IN THE 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**

PETITIONERS' OPPOSING POINTS AND AUTHORITIES IN RESPONSE TO RESPONDENT'S MOTION TO STAY PROCEEDINGS

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INTRODUCTION

India's stay motion should be denied. In the set-aside proceedings at the seat of the arbitration, two levels of courts already have rejected all of India's challenges to the award finding that India is liable to Petitioners. And India's efforts to obtain a stay of enforcement of this award from the trial court there, which has primary jurisdiction, have been rejected. Instead, that court has granted to Petitioners an order of exequatur enforcing their award as a money judgment. India suggests no reason for this Court to depart from that course.

Even more fundamentally, through its recent actions India has demonstrated it has no intention of ever paying Petitioners' arbitration award, but rather intends to use any delay in the award's enforcement to deploy its own legal apparatus to attempt to undermine Petitioners' very existence.

Article V of the New York Convention does not contemplate or authorize the grant of a stay so as to permit an award-debtor opportunity to destroy its award-creditor, but that is what India is seeking here, and it is entirely inequitable. The U.S. District Court for the Western District of Washington in related confirmation proceedings has already recognized these as "unique circumstances . . . confronting the Court's fair administration of justice." *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, 2021 WL 3616787, at *5 (W.D. Wash. Aug. 16, 2021). And the court acknowledged—in rejecting stay applications there—that this dispute "has been subject to hindrance and delay, largely on the part of Respondent Antrix Corp." Order, *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, No. 18-cv-1360, Dkt. No. 132 (W.D. Wash. Aug. 9, 2021). If India is to be granted any stay of enforcement, it is vital that any such stay be conditioned on the posting of security, as authorized by Article VI of the New York Convention. Only full security will ensure that India, at the end of its set-aside proceedings, pays what it justly owes.

BACKGROUND

I. India And Antrix Destroy Petitioners' Investments In Devas—An Indian Company—And Three Arbitral Tribunals Award Damages In Proceedings Brought By Devas, Petitioners, And Another Devas Shareholder.

As Petitioners explain in more detail in their concurrently-filed brief opposing India's motion to dismiss, Petitioners are Mauritian companies (whose shareholders are primarily from the U.S.) who made significant investments in a hybrid satellite and terrestrial communications business owned by Devas. After almost two years of negotiations, on January 28, 2005, Devas entered into an agreement with Antrix (the "Agreement"), a corporation wholly owned and controlled by the Indian government and operating under the administrative control of the Indian Space Research Organization ("ISRO") and the Department of Space. ECF No. 1-6 ¶ 5. Pursuant to the Agreement, Antrix leased spectrum capacity in the "S-band" (2500–2690 MHz) to Devas and agreed to provide two satellites to broadcast at that spectrum, to be built, operated, and launched by ISRO. These satellites were to form an integral part of a hybrid satellite/terrestrial system through which Devas would provide broadband wireless access and audio-video services cost-effectively within India. Under the Agreement, Devas was required to pay Antrix upfront fees of approximately $40 million to reserve transponder capacity on the two satellites, followed by an annual lease fee after the satellites were launched. *Id.* ¶¶ 89–90. Following execution of the Agreement, Petitioners injected multiple rounds of capital into Devas. *See id.* ¶¶ 107–08, 111, 205. Devas fully performed under the agreement, but Antrix both failed to perform and repudiated the deal entirely.

On July 3, 2012, Petitioners commenced an arbitration against India under the Mauritius-India Bilateral Investment Treaty (the "Treaty"). Following several years of litigation, a three-member Tribunal constituted in accordance with the 1976 U.N. Commission on International Trade Law ("UNCITRAL") Rules and seated in The Hague issued a Merits Award on July 25,

2016, finding India liable for breaches of Treaty in connection with the annulment of the Agreement. *See id.* ¶ 501. In a later decision on damages—the Quantum Award (together with the Merits Award, the "Treaty Awards"), issued on October 13, 2020—the Tribunal majority ordered India to pay Petitioners $111 million plus interest and costs. ECF No. 1-4 ¶¶ 606, 663(a). The Quantum Award further ordered that India: (1) "may not withhold or offset any portion of the award based on a claim that such amount is subject to taxation or other deductions," *id.* ¶ 663(i); and (2) "shall indemnify the [Petitioners] with respect to any Indian taxes, charges, or other set-offs imposed on the compensation awarded," *id.* ¶ 663(j).

Devas itself also pursued relief from Antrix in arbitration pursuant to the Agreement, commencing an arbitration in the International Chamber of Commerce ("ICC") in 2011. ECF No. 1-10, ¶¶ 13, 131. Ultimately, the ICC Tribunal unanimously concluded that Antrix "wrongful[ly] repudiate[ed]" the contract and awarded Devas $562.5 million plus interest. *Id.* ¶¶ 362, 401.[1] In addition to Devas and Petitioners' arbitrations, Deutsche Telekom AG pursued a third arbitration. Deutsche Telekom is another shareholder in Devas. Its arbitration was seated in Geneva under the India-Germany Treaty. Ultimately, Deutsche Telekom won over $132 million plus interest for India's violation of that treaty. Champion Decl. Ex. 12, ¶¶ 357. India and Antrix have paid not a cent in response to any of these three awards.

In *none* of these proceedings did India allege that Devas or its shareholders committed fraud. Nor did any arbitral tribunal find *any* indication of misconduct by Devas or its shareholders.

[1] Upon issuance of the ICC Tribunal's award, and following briefing, the Treaty Tribunal adjudicating Petitioners' claims against India noted that Petitioners must avoid double compensation by ensuring that collections under the Quantum Award were not duplicative of collections under the ICC Award. ECF No. 1-4 ¶ 663(k).

II. India Aggressively Deploys Its Sovereign Powers To Undermine The Arbitrations, Award Enforcement, And Its Award-Creditors Themselves.

Since Devas and Petitioners initiated the ICC and Treaty Arbitrations, India has sought to undermine the awards and their enforcement and to retaliate against Devas and its investors. Specifically, India has caused various of its ministries and organs to bring regulatory and criminal actions against Devas and its employees, directors, and investors. The Enforcement Directorate ("ED") of the Ministry of Finance commenced an investigation into Devas in 2011, shortly after Devas initiated arbitration proceedings against Antrix. Babbio Decl. ¶ 8. The ED has since launched additional investigations into Devas, imposed penalties of tens of millions of dollars on Devas and its officers, frozen Devas's accounts in India, and even raided the company's offices and detained its personnel overnight for interrogation without access to counsel. *Id*.

Similarly, India's Central Bureau of Investigation ("CBI") has been deployed to harass and intimidate Devas. In 2015, the CBI promptly launched an investigation into Devas, two of its officers, and other former officials at Antrix and the Department of Space, just months before the ICC Award was issued. *Id.* ¶ 9.[2] This investigation followed reporting in 2015 that India intended "to nudge the Central Bureau of Investigation (CBI) to speed up the ongoing criminal investigation in connection with the [Agreement]" with the "hopes to prove in court that the deal was scrapped . . . due to illegalities and irregularities in the contract between Antrix and Devas."

[2] The CBI has been criticized in the past for acting for political purposes and for being a "handmaiden" of the government. *Vinod Rai: CBI Can't Be as Autonomous or Independent as CAG*, The Economic Times (Sept. 12, 2014), *available at* https://economictimes.indiatimes.com/news/politics-and-nation/vinod-rai-cbi-cant-be-as-autonomous-or-independent-as-cag/articleshow/42361701.cms

ECF No. 1-18 (Antrix-Devas Deal: Government to Field Top Lawyers in Delhi High Court, Indian Express (Oct. 9, 2015), *available at* https://indianexpress.com/article/india/india-news-india/antrix-devas-deal-government-to-field-top-lawyers-in-delhi-high-court/).

India continued this harassing activity in 2016, after the parties had been informed to expect the Merits Award in their Arbitration. In June 2016, India's ED purported to issue a show-cause notice against Devas and twenty of its current and former directors and foreign investors (including Petitioners), threatening massive penalties for alleged violations of India's Foreign Exchange Management Act, based on the theory that the investments made by non-Indian entities into Devas somehow violated India's foreign-exchange laws, despite the fact that the investments were approved by India's Foreign Investment Promotion Board. And soon after the UNCITRAL Tribunal rendered the Merits Award, on July 26, 2016, India announced a purported money laundering investigation by the ED and another investigation by the CBI, ECF No. 1-20, while a "top source" in the Government leaked to the press that the "idea" behind the investigations was "to recover from Devas the amount it hopes to earn through international arbitration. The possible course of action may include imposition of penalty on Devas, and prosecution of the company and all its directors under [the Prevention of Money Laundering Act]." *ED Moves to Prosecute Devas Under PMLA for FEMA Violation,* Times of India (July 27, 2016), available at http://timesofindia.indiatimes.com/india/ED-moves-to-prosecute-Devas-underPMLA-for-Fema-violation/articleshow/53407579.cms.

Later in 2016, the CBI issued a so-called "charge-sheet" outlining possible charges against Devas and certain of its officers and former employees. The "charge sheet" theory was that the Agreement, in hindsight, was not as financially advantageous to India as it could have been, and therefore the Indian officials signing it must have committed an offense and Devas should be treated as an accessory. Babbio Decl. ¶ 9. India, in fact, used this specious charge sheet to request

an adjournment of the quantum phase of the Treaty Arbitration, arguing that a "stay of arbitral proceedings" was warranted because the alleged "illegalities" discovered from these "recent developments" would render the Agreement "void *ab initio*." ECF No. 1-4, ¶ 41–42. Petitioners opposed this request, reminding the Tribunal that India had never made any competent allegation of impropriety by a Devas director, officer, or founder regarding the Agreement (much less any claim of wrongdoing by the Petitioners)—and that even the CBI "charge-sheet" had failed to identify any such wrongdoing. The Tribunal denied India's stay application, noting that "the CBI investigation was initiated in 2014" and that India "was therefore aware of its contents when it agreed to the timetable" for the arbitration. *Id.* ¶ 43. The Tribunal further held that several of the implicated directors of Devas were witnesses in the Arbitration, two of whom had already been subject to cross-examination by India, yet "no evidence of wrongdoing on their part or on the part of Devas Multimedia Private Ltd. was adduced." ECF No. 1-20, ¶ 17.

India continued its retaliatory campaign against Devas and its directors anyway. In early January 2017, the ED froze Devas's bank accounts and mutual funds in India in an attempt deprive Devas of the funds needed to defend itself from the continued harassment by India. Babbio Decl. ¶ 8. In addition, on January 23, 2017, three officials from the ED stormed into Devas's offices and seized various original documents and Devas's checkbook. *Id.* The ED detained four Devas employees, three of whom were questioned for over 15 hours with no communication with the outside world or access to counsel, and pressured—under threat of arrest—into signing statements as a condition of their release, which they promptly recanted once released. *Id.* In January 2019, the ED imposed a penalty order of approximately USD 220 million against Devas, its investors (including Petitioners), and present and former directors and officers, without any opportunity for Devas or its employees or shareholders to be heard. *Id.*

III. The Western District of Washington Denies Requests To Stay Confirmation Proceedings Pending Resolution Of Indian Litigation Against Devas, Confirms The ICC Award, And Permits Petitioners To Intervene And Enforce The ICC Award.

Even while India worked to intimidate Devas and its shareholders, Devas sought to confirm the ICC Award in federal district court in Seattle in September of 2018. At Antrix's request, however, the court stayed proceedings pending the resolution of Antrix's set-aside action in India, the seat of the ICC Tribunal. *See Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, No. 18-cv-1360, ECF No. 28 (W.D. Wash. Apr. 16, 2021).[3] In the same order, the court refused Antrix's request to dismiss the case based on the doctrine of forum non conveniens because "[a]ctive investigations and proceedings against Petitioner and its officers and agents in India—including both civil and criminal proceedings—raise additional concerns about the neutrality of proceedings in India." *Id.* at 2. Nearly two years later, with the set-aside challenge in India still mired in preliminary stages as a result of Antrix's tactical litigation, Devas moved to lift the stay.

Applying *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310 (2d Cir. 1998), the Western District of Washington concluded that the lack of progress in the proceedings in India—caused by the Indian government—weighed heavily in favor of lifting the stay. *Devas Multimedia Private Ltd. v. Antrix Corp.*, 2020 WL 5569782 (W.D. Wash. Sept. 17, 2020). The court found that Antrix's conduct gave "some indication of 'intent to hinder or delay resolution of the dispute,' which counsels in favor of lifting the stay." *Id.* at *4 (quoting *Europcar*, 156 F.3d at 318). The court further found that "delayed enforcement of the Award, particularly given the amount of money at issue, has burdened [Devas], which to date has not received any 'suitable

[3] Docket entries in *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, No. 18-cv-1360 (W.D. Wash.) are cited in this memorandum as W.D. Wash. ECF No. __. For the Court's convenience, Petitioners have attached the most important of those entries to the Declaration of Anne Champion submitted in support of this memorandum. *See* Champion Decl. Exs. 5–7, 9–11.

security.'" *Id.* (quoting *Europcar*, 156 F.3d at 318). Finally, the court observed that "related proceedings in France, the Netherlands, Switzerland, and the United Kingdom have all proceeded *despite* the ongoing jurisdictional dispute in India," which "counsels in favor of lifting the stay." *Id.* at *5.

After lifting the stay, the district court confirmed the ICC Award and entered judgment for Devas and against Antrix for nearly $1.3 billion, including interest. ECF No. 1-13. Antrix's appeal to the Ninth Circuit remains pending. *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, No. 20-36024 (9th Cir. Nov. 25, 2020), ECF No. 1.

IV. Antrix And India Move To Liquidate Their Award-Creditor, Devas, To Evade The Awards And Judgments Against It.

On November 4, 2020, the day the federal court in Western District of Washington confirmed the ICC Award, the Commissioner of Income Tax for India announced the creation of a monitoring committee to "expedite the statutory proceedings" against Devas and its investors. ECF No. 1-22. The monitoring committee was directed to go "on a war footing," including launching tax proceedings that appear designed to generate large tax bills, penalties, and interest large enough to offset the Quantum Award (in addition to other awards). ECF No. 1-22. That same day, India amended its Arbitration Law to require the unconditional stay of execution of an award upon a mere prima facie showing that the award recipient committed fraud. And just days later, on November 9, 2020, India's Registrar of Companies, which had targeted Devas as early as 2011 in an attempt to cancel its registration as a company, filed multiple "urgent" applications before the High Court of Delhi requesting permission to take coercive steps against Devas. *Id.* ¶¶ 15–17.

A few months later, on January 14, 2021, with no notice to Devas, Antrix took the drastic and highly irregular step of seeking permission from the Central Government of India to file a winding-up petition against its creditor, Devas. Dutt Decl. ¶ 4 & Ex.1. Although the crux of

Antrix's petition was that Devas and its shareholders had committed fraud, this was the first time Antrix made any allegations of fraud in the over ten years that had elapsed since it repudiated its contract, despite spending most of that decade locked in arbitration and litigation against Devas. Indeed, Antrix's counsel in the Western District of Washington confirmation proceedings had disavowed any fraud argument entirely, urging that "none of [Antrix's] argument is based on an allegation of misconduct on the part of Devas. So that's a red herring. Let's not follow down that rabbit hole . . . . We're not arguing that." W.D. Wash. ECF No. 50, at 32:3–6.

Merely four days after Antrix's petition, on January 18, 2021, the Central Government authorized Antrix to present the winding-up petition before the National Company Law Tribunal ("NCLT"). Dutt Decl. ¶ 4& Ex. 2. That same day, Antrix petitioned the NCLT to order that Devas be wound up based on the specious and unsubstantiated fraud allegations Antrix had never before made. Babbio Decl. ¶ 19 & Ex. 9. Without affording Devas any opportunity to respond, the NCLT issued a provisional liquidation order *the very next day*, on January 19, 2021, appointing a Provisional Liquidator to occupy Devas and prepare to wind it up. *Id.* & Ex. 10. The Solicitor General of India and the Additional Solicitor General of India argued the case before the NCLT on *Antrix's* behalf. Dutt Decl. ¶ 6. India's Ministry of Corporate Affairs also, unsurprisingly, "supported" Antrix's case. *Id*.

The Provisional Liquidator—an Indian government employee—immediately took steps to undermine Devas's ability to enforce the ICC Award. Critically, he fired *all* arbitration and enforcement counsel for Devas, who were engaged in confirmation proceedings in multiple jurisdictions, including the U.S., France, and the UK. Dutt Decl. ¶ 7 & Ex. 6. The Provisional Liquidator also failed to defend Devas in proceedings arising from the various retaliatory investigations. *Id.* ¶¶ 9–10 & Exs. 8, 9. The Provisional Liquidator then issued interim reports in which he made

several allegations of fraud against Devas, parroting allegations previously made in the NCLT's order. *Id.* ¶ 8 & Ex. 7.

In the meantime, the Indian government's liquidation of Devas proceeded at a breakneck pace. One of the Petitioners here, Devas Mauritius Employees Private Limited ("DEMPL"), appealed the NCLT's provisional liquidation decision, but the appellate court denied the appeal on February 11, 2021 and directed DEMPL to move for redress before the NCLT. Dutt Decl. ¶ 11 & Ex. 10. DEMPL did so, but the NCLT, too, denied intervention, concluding that Devas could itself oppose the winding up, and directed Devas—through counsel for DEMPL—to file a reply. *Id.* & Ex. 11. Devas's ex-director filed an affidavit opposing the winding-up proceedings. *Id.* & Ex. 12. The Additional Solicitor General of India continued to represent Antrix in these proceedings and the Ministry of Corporate Affairs continued to support Antrix's case. *Id*.

On May 25, 2021, the NCLT issued a final liquidation order, appointing the Provisional Liquidator as Official Liquidator and directing him to liquidate Devas. Babbio Decl. ¶ 19 & Ex. 11. The NCLT adopted Antrix's arguments wholesale without ever conducting an evidentiary hearing. Specifically, Antrix had argued that Devas must have been a fraudulent entity because it was incorporated shortly before the Agreement was signed (even though that was well known to Antrix at the time it entered into the Agreement and that Devas was incorporated following years of negotiations with Indian officials) and because Indian governmental officials failed to conduct appropriate internal controls in approving the Agreement (even though Devas had no power over those approvals). Dutt Decl. ¶¶ 12–14 & Exs. 13–14. Antrix's other allegations—that Devas lacked the technical capacity to fulfill the Agreement, that there were irregularities in the formation of the Agreement, or that Devas misused its Delaware incorporated subsidiary—are all contradicted by Antrix's own records, including most clearly by an independent report drafted by the

Director of the Indian Institute of Space and Technology that had investigated the Agreement. Dutt Decl. ¶¶ 15–16. The NCLT parroted Antrix's unsupported theories and arguments anyway.

What is more, the NCLT revealed the true reason for its liquidation order: to stop Petitioners and Devas from enforcing the arbitration awards against India and Antrix. The NCLT noted that "Antrix and Union of India have suffered [the] huge ICC Award and are facing its enforcement proceedings" and that, in its view, Devas was "misusing the legal status conferred on it by virtue of its incorporation by filing various proceedings on untenable grounds in India and abroad to enforce ICC Award." *Id.* ¶ 17. In other words, Devas was "misusing the legal status conferred on it" to seek damages for Antrix and India's breach of the Agreement—damages to which *three* independent arbitral Tribunals confirmed Devas and its shareholders were entitled. That is why India, Antrix, and the NCLT sought to take over and wind up Devas entirely.

On the same day it issued its final liquidation order, the NCLT ruled that DEMPL had no basis to participate in the Devas proceeding before the NCLT. Dutt Decl. ¶ 17 & Ex. 15. An ex-director of Devas and DEMPL appealed both orders before the NCLAT. Dutt Decl. ¶ 18. But the NCLAT declined to stay the liquidation of Devas for the duration of the appeal of the liquidation order. *Id*. ¶ 19. Devas, through its ex-Director, appealed to the Supreme Court of India for an interim stay of the liquidation order but the court refused to intervene, observing that there was no substantial question of law involved at this stage. *Id.* & Ex. 17. The Additional Solicitor General of India continued to appear on behalf of Antrix in the appellate proceedings and the Ministry of Corporate Affairs continued to support Antrix's positions. *Id.* & Ex. 16. On September 8, 2021, the NCLAT rejected the appeals of the final liquidation order. *Id*.

All the while, the Liquidator was making good on his promise to disrupt and obstruct the ability of Devas and its shareholders to collect on their Awards. For instance, after the Liquidator fired Devas's global arbitration and enforcement counsel, he left Devas entirely unrepresented in

the confirmation proceedings in Washington for five months. Champion Decl. ¶ 3. Petitioners, however, actively worked to enforce the Court's judgment, including by seeking discovery from Antrix and a third party with whom Antrix had previously contracted to further enforcement of the Washington court's judgment. *Id*. That discovery, which led to motions practice, resulted in the Liquidator finally hiring counsel for Devas. *Id.*

But rather than supporting Petitioners' enforcement efforts for Devas and its intervening shareholders, this new counsel adopted Antrix's and India's approach: new counsel asked the district court to stay proceedings. Champion Decl. ¶ 12 & Ex. 9. The court rejected that request. It observed that "[a]s the Court has repeatedly emphasized, this matter has been subjected to hindrance and delay, largely on the part of [Antrix]" and concluding that the Liquidator's "motion for a stay . . . lacks merit under these circumstances and is intended to further delay these proceedings, as well as [the Devas Shareholders'] right to recover on the Award." W.D. Wash. ECF No. 132, at 1–2. Soon thereafter, the court recognized that Petitioners were "successors in interest" with power to enforce the ICC Award and judgment and ordered Antrix to respond to Petitioners' post-judgment discovery requests. *Devas*, 2021 WL 3616787, at *3–4. In granting Petitioners (as intervenors) the right to serve post-judgment discovery, the court explained that Antrix and India's obstruction and delay represented "unique circumstances . . . confronting the Court's fair administration of justice." *Id.* at *5.

As global proceedings have developed, India's various state organs have continued to harass Devas, its former officers and employees, and are now even coming after Devas's shareholders. The latest: The Enforcement Directorate has asked Indian courts for authorization to apply to authorities in Mauritius under the India-Mauritius Mutual Legal Assistance Treaty to find and attach Petitioners' assets there. Dutt Decl. ¶ 20 & Ex. 19. Thus India continues to weaponize its

agencies to harass and intimidate its award-creditors with the express goal of extinguishing its substantial debts.

V. Multiple Foreign Courts Have Recognized The Treaty Awards And Rejected India's Attacks On Them.

Other courts have not let India and Antrix get away scot-free. In 2016, India challenged the Merits Award in litigation in the Dutch courts at The Hague, which was the seat of the arbitration. ECF No. 16-12. The Hague District Court denied India's challenge and affirmed the Merits Award in November 2018. ECF No. 1-9. India appealed to The Hague Court of Appeal, which again rejected India's challenge and reaffirmed the Merits Award in February 2021. Champion Decl. Ex. 3. Both the Hague District Court and the Court of Appeals also denied India's request to stay proceedings pending the criminal investigations in India, finding the scope, nature, and duration of India's investigations to be so "exceedingly uncertain" that granting a stay would be contrary to the Petitioners' due-process rights. ECF No. 1-9, ¶ 4.63; Champion Decl., Ex. 3, ¶ 5.40. India has appealed to the Dutch Supreme Court. ECF No. 16-14.

On February 5, 2021, India filed a challenge to the Quantum Award in the Hague District Court alleging that the Tribunal failed to consider that Devas required a license from the Wireless Planning and Coordination Wing ("WPC") of the Department of Telecommunications to provide terrestrial services as contemplated by the Agreement. ECF No. 16-13. India acknowledged that this challenge was a "continuation of the setting aside proceedings . . . which India earlier instituted" against the Merits Award before the same Hague District Court, in which the court "rejected all grounds for setting aside raised by India." *Id.* ¶ 1.

After Dutch trial and appellate courts both rejected India's set-aside petition, The Hague District Court—the same court that heard India's challenge to the Merits Award—entered an exequatur order allowing Petitioners to enforce the Quantum Award in the Netherlands. Champion

Decl. Ex. 4. This order, which permits Petitioners to fully enforce the Quantum Award against Indian property in the Netherlands, is unaffected by India's ongoing appeal or its attempt to set aside the Quantum Award. *Id*. ¶ 7.

ARGUMENT

India asks this Court to stay all proceedings in this case pending the resolution of its set-aside actions in the Netherlands and other actions in India. India's request lacks merit—another desperate gambit to avoid judgment day and having to pay Devas and its shareholders for India's and Antrix's misdeeds of *ten years ago*. Indeed, from the time of its destruction of Devas and Petitioners' interests back in 2011, India has ceaselessly acted to delay and hinder the vindication of Devas and Petitioners' rights. The Tribunal, the U.S. District Court for the Western District of Washington, and courts in numerous countries around the world have declined to further accept India's obfuscations and have refused to stay proceedings when faced with requests just like this one. *See Devas*, 2020 WL 5569782, at *5. This Court should reject India's delay tactics and allow this action to proceed.

I. India Does Not Meet The Standard For A Stay Of Proceedings.

"A stay of confirmation should not be lightly granted lest it encourage abusive tactics by the party that lost in arbitration." *GE Transp., S.P.A. v. Republic of Albania*, 693 F. Supp. 2d 132, 138 (D.D.C. 2010) (quoting *Europcar*, 156 F.3d at 317). Courts within this district look to the non-exclusive factors set out in *Europcar* to determine whether a stay of an action to confirm a foreign arbitration under the New York Convention is appropriate. *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 879–80 (D.C. Cir. 2021). Those factors include:

> (1) the general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;

> (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;
>
> (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
>
> (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;
>
> (5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the Convention, the party seeking enforcement may receive "suitable security" and that, under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country . . . ; and
>
> (6) any other circumstances that could tend to shift the balance in favor of or against adjournment.

G.E. Transp., 693 F. Supp. 2d at 138 (citing *Europcar Italia*, 156 F.3d at 317–18); *Devas*, 2020 WL 5569782, at *2–3. The Court should conduct its analysis with the understanding that "the primary goal of the Convention is to facilitate the recognition and enforcement of arbitral awards." *Stileks*, 985 F.3d at 880 (quoting *Europcar*, 156 F.3d at 318). And although all six factors assist the district court's determination, it is the first two factors that bear the most weight. Those factors "directly implicate the court's responsibility to 'balance the Convention's policy favoring confirmation of arbitral awards against the principle of international comity embraced by the Convention.'" *Id.* at 880 (quoting *Four Seasons Hotel & Resorts B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1172 (11th Cir. 2004). Here, none of the factors supports imposition of a stay. In fact, a

stay would only reward India's audacious abuse of its legal system to undermine both the Treaty and ICC Awards. This Court should deny India's motion.

A. Granting A Stay Would Needlessly Prolong These Proceedings And Undermine The Objectives Of Arbitration.

First, a stay would not further the "general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation." *Stileks*, 985 F.3d at 879–80 (quoting *Europcar*, 156 F.3d at 317). As in *Stileks*, where the D.C. Circuit recently affirmed the district court's decision to lift a stay, the underlying dispute between Petitioners and India began over a decade ago. Petitioners commenced arbitration proceedings over nine years ago. The Tribunal found in favor of Petitioners on the merits over five years ago and issued its Quantum Award nearly one year ago. The lengthy timeline of the parties' dispute is more than enough to justify denying India's request for a stay and proceeding with enforcement of the award. *See Venco Imtiaz Constr. Co. v. Symbion Power LLC*, 2017 WL 2374349, at *6 (D.D.C. May 31, 2017) ("[Petitioner] first requested arbitration approximately four years ago, which is a length of time that courts often consider long enough to justify immediate enforcement."); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 72 (D.D.C. 2013) ("Chevron submitted its Notice of Arbitration in this matter more than six years ago, a delay that surely does not constitute an 'expeditious resolution' of the dispute."); *GE Transp. S.P.A.*, 693 F. Supp. 2d at 139 ("Despite these favorable rulings in the [arbitral] forum agreed to by Albania, the petitioners have yet to receive any satisfaction, nearly four years after commencing arbitration."). Issuance of a stay in these proceedings would only further serve to delay the resolution of this dispute.

In the more than ten years that Petitioners and their company have been locked in this dispute, they have asserted claims in two different arbitral proceedings conducted on two different continents. India has challenged the Merits and Quantum Awards in set-aside proceedings in the

Netherlands and has attacked the related ICC Award in set-aside proceedings in India. Undeterred by the repeated rulings in Petitioners' favor and the enforcement of the two Awards, India has dispatched its highest governmental attorneys into its own National Company Law Tribunal and used that body to seize control of Devas in an ongoing effort to undermine the arbitral awards issued against it and Antrix. *See supra* Background Pts. II–IV. This history of obstruction frustrates the purpose of the international arbitral system in general and of the New York Convention in particular. India's refusal to respect Petitioners' rights and the Quantum Award should not be rewarded with a further stay from this Court. The first factor weighs against a stay.

B. India's Appeal In The Netherlands Has Little Chance Of Success.

Second, India provides no "estimated time for those proceedings to be resolved," and its appeal in the Netherlands to set aside the Quantum Award is unlikely to succeed—just as its petition to set aside the Merits Award failed in two levels of the Dutch courts. *See Europcar*, 156 F.3d at 317; *Devas*, 2020 WL 5569782, at *4. Courts within this Circuit have routinely denied stays where, as here, the foreign court in the first instance has already ruled in favor of the award. *See Chevron*, 949 F. Supp. 2d at 72 ("[A]lthough the Dutch proceeding is ongoing, the District Court of the Hague issued a decision denying [respondent's] petition to set the award aside more than a year ago."). Here, the Hague District Court rejected India's petition to set aside the Merits Award nearly three years ago. The Hague Court of Appeal affirmed the decision in February 2021. But most critically, as to the Merits Award and proceedings with respect to the Quantum Award, India gives this Court no way of knowing "how long any [further] appeal[s] might take." *Venco*, 2017 WL 2374349, at *6. The second factor weighs heavily against a stay.[4]

[4] Nor does India have any basis to assert the NCLT proceeding as a basis for the stay. That court lacks the power to render a judgment either enforcing or setting aside an arbitral award, Dutt Decl. ¶ 17, and that proceeding does not address the Treaty Awards at all. That proceeding, in which

C. Dutch Courts Have Already Denied India's Attempts To Set Aside The Merits Award.

Third, the court must consider "whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review." *Europcar*, 156 F.3d at 317. Under similar circumstances, the D.C. Circuit in *Chevron* found that the standard applied by Dutch set-aside courts "is not so much more exacting than the one applied here that it weighs strongly against confirmation, and indeed, the fact that the Dutch District Court has already denied the motion to set aside demonstrates that to the extent the standard is any more searching, it has not helped [respondent] in its attempt to resist confirmation." 949 F. Supp. 2d at 72.

And although India only recently initiated set-aside proceedings against the Quantum Award in the District Court of the Hague, its challenges are largely duplicative of those in its already failed challenge to the Merits Award. *Compare* ECF No. 16-12, ¶¶ 20–22 *with* ECF No. 16-13, ¶¶ 14–18 (challenging the Awards based on the Tribunal's findings on the WPC license, which have already been rejected by the Hague District Court and Court of Appeals, *see* Memorandum in Support of Petitioners' Opp. to Mot. to Dismiss at 9-10). India's other challenges to the Quantum Award relate solely to the calculation methodology of the compensation due to Claimants and do not impact the Tribunal's findings (now twice upheld by Dutch courts) that it had jurisdiction over the dispute and India is liable for breaching the Treaty. The third *Europcar* factor therefore leans against a stay.

Devas has been subjected to a hostile takeover by its judgment debtor (represented by the principal attorneys of the Indian government), has nothing to do with Petitioners' ability to enforce the Treaty Awards.

D. Enforcing The Award Raises No Comity Concerns, Particularly Where The Pending Foreign Proceedings Were Brought Primarily To Delay Enforcement.

Fourth, the court must consider the characteristics of the foreign proceedings, including, as relevant, "whether they were brought . . . to set the award aside (which would tend to weigh in favor of enforcement)," "whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity," and "whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute." *Europcar*, 156 F.3d at 318. India's conduct in the litigation indicates an ongoing attempt to "hinder or delay resolution of the dispute." *Id; Devas*, 2020 WL 5569782, at *4. To this day, India continues its efforts to harass and intimidate Petitioners and Devas into giving up what they are rightfully owed under the Awards. *See supra* Background Pt. II–IV. Every delay in this proceeding and others only gives India more time to weaponize the power of its Central Government against Petitioners. Moreover, Petitioners sought enforcement in this Court *before* India filed its latest challenge before The Hague District Court. That this action is first-filed means proceeding here raises no concerns that this Court will jump out ahead and somehow harm international comity. The fourth *Europcar* factor counsels against a stay.

E. The Balance Of Hardships Favors Petitioners.

Fifth, the court must balance "the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the Convention, the party seeking enforcement may receive 'suitable security' and that, under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country." *Europcar*, 156 F.3d at 318. The balance of hardships weighs heavily in favor of denying the stay. *Devas*, 2020 WL 5569782, at *4. Given India's recent actions, there should be no doubt that India will use further delays to concoct additional schemes to attack Petitioners and avoid enforcement of the Award. Moreover,

India has not paid a single cent of what it owes under the Award, and Petitioners have received no security whatsoever. This dispute is more than ten years old, and the Arbitration itself began more than nine years ago. "After such an extensive delay, the balance of hardships—and, indeed, the interests of justice—strongly favor immediate confirmation." *Chevron*, 949 F. Supp. 2d at 57; *Hardy Expl. & Prod. (India), Inc. v. Government of India*, 314 F. Supp. 3d 95, 108 (D.D.C. 2018) ("[G]iven the length of time [petitioner] has waited to receive the award, and the amount of money at issue, [petitioner] would be burdened should the Court delay confirmation of the award."). The fifth factor further leans against issuance of a stay.

F. The Circumstances Here Show That No Stay Should Be Granted.

Sixth, the court may consider "any other circumstances that could tend to shift the balance in favor of or against adjournment." *Europcar*, 156 F.3d at 318. The circumstances against a stay here exist in spades. From nearly the outset of the underlying arbitration, India has launched several retaliatory investigations into Devas, its shareholders (including Petitioners), officers, and employees, involving concocted and false allegations of fraud and criminal conduct, all in a transparent attempt to undermine the arbitrations and the awards. *See supra* Background Pts. II–IV. India's campaign began with these investigations and now India has, through its instrumentality, Antrix, procured an order of its courts permitting Antrix to wind up its own creditor, Devas, and subsequently appointing a governmental official to take control of the company and further stall enforcement. *Id.* India's actions thus far amount to a deliberate and calculated attempt to thwart all attempts to collect on any of the awards against it or Antrix. Further delay will only aid India in those efforts. A stay "should not be lightly granted lest it encourage abusive tactics by the party that lost in arbitration." *Europcar*, 156 F.3d at 318.

Signals of such tactics abound. In the proceeding currently before the U.S. District Court for the Western District of Washington between Devas and Antrix arising out of the same facts,

and considering the same decade of tortuous litigation, the court found it just to lift the stay in that case, and recently denied a request for a further stay of proceedings. *See* W.D. Wash. ECF No. 132. There, the court "repeatedly emphasized" that the "matter ha[d] been subjected to hindrance and delay, largely on the part of Respondent. . . . The parties' dispute arises from conduct in February 2011, the Award was issued in favor of Petitioner in September 2015, and Petitioner's related confirmation action was filed in this Court nearly three years ago in September 2018." *Id.* at 1–2. And more recently, in exercising its inherent authority to allow Petitioners (as intervenors) to enforce Devas's own arbitral award, the Court explained that the "unique circumstances . . . confronting the Court's fair administration of justice," *Devas*, 2021 WL 3616787, at *5, require enforcement proceedings against India and Antrix to proceed apace.

The same considerations apply to this action, which arises from India's conduct more than a decade ago, resulted in an Arbitration that began more than nine years ago and led to a Merits Award issued more than five years ago. Here, just as in *Chevron*, *GE Transport*, and *Hardy*, there is simply no basis to stay enforcement of an arbitral award that resulted from years of litigation, has been enforced through an exequatur in the primary jurisdiction, and is based on unlawful conduct by the respondent many years ago. The stay should be denied.

II. Judicial Economy, International Comity, And The Principle Of Respect For The International Arbitral System Embodied In The New York Convention Preclude A Stay.

India's argument for a stay rests heavily on assertions of "judicial economy" and "international comity." These arguments ignore the more than ten years that have elapsed since India breached its obligations to Petitioners and warp the system of international arbitration into an endless tangle of litigation. Any concerns over international comity are drastically outweighed by the need to resolve the parties' dispute expediently, as evidenced by the lengthy history of the underlying arbitration. Courts have routinely declined to stay enforcement proceedings where, as here,

the underlying arbitration was commenced long ago, and the foreign court of first instance has denied the challenge and the challenge is on appeal. *See, e.g.*, *Chevron*, 949 F. Supp. 2d at 71–72 (declining to stay enforcement where the arbitration had been filed 6 years prior and the Hague District Court denied Ecuador's set aside petition); *G.E. Transp.*, 693 F. Supp. 2d at 138–39 (proceeding with enforcement where petitioners had commenced the arbitration four years prior and the foreign appellate court declined to grant interim relief); *China Nat'l Chartering Corp. v. Pactrans Air & Sea, Inc.*, 2009 WL 3805596, at *1 (S.D.N.Y. Nov. 13, 2009) (denying a stay where an appeal of the arbitral award was pending and there were indications of delay); *MGM Prods. Grp., Inc. v. Aeroflot Russ. Airlines*, 573 F. Supp. 2d 772, 778 (S.D.N.Y. 2003) (refusing to stay enforcement where the arbitration began five years prior and foreign courts were considering an appeal of "issues the arbitration panel presumably already considered [] and promises to delay the finality of arbitration"); *Sarhank Grp. v. Oracle Corp.*, 2002 WL 31268635, at *6 (S.D.N.Y. Oct. 9, 2002), *vacated on other grounds*, 404 F.3d 657 (2d Cir. 2005) (declining stay where the arbitration began four years prior and foreign set-aside proceedings were ongoing).

The same considerations apply here. Petitioners filed an arbitration more than nine years ago. The Tribunal panel issued its Merits Award five years ago. India's first appeal was rejected by the Hague District Court three years ago. India's second appeal was rejected by the Hague Court of Appeal earlier this year. Under these circumstances, India's speculative concerns that the Merits Award could be overturned on its third attempt are heavily outweighed by the primary "goals of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation." *Europcar*, 156 F.3d at 317. Indeed, foreign courts have unanimously recognized the Treaty Awards—including both the trial and appellate courts in the Netherlands, the seat of the arbitration, as well as in numerous exequatur orders issued around the world. If any-

thing, given the prolonged nature of this dispute, "enforcement of the Award would be more expeditious than denying enforcement to await the ultimate conclusion of the [foreign] court." *Sarhank*, 2002 WL 31268635, at *6.

India insists that a number of other cases justify a stay in this proceeding, Br. at 18 n.5, but those decisions merely highlight the impropriety of a stay here. In the great majority of those cases, this court granted a stay *before* courts in the primary jurisdiction had made *any* ruling confirming or setting aside the arbitral award. *See* Mem. Op., ECF No 24, *Cube Infrastructure Fund v. Kingdom of Spain*, No. 20-cv-1708 (D.D.C. May 17, 2021); *CPConstruction Pioneers Baugesellschaft Anstalt v. Government of Republic of Ghana*, 578 F. Supp. 2d 50, 54 (D.D.C. 2008); *Getma Int'l v. Republic of Guinea*, 142 F. Supp. 3d 110, 115 (D.D.C. 2015); *Union Fenosa Gas S.A. v. Arab Republic of Egypt*, 2020 WL 2996085, at *1 (D.D.C. June 4, 2020); *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 190–91 (D.D.C. 2016) (set-aside proceedings pending without ruling in Swedish courts); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 36 (D.D.C. 2019); *Infrastructure Servs. Luxembourg S.A.R.L. v. Kingdom of Spain*, 2019 WL 11320368, at *1 (D.D.C. Aug. 28, 2019); Notice, ECF No. 21, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, No. 18-cv-1461 (D.D.C. Feb. 11, 2019); *9REN Holding S.A.R.L. v. Kingdom of Spain*, 2020 WL 5816012, at *1 (D.D.C. Sept. 30, 2020); *CEF Energia, B.V. v. Italian Republic*, 2020 WL 4219786, at *1 (D.D.C. July 23, 2020) (Swedish court had yet to rule on set-aside proceeding in first instance and had issued stay prohibiting enforcement prior to ruling). Furthermore, in *Union Fenosa*, *9REN*, *Karadeniz*, *Masdar*, *Infrastructure Services*, and *Eiser*, the stays issued there were not premised on set-aside proceedings in foreign courts. Instead, the courts there stayed pending a review conducted by a specialized annulment committee set up as part of the arbitration process instituted by the International Center for the Settlement of Investment Disputes. Once that committee renders its decision there is no

further remedy or appeal available for the parties. *See, e.g.*, Order, ECF No. 51, *Eiser Infrastructure Ltd. v. Kingdom of Spain*, 18-cv-1686 (D.D.C. Feb. 13, 2021).

As the Court in *Getma* wrote, India's cases are "easily distinguishable" because here, as in *Chevron* and *GE Transport*, "at least one foreign tribunal in each case had already conducted a post-arbitration review of the arbitral award at issue and refused to set it aside." 142 F. Supp. 3d at 115. In other cases India cites, it was the party seeking to *enforce* the award that also sought the stay (*i.e.*, analogous to Petitioners here, not India), *see, e.g.*, *Gretton Ltd. v. Republic of Uzbekistan*, 2019 WL 464793 (D.D.C. Feb. 6, 2019); *Hulley Enters. Ltd. v. Russian Fed'n*, 211 F. Supp. 3d 269 (D.D.C. 2016), which eliminated the possibility of prejudice from the delay of collection. Indeed, in *Hulley*, the petitioner sought to stay the confirmation proceeding because the set-aside court in another jurisdiction had vacated the arbitration; the petitioner intended to preserve the action while it appealed the set-aside. 211 F. Supp. 3d at 287.[5]

Despite India's repeated assertion that its requested stay has been granted as a matter of course in this court, India fails to identify a single case in which a stay was granted *after* multiple courts in the primary jurisdiction had already rejected set-aside petitions and more than a decade had elapsed from the violation of the petitioner's rights. That is because, as *Chevron*, *GE Transport*, and *Hardy* confirm, a stay is not warranted here.

[5] The decision in *Hulley II* is similarly distinguishable—by that point in the litigation different courts within the Dutch legal system had issued conflicting rulings on the validity of the $50 billion arbitral award and the parties in the American proceeding had variously opposed or supported a stay based on those outcomes. *Hulley Enters. Ltd. v. Russian Fed'n*, 502 F. Supp. 3d 144, 149–50 (D.D.C. 2020). Here, by contrast, there are no conflicting rulings and there is substantially less value in controversy, and thus substantially less risk of unjustified offense to the foreign sovereign.

III. If the Court Grants A Stay (And It Should Not), India Should Be Required To Post Full Security As Article VI Of The New York Convention Provides.

If this Court decides to stay this proceeding, it should require India to post security as provided under Article VI of the New York Convention. That provision empowers a court to require "suitable security" from an arbitral award debtor who seeks to stay enforcement while attempting to set aside an arbitral award. *Europcar*, 156 F.3d at 318. Ordinarily, it is the practice of courts in this district not to require foreign sovereigns to post security, *see, e.g.*, *Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain*, 2020 WL 417794, at *6 (D.D.C. Jan. 27, 2020), but the "unique circumstances . . . confronting this Court's fair administration of justice," *Devas*, 2021 WL 3616787, at *5, render this case far from ordinary.

Here, India has not only brought ceaseless attacks on the arbitral award, it has also mobilized its nominally independent judiciary to seize control of its judgment creditor through the NCLT proceeding. *See supra* Background Pts. II–IV. India has revised its own domestic arbitral law to prevent enforcement of the Quantum Award in India. *Id.* It has directed its state-owned entities, including state-owned banks connected to the international financial system, to remove funds from foreign currency accounts held abroad in order to frustrate the enforcement of international arbitration awards.[6] And India has not only refused to pay the arbitral awards, it has also initiated criminal and civil investigations and attempted to levy fines against its opposing parties with the stated intent of using these sham proceedings to offset any payments that its creditors are able to extract through enforcement of the arbitral awards. *Id.*

[6] *See* Aftab Ahmed & Nupur Anand, *Exclusive-India asks state banks to withdraw cash held abroad over Cairn dispute, sources say*, Reuters (May 6, 2021) *available at* https://www.reuters.com/article/cairn-energy-india-arbitration-idCAL4N2MT38L; Upmanyu Trivedi & Anurag Kotoky, *Devas joins Cairn in Trying to Seize Air India's Overseas Assets*, Bloomberg Business (June 29, 2021) *available at* https://www.bloomberg.com/news/articles/2021-06-29/devas-joins-cairn-in-trying-to-seize-air-india-s-overseas-assets.

In light of this conduct, it is clear that regardless of whether India remains technically "solvent" through the pendency of the litigation, *Novenergia II*, 2020 WL 417794 at *6, it will refuse to satisfy a judgment against it. Given the near certainty of its defiance of the Court's ultimate judgment (just as India's instrumentality Antrix is presently defying the judgment of the district court for the Western District of Washington), it would be inequitable to permit India to stay this action indefinitely without required suitable security to protect Petitioners' interests.

CONCLUSION

This Court should deny India's motion to stay this proceeding or, in the alternative, if the Court issues a stay, require India to post substantial security pursuant to Article VI of the New York Convention.

Dated: September 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 17, 2021, I caused the foregoing Petitioners' Opposition to Respondent's Motion to Stay Proceedings to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

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