding in spite of such conduct. Therefore, according to the Republic of India, the award is contrary to public policy and good morals and subject to annulment based on Article 1065(1)(e) Civil Procedure Code. The Court of Appeal concurs with the District Court's judgment that the reliance on this annulment ground fails because it has not been established in court that the formation of the Devas Agreement was accompanied by criminal conduct (paragraph 4.74 of the District Court judgment).

5.40 The Court of Appeal rejects the Republic of India's request to stay these proceedings pending the outcome of the criminal proceedings in India. In its Statement of Appeal, the Republic of India anticipated that the criminal proceedings against the persons mentioned in the Criminal Complaint would commence in 2019. However, there are, at present, still no criminal proceedings pending in India. The persons at issue have not even yet been officially indicted, and it is at least uncertain whether that is still going to happen (see para 5.35 above). Like the District Court, the Court of Appeal therefore considers that the granting of such a request would be contrary to due process.

5.41 In view of the above, grounds of appeal 6 through 9 are also dismissed.

Offer of proof

5.42 The offer of proof formulated by the Republic of India at the end of its Statement of Appeal is dismissed. Insofar as that offer of proof relates to the Republic of India's allegations concerning the relevant permits, the findings set out above demonstrate that such allegations either lack sufficient backing or are not determinant for the resolution of the claim in these annulment proceedings. Insofar as the offer of proof relates to the current use of the GSAT-6 satellite, it is irrelevant (see para 5.31 above). To the extent that it relates to the production of documents, the position is that the Republic of India should itself have provided any documents on which it intends to rely.

Conclusion and allocation of costs

5.43 Given that the grounds of appeal fail, the District Court's judgment shall be affirmed. The

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Republic of India shall, as the losing party, be ordered to pay the costs of the proceedings.

6 Decision

The Court of Appeal:

- affirms the District Court's judgment issued among the parties on 14 November 2018;

- orders the Republic of India to pay the costs of the proceedings incurred by Devas *et al,* assessed at € 741.- in court fees, € 3,342.- in representation costs and € 163,- in post-judgment representation costs to be increased by €85. - if the judgment is not voluntarily complied with within fourteen days from notification and the judgment is subsequently served, and determines that these amounts must be paid within 14 days from the day of the judgment, or, with respect to the amount of € 85. -, after the date of service, failing which such amounts shall be increased by the statutory interest as provided in Article 6:119 Civil Code accruing from the expiry of the stated 14-day period;

- declares this judgment provisionally enforceable with respect to the costs order;

This judgment was issued by mrs P. Glazener, J.J. van der Helm and D. Aarts and pronounced at the public court session of 16 February 2021 in the presence of the Registrar.