UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CC/DEVAS (MAURITIUS) LTD, et al., Petitioners, v. REPUBLIC OF INDIA, Respondent.	Civil Action No. 1:21-cv-00106-RCL

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF THE REPUBLIC OF INDIA'S MOTION TO STAY

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The Republic of India ("India") respectfully moves this Court to stay the present action for the duration of ongoing related litigation in the Netherlands and India. The Dutch litigation concerns the annulment ("set aside") of the two arbitration awards (the "Merits Award" (ECF 1-6) and the "Quantum Award" (ECF 1-4), together, the "Awards") at issue in this case. The Netherlands was the place of the underlying arbitration (the "seat" or "primary jurisdiction"), and a district court "normally may not enforce an arbitration award that has been lawfully set aside" by the courts at the seat of arbitration. *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007). Meanwhile, in the parallel Indian proceedings, an appellate body is presently hearing Petitioners' challenge to a first-instance judgment, which held, *inter alia*, that Petitioners acquired—through fraud and collusion—the 2005 contract at issue in the underlying arbitration. The Indian judicial system's final determination of these issues will likewise impact this Court's consideration of India's arguments in this U.S. action.

As further detailed below, India's Motion to Stay is justified by judicial economy, international comity, and the balance of hardships, including the devastating impact of the COVID-19 pandemic. India therefore asks this Court to apply the same reasoning and issue the same relief as in seventeen previous rulings in this District. In those analogous proceedings to enforce international arbitration awards, this Court routinely has granted the motions to stay submitted by Egypt, Guinea, Italy, Kazakhstan, Pakistan, Russia, Spain, Uzbekistan, and Venezuela, while parallel set-aside or annulment proceedings were underway in the primary jurisdiction (much as in the present litigation). Here, India also should receive the same relief that was granted previously to those other foreign sovereign States, including because India is presently burdened with fighting a grave public health crisis.

PRELIMINARY STATEMENT

Petitioners CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited are three Mauritian entities that held shares in Devas Multimedia Private Limited ("Devas"), an Indian company. Pet. ¶¶ 1-2 (ECF 1). Petitioners are seeking to collect more than $120 million from India in accordance with the Awards rendered by an arbitral tribunal seated in the Netherlands on the basis of the 1998 Mauritius-India Agreement for the Promotion and Protection of Investments, a bilateral investment treaty (the "BIT" (ECF 1-8)). *Id.* ¶¶ 1, 8-9. In support of this effort, Petitioners have submitted a petition to this Court, requesting confirmation of the Quantum Award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), June 10, 1958, 21 U.S.T. 2517. *Id.*

In response, India has filed today a Motion to Dismiss for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611. As explained in the Motion to Dismiss, India never offered—let alone agreed—to arbitrate any disputes concerning Petitioners' pre-investment activities (*i.e.*, as opposed to genuine "investment" activities). India thus never waived sovereign immunity or offered to arbitrate Petitioners' dispute, as required in order to establish subject-matter jurisdiction under either 28 U.S.C. § 1605(a)(1) or § 1605(a)(6). *See* Pet. ¶ 17 (ECF 1) (invoking the "waiver" and "arbitration" exceptions).

For the avoidance of doubt, India also reserves the right to raise subsequent and additional defenses under the New York Convention.[1] Such defenses under the New York Convention may potentially include, but are not limited to, the grounds that Petitioners' claims are barred from

[1] As a foreign sovereign State, India is first entitled to "a threshold determination of immunity" under the FSIA "before the sovereign can be compelled to defend the merits" of its challenges under the New York Convention. *Process & Indus. Devs. v. Fed. Republic of Nigeria ("P&ID")*, 962 F.3d 576, 585 (D.C. Cir. 2020) (citations and quotation marks omitted).

arbitration under the "essential security" clause of the BIT and that Petitioners' claims are likewise precluded based on their fraud and collusion in the acquisition of the underlying 2005 contract. *See, e.g.*, New York Convention, arts. V(1)(a), V(1)(c), V(2)(a), V(2)(b).

Significantly, many of India's present and potential arguments in this U.S. action overlap substantially with issues now being decided in parallel litigation in the Dutch and Indian judicial systems. In the Netherlands, two simultaneous proceedings to annul the Merits Award and Quantum Award are now pending in, respectively, the Dutch Supreme Court and the District Court of The Hague. *See* India's Initiating Document in Cassation ("Cassation Pet."), May 17, 2021 (Kownacki Decl., Ex. 14); India's Writ of Annulment ("Quantum Writ"), Feb. 5, 2021 (Kownacki Decl., Ex. 13). Meanwhile, separate litigation is also ongoing in India in relation to the winding-up of Devas itself—based upon Petitioners' fraudulent conduct during the acquisition and operation of the Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft of January 28, 2005 (the "Devas-Antrix Agreement") (Kownacki Decl., Ex. 1). *See* Judgment of National Company Law Tribunal ("Winding-Up Judgment"), May 25, 2021 (Kownacki Decl., Ex. 15); Appellate Br. of Antrix Corp. Ltd & Ors. ("Winding-Up Appellate Br."), June 20, 2021 (Kownacki Decl., Ex. 18). Among other issues, the winding-up proceeding directly concerns the validity of the same underlying contract now at issue in this U.S. action. *E.g.*, Pet. ¶¶ 3, 5, 6, 20, 22, 23, 27, 28, 32, 33, 46, 47, 49, 58, 66, 73, 74, 79 (ECF 1) (referring to the Devas-Antrix Agreement more than twenty times).

Where overlapping issues arise in parallel litigation, this Court previously has found such circumstances to be "paradigm example[s] of . . . case[s] warranting a stay." *Hulley Enters. v. Russian Fed'n* ("*Hulley II*"), 502 F. Supp. 3d 144, 154 (D.D.C. 2020) (extending stay pending Dutch annulment litigation); *Hulley Enters. v. Russian Fed'n* ("*Hulley I*"), 211 F. Supp. 3d 269,

282 (D.D.C. 2016) (granting original stay pending Dutch annulment litigation). Further, this Court regularly has observed that "litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests." *Masdar Solar & Wind Coop. U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 40 (D.D.C. 2019) (quoting *Naegele v. Albers*, 355 F. Supp. 2d 129, 141 (D.D.C. 2005)) (internal quotation marks omitted).

In sharp contrast to this common-sense observation, Petitioners have adopted a wasteful and disorderly approach to pursuing enforcement of the Awards—apparently in multiple jurisdictions around the world—while the Dutch and Indian proceedings remain pending. According to Petitioners' recent filing in the U.S. District Court for the Southern District of New York, Petitioners have evidently sought *ex parte* confirmation ("pending service") of the Merits Award and Quantum Award in some or all of the following jurisdictions: Australia, Belgium, England, France, and Luxembourg.[2] Compl. at ¶ 41 (ECF No. 1), *Devas v. Air India*, No. 1:21-CV-5601 (S.D.N.Y. June 28, 2021). Evidently, Petitioners believe it would be appropriate for this Court to consider some or all of the same legal and factual issues together with <u>at least eight</u> other national courts or tribunals simultaneously, despite the risk of conflicting decisions and waste of resources.

This Court, however, has consistently rejected such an approach—including by staying petitioners' U.S. enforcement litigation to await the results of set-aside or annulment proceedings at the seat of arbitration. "To put it simply, this is a litigation quagmire that a stay would forestall . . . ." *Hulley II*, 502 F. Supp. 3d at 156, 162 (explaining that "[s]tays have generally been

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[2] India has not received adequate notice or service of process in some or all of the jurisdictions referenced by Petitioners in their Complaint in the New York litigation. India reserves all rights and defenses in respect of such proceedings, including, but not limited to, service of process, sovereign immunity, and all potential challenges under the New York Convention and applicable law.

found warranted to avoid this litigation quagmire"). Significantly, this Court has recognized "broad discretion" to grant a stay not only where the parallel litigation was a set-aside proceeding (as in the present Dutch annulment litigation), but also where the parallel litigation involved overlapping issues (as in the present Indian winding-up proceeding). *See IBT/HERE Emp. Representatives' Council v. Gate Gourmet Div. Ams.*, 402 F. Supp. 2d 289, 293 (D.D.C. 2005) (granting a stay on the basis that parallel proceedings "may affect the parties' understanding of the scope of this case going forward, may reorient the parties' arguments, may catalyze a settlement of this matter, may moot the defendants' motion to dismiss, or may resolve the issues raised in this lawsuit in their entirety").

The legal framework applicable to this Court's evaluation of this Motion to Stay is set forth in *Landis v. North American Co.*, 299 U.S. 248, 254 (1936),[3] which applies when this Court exercises its inherent power to stay proceedings during parallel litigation in another forum. *See also Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("In the exercise of a sound discretion [the court] may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same.") (citing *Landis*, 299 U.S. at 248). Applying this framework, this Court routinely considers the issues of judicial economy, international comity, and the balance of hardships in evaluating whether or not to stay litigation. All three factors weigh

[3] The present stay is to be evaluated under *Landis*, 299 U.S. at 254, as a matter of this Court's inherent authority, rather than under Article VI of the New York Convention. This is because "this Court has not ruled on its jurisdiction in this case and thus is not in a position to issue a stay pursuant to the New York Convention." *Hulley II*, 502 F. Supp. 3d at 153 (citations and quotations omitted); *see also Cef Energia v. Italian Republic*, No. 19-cv-3443 (KBJ), 2020 U.S. Dist. LEXIS 130291, at *13 (D.D.C. July 23, 2020) ("This Court is considering Italy's motion to stay 'under its inherent powers[,]' rather than Article VI of the Convention, because the Court's own jurisdiction has yet to be established.") (quoting *Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain*, No. 18-CV-01148 (TSC), 2020 U.S. Dist. LEXIS 12794, at *6 (D.D.C. Jan. 27, 2020)).

heavily in favor of staying the present U.S. enforcement proceedings while the Dutch annulment litigation and the Indian winding-up proceedings are pending.

Here, the Dutch litigation, as with many set-aside proceedings at the seat of arbitration, "could significantly impact this litigation" for multiple reasons explained fully below. *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, No. 1:19-CV-3783 (CJN), 2021 U.S. Dist. LEXIS 63261, at *8 (D.D.C. Mar. 31, 2021). Indeed, if this Court were to grant enforcement, and the Dutch courts later set aside one or both of the Awards, this would necessarily "result in 'more expensive litigation involving more complex issues.'" *Cef Energia, B.V. v. Italian Republic*, No. 19-CV-3443 (KBJ), 2020 U.S. Dist. LEXIS 130291, at *15 (D.D.C. July 23, 2020) (quoting *Getma Int'l v. Republic of Guinea*, 142 F. Supp. 3d 110, 114 (D.D.C. 2015)). This Court also should stay this action pending the result of the Indian litigation, given that those proceedings inevitably will "affect the parties' understanding of the scope of this case" and potentially "reorient the parties' arguments" under the New York Convention regarding issues of arbitrability and public policy in relation to Petitioners' acts of fraud. *See IBT/HERE*, 402 F. Supp. 2d at 293.

Finally, a stay of these U.S. proceedings is further necessitated by the tragic recent events in India resulting from the COVID-19 pandemic. Last year, this Court found that the effects of COVID-19 on the Republic of Egypt, among other factors, was a strong justification for staying a closely analogous case. *See Unión Fenosa Gas, S.A. v. Arab Republic of Egypt,* No. 18-CV-2395 (JEB), 2020 U.S. Dist. LEXIS 98645, at *12-13 (D.D.C. June 4, 2020) (granting stay in light of the "ongoing global COVID-19 pandemic" and resulting financial crisis in Egypt). The dire situation currently facing India—with respect to both the public-health component and the related economic burden—far surpasses the situation in Egypt in 2020. This is not a time for India to be

embroiled in duplicative litigation in multiple jurisdictions around the world. Therefore, this Court should exercise its discretion to minimize the strain upon the people of India.

BACKGROUND

For the purposes of this Motion to Stay, a brief summary of this dispute's factual and procedural background is provided below. Further details are set forth in India's Motion to Dismiss and the accompanying materials.

A. The 2005 Agreement Between Devas and Antrix

Devas is an Indian-registered entity incorporated on December 17, 2004. Merits Award ¶ 66 (ECF 1-6). Antrix Corporation Limited ("Antrix") is an Indian-registered commercial entity incorporated on September 28, 1992, which is wholly owned by the Government of India and falls within the administrative jurisdiction of the Indian Space Research Organization ("ISRO") and the Indian Department of Space ("DOS"). *Id.* ¶ 67.

The current dispute arises out of the 2005 Devas-Antrix Agreement, which concerned the lease of the so-called "S-Band spectrum" (2500-2690 MHz) and operation of commercial satellites. *See e.g.*, Pet. ¶ 3 (ECF 1). The Devas-Antrix Agreement was never approved by the Government of India, the requisite licenses contemplated under the Agreement were never granted (described below), and the Agreement was ultimately terminated in 2011 because of India's foreseeable policy decision to reserve the S-Band spectrum for national security purposes. *See id.* ¶ 6. In parallel, a related dispute has now arisen with respect to evidence showing that Devas originally procured the Devas-Antrix Agreement in 2005 through acts of fraud, including by means of collusion with corrupt Antrix executives. *See* Winding-Up Judgment ¶ 2 (Kownacki Decl., Ex. 15); Winding-Up Appellate Br. ¶ 12B (Kownacki Decl., Ex. 18).

The S-Band is a scarce and valuable portion of the electromagnetic spectrum that can be used to send and receive signals using small units (*e.g.*, mobile phones and laptop computers)

without requiring such units' antennas to be pointed directly at the satellite. *See e.g.*, Merits Award ¶ 72 (ECF 1-6). India originally obtained limited allocations of S-Band spectrum from the International Telecommunications Union ("ITU") through a complex inter-governmental process. *Id.* ¶¶ 71, 74. Notably, any S-Band spectrum allocated for one operator cannot be simultaneously used by another operator without causing significant interference or even total unavailability of the service. *Id.* ¶ 80. Significantly, India's military and defense agencies—including India's Navy, Air Force, and Ministry of Defence—have all required the use of S-Band capacity for national-security purposes for many years. *Id.* ¶ 304; Direct Testimony of Mr. A. Vijay Anand, Joint Secretary, Department of Space, Government of India ("Anand Statement") ¶¶ 5-6, n.21, Dec. 2, 2013 (Kownacki Decl., Ex. 6).

On January 28, 2005, Devas and Antrix executed the Devas-Antrix Agreement, under which Antrix agreed to lease S-Band capacity to Devas in relation to a pair of satellites to be built and launched by the ISRO. *See* Devas-Antrix Agreement (Kownacki Decl., Ex. 1). As is typical for such projects, each of the parties undertook to obtain certain approvals and licenses before the project could be implemented. *Id.* arts. 3(c), 12(b)(vii). In particular, Article 3(c) of the Devas-Antrix Agreement stipulated that responsibility for obtaining governmental and regulatory approvals would rest with Antrix, and that Antrix would assist Devas in obtaining any further necessary licenses, whereas Devas would bear the cost of obtaining these approvals. *Id.* art. 3(c). Article 12(b)(vii) further provided that Devas would be solely responsible for securing and obtaining all licenses and approvals for the delivery of Devas Services via satellite and terrestrial network. *Id.* Art. 12(b)(vii).

The Devas-Antrix Agreement explicitly anticipated the possibility that Antrix might be denied approvals for the required "orbital slot" for the satellites. Specifically, the parties agreed

to a comprehensive set of provisions describing their rights and obligations in the event of failure to obtain the required governmental approval or licenses. *See id.* art. 7. Article 7(c) thus provided that Antrix could terminate the Agreement in the event that it would be "unable to obtain the necessary frequency and orbital slot coordination required for operating" one of the two satellites. *Id.* Art. 7(c). Under such circumstances, Antrix would be required to reimburse Devas only for certain "Upfront Capacity Reservation Fees," and "neither Party shall have any further obligation to the other Party under this Agreement nor be liable to pay any sum as compensation or damages (by whatever name called)." *Id.*

Devas and Antrix thus were both fully aware that the Devas-Antrix Agreement was only the first of many potential steps—and that the planned "investment" could not be realized without subsequent approvals and authorizations from the Government of India. This is further evidenced by the *force majeure* clause contained in the Devas-Antrix Agreement, which listed "acts of or failure to act by any governmental authority acting in its sovereign capacity" as one of the *force majeure* events that would justify the relevant party's "failure or delay in performance of its obligations" without incurring any liability. *Id.* art. 11.

It should be emphasized that the Government of India was not itself a party to the Devas-Antrix Agreement. Rather, as was explicitly set forth in the text of the Agreement, the Government's exclusive role was that of a regulator. *Id.* Annexure I (defining "Governmental Regulatory Authority" as "any Government state or Central, municipality, local authority, town, village, court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of India," and "Regulatory Approval" as "any and all approvals, licenses, or permissions from Governmental or Regulatory Authorities").

Indeed, as an Indian tribunal observed in an order rendered earlier this year, Antrix officials took numerous steps to conceal even the existence of the Devas-Antrix Agreement from the Government of India beginning in 2005. Winding-Up Judgment ¶ 2(26) (Kownacki Decl., Ex. 15); Winding-Up Appellate Br. ¶ 31 (Kownacki Decl., Ex. 18). This fact—which corroborates other evidence of collusion between corrupt Antrix executives and Devas—has taken on additional importance in light of the fraud investigation and ongoing winding-up proceedings in India, as described below.

B. The 2011 Termination Based on India's National Security Requirements

In late 2009, allegations of irregularities relating to the Devas-Antrix Agreement prompted India's Department of Space ("DOS") to establish a committee to review the "legal, commercial, procedural and technical aspects" of the Devas-Antrix Agreement. *See* Merits Award ¶ 120 (ECF 1-6). This committee delivered its report in May 2010. *Id.* ¶ 122. The delivery of the committee's report coincided with concerns raised by Department of Telecommunications ("DOT") and the Ministry of Defence regarding the Indian armed forces' projected needs for S-Band spectrum. *Id.* ¶ 129.

In July 2010, based on input provided by multiple agencies and ministries, the Government concluded that India's national security needs could not be met if the Devas-Antrix Agreement were to be approved and licensed. *See* Department of Space, Note for the Cabinet Committee on Security, Annulling the Devas-Antrix Agreement (the "Note for the Cabinet Committee on Security") Feb. 16, 2011 (Kownacki Decl., Ex. 7); *see also* Anand Statement ¶¶ 18-20 (Kownacki Decl., Ex. 6). In particular, a note prepared for India's Cabinet Committee on Security observed that "[s]pace 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." *See* Note for the Cabinet Committee on Security, ¶ 34, Feb. 16, 2011 (Kownacki Decl., Ex. 7). Accordingly, the Note recommended that an orbital slot in S-Band for commercial activities should not be provided to Antrix, thus necessitating the annulment of the Devas-Antrix Agreement. *Id.* ¶¶ 45.1-45.2.

On February 25, 2011, Devas was notified of the termination of the Devas-Antrix Agreement. Merits Award ¶ 146 (ECF 1-6). While the termination could have been based exclusively upon the *force majeure* clause under Article 11, Antrix also invoked Article 7(c) of the Agreement, and accordingly reimbursed Devas for the Upfront Capacity Reservation Fees. *Id.* ¶ 156. As explained above, under the termination provisions of the Devas-Antrix Agreement, the reimbursement of the Upfront Capacity Reservation Fees constituted the entirety of the compensation due to Devas.

C. The 2012 Arbitration

On July 3, 2012, Petitioners purported to accept India's offer of arbitration under the BIT by submitting a Notice of Arbitration. *Id.* ¶ 8. The Hague in the Netherlands was chosen as the seat of the arbitration, and the Permanent Court of Arbitration was selected to administer the proceedings. *Id.* ¶¶ 12, 17. In parallel, pursuant to Article 20 of the Devas-Antrix Agreement, Devas initiated a separate commercial arbitration against Antrix on June 29, 2011, before a tribunal seated in India under the Rules of the International Chamber of Commerce. *Id.* ¶ 59.

India objected to the BIT tribunal's jurisdiction on multiple grounds, including on the basis that Devas's conduct only involved pre-investment activities, which do not fall within the ambit of Articles 1(1), 2, and 8 of the BIT. Respondent's Statement of Defence in PCA Case No. 2013-09 ("India's Statement of Defense"), ¶ 90, Dec. 2, 2013 (Kownacki Decl., Ex. 5). As India explained, Article 8 of the BIT contemplated only disputes relating to genuine "investments," and

not disputes relating to mere preparations or pre-investment activities. *Id.* ¶¶ 91-93. As India further explained, a commercial contract—for which no applicable license has yet been formally granted by the relevant authorities—cannot constitute an "established" asset or "business concession[] conferred by law or under contract" under Article 1(a)(i) or 1(a)(v) of the BIT. *Id.* ¶ 98. In the present case, the Devas-Antrix Agreement required Devas to seek a particular form of license (the "WPC License"), which Devas failed to obtain. *See* Merits Award ¶¶ 193-94 (ECF 1-6). For the purposes of the BIT, therefore, Devas's activities in connection with the Devas-Antrix Agreement were not "investments" at all. *See* India's Statement of Defense ¶ 98 (Kownacki Decl., Ex. 5). As many international tribunals have previously held, such a commercial contract constitutes merely pre-investment activity, and thus falls outside the standing offer to arbitrate "investment disputes." *See id.* ¶¶ 90-98.

In its Merits Award rendered on July 25, 2016, however, the tribunal disregarded India's arguments and improperly upheld its jurisdiction. *See* Merits Award ¶¶ 196-210 (ECF 1-6). The tribunal subsequently issued the Quantum Award on October 13, 2020, ordering India to pay damages totaling $111,296,000, plus interest and attorneys' fees. *See* Quantum Award (ECF 1-4).

D. The Two Ongoing Annulment Proceedings in the Netherlands

After the Tribunal issued the Merits Award, India timely commenced annulment proceedings in the Dutch courts in accordance with applicable Dutch legislation. *See* Writ of Annulment before the District Court of The Hague ("Merits Writ"), ¶¶ 24-25, Oct. 27, 2016 (Kownacki Decl., Ex. 12). On October 27, 2016, India applied to the District Court of The Hague to have the Merits Award annulled. *See id.* India raised a range of arguments pertaining to the absence of an arbitration agreement, the tribunal's failure to respect due process, and certain violations of public policy reflected in the Merits Award. *Id.* § 3.4. Those proceedings have now progressed through to the Supreme Court of the Netherlands. Specifically, after the lower courts

rejected India's arguments, India commenced an appeal in cassation as of right on May 17, 2021, which is now pending. *See* Cassation Pet. (Kownacki Decl., Ex. 14). This appeal is likely to be heard and decided during the course of 2021 or 2022.

India also has commenced a separate annulment proceeding in relation to the Quantum Award. On February 5, 2021, India submitted a Writ of Annulment to the District Court of The Hague, raising multiple additional grounds for set aside under Dutch law. Quantum Writ ¶¶ 173-241 (Kownacki Decl., Ex. 13). In particular, India alleges that the tribunal failed to consider certain aspects of India's evidence and that it failed to adhere to the specific procedures agreed upon by the parties. *Id.* ¶¶ 188-98. In due course, the District Court of The Hague will issue a procedural schedule to determine the applicable deadlines for the parties' submissions in this second Dutch annulment proceeding.

E. Parallel Litigation in India

Apart from the two Dutch annulment proceedings described above, at least six other national courts and tribunals—not counting this Court—have also been asked to consider aspects of the present dispute.

The first of these national proceedings is before an Indian appellate body known as the National Company Law Appellate Tribunal ("NCLAT"), which is presently hearing Petitioners' challenge to a lower tribunal's order regarding the wind up of the Indian company, Devas. *See* Winding-Up Judgment (Kownacki Decl., Ex. 15); Winding-Up Appellate Br. ¶ 1 (Kownacki Decl., Ex. 18). These winding-up proceedings resulted from a fraud investigation conducted in India in relation to the irregularities observed during the negotiation and execution of the 2005 Devas-Antrix Agreement. As explained in a 2016 Final Report issued by India's Central Bureau of Investigation, a total of nine individuals and entities are implicated in the fraudulent scheme—including Devas itself, Devas's chief executive officer, two of Devas's directors, two Antrix

executives, and several DOS officers. Final Report No. 01/2016 issued by the Honorable Court of the Principal Special Judge for the Government of India's Central Bureau of Investigation's Cases, New Delhi Branch, Aug. 11, 2016 (Kownacki Decl., Ex. 8). In 2017, the allegations in the charge sheet were confirmed by India's anti-money-laundering authority, and a Supplementary Final Report was issued in 2019. Relevant criminal proceedings are now pending under the Prevention of Money Laundering Act ("PMLA") and Foreign Exchange Management Act ("FEMA") on the basis that Devas had participated in a criminal conspiracy and committed unlawful transactions involving the proceeds of fraud.[4] *See* Adjudicating Authority Order Under the Prevention of Money Laundering Act, Aug. 16, 2017 (Kownacki Decl., Ex. 9); Adjudicating Authority Order Under the Prevention of Money Laundering Act, Oct. 11, 2017 (Kownacki Decl., Ex. 10); Supplementary Final Report No. 01/2019 issued by Hon. Santosh Snehi Mann, Special Judge, PC Act (CBI-03), Patiala House Courts, New Delhi, Jan. 8, 2019 (Kownacki Decl., Ex. 11).

The winding-up proceeding before the National Company Law Tribunal ("NCLT") was commenced by Antrix on January 18, 2021, based on evidence that emerged during the criminal investigation. Winding-Up Judgment ¶ 19(9) (Kownacki Decl., Ex. 15). The NCLT granted Antrix's petition on May 25, 2021, and appointed an official liquidator to take responsibility for Devas. *Id.* ¶ 38. In its order, the NCLT rendered detailed findings regarding the evidence that Devas executives, acting "in connivance and collusion with the then officials of Antrix," had obtained the Devas-Antrix Agreement by fraud and without the approval or knowledge of the Government. *Id.* ¶ 14. Among other evidence set forth in the relevant pleadings, *see* Winding-Up

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[4] Additional proceedings are also pending before the Telecom Disputes Settlement and Appellate Tribunal (TDSAT), Customs Excise and Service Tax Appellate Tribunal (CESTAT), and Income Tax Appellate Tribunal (ITAT).

Appellate Br. ¶ 15 (Kownacki Decl., Ex. 18), three of the more significant examples of this fraudulent conduct are listed below.

First, as Antrix has explained in the Indian litigation, Devas made representations to Antrix during negotiation of the 2005 Devas-Antrix Agreement—as reflected in Article 12(b) thereof—that it had "ownership" of certain intellectual property needed to design Digital Multimedia Receivers and Commercial Information Devices. *Id.* ¶ 27D. During the present litigation in India, however, Devas has now explicitly conceded that it never had such "ownership." *Id.* ¶ 27. Instead, Devas now takes the position that it merely possessed the "capability" subsequently to develop such technology and intellectual property in the future, and that its representations were consistent with such "capability." *Id.*; *see also* Devas Appellate Rejoinder ¶ 169, June 2021 (Kownacki Decl., Ex. 19) ("Devas represented that it had the ability to design Digital Multimedia Receivers (DMR) and Commercial Information Devices (CID)" (emphasis added)). This new litigation position, however, cannot be reconciled with the reference to "ownership" set forth in Article 12(b) of the Devas-Antrix Agreement, or the other evidence that Antrix has set forth in the relevant submissions in the Indian litigation. Winding-Up Appellate Br. ¶ 27D (Kownacki Decl., Ex. 18).

Second, in December 2005, almost eleven months after the conclusion of the Devas-Antrix Agreement, the relevant Antrix officials had taken multiple, consistent steps to conceal the existence of the Devas-Antrix Agreement from the Union Cabinet—*i.e.*, the supreme decision-making body in the Government of India—as the NCLT emphasized and as Antrix further explains in its pleadings. Winding-Up Judgment (Kownacki Decl., Ex. 15) ("The existence of this contract was suppressed by the 'then officials', from various government authorities, while seeking approvals for the project."). *See also* Winding-Up Appellate Br. ¶ 8C (Kownacki Decl., Ex. 18) ("In other words, the Cabinet approved building two satellites for generic use but the two satellites

approved by the Cabinet were leased exclusively to Devas fraudulently by the then officials of Antrix and the Cabinet was not aware of this information at the time of approval."). The NCLT further considered it significant that "the SATCOM Policy mandates authorization" of such programs "only by the Indian Administration through its Ministries and Regulatory authorities," whereas "Antrix does not qualify as one falling under [the] Indian Administration of a Department of the Government or a regulatory authority . . . ." Winding-Up Judgment ¶ 21 (Kownacki Decl., Ex. 15). As Antrix itself argues in the Indian litigation, these events demonstrate that Devas was acting in "collusion" with the then Antrix officials to arrange "a back-door deal." Winding-Up Appellate Br. ¶¶ 12B, 18D, 26A(e), 26A(g) (Kownacki Decl., Ex. 18).

Third, two months later in February 2006, when Devas sought approval to bring funds into the country, Devas submitted an application describing a business model that was incompatible with the Devas-Antrix Agreement. Devas's Application to the Government of India's Foreign Investment Promotion Board ("FIPB Application") at 2-3, Feb. 2, 2006 (Kownacki Decl., Ex. 2). The 2005 Devas-Antrix Agreement was never mentioned in the application. *Id.* Whereas the Devas-Antrix Agreement asserted that Devas already owned the relevant technologies and intellectual property, the FIPB application asserted that "[a]l the technologies for providing the services are developed indigenously in India." *See id.* ¶ 10(a). Moreover, the FIPB Application states that services would be provided through a "broadband information download channel," whereas the Devas-Antrix Agreement never mentioned this mode of transmission. *See* Winding-Up Appellate Br. ¶ 34A(h)(vii). The FIPB application as a whole was also styled as seeking approval merely for "setting up Internet Service Provider (ISP services)," whereas the Devas-Agreement contemplated a significantly broader range of services. Winding-Up Appellate Br. ¶ 34A(h) (Kownacki Decl., Ex. 18). Significantly, Devas also diverted substantial funds

"within and outside India" in order to be used for non-ISP purposes, which was incompatible with the approval received from the FIPB for providing ISP services only. Winding-Up Appellate Br. ¶ 34A(m)-(n).

After the NCLT judgment was rendered, Petitioners subsequently appealed that judgment to the NCLAT on May 28, 2021. *See* Devas's Appeal to the Supreme Court of India ("Devas Appeal") at 21-22, June 8, 2021 (Kownacki Decl., Ex. 16). Once the NCLAT's judgment is rendered, either party may pursue a further appeal. Initially, Petitioners submitted an interim application to the NCLAT for a stay of the NCLT's winding-up judgment, which was denied on June 7, 2021. *Id.* at 40. The NCLAT rejected the interim application, and the Supreme Court of India likewise rejected Petitioners' appeal against the interim order under Section 423 of the Companies Act (2013) on June 15, 2021. *See* Supreme Court of India's Order in Civil Appeal No. 1848 of 2021 ("Order of the Supreme Court") June 15, 2021 (Kownacki Decl., Ex. 17). Proceedings on the merits are now pending before the NCLAT, and a hearing was held on July 8, 2021. *Id.* Once the NCLAT's judgment is rendered, either party may pursue a further appeal of the merits judgment to the Supreme Court of India as the court of final instance.

F. Parallel Litigation in Australia, Belgium, England, France, and Luxembourg

In parallel, Petitioners are apparently seeking recognition and enforcement of the Quantum Award under the New York Convention in at least five additional jurisdictions. In a court filing in the Southern District of New York, Petitioners claim to have commenced such proceedings "in Belgium on May 25, 2021; in France on May 27, 2021; and in Luxembourg on June 8, 2021." Compl. at ¶ 41 (ECF No. 1), *Devas v. Air India*, No. 1:21-CV-5601 (S.D.N.Y. June 28, 2021). Petitioners further state in that court filing that "[a]n order recognizing the Award in England and

Wales was granted on May 11, 2021, pending service [*i.e.*, *ex parte*]. An action to confirm the Award in Australia is pending." *Id.*

Some or all of these cases are understood to have proceeded *ex parte* without any involvement from India thus far. In such proceedings, India reserves all rights to raise appropriate defenses in accordance with its sovereign immunity under international law, defenses under the New York Convention, and all other applicable legal rules.

ARGUMENT

This Court "has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing *Landis*, 299 U.S. at 254). In determining whether to grant a stay, a court should "weigh competing interests and maintain an even balance between the court's interests in judicial economy and any possible hardship to the parties." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 732–33 (D.C. Cir. 2012) (quotation and citation omitted). In cases such as the present one, this Court also repeatedly has acknowledged the significance of "the interest of international comity." *Hulley II*, 502 F. Supp. 3d at 158; *Cef Energia*, 2020 U.S. Dist. LEXIS 130291, at *22.

The Motion to Stay should be granted pending the resolution of the Dutch annulment litigation and the Indian winding-up proceeding, both of which are likely to alter or render entirely moot many of the legal and factual questions in this case. In at least seventeen previous rulings,[5]

[5] *See Cube Infrastructure Fund v. Kingdom of Spain*, No. 20-CV-1708 (EGS), Mem. Op. and Order, ECF No. 24, (D.D.C. May 17, 2021); *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, No. 1:19-CV-03783 (CJN), 2021 U.S. Dist. LEXIS 63261, at *8 (D.D.C. Mar. 31, 2021); *Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, 1:19-cv-00046(KBJ)(RMM), Min. Order, (D.D.C. Nov. 17, 2020); *NextEra Energy Global Holdings B.V. v. Spain*, No. 19-CV-1618 (TSC), 2020 U.S. Dist. LEXIS 180119, at *6 (D.D.C. Sept. 30, 2020); *9REN Holding S.A.R.L. v. Spain*, No. 19-CV-1871 (TSC), 2020 U.S. Dist. LEXIS 180117, at *6 (D.D.C. Sept. 30, 2020); *Cef Energia, B.V. v. Italian Republic*, No. 19-CV-3443 (KBJ), 2020 U.S. Dist. LEXIS 130291, at *13-14 (D.D.C. July 23, 2020); *Eiser Infrastructure*

this Court has stayed proceedings in essentially identical circumstances, where a foreign sovereign State has requested a stay pending the results of annulment or set-aside proceedings in another forum. The same relief, at a minimum, should be granted in the present case. Indeed, even where parallel litigation is not a set-aside case, a stay may nonetheless be warranted where parallel litigation "may affect the parties' understanding of the scope of this case going forward, may reorient the parties' arguments, may catalyze a settlement of this matter, may moot the defendants' motion to dismiss, or may resolve the issues raised in this lawsuit in their entirety." *IBT/HERE*, 402 F. Supp. 2d at 293.

I. Judicial Economy Will Be Served by a Stay

As this Court has emphasized repeatedly, "'litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests.'" *Masdar Solar*, 397 F. Supp. 3d at 40 (quoting *Naegele*, 355 F. Supp. 2d at 141); *see also Infrared Envtl. Infrastructure GP Ltd. v. Kingdom of Spain*, No. 20-817 (JDB), 2021 U.S. Dist. LEXIS 120489, at *16 (D.D.C. June 29, 2021) (granting stay on the basis of judicial economy); *Hulley II*, 502 F. Supp. 3d at 161 (same); *9REN Holding S.A.R.L. v. Kingdom of Spain*, No. 19-cv-1871 (TSC), 2020 U.S. Dist. LEXIS 180117, at *6 (D.D.C. Sept. 30, 2020) (same); *NextEra Energy Glob. Holdings*

Ltd. v. Kingdom of Spain, No. 1:18-CV-1686 (CKK), Order Staying Case, ECF No. 51, (D.D.C. Feb. 13, 2020); *Infrastructure Servs. Luxembourg S.a.r.l. v. Kingdom of Spain*, No. 1:18-CV-1753 (EGS), Min. Order, (D.D.C. July 15, 2020); *Hulley II*, 502 F. Supp. 3d at 158; *Unión Fenosa Gas S.A. v. Arab Republic of Egypt*, No. 18-CV-2395 (JEB), 2020 U.S. Dist. LEXIS 98645, at *5-6, *15 (D.D.C. June 4, 2020); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, No. 1:18-CV-2254 (JEB), Order 1-2, ECF No. 29, (D.D.C. Sept. 18, 2019); *Karkey Karadeniz v. Islamic Republic of Pakistan*, No. 1:18-cv-01461(RJL), Min. Order, (D.D.C. July 24, 2019); *Gretton Ltd. v. Republic of Uzbekistan*, No. 18-CV-1755 (JEB), 2019 U.S. Dist. LEXIS 18990, at *19-20 (D.D.C. Feb. 6, 2019); *Stati v. Republic of Kazakhstan*, No. 14-CV-1638 (ABJ) (ZMF), Min. Order, (D.D.C. Aug. 15, 2017); *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 193 (D.D.C. 2016); *Hulley*, 211 F. Supp. 3d at 288; *Getma Int'l v. Republic of Guinea*, 142 F. Supp. 3d 110, 119 (D.D.C. 2015).

B.V. v. Kingdom of Spain, No. 19-cv-1618 (TSC), 2020 U.S. Dist. LEXIS 180119, at *6 (D.D.C. Sept. 30, 2020) (granting stay on this basis); *Cef Energia*, 2020 U.S. Dist. LEXIS 130291, at *15 (same); *IBT/HERE*, 402 F. Supp. 2d at 293 (same).

This common-sense principle is exemplified by the present case. In light of the extensive overlap of issues between the parallel Dutch, Indian, and U.S. proceedings, judicial economy favors a stay in at least three different respects.

First, a successful annulment in the Netherlands likely would render the Award unenforceable under Article V(1)(e) of the New York Convention, thus significantly reducing the scope of the task facing this Court. *Hulley II*, 502 F. Supp. 3d at 154 (explaining that, "[i]f the Dutch courts, which have primary jurisdiction, set aside the Awards, resolving jurisdictional issues in this case may be a fruitless exercise") (quotation and citation omitted). Under Article V(1)(e), "a secondary Contracting State normally may not enforce an arbitration award that has been lawfully set aside by a 'competent authority' in the primary Contracting State." *TermoRio*, 487 F.3d at 935. As the D.C. Circuit has explained, "an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made." *Id.* at 936 (emphasis added). Consequently, if India ultimately prevails based upon any of the grounds raised before the Dutch Supreme Court (as to the Merits Award) or the District Court of The Hague (as to the Quantum Award), then Petitioners will have "no cause of action" in the U.S. litigation. *Hulley I*, 211 F. Supp. 3d at 282.

Even if India is not successful or is only partially successful in the annulment proceedings, the resulting annulment decisions in the Dutch litigation nonetheless would assist this Court in analyzing the overlapping issues "at a minimum, by virtue of [their] persuasive value." *RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261, at *8 (quoting *Hulley I*, 211 F. Supp. 3d at 284)

(granting a stay); *Masdar Solar*, 397 F. Supp. 3d at 40 (same); *NextEra*, 2020 U.S. Dist. LEXIS 180119, at *6 (same). Similarly, the Indian proceedings will potentially clarify both the facts and the Indian legal principles relating to India's arguments under the New York Convention. These may include, but are not limited to, India's arguments pertaining to the relationship between Petitioners' acts of fraud and the so-called legality clause under the BIT. *See* BIT, Article 1(a) (providing that "'investment' means every kind of asset established or acquired <u>under the relevant laws and regulations of the Contracting party</u>" (emphasis added)). Such arguments may also potentially relate to how Petitioners' acts of fraud implicate questions of arbitrability and public policy under Article V(2)(a) and V(2)(b) of the New York Convention.

<u>Second</u>, a stay also will conserve judicial resources by safeguarding any judgment of this Court from remand and reconsideration. If the U.S. enforcement action proceeds before the Dutch courts render a final decision on enforceability of the Quantum Award, then any judgment issued by this Court remains vulnerable to being upended in the event that the Quantum Award is ultimately annulled in the Netherlands. *See TermoRio S.A. E.S.P.*, 487 F.3d at 936 ("'mechanical application of domestic arbitral law'" to a foreign award that is subsequently set aside "'would seriously undermine finality and regularly produce conflicting judgments'") (quoting *Baker Marine, Ltd. v. Chevron, Ltd.*, 191 F.3d 194, 197 n.2 (2d Cir. 1999)).

Case law shows the wisdom of staying U.S. enforcement proceedings during parallel annulment or set-aside proceedings. In *Thai-Lao Lignite (Thail.) Co. v. Gov't of the Lao People's Democratic Republic*, 864 F.3d 172, 178-79 (2d Cir. 2017), the Second Circuit upheld the district court's recognition of a Malaysian arbitral award under the New York Convention. Shortly thereafter, the Malaysian courts set aside the Malaysian arbitral award under Malaysian law. *Id.* at 180. The U.S. district court thus was obliged to vacate its prior judgment under Rule 60(b)(5)

of the Federal Rules of Civil Procedure. *Id.* at 180–81. The U.S. proceedings then returned for a second time to the Second Circuit, where vacatur was affirmed—but not until after the *Thai-Lao Lignite* case had wasted the U.S. courts' time and resources for seven years. *Id.* at 191.

There are many such examples. In the recent *Eiser* case, a district judge prudently stayed enforcement while a parallel annulment was pending, and the petitioner ultimately withdrew the U.S. enforcement proceeding after the annulment was successful. Stipulation of Dismissal at 2 (ECF No. 63), *Eiser Infrastructure Ltd. v. Kingdom of Spain*, No. 1:18-cv-1686 (CKK) (D.D.C. June 4, 2021) ("Due to the annulment of the Award, the Parties agree that this case is now moot."). Another district judge imposed a stay "pending the outcome of Guinea's attempt to have the award annulled," which was ultimately successful—thus leading to refusal of enforcement under Article V(1)(e) of the New York Convention. *See Getma Int'l v. Republic of Guinea*, 191 F. Supp. 3d 43, 45, 55 (D.D.C. 2016), *aff'd* 862 F.3d 45, 50 (D.C. Cir. 2017). In a third case, the Second Circuit was compelled to remand a judgment of enforcement because, while the appeal was pending, a court of the primary jurisdiction set aside the award after the U.S. district court had enforced it. *See Corporación Mexicana de Mantenimiento Integral. S. de R.L. de C.V. v. Pemex Exploración y Producción (Corporación Mexicana)*, No. 10-4656, 2012 U.S. App. LEXIS 27054, at *2 (2d Cir. Feb. 16, 2012) (remanding case to determine the relevance of a judgment annulling the underlying arbitral award).

In light of these cautionary tales, courts in this District have consistently embraced the more prudent approach—stay pending set-aside. *See RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261, at *8 ("If this Court were to affirm an award that [the parallel proceeding] later annuls, '[m]ore expensive litigation involving more complex issues would result.'") (quoting *Getma Int'l*, 142 F. Supp. at 114); *Hulley II*, 502 F. Supp. 3d at 155 ("[A]ny decision predicated

even remotely on [an undecided annulment proceeding] . . . would necessarily result in more litigation than otherwise would occur if the instant proceedings were halted pending the outcome of Dutch litigation."); *Gretton Ltd. v. Republic of Uzbekistan*, No.18-1755(JEB), 2019 U.S. Dist. LEXIS 18990, at *11 (D.D.C. Feb. 6, 2019) ("If the Court were to side with [one of the parties] now and then [the other party] were to win on appeal in [the primary jurisdiction], [the parties] could well be back in a U.S. court . . . litigating some of the issues raised in this case all over again. That is hardly the kind of efficient dispute resolution that arbitration is meant to serve."). A stay thus provides the best means of conserving judicial resources and mitigates the risk of issuing a decision that is subsequently undermined by a set-aside ruling in the Netherlands.

Third, a stay will prevent the type of "'fractured and disorderly' and unnecessary litigation" presently pursued by Petitioners, but disfavored by this Court. *Hulley I*, 211 F. Supp. 3d at 285 (quoting *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 144 F. Supp. 3d 115, 118–19 (D.D.C. 2015)). Indeed, this Court consistently has found that litigating the same issues simultaneously in even just two jurisdictions does not serve judicial economy. *See Masdar Solar*, 397 F. Supp. 3d at 40. Here, by contrast, there are already three proceedings ongoing in India and the Netherlands, while Petitioners' parallel lawsuits have now apparently proliferated across at least five more jurisdictions (Australia, Belgium, England, France, and Luxembourg), not counting the District of Columbia. *See* Compl. at ¶ 41 (ECF No. 1), *Devas v. Air India*, No. 1:21-CV-5601 (S.D.N.Y. June 28, 2021). Petitioners' fractured and disorderly approach creates a substantial risk of conflicting results in addition to the inevitably duplicative waste of resources.

Unsurprisingly, this type of "litigation quagmire" is disfavored. *Hulley II*, 502 F. Supp. 3d at 156 ("Absent a stay, history may be forced to repeat itself with yet additional litigation to retrieve

seized property. To put it simply, this is a litigation quagmire that a stay would forestall . . . ."). Considerations of judicial economy, therefore, will be best served by staying this case.

II. International Comity Will Be Served by a Stay

This case involves a Dutch arbitration regarding a dispute between India and a group of Mauritian entities under an international treaty to which the United States is not a party. This Court's premature intervention into this dispute, therefore, would be contrary to international comity. As emphasized in *Masdar Solar*:

> Interests of comity . . . are especially strong where a foreign parallel proceeding is ongoing . . . and there is a possibility that the award will be set aside, since a court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings.

397 F. Supp. 3d at 40 (emphasis in original) (internal citation omitted); *see also Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (explaining that the "central precept of comity . . . fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations"); *Hulley II*, 502 F. Supp. 3d at 158 ("[T]he interest of international comity and orderly litigation are best served by imposing a stay pending final judgment in the primary jurisdiction on a set-aside proceeding").

The concerns expressed in *Masdar Solar* are directly at play here. Any decision in the present case will require this Court to determine a number of dispositive issues that are currently being litigated in the Netherlands and India, including whether India agreed to arbitrate with Petitioners and whether Petitioners committed fraud in India. It would be contrary to the precept of international comity for this Court to "wade into this territory unnecessarily," as held repeatedly in prior decisions. *Masdar Solar*, 397 F. Supp. 3d at 40; *see also Infrared*, 2021 U.S. Dist. LEXIS 120489, at *15 (same); *9REN Holdings*, 2020 U.S. Dist. LEXIS 180117, at *6 (same). This consideration is particularly acute given that the United States is not a party to the Mauritius-India

BIT and lacks the Dutch courts' interest as the seat of the underlying arbitration. *E.g.*, *Hulley II*, 502 F. Supp. 3d at 157 (explaining that "another aspect of international comity militating in favor of a stay" is the fact that the case involves "the proper interpretation and application of [a treaty], to which the United States is not a signatory").

Comity also requires this Court to defer to the Indian judicial system in the resolution of questions of Indian law—such as the questions now pending before the NCLAT in the appeal which Petitioners themselves have commenced. Winding-Up Appellate Br. ¶ 1 (Kownacki Decl., Ex. 18). In this regard, the Supreme Court recently addressed the proper methodology for "the determination of an issue of foreign law" under Federal Rule of Civil Procedure 44.1. *Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018). Embracing an analogy to the federal courts' longstanding approach to interpreting state law (*i.e.*, the law of a state of the Union rather than a foreign state), the Supreme Court confirmed that "a decision of the State's highest court" is indeed "binding on the federal courts" with respect to the law of the foreign state. *Id.* at 1868 (citations and quotation marks omitted). It is thus imprudent and inappropriate for this Court to resolve issues arising under Indian law prematurely, while parallel proceedings are ongoing in India.

In accordance with this principle, this Court and other federal courts routinely stay proceedings awaiting a foreign court's determination of foreign law. *CPConstruction Pioneers Baugesellschaft Anstalt v. Gov't of Republic of Ghana*, 578 F. Supp. 2d 50, 54 (D.D.C. 2008) (staying litigation because "it would have to decide an intricate point of Ghana law that is more properly decided by a Ghana court"), amended by 578 F. Supp. 2d 48, 49 (D.D.C. 2008); *Consorcio Rive S.A. de C.V. v. Briggs of Cancun, Inc.*, No. 99-CV-2204, 2000 U.S. Dist. LEXIS 899, at *10 (E.D. La. Jan. 25, 2000) ("The Mexican action to nullify the award involves issues of

Mexican law, which the Mexican courts are better situated than this Court to resolve. This action should be stayed pending the outcome of the Mexican proceedings."); *Caribbean Trading & Fid. Corp. v. Nigerian Nat'l Petroleum Corp.*, No. 90-CV-4169(JFK), 1990 U.S. Dist. LEXIS 17198, at *20–21 (S.D.N.Y. Dec. 18, 1990) (staying potential confirmation and enforcement of arbitral award because "[t]he contract is governed by the law of Nigeria, and the Nigerian courts are better equipped than this Court to determine the proper application of that law"); *Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F. Supp. 948, 962 (S.D. Ohio 1981) ("[I]n order to avoid the possibility of an inconsistent result, this Court has determined to adjourn its decision on enforcement of the . . . [a]ward until the Indian courts decide with finality whether the award is correct under Indian law.").

In the present case, therefore, this Court should likewise stay the present litigation to avoid the possibility of multiple conflicting judgments in violation of the principle of international comity.

III. The Balance of Hardships Overwhelmingly Favors a Stay

The possible hardships to each party also favor India, which will be significantly burdened in several respects if a stay is not granted.

First, without a stay, India will be forced to expend significant resources challenging the validity of the Awards in multiple fora. In this regard, courts have noted that a foreign State would "undeniably be burdened by having to attack the validity of [an] arbitral award in two forums" simultaneously, particularly where the primary jurisdiction is outside of the United States. *Masdar Solar*, 397 F. Supp. 3d at 40 (emphasis added). Without a stay, as stated above, India would not only have to challenge the validity of the Awards in the Netherlands, but also—due to Petitioners' tactics and gamesmanship—in the United States, as well as in Australia, Belgium, England, France, and Luxembourg, where Petitioners allegedly have commenced *ex parte* proceedings.

Second, India would suffer severe hardship if the Award is enforced and the Dutch courts set aside the Award on any of the multiple grounds asserted by India, which would eliminate India's liability for any damages. The size of the Quantum Award and the fact that it is yet subject to reversal weighs in favor of a stay. *See Unión Fenosa Gas, S.A*, 2020 U.S. Dist. LEXIS 98645, at *12–13 (concluding that "[t]he Court is loath to plunge so deeply into a sovereign's treasury . . . if there is a chance that the award might be set aside or mitigated to some extent").

In this regard, courts in this District have consistently recognized the "very real harm" of a foreign State's assets being seized during the potential execution of a judgment where the primary jurisdiction's courts could later "determine that the award was improper." *Getma*, 142 F. Supp. 3d at 118 (quoting *Jorf Lasfar Energy Co., S.C.A. v. AMCI Exp. Corp.*, No. 05-CV-0423, 2005 U.S. Dist. LEXIS 34969, at *10 (W.D. Pa. Dec. 22, 2005)); *see also RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261, at *8 ("[I]f the Court were to confirm the award now, Spain could face the arduous task of trying to recover seized assets if its annulment application before the ICSID proves successful."); *see also Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain*, No. 18-CV-01148 (TSC), 2020 U.S. Dist. LEXIS 12794, at *10 (D.D.C. Jan. 27, 2020) ("[T]he risk of premature enforcement could result in [a foreign State] trying to recover assets seized during this action if it were to prevail in the [set aside] proceedings."); *Masdar Solar*, 397 F. Supp. 3d at 40 (emphasizing the burden to a foreign State arising from "ultimately having to recover assets seized during this action should the annulment proceeding go its way"). If the Court were prematurely to confirm the Quantum Award, which the Dutch courts may later annul, India would face the onerous task of trying to recover seized assets. *Hulley II*, 502 F. Supp. 3d at 156 (describing "costly proceedings to retrieve the property when the Awards were set aside by the Dutch District Court").

Third, the hardship resulting from the COVID-19 pandemic also weighs heavily in favor of a stay. *See Unión Fenosa Gas, S.A*, 2020 U.S. Dist. LEXIS 98645, at *13–15 (warning against premature enforcement of an arbitral award "during a period of immense uncertainty" stemming from "an unprecedented global pandemic"). A global health crisis is not the right moment to engage in "unnecessary expenditure of time and money on discovery," as many courts have noted. *Boger v. Citrix Sys.*, No. 8:19-cv-01234-PX, 2020 U.S. Dist. LEXIS 71072, at *4 (D. Md. Apr. 22, 2020) (granting stay due, in part, to "unprecedented disruption because of the COVID-19 pandemic"); *see also Qxmédical, LLC v. Vascular Sols., LLC*, No. 17-CV-1969 (PJS/TNL), 2020 U.S. Dist. LEXIS 118305, at *4 (D. Minn. July 7, 2020) (granting stay in part because of "the impact of the COVID-19 pandemic on the Court's operations"); *Divx, LLC v. Netflix, Inc.*, No. CV 19-1606 PSG, 2020 U.S. Dist. LEXIS 100327, at *6–7 (C.D. Cal. May 11, 2020) (granting stay and noting that "[t]he coronavirus pandemic is also a relevant consideration").

Although India has started to turn the corner in reducing the number of new cases and increasing the number of vaccinated individuals, COVID-19 has taken a grave toll on the country. India has more than 30 million confirmed cases and more than 436,000 deaths. Gov't of India Ministry of Health and Family Welfare, *COVID-19 Statistics*, https://www.mohfw.gov.in (last visited Aug. 27, 2021) (Kownacki Decl., Ex. 20). The global pandemic also has strained India's economy. India's gross domestic product ("GDP") is estimated to contract 7.3% in fiscal year 2020-2021—its first economic contraction since 1979. *See* Gov't of India Public Debt Management Quarterly Report, ¶ 1.2, June 2021 (Kownacki Decl., Ex. 21). Relatedly, India's fiscal profile has been harmed by the ongoing pandemic, with its public debt growing nearly 23% between April 2020 and March 2021, according to recent statistics. *Id.* ¶ 2.1.

In these unprecedented circumstances, extracting nearly US $ 120 million from India—in particular when those funds could ultimately be returned to India—before the Dutch and Indian proceedings run their course is likely to have considerable ramifications. Fundamentally, a premature enforcement in this case would result in burdensome and unnecessary harm to India, at a time when the global pandemic makes such a result inappropriate and unjustifiable.

Conversely, Devas will experience no substantial hardship from staying proceedings until clarity emerges from the set-aside proceedings in the Netherlands and the winding-up proceeding in India. Devas can be expected to assert an "interest in expeditiously collecting an award." *Masdar Solar*, 397 F. Supp. 3d at 40. As courts in this District have previously found, however, this concern is not dispositive where "hasty enforcement . . . present[s] a 'clear case of hardship or inequity,'" as described above. *Id.* (citing *Landis*, 299 U.S. at 255). In any event, the accrual of post-award interest can easily compensate for any delay should Devas succeed in the set-aside proceedings. *RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261, at *8–9 (holding that the importance of "quickly collecting [an] arbitral award" is "less acute" where interest continues to accrue on the award); *Novenergia II*, 2020 U.S. Dist. LEXIS 12794, at *9–11 (finding that set-aside proceedings lasting more than four years did not outweigh hardships on foreign State and that any delay in obtaining the award could be compensated with interest).

The Court, therefore, should conclude that the balance of hardships overwhelmingly weighs in favor of a stay.

CONCLUSION

For the reasons stated above, India respectfully requests that the Court stay this U.S. action pending resolution of the set-side proceedings in the Dutch courts and the winding-up proceeding in the Indian judicial system.

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Respectfully submitted,

WHITE & CASE

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