

PCA CASE NO. 2016-7

**In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With
The Agreement Between The Government Of The United Kingdom Of Great Britain
And Northern Ireland And The Government Of The Republic Of India
For The Promotion And Protection Of Investments**

-and-

**The Arbitration Rules Of The United Nations Commission On International Trade Law,
1976 (the “UNCITRAL Arbitration Rules”)**

-between-

**CAIRN ENERGY PLC
CAIRN UK HOLDINGS LIMITED**

Claimants

-and-

The Republic of India

Respondent

Procedural Order No. 3

Decision on the Respondent’s Application for a Stay of the Proceedings

The Arbitral Tribunal
Dr. Laurent Lévy (Presiding Arbitrator)
Mr. Stanimir A. Alexandrov
Mr. J. Christopher Thomas, QC

Registry
Permanent Court of Arbitration

31 March 2017

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I. PROCEDURAL HISTORY

1. On 12 April 2016, a few days before the first procedural hearing, the Respondent announced its intention to make an application for a stay of the present proceedings (the “Stay Application”). By letter of 15 April 2016, the Claimants objected to any such application.
2. During the first procedural hearing, the Parties and the Tribunal addressed the Respondent’s intention to file the Stay Application and set a briefing schedule for that purpose.
3. On 6 June 2016, the Respondent filed its Stay Application. The Claimants submitted their Response on 12 July 2016, and the Respondent filed its Reply on 28 July 2016. The Claimants did not file a Rejoinder.
4. At the Respondent’s request, over the Claimants’ objections, on 7 October 2016 the Parties and the Tribunal held a hearing on the Respondent’s Stay Application (the “Hearing”). The Hearing took place in Geneva, with the Parties and the President participating in person, and the co-arbitrators participating via telephone conference.
5. On 3 November 2016, the Tribunal informed the Parties that “before it issue[d] its decision on the Stay Application and without prejudging any of the issues before it, the Tribunal would like to explore avenues of coordination with the *Vedanta* tribunal that would be directed at reducing the risk of inconsistent decisions while allowing both arbitrations to proceed.”¹ It therefore invited the Parties to “to consult between themselves and with Vedanta to determine whether other options – short of a full consolidation or a full stay of the proceedings – would be feasible, and to revert to it (preferably jointly) by 18 November 2016.”² In that letter, the Tribunal also addressed the issue of document sharing between both arbitrations, which is a matter that will be addressed in a separate procedural order.
6. In the weeks that followed, the Parties exchanged correspondence with a view to complying with the Tribunal’s invitation.³ By email of 25 November 2016, the Tribunal encouraged the Parties to cooperate with each other and with Vedanta, with a view to agreeing on an enhanced form of coordination in both proceedings that would be acceptable to all parties and the two tribunals.
7. On 8 December 2016, the Claimants informed the Tribunal that its attempts to reach an agreement with Vedanta on enhanced forms of coordination and/or document sharing between the *Cairn* and *Vedanta* arbitrations had failed.

¹ Tribunal’s Letter 2 of 3 November 2016, p. 1.

² *Id.*, pp. 1-2.

³ *See, e.g.*, Claimants’ letters of 11, 19 and 23 November 2016, and Respondent’s communications of 15 and 30 November 2016 and 8 December 2016.

8. On 17 December 2016, the Respondent renewed its Stay Application, and made further submissions in that regard. At the Tribunal's invitation, the Claimants submitted a response on 9 January 2017. On 15 February 2017, the Respondent submitted a reply, to which the Claimants filed a rejoinder on 22 February 2017.
9. In its letter of 15 February 2017, and as reiterated by communications of 2, 13 and 17 March 2017, the Respondent requested a second hearing on its Stay Application. The Claimants objected to this second hearing by letter of 7 March 2017.
10. By letter of 14 March 2017, the Claimants informed the Tribunal of certain new developments in India that could have an impact on their case, including the fact that on that same day they had received a letter from the Office of the Assistant Commissioner of Income Tax indicating that it would proceed to the forced sale of the CUHL's shares in CIL (as defined further below) if the tax demand was not paid by 15 June 2017. The Respondent commented on these new developments by letters of 17 March 2017, where it also made additional submissions in respect of its Stay Application (as well as its Application for Bifurcation, which will be addressed in a separate procedural order) and reiterated its request for a hearing on the Stay Application.
11. At the Tribunal's invitation, the Claimants submitted their response to these further submissions on the Stay and Bifurcation Applications on 23 March 2017. On that same day, the Respondent confirmed that the letter of the Office of the Assistant Commissioner of Income Tax mentioned in the preceding paragraph should be treated as a notice for purposes of its letter of 11 May 2016, in which the Respondent represented that it would "take no steps to purport to transfer, sell, encumber or in any other way dispose of the [CIL] shares during the pendency of these arbitral proceedings, without giving Cairn UK Holdings Ltd three months' written notice" of its intention to do so."⁴
12. By letter of 27 March 2017, the Tribunal informed the Parties that the Respondent's request for a second hearing on its Stay Application was denied, that the Stay Application was also denied, and that a decision with the Tribunal's reasoning would follow shortly.
13. The present Decision addresses the Respondent's application for a stay of the proceedings.

⁴ Respondent's letter of 11 May 2017, p. 1.

II. PARTIES' POSITIONS

14. As it is the Respondent who requests a stay of the proceedings, the Tribunal will start with the Respondent's position, and will then address the Claimants'.

A. The Respondent's position

15. In the Respondent's submission, these proceedings should be stayed pending the determination of another arbitration initiated by Vedanta Resources Plc against the Respondent (the "*Vedanta* arbitration"), and pending the determination of any cross-litigation between Cairn⁵ and Vedanta and/or its subsidiary Cairn India Limited ("*CIL*").⁶ According to the Respondent, this arbitration and the *Vedanta* arbitration constitute "parallel arbitration proceedings" that "are based on identical issues of fact and law"⁷ that are "inextricably linked"⁸ (Section 1). The links between these two cases create a risk of irreparable harm to India which requires adequate coordination, preferably in the form of a stay of these proceedings in favour of the *Vedanta* arbitration (Section 2). In the Respondent's view, the Tribunal has the power to order such a stay and the test to be applied is that of the balance of prejudice (Section 3). In this case, the balance of prejudice falls to India, and as a result this arbitration should be stayed (Section 4).

1. The Cairn and Vedanta arbitrations are inextricably linked

16. The Respondent contends that the *Cairn* and *Vedanta* arbitrations are inextricably linked because (i) they refer to the same underlying transaction, (ii) Cairn and Vedanta are linked by contractual indemnity provisions, and (iii) Cairn and Vedanta are cooperating and sharing information, as well as the same counsel.
17. The Respondent explains that these two arbitrations relate to two tax demands that concern the same underlying economic transaction, and which are "two sides of the same coin".⁹ The Respondent explains that:
- a. This arbitration "concerns the tax demand issued by the Respondent's Income Tax Department against CUHL [Cairn Energy UK Holdings Ltd] for its failure to pay capital gains tax as the seller of shares of Cairn India Holdings Ltd ("*CIHL*"), a company incorporated in Jersey, to Cairn India Ltd ("*CIL*"), a company incorporated in India, in 2006."¹⁰

⁵ By "*Cairn*", the Parties refer specifically to the Claimants in this arbitration, i.e. Cairn Energy Plc and Cairn UK Holdings Limited.

⁶ For the sake of clarity, the Tribunal has italicized the case names and removed italics from party names, even when the Parties have not done so.

⁷ Respondent's Application for a Stay of the Proceedings, ¶ 2.

⁸ *Id.*, ¶ 44; Transcript of the hearing of 7 October 2016 ("*Tr.*"), 64:18-65:1 (Mr. Moolan).

⁹ *Tr.*, 64:18-23 (Mr. Moolan).

¹⁰ Respondent's Application for a Stay of the Proceedings, ¶ 4.

- b. In turn, “[t]he *Vedanta* Arbitration concerns a mirror-image tax demand which was issued against CIL for its failure to withhold capital gains as the buyer of those shares before making payment to CUHL, a non-resident company, for the shares.”¹¹ CIL is now controlled by Vedanta.
18. While the Respondent concedes that the issues before the *Cairn* and *Vedanta* tribunals are not identical,¹² it argues that the core issue – the lawfulness of the Respondent’s tax demand – is the same in both arbitrations. It further contends that the Tribunal itself made this “correct” albeit “provisional” determination in its Letter 2 of 3 November 2016.¹³
19. The Respondent asserts that, in addition to these parallel proceedings, there is also a threat of cross-litigation between the Claimants and Vedanta as a result of indemnity provisions in the 2006 share purchase agreements. According to the Respondent, this indemnity would essentially allow Vedanta, through CIL, to demand CUHL to reimburse any amounts paid by Vedanta to the Indian government as a result of the tax assessment against CIL described under paragraph 17.b above. The Respondent cites the contractual provisions that give rise to this indemnity obligation,¹⁴ as well as correspondence in which CIL has notified CUHL that it demands indemnification for any tax and interest assessed against CIL by the Indian tax authorities as a result of the transaction.¹⁵ The Respondent also asserts that this indemnity “brings into play a duty to mitigate by Vedanta’s indirect subsidiary, CIL, for the benefit of Cairn, which duty Vedanta is fulfilling by pursuing the *Vedanta* proceedings against India”.¹⁶ The Claimants’ attempts to show that there are various scenarios that could unfold merely prove the complexities involved.¹⁷
20. The Respondent also alleges that there is a “unity of interests” between the Claimants and Vedanta, that they have “coordinated their efforts in pursuing these related proceedings”.¹⁸ The Respondent argues that this coordination has had the effect deferring the dispute between the Claimants and CIL with respect to the indemnities provided by CUHL to CIL under the purchase agreements.

¹¹ *Id.*, ¶ 4.

¹² Respondent’s Letter 1 of 15 February 2017, ¶ 6(a).

¹³ Respondent’s Letter 1 of 15 February 2017, ¶¶ 4 and 6(a). The Respondent refers to the Tribunal’s Letter 2 of 3 November 2016, where it stated that “one alternative that warrants serious consideration would be to seek to coordinate the present proceedings with the *Vedanta* proceedings so that, putting to one side what might be called the less central issues, the question of the lawfulness of the Respondent’s tax measure under the treaty could be briefed, argued and heard before both tribunals at the same time, and perhaps, if all parties consented, eventually decided by both tribunals jointly.” Tribunal’s Letter 2 of 3 November 2016, p. 3.

¹⁴ Exh. C-6 and C-7.

¹⁵ Exh. R-1.

¹⁶ Respondent’s letter of 17 December 2017, ¶ 5(c), citing Exh. R-3, R-4, R-5, R-2 and R-7.

¹⁷ Tr., 165:22-166:1 (Mr. Moolan).

¹⁸ Respondent’s Application for a Stay of the Proceedings, ¶ 5.

21. According to the Respondent, this cooperation “includes sharing of information through their choice of counsel”, as one of the Claimants’ counsel (Mr. Harish Salve SA) is also counsel to Vedanta.¹⁹ The Respondent cites correspondence that it asserts demonstrates such coordination.²⁰ According to the Respondent, the Claimants have barely attempted to rebut the evidence that they and CIL (i.e., Vedanta) have coordinated their efforts in pursuing their BIT proceedings.²¹ The Respondent also contends that, while the Claimants have stated that their knowledge of the *Vedanta* arbitration is based on publicly available information, their comments suggest knowledge of facts that are not in the public domain. The Respondent deduces that this information was provided by its common counsel, adding that “it is ludicrous to suggest that two Parties linked by an indemnity provision which may lead to litigation – including obvious questions as to steps taken by Vedanta to mitigate any loss through the pursuit of litigation – are not sharing information; as they clearly are.”²²
22. The Respondent objects to the Claimants’ allegations that Mr. Salve does not share information on the *Vedanta* case with them: it contends that the “formal position” is the Mr. Salve is instructed in both cases, with the result that “Counsel for Vedanta is counsel for Cairn”; “he has sight of both pleadings”, and “[h]is knowledge is imputable to the Claimants.”²³
23. That being said, the Respondent clarifies that it has “never suggested that there is anything untoward about Cairn and Vedanta collaborating and cooperating. Our case is the exact opposite; it is exactly what you would expect. You have one party that is on the receiving end of an indemnity, of course they agree to liaise, and you have seen from the correspondence Vedanta itself saying, ‘We need to mitigate our damages’.”²⁴ Indeed, the Respondent notes that normally when an indemnity is in place there is a right of control of the proceedings, and thus both investors have “good reasons to cooperate”.²⁵ The Tribunal understands this to mean that the Respondent does not object to the coordination of the claims, but argues that this shows how linked the claims are.²⁶
24. Somewhat inconsistently, the Respondent also argues that Cairn and Vedanta have pursued “independent uncoordinated – deliberately uncoordinated – litigation from

¹⁹ *Id.*, ¶ 7.

²⁰ Exh. R-1, R-2, R-5, R-7.

²¹ Respondent’s Reply, ¶¶ 6-12

²² Respondent’s Reply, ¶ 10.

²³ Tr., 163:21-164:9 (Mr. Moolan).

²⁴ Tr., 172:14-21 (Mr. Moolan).

²⁵ Tr., 172:24-173:13 (Mr. Moolan).

²⁶ When restated by the Tribunal, Counsel for the Respondent confirmed that it did not object to this coordination. See Tr., 175:2-8 (The President/Mr Moolan: “THE PRESIDENT: [...] I also had understood that you did not find any fault with the fact that the two Claimants in two arbitrations might be coordinating because there is an indemnity. I had also not read your submissions that way. MR MOOLLAN: Thank you, Mr Chairman.”)

one another”.²⁷ The Respondent’s point appears to be that “Cairn and Vedanta have chosen (i) to commence two separate investment arbitrations, having had prior discussions about the same in the context of the indemnity which links them and (ii) to do all in their power to avoid any coordination or sharing of information between the two sets of proceedings, thus creating [] incontrovertible difficulties”.²⁸ In particular, the Respondent complains that while the Claimants and Vedanta are coordinating and sharing information, “everything is being done by them to keep the two tribunals in the dark about the other set of proceedings, and to seek to avoid the possibility of the two tribunals putting in place proper coordination between the two sets of proceedings.”²⁹ For the Respondent, this is confirmed by the fact that the Claimants have rejected the designation of Singapore (which is the seat in the *Vedanta* proceedings) as the seat of this arbitration, and the application of the UNCITRAL Transparency Rules³⁰).

25. The Respondent submits that Claimants’ attempt to isolate these proceedings should not be condoned by the Tribunal: the claimants in both cases (“through their overt choice of Counsel and covert cooperation”) and the Respondent (through its defence in both proceedings), are aware of what is going on in both arbitrations; “the only party being kept in the dark is this Tribunal.”³¹

2. A stay of the proceedings is needed to prevent irreparable harm to India

26. The Respondent contends that the links between these two arbitrations create a risk of “manifest prejudice” or “irreparable harm” to the Respondent, and that a stay is necessary to “ensure the proper administration of international justice.”³² In the Respondent’s submission, “the correct approach is to coordinate the two related proceedings in a fair and efficient manner”, which “would be best done by staying these proceedings pending the outcome of the *Vedanta* Arbitration and any litigation instituted by CIL and/or Vedanta against the Claimants which seeks to enforce the contractual indemnities provided in the 2006 Agreements.”³³
27. First, the Respondent argues that “[t]he inextricable link between the *Vedanta* Arbitration and the present proceedings gives rise to a real and substantial risk that the two proceedings will result in conflicting and irreconcilable awards.”³⁴ According to the Respondent, “[s]uch an outcome would plainly be illogical and absurd”, “would run counter to the Respondent’s basic framework of tax assessment and collection, and

²⁷ Tr., 80:1-3 (Mr. Moolan).

²⁸ Respondent’s Reply, ¶ 17. *See also* Tr., 80:6-16 (Mr. Moolan).

²⁹ Respondent’s Reply, ¶ 10.

³⁰ *Id.*, ¶ 13.

³¹ *Id.*, ¶ 12.

³² Respondent’s Reply, ¶ 2; Tr. 23:13-15; 47:20-22 (Mr. Moolan).

³³ Respondent’s Application, ¶ 11.

³⁴ Respondent’s Application, ¶ 45.

it would also threaten the coherence and legitimacy of the investment arbitration system.”³⁵

28. With respect to the risk of inconsistent decisions, the Respondent accepts that “[w]hile it is correct that the two sets of proceedings do not and will not raise the exact same points”, it stresses that “the core question in each case – the legitimacy of India’s taxation of the extraordinary capital gain made by Cairn in 2006 (an extraordinary gain which has not been taxed anywhere in the world) – is exactly the same.”³⁶
29. Second, the Respondent has also stated that “[t]he two arbitrations represent a coordinated attempt by the buyers and sellers of the taxable asset to have two bites at the same cherry: a finding by an international tribunal that the tax measure was somehow in breach of the BIT.”³⁷ In its Reply, the Respondent clarified that the expression “two bites at the same cherry” did not imply that Cairn and Vedanta were seeking double recovery, but rather that the risk is one of “double jeopardy”.³⁸ Somewhat contradictorily, at the hearing the Respondent restated that Cairn and Vedanta were seeking “two bites at the cherry”.³⁹ The Tribunal understands that the Respondent is referring to the following risk: if there is a situation where one investor wins against India and the other loses, the losing investor will attempt to avail itself of the other investor’s positive result.⁴⁰
30. As to the fact that India is pursuing tax demands against both the seller (CUHL) and the buyer (CIL), the Respondent argues that this “is merely the product of the fact that the tax remains unpaid and that the Respondent’s Income Tax Department is under a statutory obligation to implement and enforce the provisions of the Income Tax

³⁵ *Id.*, ¶ 4.

³⁶ Respondent’s Reply, ¶ 11.

³⁷ Respondent’s Application, ¶ 9.

³⁸ Respondent’s Reply, ¶ 21. At the hearing, Counsel for the Respondent clarified: “Double jeopardy in the sense that you are damned if you do, you are damned if you do not. By having two sets of proceedings, as I gave you that scenario, you may well end up in a situation where India wins one of the cases, loses the other case and is then damned come what may. [...] [T]hat is because of the interplay of two things: (i) the fact that these two tax demands are mirror images of one another; and (ii) the existence of the indemnity. Let me go to the example again. [...] Vedanta loses, Cairn wins. Because it is the same tax measure, Vedanta will then undoubtedly try to say, ‘Well, how can I be liable? The capital gains tax is gone. You cannot be withholding tax without capital gains tax’ and vice versa. That does not need the indemnity, that is just because they are two sides of the same coin. That is made even more complex by the existence of the indemnity. Same scenario: Vedanta loses, Cairn wins. What does Vedanta do? Of course it sues Cairn, it has got an indemnity. It sues Cairn, it wins, USD 4 billion payable to India, Cairn pays USD 4 billion to Vedanta. So the USD 4 billion have effectively gone from Cairn to Vedanta to India. What does Cairn do? ‘But I won. You did not have that right against me. Can I please now have the USD 4 billion I have just had to pay to CIL?’”. Tr., 84:18-85:25 (Mr. Moolan).

³⁹ Tr., 176:20-177:5 (Mr. Moolan) (“[W]e do say they are having two bites of the cherry because whichever party – imagine there is a win-lose situation – [...] Whoever loses will say, ‘Well, the other one has won, there is therefore no tax liability there, therefore there cannot be any tax liability on me’.”)

⁴⁰ *Id.*

Act.”⁴¹ The Respondent emphasizes that Indian law does not allow it the discretion not to pursue a demand against a defaulting party (whether seller or buyer).⁴²

31. The Respondent rejects the Claimants’ suggestion that the risk of inconsistent outcomes could be blamed on the Respondent’s decision to pursue both Cairn and Vedanta: it argues that “[t]he Claimants, not India, have chosen to work with Vedanta to bring two separate sets of arbitral proceedings seeking to impugn the exact same tax measure; and to do everything in their power to avoid those two sets of proceedings being properly coordinated.”⁴³
32. The Respondent further asserts that this arbitration should be stayed in favour of the *Vedanta* arbitration and not the other way around, for the following reasons:
 - a. The Respondent’s first point (which it concedes may be a “a bit flippant”), is that if it had proposed to stay the *Vedanta* arbitration, then Vedanta would have complained as Cairn is doing now, “so one has to stay somewhere”.⁴⁴
 - b. Second, the Respondent submits that the *Vedanta* case is more advanced. While the Cairn arbitration was filed first in time, Vedanta submitted its Statement of Claim first, filed an application for interim measures first, and the *Vedanta* tribunal scheduled a hearing on the Respondent’s Application of Bifurcation, which was to be filed the week after the Respondent’s Reply.⁴⁵
 - c. Third, “the existence of the indemnity from CUHL to Vedanta makes it clear that there can be only one logical sequence of litigation”.⁴⁶ According to the Respondent, “the existence of that indemnity creates the risk – in addition to all the other risks of inconsistency and prejudice noted by the Respondents – that (i) Vedanta may lose its proceedings against the Respondent; (ii) Vedanta (through CIL) will then pursue Cairn under the indemnity; (iii) with the result that Cairn will seek to recoup amounts paid out to Vedanta (via CIL) under the indemnity against the Respondent in this or further proceedings.”⁴⁷ As a result, the Respondent contends that “the logical sequence of events is for the *Vedanta* arbitration to conclude (with all relevant proceedings, evidence and awards to be made available to the present Tribunal), for any indemnity proceedings to play out, and for the present arbitration to then resume with the benefit of the outcome of both sets of proceedings and of the reasoning of the *Vedanta*

⁴¹ *Id.*, ¶ 16.

⁴² *Id.*, ¶ 14, referring to Exh. R-13, Common Cause A Registered Society v Union of India and Others, [1996] 222 ITR 260 (SC), para. 18); Exh. R-14, Income Tax Act 1961, s. 143(1), and Exh. R-15, Income Tax Act 1961, s. 119 proviso (a).

⁴³ Respondent’s Application, ¶ 50.

⁴⁴ Tr., 71:24-72:3 (Mr. Moolan).

⁴⁵ Respondent’s Reply, ¶ 18; Tr., 72:4-19 (Mr. Moolan).

⁴⁶ Tr., 73:3-8.

⁴⁷ Respondent’s Reply, ¶ 18.

Tribunal.”⁴⁸ Indeed, according to the Respondent, “Vedanta’s claim and the fate of Vedanta’s claim will determine whether or not the indemnity will be triggered. Whether or not the indemnity will be triggered will, in turn, directly impact Cairn’s claims.”⁴⁹

33. If Cairn disagrees that the risk described in paragraph 32.c above exists, the Respondent has invited it to “confirm that it commits and binds itself not to seek to claim against the Respondent in any circumstance any amount which Vedanta may recover against it under any indemnity between Cairn and Vedanta arising from the transactions at issue in this case.”⁵⁰ For the Respondent, “[a] failure to do so will speak for itself.”⁵¹ During the hearing, the Respondent argued that the Claimants had provided no such confirmation, and submits that this means that the risk identified by the Respondent is “likely” and that it is accordingly necessary for the various proceedings to follow the sequence outlined by the Respondent.⁵²
34. As discussed further below, the Respondent submits that the links between the two arbitrations warrant a stay of this arbitration, “pending determination of the *Vedanta* Arbitration by the *Vedanta* Tribunal and, if applicable, the resolution of any cross-litigation between CIL and/or Vedanta and the Claimants concerning the CUHL and CIL Tax Demands”.⁵³ The Respondent clarifies however that it “remains open to other avenues of coordination which would bring about a fair, efficient and predictable outcome”,⁵⁴ including consolidation.⁵⁵
35. In this context, the Respondent welcomed the Tribunal’s invitation to the Parties to attempt to agree with Vedanta a form of enhanced coordination between the two arbitrations in which “the question of the lawfulness of the Respondent’s tax measure under the treaty could be briefed, argued and heard before both tribunals at the same time, and perhaps, if all parties consented, eventually decided by both tribunals jointly.”⁵⁶ The Respondent suggests that the Parties’ failure to agree to the Tribunal’s proposal can be attributed to both the Cairn and Vedanta claimants’ unwillingness to engage in such enhanced coordination.⁵⁷ The Respondent argues in this respect that:

⁴⁸ *Id.* See also Tr., 73:3-13 (Mr. Moolan) (“[T]he existence of the indemnity from CUHL to Vedanta makes it clear that there can be only one logical sequence of litigation. First, the *Vedanta* arbitration must conclude. Depending on the outcome of that arbitration, indemnity proceedings by Vedanta against Cairn may be triggered. It is in light of the result of that process that the Cairn arbitration can take place.”) See also Respondent’s Letter 1 of 15 February 2017, ¶ 8.

⁴⁹ Tr., 160:18-22 (Mr. Moolan).

⁵⁰ Respondent’s Reply, ¶ 18.

⁵¹ *Id.*

⁵² Tr., 75:15-76:3; 160:23-163:13 (Mr. Moolan).

⁵³ Respondent’s Reply, ¶ 33.

⁵⁴ Respondent’s Application, ¶ 11.

⁵⁵ Respondent’s Reply, ¶ 32.

⁵⁶ Tribunal’s Letter 2 of 3 November 2016, p. 3.

⁵⁷ In its letter of 17 December 2016, the Respondent also requests the Claimants to produce documents related to their correspondence with Vedanta, and requests the establishment of a document sharing

- a. “It is obvious that coordination has continued between the two sets of Claimants”;⁵⁸
 - b. Despite the Claimants’ contentions to the contrary, “[t]he interests of Vedanta and Cairn against India are perfectly aligned. As recognised in correspondence between the two sets of Claimants, the *Vedanta* arbitration is a manifestation of Vedanta’s duty to mitigate its claim against the Cairn Claimants under the indemnity, and the indemnity will only come into play if Vedanta is unsuccessful against India.”⁵⁹
 - c. “The Claimants’ concerted strategy is clear: to try and push the *Cairn* arbitration as aggressively as possible, while slowing down the *Vedanta* arbitration [...] and to pretend that the lack of cooperation is due to Vedanta so that the Cairn Claimants should not face the obvious consequences of the Claimants’ concerted actions i.e. a stay of the *Cairn* arbitration”.⁶⁰
36. The Respondent further contends that “Cairn’s right to prosecute its claims must be balanced against the Respondent’s right to a fair trial and hearings, including trials and hearings which minimise the risk of inconsistent outcomes in the two arbitrations.”⁶¹ The Respondent also requests the Tribunal to take into account that “the Claimants’ actions to defeat attempts at coordination and this Tribunal’s own proposals of 3 November 2016, are prejudicing the Respondent’s rights to a fair hearing in both arbitrations (and relevantly for these applications in this, *Cairn* arbitration) in that they inter alia prejudice the possibility of ensuring consistent outcomes in the two arbitrations.”⁶²

3. The Tribunal has the power to stay the proceedings

37. The Respondent submits that the Tribunal has the power to stay proceedings. For the Respondent, this power arises under Article 15(1) of the UNCITRAL Rules, as well as from its inherent powers.⁶³
38. In the Respondent’s view, the jurisprudence of UNCITRAL tribunals (such as *Methanex v. United States* and *UPS v. Canada*) demonstrates that “(i) Article 15(1) provides the Tribunal with a broad power over procedural issues; and (ii) that power is understood to confer ‘the broadest procedural flexibility’ subject to compliance with fundamental safeguards.”⁶⁴ While none of these cases refers specifically to a stay of

regime between the *Cairn* and *Vedanta* arbitrations. The Tribunal addresses these requests in a different order.

⁵⁸ Respondent’s letter of 17 December 2016, ¶ 5(a).

⁵⁹ *Id.*, ¶ 7. See also Respondent’s Letter 1 of 15 February 2017, ¶ 6(b).

⁶⁰ *Id.*, ¶ 5(d).

⁶¹ Respondent’s Letter 1 of 15 February 2017, ¶ 8.

⁶² Respondent’s letter of 17 December 2016, ¶ 10. See also Respondent’s Letter 1 of 15 February 2017, ¶ 13.

⁶³ Respondent’s Application, ¶¶ 54-68; Tr., 23:4-8; 24:1-31:8 (Mr. Moolan).

⁶⁴ Respondent’s Application, ¶ 57.

the proceedings, the Respondent contends that the cases are relevant to “demonstrate the breadth of application of Article 15(1)”.⁶⁵ The Respondent also cites the *Hrvatska* case for the proposition that “the Tribunal has an inherent power to take measures to preserve the integrity of its proceedings”, and that, “[m]ore broadly, there is an ‘inherent power of an international court to deal with any issues necessary for the conduct of matters falling within its jurisdiction’”, which “‘exists independently of any statutory reference’.”⁶⁶

39. In the Respondent’s submission, “[t]he Tribunal’s broad powers under Article 15 of the UNCITRAL Rules, as well as in the exercise of its inherent powers, include the power to stay or suspend the proceedings in the interests of ensuring fairness in the treatment of the Parties and the proper administration of international justice.”⁶⁷ In the Respondent’s view, “[t]his arbitration is well suited for the exercise of such a power because of the clear existence of concurrent proceedings, the possibility of conflicting decisions, as well as the possibility of cross-litigation between the Claimants in the two proceedings.”⁶⁸
40. The Respondent contends that the power of international courts and tribunals to stay proceedings has been confirmed in international arbitral and judicial practice. Citing *S.D. Myers* and *Bilcon*, it notes that tribunals constituted under the UNCITRAL Rules have confirmed their power to stay proceedings, but acknowledges that those tribunals did not, on the facts of those cases, accede to the request for a stay.⁶⁹
41. The Respondent notes however that international tribunals constituted under other rules (specifically, in *SPP v. Egypt*, the *Mox Plant case* and *SGS v. Philippines*) have stayed the proceedings pending the outcome of related litigation.⁷⁰ According to the Respondent, these cases “demonstrate that this Tribunal undoubtedly has the power to stay its proceedings in appropriate circumstances; for instance where the resolution of a relevant issue is pending before another body.”⁷¹ While the Claimants “seek to distinguish those cases on their specific fact patterns, [...] this cannot bring into doubt the existence of the discretion to stay as a matter of law, but only serves to highlight that any exercise of that discretion must, by its very nature, be driven by the facts.”⁷² It

⁶⁵ Respondent’s Reply, ¶ 23.

⁶⁶ Respondent’s Application, ¶ 58, citing, *Hrvatska Elektroprivreda v Slovenia* (ICSID Case No ARB/05/24), Order Concerning the Participation of Counsel of 6 May 2008, ¶ 33 (Exh. RLA-21).

⁶⁷ Respondent’s Application, ¶ 59.

⁶⁸ *Id.*

⁶⁹ Respondent’s Reply, ¶¶ 24-26, citing *S.D. Myers, Inc. v Government of Canada* (Procedural Order No 18 of 26 February 2001), ¶¶ 7, 9-11, 15 (Exh. RLA-28), and *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v Government of Canada*, PCA Case No. 2009-04 (Procedural Order No 19 of 10 August 2015), ¶ 4 (Exh. RLA-29).

⁷⁰ Respondent’s Application, ¶¶ 60-65.

⁷¹ *Id.*, ¶ 65.

⁷² *Id.*, ¶ 27.

is the Respondent's submission that the facts of this case "warrant the exercise of that discretion."⁷³

42. In the Respondent's view, a tribunal's power to stay proceedings should be used in the case of concurrent investment treaty proceedings such as this one. The Respondent notes in this respect that the United Nations Commission on International Trade Law ("UNCITRAL"), the International Law Commission ("ILA") and leading writers and practitioners have highlighted the risks of multiple proceedings in investment treaty arbitration, which include the risk of inconsistent outcomes, duplication of efforts, additional costs, and procedural unfairness.⁷⁴ The temporary stay of an arbitration pending the outcome of other proceedings has been proposed as one of the possible solutions to these risks.⁷⁵
43. Contrary to the Claimants' characterization, the *Cairn* and *Vedanta* proceedings are clearly "multiple proceedings in investment arbitration" as defined in the UNCITRAL Secretariat's Note on concurrent proceedings, which includes "situations "[w]here unrelated claimants initiate separate proceedings against the same respondent with regard to the same measure (under an investment treaty and/or a contract)."⁷⁶
44. The Respondent argues that, contrary to the Claimants' contention, the UNCITRAL Secretariat's Note does not state that the power to stay an arbitration (or otherwise take into account of parallel proceedings) is limited to cases when there is a specific treaty provision providing for such measures. To the contrary, the Note recommends the Commission to prepare a guidance text to assist tribunals in the management of concurrent proceedings, including on whether there is an inherent power to stay proceedings, decline jurisdiction, or proceed with consolidation. The Note thus clearly envisages cases where there is no treaty provision.⁷⁷
45. The Respondent emphasizes that "this Tribunal undoubtedly has the power to stay its proceedings in appropriate circumstances; for instance where the resolution of a relevant issue is pending before another body. The only question is whether it should use that power in the present case."⁷⁸ The Respondent submits that "the issue lies not with the absence of tools which tribunals may use to manage situations such as the present one, but with a lack of appreciation by tribunals as to when or how to use those tools."⁷⁹ Citing Prof. Kaufmann-Kohler, the Respondent argues that, beyond

⁷³ *Id.*, ¶ 27.

⁷⁴ Respondent's Application, ¶¶ 46-48, 52-53, citing Exh. RLA-13, RLA-14, RLA-15, and RLA-16.

⁷⁵ *Id.*

⁷⁶ Respondent's Reply, ¶ 30, citing UNCITRAL Secretariat Note, Concurrent Proceedings in Investment Arbitration, UN Doc. A/CN.9/881 (8 April 2016), ¶ 8 (Exh. CLA-73).

⁷⁷ Respondent's Reply, ¶¶ 28-31, citing UNCITRAL Secretariat Note, Concurrent Proceedings in Investment Arbitration, UN Doc. A/CN.9/848 (17 April 2015) (Exh. RLA-13), ¶ 19.

⁷⁸ Respondent's Application, ¶ 65.

⁷⁹ *Id.*

occasional remedies, “a serious effort is needed to elaborate more general solutions” that require “creative thinking”.⁸⁰

46. Citing *S.D. Myers*, the Respondent submits that the test to determine if a case must be stayed is “essentially one of a balance of prejudice”: the Tribunal “should weigh, on one side, the prejudice which is likely to arise if [it does] not grant a stay, and that includes the serious and irreparable risk of inconsistent decisions [...] against the prejudice which the Claimants say they will suffer if a stay is granted, which [...] is essentially monetary.”⁸¹
47. The Respondent submits that the Tribunal can find guidance in the recent work of the International Law Commission (ILA) on concurrent proceedings (the “ILA Paper”).⁸² The Respondent acknowledges that the ILA Paper’s starting position is that, once it has established that it has jurisdiction, a tribunal must proceed with the arbitration, but argues that, in order to avoid conflicting decisions, costly duplication of proceedings or oppressive tactics, the ILA Paper notes that a tribunal may decide to stay an arbitration (even when the triple identity test is not satisfied) if the tribunal (i) is not precluded from doing so under the applicable law; (ii) it is satisfied that the outcome of the pending proceedings is material to the outcome of the current arbitration, and (iii) it is satisfied that there will be no material prejudice to the party opposing the stay.⁸³

4. The test to stay the proceedings is met in this case

48. In the Respondent’s view, “the ‘balance of convenience’ to the parties – taking into account the costs which the Parties will incur, and the possible prejudice faced by the Respondent given the risks arising from the existence of the indemnity, the ‘duplication of efforts’ in being required to defend the two claims concurrently, and the possibility of ‘potentially contradictory outcomes’ overwhelmingly favours the granting of a stay.”⁸⁴ In this respect, the Respondent contends that “the harm which India stands to suffer if the proceedings are not stayed – and inconsistent outcomes reached – is irreparable and cannot be compensated in damages.”⁸⁵
49. It also argues that “it is fundamentally unfair for the Respondent to have to defend two claims arising out of the same measure in circumstances where the Respondent could find itself exposed to different awards”, and “the maintenance of concurrent

⁸⁰ Respondent’s Application, ¶ 52, citing Gabrielle Kaufmann-Kohler, “Multiple Proceedings – New Challenges for the Settlement of Investment Disputes”, in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2013), pp. 11-12 (Exh. RLA-16).

⁸¹ Tr., 23:10-22 (Mr. Moolan); see also Respondent’s Reply, ¶¶ 25, 31.

⁸² De Ly and Sheppard, “ILA Final Report on Lis Pendens and Arbitration”, 25(1) *Arbitration International* 83, 84 (2009) (Exh. RLA-14).

⁸³ Tr., 31:11-35:10 (Mr. Moolan, citing Exh. RLA-14).

⁸⁴ Respondent’s Reply, ¶ 31.

⁸⁵ Respondent’s Letter 1 of 15 February 2015, ¶ 8(c).

proceedings in the present case is inconsistent with the proper and fair administration of international justice”.⁸⁶

50. By contrast, any prejudice which the Claimants may suffer (none being admitted) could ultimately be compensated through monetary compensation, bearing in mind that the Claimants have long reaped the benefits of their extraordinary capital gains, without ever paying tax thereon in any jurisdiction.”⁸⁷
51. The Respondent also contends that the Claimants exaggerate the prejudice that would be suffered by them, and argues that “it is all hyperbole which is designed to scare [the Tribunal] from doing the right thing.”⁸⁸ In particular, the Respondent argues that, contrary to what the Claimants suggest, it is not proposing a lengthy and indefinite stay; it is asking for “a temporary stay, limited in time by the duration of another set of proceedings and, in this instance, [...] of two further sets of proceedings” – in other words, it is requesting a “clearly defined stay”.⁸⁹ The Respondent asserts that the *Vedanta* proceedings are well advanced, with a hearing on bifurcation in December 2016 and, if bifurcation is ordered, a hearing on jurisdiction in May 2017. As for the indemnity proceedings, the Respondent notes that they would take place in English Commercial Courts and that it understands that counsel has already been retained. The Respondent also explains that, if a stay was granted, this Tribunal would remain fully constituted, it would be fully appraised of the advancement of the *Vedanta* proceedings (once a proper information-sharing system is put in place), and there would be regular updates from the Parties. The Tribunal would thus remain in full charge of the proceedings and would remain “free at all times to vary or discharge the stay if it felt that the reason why it had granted the stay in the first place had gone away or that something had happened which warranted for this course of action to take place.”⁹⁰
52. As to the Claimants’ allegations that the prejudice to Cairn is greater than the prejudice to Vedanta if the *Vedanta* arbitration was stayed, the Respondent argues that “this case in terms of alleged prejudice is exactly the same as Vedanta, the same interest is accruing against Vedanta”, and that “[t]he only difference [...] is that Vedanta has assets in India and, therefore, India will be able to enforce its tax demand against Vedanta”, “[w]hereas these Claimants have already taken all their funds out of India, with the only remaining funds being what has been attached.”⁹¹
53. Finally, the Respondent objects to the Claimants’ argument that granting a stay would be inconsistent with the Respondent’s obligation to provide a prompt and effective remedy. The Respondent denies that it has breached the BIT and rejects the suggestion that the Tribunal should assume that it has, and also rejects the proposition that the

⁸⁶ Respondent’s Application, ¶ 49.

⁸⁷ Respondent’s Reply, ¶ 31.

⁸⁸ Tr., 169:8-9 (Mr. Moolan).

⁸⁹ Tr., 76:7-16 (Mr. Moolan).

⁹⁰ Tr., 76:17-78:5 (Mr. Moolan).

⁹¹ Tr., 167:17-168:3 (Mr. Moolan).

BIT's object and purpose should require a prompt and effective remedy that would be inconsistent with the proper management of concurrent proceedings.⁹²

* * *

54. For the reasons set out above, the Respondent request the Tribunal to:
- a. "stay these proceedings pending determination of the *Vedanta* Arbitration by the *Vedanta* Tribunal and, if applicable, the resolution of any cross-litigation between CIL and/or Vedanta and the Claimants concerning the CUHL and CIL Tax Demands; and
 - b. award the Respondent the costs of this Application."⁹³

B. The Claimants' position

55. The Claimants contend that the Respondent's stay application is "wholly unjustified and should be summarily dismissed."⁹⁴ In the Claimant's view, "the lengthy and indefinite stay of this arbitration that is requested by the Respondent would constitute an egregious and unprecedented denial of justice, and India cannot be allowed to repudiate its treaty obligation to grant the Claimants the right to seek a prompt and effective remedy for their serious and continuing harms."⁹⁵
56. The Claimants contend that "the requested stay cannot be considered while India continues to hold Cairn's investment and aggressively pursues its multi-billion-dollar tax claim against Cairn."⁹⁶ The Claimants argue that the Respondent is requesting a stay for an indefinite period, contingent on the outcome of multiple disputes (e.g., the *Vedanta* arbitration and any disputes between the Claimants and Vedanta), each of which could last several years. However, the circumstances of this case require an immediate remedy: the Claimants argue that the Respondent "has wrongfully deprived Cairn of US\$ 1 billion in assets"⁹⁷ and "continues to detain those assets, causing massive on-going harm and preventing Cairn from being able to pursue substantial business opportunities;"⁹⁸ "Indian tax authorities continue to aggressively pursue Cairn and have threatened further penalty proceedings;"⁹⁹ and "even before any penalties are assessed, the purported tax bill is mounting at a staggering rate of US\$ 44 million per month, or over a half billion US dollars per year."¹⁰⁰

⁹² Respondent's Reply, ¶ 20.

⁹³ Respondent's Reply, ¶ 33.

⁹⁴ Claimants' Response, ¶ 2.

⁹⁵ Claimants' letter of 22 February 2017, p. 2.

⁹⁶ Claimants' Response, ¶ 5.

⁹⁷ *Id.*, ¶ 18.

⁹⁸ *Id.*, ¶ 18.

⁹⁹ *Id.*, ¶ 18.

¹⁰⁰ *Id.*, ¶ 18.

57. The Claimants' arguments can be grouped as follows. The Claimants first contend that the points of commonality between the *Cairn* and *Vedanta* arbitrations are not parallel proceedings (Section 1). The Claimants also contend that there are better ways of ensuring the coordination of the two proceedings than ordering a lengthy stay (Section 2). In any event, the Claimants submit that a party seeking to stay an arbitration faces a high burden of persuasion, which is not met here (Section 3). They further contend that the balance of convenience militates against a stay (Section 4).

1. The *Cairn* and *Vedanta* arbitrations are not parallel proceedings

58. Contrary to the Respondent's contention, this arbitration and the *Vedanta* arbitration are not parallel or concurrent proceedings that could potentially threaten the coherence or legitimacy of the investment arbitration system and thus justify a stay.

59. The Claimants acknowledge that the transaction that gives rise to the tax demands against Cairn and Vedanta is the same, but argues that there are many fundamental differences between the two cases. To begin with, the Claimants argue that there is no triple identity:¹⁰¹

- a. The *parties* are different: the claimants in the *Cairn* arbitration are CUHL and Cairn Energy Plc (the seller/taxpayer and its 100% shareholder, respectively), while the Claimant in the *Vedanta* arbitration is Vedanta (a partial shareholder of the buyer/taxpayer). Cairn and Vedanta are not the same or closely related parties; nor are they companies in the same corporate chain or group: they are entirely separate publicly held companies owned by different shareholders.
- b. The *causes of action* are different: although both Cairn and Vedanta rely on the same treaty (the UK-India BIT), the Claimants understand that they have each brought different treaty-based claims. On one hand, Cairn advances claims of expropriation of shares under Article 5 of the BIT, claims of breach of FET under Article 3 of the BIT, and claims for a denial of its right to repatriate funds. The Claimants note that they cannot be certain of Vedanta's claims, but note that it is possible to assume that Vedanta will bring a claim for breach of FET. However, the basis for Vedanta's legitimate expectations would be different to Cairn's: while in 2006 Cairn could not have known that India would radically reinterpret the ITA, Vedanta made its investment in 2011, after India had introduced its new interpretation of the ITA. The Claimants are also unaware of a similar seizure of shares such as the one inflicted upon Cairn that could give rise to an expropriation claim.

The Claimants also note that the *measures* that give rise to these causes of action are different: the measures that serve as basis for Cairn's claim are the 22 January 2014 order pursuant to § 281B ITA attaching Cairn's shares in CIL, and the 25 January 2016 Final Assessment Order pursuant to §§ 148, 143(3) and 144(C)13 ITA and Notice of Demand under to § 156 ITA, ordering Cairn to pay approximately USD 4.3 billion. In turn, the measure that gives rise to Vedanta's claim is the 11 March 2015 Tax Assessment under § 201 ITA declaring CIL to

¹⁰¹ Tr., 145:6-148:21 (Mr. McNeill); Claimants' Hearing Slides, Slide 19.

be an “assessee in default” and ordering the payment of approximately USD 3.1 billion. The Claimants have no knowledge of another measure, but note that it could possibly exist.

- c. Finally, the Claimants note that the *requests for relief* are likely to be different in both arbitrations. The Claimants have no knowledge of the specific request made by Vedanta, but note that Cairn’s principal relief relates to the losses arising from the seizure of Cairn’s shares (noting that they are not aware of a similar seizure of Vedanta’s shares) and only alternatively relief from India’s tax assessment, in the amount of USD 4.4 billion.
60. In addition, the Claimants contend that there is no conceivable possibility of double recovery by either Cairn or Vedanta. In particular, each investor seeks compensation for its own losses: Cairn in particular seeks compensation for the consequences of the seizure of its shares in in CIL, and while it also seeks protection against any tax levies made by India, this would not result in any net recovery by Cairn. By contrast, India is able to collect the same tax from both Cairn and Vedanta: although India has stated that it can legally collect tax only from the buyer or the seller but not both, it has made clear that even if it recovers the tax from CUHL it can still recover interest and penalties from CIL.¹⁰²
61. The Claimants add that the Respondent’s allegations of coordination and unity of interest between Cairn and Vedanta are “speculative, false and legally irrelevant”, and even if they “contained any measure of truth, they would fall far short of justifying treating Cairn and Vedanta as a single party or ‘closely related’ parties and staying this arbitration on that basis.”¹⁰³
62. Contrary to India’s contentions, it would not be unfair to allow this arbitration to continue: it was India’s decision to initiate separate tax proceedings against CUHL and CIL in connection with the same 2006 share transfers. “India should not be surprised that as a result each assessee would wish to exercise independent rights to challenge such wrongful tax claims domestically or that distinct foreign investors would bring treaty claims seeking redress for violations of international law.”¹⁰⁴ The Claimants add that “[i]t is no excuse for India to say that it is statutorily required to pursue independent tax assessments against both companies; the remedy is for India to amend its statute to give itself a choice, rather than to irrationally compel the two claimants to elect a single remedy between them.”¹⁰⁵
63. As to the indemnity that exists between Cairn and CIL,¹⁰⁶ the Claimants made the point in one of its presentation slides that this is irrelevant: it is irrelevant to India

¹⁰² Claimants’ Response, ¶ 25.

¹⁰³ *Id.*, ¶ 35.

¹⁰⁴ *Id.*, ¶ 21.

¹⁰⁵ Claimants’ letter of 9 January 2017, p. 22.

¹⁰⁶ The Claimants clarify that the indemnity that arises from the 2006 transactions and that is at stake here runs between CUHL and CIL, and not CUHL and Vedanta (Vedanta is the 55% shareholder of CIL, but the indemnity is not directly with Vedanta). Tr., 119:6-21 (Mr. McNeill).

(who is not a party to the 2006 agreements); it is irrelevant to the requested stay, because it is a contractual allocation of risk between two private entities, and it is irrelevant to the risk of conflicting outcomes, because the requested stay pending any cross-litigation is intended to foreclose future remedies.¹⁰⁷ More importantly, it is irrelevant because, as explained further below, the Claimants are already requesting to be made whole from any demands from India.¹⁰⁸ In any event, the Claimants note that the indemnities would come to play even if Vedanta were to win in this arbitration, because as it is only a 51% shareholder in CIL, CIL still might seek to recover from Cairn the full indemnity. As a result, there is no benefit in waiting for the outcome of the *Vedanta* arbitration or any indemnity litigations.¹⁰⁹

64. The Claimants further argue that the existence of the indemnity is also irrelevant because, even without a contractual indemnity, if CIL was forced to pay taxes on Cairn's behalf, it could still bring a common law claim against Cairn.¹¹⁰

2. There are other less extreme alternatives to coordinate

65. Prior to addressing the stay application itself, the Claimants argue that there are other less extreme methods to ensure a proper coordination of cases (other than a stay or a full consolidation) that could have been considered by the Respondent, for instance, (i) appointing arbitrators common to the two arbitrations, (ii) sharing the pleadings and evidence between the two arbitrations, and (iii) staying the *Vedanta* arbitration instead of this arbitration.
66. With respect to (i), the Claimants note that appointing arbitrators common to two arbitrations is a method that has been used to mitigate the risk of inconsistent decisions from arbitrations involving the same government measures. However, the Respondent made no attempt to do so. In this respect, the Claimants note that the Respondent waited seven months to file its application for a stay, which according to the Claimants, "is not just a matter of delay; it is also a matter of what opportunities you have missed potentially to find some means of coordinating cases that you believe give rise to a risk of conflicting decisions."¹¹¹ Among the opportunities that the Respondent missed was the opportunity to appoint common arbitrators.¹¹²
67. With respect to (ii), the Claimants submit that sharing the pleadings and evidence between the two arbitrations would facilitate the flow of information between both cases and mitigate the risk of inconsistency decisions. The Claimants acknowledge that the Respondent has agreed that documents from one case should be disclosed in the other, but suggest that the Respondent's position has been inconsistent: on the one hand, to date the Respondent has refused to share documents from the *Vedanta*

¹⁰⁷ Claimants' Hearing Slides, Slide 25.

¹⁰⁸ Tr., 180:16-181:18 (Mr. Nelson).

¹⁰⁹ Tr., 181:19-183:23 (Mr. Nelson).

¹¹⁰ Tr., 184:19-185:16 (Mr. McNeill).

¹¹¹ Tr., 100:11:22 (Mr. McNeill).

¹¹² Tr., 99:18-101:25 (Mr. McNeill).

case with this Tribunal, arguing that the confidentiality and transparency regime in the *Vedanta* case has not been put in place, but on the other hand has threatened to introduce selected pleadings in the *Vedanta* case to counter the Claimants' arguments. Considering that the Respondent is the only party with full access to the documents of both proceedings, the Claimants consider this to be "fundamentally unfair".¹¹³

68. In the Claimants' submission, "enhancing information flow between the two tribunals would help ensure common information is available for issues common to the two arbitrations" and "is the most sensible way of thinking about coordinating the two cases."¹¹⁴ The Claimants clarify that if the Tribunal intends to set up a regime for the sharing of information between both arbitrations, "Cairn would be fully in support of these efforts and would be willing to engage in discussions about what sort of documents could be produced to the *Vedanta* case if mutual disclosure were a requirement."¹¹⁵
69. With reference to PO2, the Claimants add that, "if the Tribunal concluded that the transparency regime was an excessive and inappropriate means to share documents between the two cases and coordinate the cases and avoid conflicting decisions, then a stay that may last five or eight years, *a fortiori*, by necessity is far, far, far in excess for the alleged problem, the alleged issue at hand, which is avoiding the risk of any conflicting decisions between the two cases."¹¹⁶
70. As to (iii), although the Claimants contend that a stay would be an "incredibly excessive means of coordinating the two cases", as "it would be denying one Claimant its right to proceed with his claim",¹¹⁷ if any case were to be stayed, "it would logically and fairly be the *Vedanta* arbitration",¹¹⁸ for the following reasons:
- a. India has seized USD 1 billion in Cairn assets and continues to hold them. According to the Claimants, "[t]his wrongful action has impacted Cairn Energy's market capitalisation and has caused serious and ongoing harm to Cairn and its business operations."¹¹⁹ As noted above, the Claimants are not aware of any similar seizure of *Vedanta*'s assets.¹²⁰ At the hearing, the Claimants argued that this amount "was growing every day" through the application of interest, and was also under the threat of penalties.¹²¹ In later submissions, the Claimants informed the Tribunal that the Income Tax Appellate Tribunal ("ITAT") had determined that the principal amount was not subject to

¹¹³ Tr., 102:1-106:1 (Mr. McNeill).

¹¹⁴ Tr., 109:1-5 (Mr. McNeill).

¹¹⁵ Tr., 108:3-15 (Mr. McNeill).

¹¹⁶ Tr., 109:5-14 (Mr. McNeill).

¹¹⁷ Tr., 109:19-21 (Mr. McNeill).

¹¹⁸ Claimants' Response, ¶ 49.

¹¹⁹ *Id.*, ¶ 50.

¹²⁰ Tr., 112:10-12 (Mr. McNeill).

¹²¹ Tr., 95:10-96:14; 112:8-9 (Mr. McNeill).

interest, but noted that this decision was subject to appeal.¹²² The Claimants later clarified that this only referred to interest under Sections 234A and 234B of the Income Tax Act, but that interest under Section 220(2) of the that Act continues to increase with every passing day.¹²³

- b. The Respondent has referred to Vedanta's tax liability as being "contingent", "derivative" and "secondary".¹²⁴ Without accepting this characterization, the Claimants argue that "it would be illogical to stay Cairn's claim in favour of the claim by a shareholder of a third-party, CIL, which the Respondent characterises as being in an inferior position vis-à-vis the impugned tax claim."¹²⁵ The Claimants add that "[i]t makes no sense to prioritise the case that supposedly raises the contingent liability and prioritise that over the case that raises the non-contingent liability of the putative seller."¹²⁶ As a result, the Claimants argue that Cairn has "a far superior right than Vedanta does to prosecute this claim" because "Cairn is the party that is accused in this matter of aggressive tax actions" and is "the one that is primarily in the firing line".¹²⁷ The Claimants add that "if Vedanta [sic] were found liable on the principal for withholding tax, [the Respondent] would come after Cairn presumably regardless of whether there was an indemnity or not".¹²⁸
- c. Moreover, "if the Respondent seeks to rely on the belief that CIL has a valid indemnity against CUHL (which Cairn strongly denies), then the Respondent could have sought a stay of the *Vedanta* arbitration [...] on the ground that Vedanta would stand to benefit, in its capacity as a majority shareholder in CIL, from CIL's indemnity rights, and should wait for CIL to exhaust that remedy first before Vedanta chooses to pursue India, in order to avoid duplicative and potentially conflicting arbitral proceedings."¹²⁹
- d. Cairn's arbitration is first in time, as the Claimants commenced arbitration before Vedanta. This order is dispositive under a *lis pendens* analysis, if that doctrine were to apply here.¹³⁰ The Claimants note that the Respondent seems to agree that the order of filings and procedural status of the two cases is relevant for its stay application, as it has previously argued that the *Vedanta* arbitration is more advanced.¹³¹ Referring to the Chairman's article on this point, the

¹²² Claimants' letter of 14 March 2017, p. 2.

¹²³ Claimants' letter of 23 March 2017, p. 2.

¹²⁴ Claimants' Response, ¶ 52; Tr., 112:18-24 (Mr. McNeill).

¹²⁵ Claimants' Response, ¶ 52.

¹²⁶ Tr., 112:24:113:3 (Mr. McNeill).

¹²⁷ Tr., 113:4-13 (Mr. McNeill).

¹²⁸ Tr., 113:14-17 (Mr. McNeill).

¹²⁹ Claimants' letter of 9 January 2017, p. 22.

¹³⁰ Claimants' Response, ¶ 51.

¹³¹ Claimants' Response, ¶ 51, referring to Respondent's counsel's statements at the First Procedural Hearing, Tr., 107:24-108:1.

Claimants submit that “[i]f you have two tribunals of equal standing, with equal rights to adjudicate a particular dispute, then the simple rule is a chronological one: which case was filed first?”¹³² But in the Claimants’ view, in this case we do not have two tribunals adjudicating on claimants with equal interests, because “Cairn has a far stronger right and a far stronger interest in having its claim adjudicated as the primary claim and not being stayed, instead of waiting for a result from the *Vedanta* Tribunal”, which would in any event have uncertain results for this Tribunal.¹³³

71. The Claimants contend that the Respondent’s real motivation to stay this arbitration and not the *Vedanta* arbitration is strategic, and not altruistic. While the Respondent “purport[s] to have altruistic intentions, to save the ISDS system”, [...] their real motivation is that “this is an easier claim to defend” because, based on the date in which Vedanta made its investments, its legitimate expectations might be different to Cairn’s.¹³⁴ The Claimants explain that Vedanta bought its shares in 2011, when the *Vodafone* proceedings were already ongoing and the Indian income tax authorities had already taken a new interpretation of Section 9.1(i) ITA, so Vedanta’s expectations with respect to that tax should be assessed as of that date.¹³⁵ In the Claimants’ view, “this is all a calculation by India of its interests in terms of which claim it prefers to defend first because it thinks it has a stronger case”.¹³⁶

3. A party seeking to stay an arbitration faces a high burden of persuasion, which is not met here

72. Turning to the Respondent’s Stay Application, the Claimants submit that a party seeking to stay an arbitration faces a high burden of persuasion, which the Respondent has not met.
73. The Claimants note in this respect that the UNCITRAL Rules do not expressly authorize the Tribunal to stay this arbitration.¹³⁷ The Claimants add that, according to the UNCITRAL Note on Concurrent Proceedings in International Arbitration, “unless an investment treaty contains express provisions for regulating parallel proceedings, a tribunal’s regulatory powers will be significantly circumscribed by the need for party consent in this area.”¹³⁸

¹³² Tr., 114:8-11 (Mr. McNeill). *See also* Claimants’ Response, ¶ 40, referring to E. Geisinger and L. Lévy, *Lis Alibi Pendens in International Commercial Arbitration in International Chamber of Commerce*, Special Supplement 2003: Complex Arbitrations: Perspectives on their Procedural Implications (Exhibit CLA-69), p. 62.

¹³³ Tr., 114:13-21 (Mr. McNeill).

¹³⁴ Tr., 115:11-116:11 (Mr. McNeill).

¹³⁵ Tr., 115:11-116:11 (Mr. McNeill).

¹³⁶ Tr., 116:21-23 (Mr. McNeill).

¹³⁷ Claimants’ Response, ¶ 39.

¹³⁸ Claimants’ Response, ¶ 36, referring to UNCITRAL Secretariat Note on “Concurrent proceedings in international arbitration” dated 8 April 2016 (UN Doc. A/CN.9/881), ¶ 40 (Exh. CLA-73).

74. That being said, the Claimants agree that the Tribunal has broad authority under Article (1) of the UNCITRAL Rules, including to order a stay.¹³⁹ However, they submit that the Tribunal’s “discretion under Article 15(1) is limited by an overriding requirement to treat parties with equality and to ensure that each party ‘is given a full opportunity of presenting [its] case’ at every stage of the proceeding.”¹⁴⁰ The Claimants also argue that the UNCITRAL Rules require that the arbitration be resolved without unnecessary delay. This requirement is express in the 2010 Rules, and in the Claimants’ submission, implied in the 1976 Rules. According to the Claimants, the reason why it was not made express in the 1976 Rules is because it could have been used against tribunals.¹⁴¹
75. The Claimants assert that the same principles exist in Dutch law: Article 1036(1) of the Netherlands Arbitration Act provides that the agreement of the parties shall control but that the tribunal has very broad discretion, while subparagraphs (2) and (3) set out the principles of equality, the right to be heard and no unreasonable delay (which is a principle that applies not only to the tribunal but is also an obligation imposed on the parties).¹⁴² According to the Claimants, “[t]he Tribunal not only has the duty to avoid unnecessary delays in the delivery of justice, but to actively ensure that the arbitration proceeds efficiently and expeditiously, particularly in a case involving claims of this magnitude and urgency.”¹⁴³
76. In the Claimants’ submission, “the Stay Application that is proposed by India in this case is fundamentally inconsistent with these core principles.”¹⁴⁴ Specifically:
- a. With respect to the equality of the Parties, the Claimants argue that “the stay would fall completely unequally in terms of the prejudice that would be suffered by Cairn.”¹⁴⁵ Contrary to what the Respondent suggests, the harm that Cairn would suffer “is not just monetary; it is the lifeblood of this company.”¹⁴⁶ The Respondent has seized USD 1 billion in Cairn shares, and if a stay is granted this means that that money will be frozen for another five to eight years, preventing the Claimants from making further investments and manage its business, making any future damages very difficult to quantify.¹⁴⁷ By contrast, staying this arbitration would have “wonderful benefits for India’s tactical interests in this case, its strategic interests, but not compensated by any benefit to this Tribunal

¹³⁹ Tr., 131:6-8 (Mr. McNeill) (“There is no dispute in this case that the Tribunal has the discretion under Article 15(1) to stay an arbitration.”).

¹⁴⁰ Claimants’ Response, ¶ 39; Tr., 96:15-25; 131:9-21 (Mr. McNeill).

¹⁴¹ Tr., 131:22-132:15 (Mr. McNeill, citing D. Caron and L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2013) (Exh. CLA-72), p. 34). See also Claimants’ Hearing Slides, Slide 15.

¹⁴² Tr., 132:16-133:19 (Mr. McNeill).

¹⁴³ Claimants’ letter of 1 January 2017, p. 20.

¹⁴⁴ Tr., 133:20-23 (Mr. McNeill). See also Claimants’ Response, ¶ 39.

¹⁴⁵ Tr., 133:24:134:1 (Mr. McNeill).

¹⁴⁶ Tr., 135:3-4 (Mr. McNeill).

¹⁴⁷ Tr., 134:3-20 (Mr. McNeill).

or to investor-State arbitration.”¹⁴⁸ Therefore, in the Claimants’ view “the prejudice is very severe and the prejudice is very, very one-sided” and “[s]o, a lengthy stay would be fundamentally inconsistent with equality to the parties.”¹⁴⁹

- b. The Claimants also argue that the stay proposed by India is inconsistent with their right to plead their case. The Claimants assert that “Cairn is suffering from very severe accusations of tax evasion and it is suffering from asset deprivation, and putting Cairn’s claim on ice, after having filed the Statement of Claim, for a very lengthy period is a fundamental denial of justice in this case and a fundamental denial of Cairn’s right to prosecute and proceed with its claims.”¹⁵⁰
- c. The Claimants also submit that the stay proposed by India contravenes the principle of that there be no unreasonable delay. Contrary to what the Respondent suggests, the stay it is requesting is not a limited stay, but a very lengthy one, and “there are no countervailing benefits that would possibly come close to justifying a delay of this magnitude.”¹⁵¹

77. The Claimants add that the Respondent has been unable to cite a single case in which a stay was actually granted under Article 15(1) of the UNCITRAL Rules. The Claimants point out that in the *S.D. Myers* and *Bilcon* cases, two NAFTA tribunals denied applications for a stay, essentially stating that “parties are entitled to have a dispute resolved expeditiously, there are strong policy reasons against suspensions, and that a party requesting a stay, therefore, faces a very high burden of showing compelling reasons.”¹⁵² In the Claimants’ submission, the burden is particularly high in a case like this: “where you have a dispute of this magnitude, USD 1 billion in seized assets, a very large and growing tax demand that is several times the size of the entire company itself, and that Cairn has continued to be pursued by the tax authorities and is wrongly accused of tax evasion, [...] when you have these very large, very significant, very severe and aggravating harms, then the compelling reasons must be extraordinary; there must be some egregious abuse by Cairn that would warrant that kind of measure. There simply is not anything of that nature here.”¹⁵³

78. The Claimants also note that tribunals that used their authority under Article 15(1) in the context of other procedural decisions have made sure to ensure the protection of the core principles cited above. For instance, in the *Methanex* case, where the tribunal determined that it had the power to accept *amicus curiae* submissions under Article 15(1), it did so after carefully ensuring that the equality of the parties and their right to plead their case were preserved, and that the proceeding was not overburdened.¹⁵⁴

¹⁴⁸ Tr., 135:3-6 (Mr. McNeill).

¹⁴⁹ Tr., 135:6-10 (Mr. McNeill).

¹⁵⁰ Tr., 135:23-135:4 (Mr. McNeill).

¹⁵¹ Tr., 136:5-21 (Mr. McNeill).

¹⁵² Tr., 139:19-23 (Mr. McNeill).

¹⁵³ Tr., 140:3-15 (Mr. McNeill).

¹⁵⁴ Tr., 136:22-139:4 (Mr. McNeill).

79. The Claimants further argue that “[t]he Respondent has failed to cite to a single authority or case that would support even a limited, short-term stay of this arbitration, let alone the lengthy and indefinite stay requested.”¹⁵⁵ The cases cited by the Respondent (*SPP v. Egypt, Mox Plant* and *SGS v. Philippines*) “are irrelevant because they deal with the entirely distinct situation where a tribunal has temporarily stayed an arbitration pending the resolution by another body of the threshold question of whether the tribunal has jurisdiction over the claims submitted to it.”¹⁵⁶ According to the Claimants, “[t]hese cases collectively stand for the proposition that a stay of arbitral proceedings is appropriate only in exceedingly limited circumstances, such as those involving parties’ consensual submission of the dispute to another forum, that look nothing like the circumstances in this arbitration.”¹⁵⁷ In addition, in these cases the claimants were at least allowed to pursue their claims, albeit in a different forum,¹⁵⁸ and the stays were granted for a limited period of time: one and a half years in *SPP v. Egypt*, three years in *SGS v. Philippines*, and less than six months in the *Mox Plant* case.¹⁵⁹ For the Claimants, the *Mox Plant* case is “a manifestation of the principle that a tribunal, when it does order a stay – even a very limited and time-defined stay such as this case – looks at the equality of the parties, looks at the prejudice that is going to occur, that is going to emerge from its stay, because of this very powerful, very strong presumption that [...] that claims must proceed.”¹⁶⁰
80. The Claimants further contend that no other theories assist the Respondent’s stay application:
- a. The doctrines of *res judicata* and *lis alibi pendens* do not assist the Respondent, because they require a strict application of the triple identity, which as noted above is not met here. In any event, the *lis alibi pendens* doctrine serves to bar a second litigation, but here Cairn’s claim was filed first. Even if these doctrines did apply, the Respondent fails to meet the ILA’s recommendations with respect to the applications of these doctrines. In particular, it “fails to overcome the prohibition on a stay in situations, as here, in which there would be material prejudice to the party opposing the stay.”¹⁶¹
 - b. There is no abuse of process that could justify a stay. For this doctrine to apply, the Tribunal would need to find “truly compelling reasons” that the Claimants have abused the arbitral process in bad faith. The Respondent has not presented any evidence that the Claimants are abusing the arbitral process, and the Claimants allege that it could not, because the Claimants have initiated this arbitration to seek relief from the application of a retroactive tax amendment that is contrary to the rule of law. The Respondent’s “vague allegations” of

¹⁵⁵ Claimants’ Response, ¶ 45.

¹⁵⁶ *Id.*, ¶ 45.

¹⁵⁷ *Id.*, ¶ 48.

¹⁵⁸ Tr., 142:1-15 (Mr. McNeill).

¹⁵⁹ Tr., 150:8-153:12 (Mr. McNeill).

¹⁶⁰ Tr., 153:5-12 (Mr. McNeill).

¹⁶¹ Claimants’ Response, ¶ 41.

coordination between Cairn and Vedanta are “empty rhetoric that does not remotely justify the extreme measures it seeks in its Application.”¹⁶² Nor is there any possibility of double-recovery by Cairn and Vedanta, so the Respondent’s allegation that they are trying to get “two bites at the cherry” is wrong.¹⁶³

81. The Claimant also argue that a stay a for an indefinite period as proposed by the Respondent would be inconsistent with the object and purpose of the BIT, which is to encourage investment in return for guarantees for the reciprocal protection of such investment. These protections are only meaningful if aggrieved investors are granted to prompt and effective remedy for any breaches. The Claimants add that India has benefitted from the Claimants’ investments, and “must not be permitted to avoid the substantive and procedural obligations it accepted under the Treaty as the *quid pro quo* for obtaining the very substantial benefits of Cairn’s investments.”¹⁶⁴
82. Finally, the Claimants contend that there are general reasons against staying an arbitration for a lengthy period of time. In particular, the Claimants argue that evidence ages or disappears; witnesses or experts may become unavailable; memories fade. A long stay would also be inefficient for the Parties and their counsel and for the Tribunal.¹⁶⁵

4. The balance of convenience militates against a stay

83. As noted above, the Claimants argue that the decision to stay an arbitration may only be taken after having assessed the stay application against the core principles that limit the Arbitral Tribunal’s discretion under Article 15(1), namely, the equality of the parties, the right of the parties to plead their case, and no unreasonable delay.
84. The Claimants also appear to agree that at least part of the relevant test to determine if a stay should be granted is the “balance of equities”, “balance of prejudice” or “balance of convenience”.¹⁶⁶ The Claimants note however that in the NAFTA cases cited by the Respondent in which this balancing test was used (*S.D. Myers* and *Bilcon*), there already was triple identity, because the parties and issues were the same. Despite this triple identity, the tribunals decided to apply this balancing test. The Claimants emphasize that both tribunals unanimously stated that there is a very strong fundamental presumption that cases must proceed and that there must be compelling reasons to issue a stay. And even though in both cases the outcome of the set-aside proceedings before Canadian courts would have disposed of the NAFTA arbitrations, both tribunals found that the State had not proved compelling reasons for a stay to be ordered.¹⁶⁷

¹⁶² *Id.*, ¶ 44.

¹⁶³ Tr., 143:16-144:15 (Mr. McNeill).

¹⁶⁴ Claimants’ Response, ¶ 20.

¹⁶⁵ Tr., 140:16-141:24 (Mr. McNeill).

¹⁶⁶ Claimants’ Response, ¶ 28; Tr., Tr., 153:13-157:4 (Mr. McNeill).

¹⁶⁷ Tr., 153:13-155:1 (Mr. McNeill).

85. In this case, the Claimants argue that the balance of prejudice militates against a stay. This is because a stay of this dispute (in particular a lengthy stay such as that proposed by the Respondent) would cause material prejudice to Cairn, without securing any equivalent benefit to the Respondent. By contrast, in the Claimant's view, continuing this arbitration would not harm the Respondent, and indeed might benefit it.
86. In this context, the Claimants note that it is not in dispute that Cairn has had USD 1 billion in shares seized. Whether this seizure was lawful or unlawful, this is a vast sum of money for a company such as Cairn, who has a market capitalization of approximately 1.5 billion. There is also a principal tax demand of USD 4.4 billion, which accumulates interest at a rate of USD 44 million per month, and USD 1.5 million every single day, plus the threat of penalties, which could rise to approximately USD 10 billion. The Claimants thus contend that "this is a dispute which is enormous in scope, particularly in relation to this Claimant, and it is a dispute that is aggravating."¹⁶⁸ As noted above, staying this arbitration would cause enormous harm to Cairn because in the meantime its assets would be frozen, and it would be prevented from running its business and making further investments.
87. By contrast, the Claimants argue that a stay of this arbitration would not provide any real benefit to anyone except to India and its strategic interests. In particular, it would not eliminate the risk of inconsistent decisions, because "any decision by the *Vedanta* tribunal would not be binding on this Tribunal, and its persuasive authority would be circumscribed by the fact that it raises different issues and relates to different harms."¹⁶⁹ As noted above, the two arbitrations relate to different breaches of the Treaty, and the claimants' legitimate expectations will be different in both cases because they made their investments with a different knowledge of possible changes in tax legislation.¹⁷⁰ Although "[t]he Respondent makes every effort to genericise the issues in the two cases by saying that both cases raise the idea that the retroactive amendment in 2012 was legitimate or illegitimate", the Claimants argue that "there is no treaty obligation called legitimate or illegitimate".¹⁷¹
88. For the Claimants, "the fundamental question for this Tribunal", based on the imperfect knowledge that it has of the *Vedanta* arbitration, "is if, hypothetically, the *Vedanta* tribunal issued its final award, how much benefit would [the Tribunal] get from it?"¹⁷² In the Claimants' submission, this benefit is "pretty modest given that it would only have potentially some persuasive influence on this Tribunal's thinking."¹⁷³ In the Claimants' view, it would not be worth staying Cairn's claims for five or eight years (or however long India is proposing) for that "alleged miniscule benefit".¹⁷⁴

¹⁶⁸ Tr., 95:10-96:14 (Mr. McNeill).

¹⁶⁹ Claimants' Response, ¶ 23.

¹⁷⁰ *Id.*, ¶ 24.

¹⁷¹ Tr., 148:21-149:2 (Mr. McNeill).

¹⁷² Tr., 149:8-12 (Mr. McNeill).

¹⁷³ Tr., 149:24:150:1 (Mr. McNeill).

¹⁷⁴ Tr., 115:1-13 (Mr. McNeill).

89. In the same vein, the Claimants also deny that a stay of this case would serve the interests of international treaty arbitration. They argue that “the treaty rights secured by an investor, in particular to seek a direct remedy against a breaching host State, would be rendered virtually meaningless if the investor were told that it had to wait years to seek a remedy because the host State was entitled to choose which claim it preferred to defend first [...]”.¹⁷⁵ In their view, “the notion of ‘claim shopping’ by a State that has enacted a measure causing losses to multiple investors but seeks to pursue [...] the weaker investor case first in the hope of establishing a precedent would be anathema to the very purpose of investment treaties and treaty arbitration.”¹⁷⁶
90. By contrast, the Claimants contend that continuing this arbitration would not cause harm to India. First, the Claimants argue that inconsistent awards could not possibly prejudice India: if India prevails in one case but not the other, it would be able to recover the tax from either Cairn or Vedanta (which is what India has stated it intends to do in any event). What India seeks to avoid are *consistent* awards (i.e., two awards confirming that India’s treatment of the claimants’ investment in both cases breaches the BIT), not inconsistent awards.¹⁷⁷
91. Second, with respect to India’s assertion that allowing the *Cairn* arbitration to continue creates the risk that Cairn may request that India pay for any indemnity it is forced to pay to Vedanta/CIL, the Claimants note that “[t]he harm alleged by India assumes a long series of hypothetical events, ending in a hypothetical request by Cairn before this Tribunal to amend its request for relief”.¹⁷⁸ As a preliminary matter, the Claimants argue that “the time for India to raise objections to making Cairn whole for any amounts paid to indemnify CIL would be if and when this speculative (and highly improbable) chain of events comes to pass”, and “[t]he mere prospect that this issue may arise in the future is hardly reason to address it now – let alone by imposing the draconian remedy that is sought by India of denying Cairn its day in court.”¹⁷⁹
92. Going to the substance of the Respondent’s argument, the Claimants contend that there are many possible ways in which events could unfold, and “most of the more likely outcomes [...] result in the same great prejudice to Cairn without providing any of the alleged benefits in terms of mitigating the risk of inconsistent awards.”¹⁸⁰ Specifically, other possibilities that must be considered are the following:
- a. One possibility is that Vedanta prevails in its arbitration, or settles its claims. In this scenario, Cairn will have stayed its case for no reason whatsoever. If Vedanta wins on the merits, the award could perhaps provide insights that would benefit the Claimants, but the Claimants would rather proceed with their case

¹⁷⁵ Claimants’ letter of 9 January 2017, p. 22.

¹⁷⁶ *Id.*

¹⁷⁷ Claimants’ Response, ¶ 22. *See also* Claimants’ letter of 9 January 2017, p. 21.

¹⁷⁸ Claimants’ Hearing Slides, Slide 10.

¹⁷⁹ Claimants’ letter of 22 February 2017, p. 3.

¹⁸⁰ Tr., 122:16-20 (Mr. McNeill).

now. If Vedanta settles, there will be no award to benefit from. And if India prevails against Vedanta on jurisdictional grounds, India would not have to defend two claims at the same time, there would be no double jeopardy, and there would be no risk of inconsistent decisions. In the Claimants' view, none of these potential outcomes gives rise to any justification to stay Cairn's claim.¹⁸¹

- b. Another possibility is that the *Vedanta* arbitration ends with a dismissal of Vedanta's claims, and CIL and Vedanta lose all further remedies before the courts of India and Singapore, but CIL decides not to bring cross claims against Cairn, or loses any claims it may have brought against Cairn (which, in the Claimants' view, is the more likely scenario as Cairn disputes CIL's indemnity claim). Again, here the Claimants argue that the risk for the Respondent does not arise.¹⁸²
- c. Even assuming India's hypothetical scenario, in which Vedanta loses its arbitration, CIL and Vedanta lose all further remedies in India and Singapore, and CIL does indeed bring contractual claims against Cairn and prevails, "the 'harm' alleged by India is the mere possibility that Cairn could request to amend its claim in this arbitration to include damages arising from amounts paid to CIL".¹⁸³ For the Claimants, "the mere prospect of this request that is remote in time, that is highly speculative, that we would say is even highly improbable to emerge, the mere risk of that emerging being the harm that we need to mitigate by staying Cairn's claim just does not stand to reason at all."¹⁸⁴ The Claimants also argue that "the ultimate irony" is that the only way in which Cairn would be able to amend its request for relief as India suggests is if the *Cairn* arbitration is stayed as India requests; if there is no stay, both arbitrations would proceed in parallel, and by the time the indemnity-related litigation is concluded in the UK courts, the *Cairn* arbitration would long be over and there would be no possibility of amending the request for relief.¹⁸⁵

93. As to the Respondent's argument that if the Claimants believe that there is no risk that they will amend their request for relief in the future, the Claimants contend that "the Claimants are already asking to be made whole entirely for any consequences that flow from this unlawful measure as it was applied to Cairn and the transaction Cairn engaged in, regardless of whether that harm flows directly or indirectly."¹⁸⁶ The Claimants point to their request for relief at paragraphs 448 and 449 of their Statement of Claim, where they request that India be ordered to compensate them "in an amount equal to the total harm suffered by the Claimants as a result of its breaches of the Treaty [...]".¹⁸⁷ In any event, the Claimants state that Cairn is "not in a position today

¹⁸¹ Tr., 122:21-125:1 (Mr. McNeill).

¹⁸² Tr., 125:2-126:3 (Mr. McNeill).

¹⁸³ Claimants' Hearing Slides, Slide 13 (emphasis in original).

¹⁸⁴ Tr., 127:9-15 (Mr. McNeill).

¹⁸⁵ Tr., 126:4-128.21 (Mr. McNeill).

¹⁸⁶ Tr., 130:12-17 (Mr. McNeill).

¹⁸⁷ Claimants' Hearing Slides, Slide 14 (emphasis eliminated).

to amend its request for relief to make some point in the context of this Stay Application.”¹⁸⁸

94. The Claimants also clarify that the contractual indemnity provision (which the Claimants dispute applies in this case) “applies only in respect of certain obligations for which the indemnifying party would be *primarily* liable” (i.e., only the principal but not any interest or penalties).¹⁸⁹ “Accordingly, even if India’s hypothetical scenario somehow came to pass, and Cairn successfully sought and obtained recovery for the \$1.6 billion paid to indemnify CIL for the principal tax liability, India would still retain twice that sum in penalties and interest collected from CIL.”¹⁹⁰ The Claimants add that “[i]n any event, India would in no way be worse off than it would have been had it simply lost the present arbitration to Cairn, and, in all likelihood, would be in a far more favourable net position by virtue of both proceedings having been conducted.”¹⁹¹
95. In conclusion, the Claimants argue that the balance of convenience weighs heavily against a lengthy stay. On one hand, “[t]he real harms that would result from a lengthy and indefinite stay would be severe and aggravating”; in particular:
- a. “Cairn would be fundamentally deprived of its right to present its case”;
 - b. “Cairn would continue to be deprived of US\$ 1 billion in assets – 40% of its market capitalization”;
 - c. “The tax demand against Cairn would continue to increase by US\$ 1.5 million per day (over US\$ 500m per year)”;
 - d. “The Indian tax authorities would continue to aggressively pursue Cairn, possibly including by further pursuing penalty proceedings (which would add billions of dollars to the tax claim)”;
 - e. “Cairn would continue to suffer reputational harm from false allegations of tax evasion”;
 - f. “A lengthy stay would risk the loss or degradation of evidence and access to witnesses or experts”;
 - g. “A lengthy stay would also be grossly inefficient for the Tribunal and its secretary, the parties and their counsel, the witnesses, the experts, and the administering institution”.¹⁹²

¹⁸⁸ Tr., 131:1-3 (Mr. McNeill).

¹⁸⁹ Claimants’ letter of 22 February 2017, p. 3.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Claimants’ Hearing Slides, Slide 24; Tr., 155:5-22 (Mr. McNeill).

96. On the other hand, “[t]he alleged benefits are one-sided, hypothetical, unsupported, and vastly outweighed by the harms”.¹⁹³ Specifically, the Claimants argue that:
- a. With respect to the reduction of the cost to India of defending against two claims, this is nominal and relative to the amounts and issues at stake;
 - b. With respect to the alleged reduction of the risk of “inconsistent outcomes”, other less harmful, more effective means are available;
 - c. With respect to the alleged reduction of the risk that Cairn might ask this Tribunal any amounts that might be paid to CIL in the event a successful indemnity claim, “a stay would have no such effect, since Cairn has already asked to be made whole from India’s wrongful actions”.¹⁹⁴

* * *

97. For the reasons set out above, the Claimants request that the Tribunal:
- a. “DISMISS the Respondent’s Application for a Stay of the Proceedings dated 6 June 2016, with prejudice; and
 - b. “ORDER the Respondent to pay the Claimants’ costs associated with the Respondent’s Stay Application.”¹⁹⁵

III. ANALYSIS

98. The Tribunal’s analysis will be structured as follows. First, the Tribunal will address whether it has the power to order a stay. In the affirmative, the Tribunal will then address the standard for a stay to be granted. It will then assess whether, applying that standard, a stay is warranted in the circumstances of this case.

A. Does the Tribunal have the power to order a stay, and if yes, what is the standard?

99. Neither the UNCITRAL Rules, nor the BIT, nor the Netherlands Arbitration Act expressly grants the Tribunal the power to order a stay of this arbitration. The question is thus whether such a power can be inferred from the Tribunal’s powers under those instruments and/or from its inherent powers.

100. Article 15(1) of the UNCITRAL Rules provides:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Claimants’ Response, ¶ 55. *See also* Claimants’ letter of 22 February 2017, p. 6, paragraph (f).

101. The Parties agree that this provision gives arbitral tribunals constituted under the UNCITRAL Rules broad procedural powers, including the power to grant a stay, subject to certain requirements.
102. The Tribunal agrees. As noted in PO2 in the context of the Respondent's application for a transparency regime,¹⁹⁶ Article 15(1) has been referred to as the "heart" of the UNCITRAL Arbitration Rules.¹⁹⁷ As noted by the *Methanex* tribunal, this provision "grants the Tribunal a broad discretion as to the conduct of this arbitration", and "is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration."¹⁹⁸ Other UNCITRAL tribunals have also considered that their broad procedural discretion under Article 15(1) empowers them to grant a stay.¹⁹⁹
103. However, as noted in the context of PO2, the Tribunal's procedural powers are not without limitation. First, one must look for any limitations in the UNCITRAL Rules themselves ("[s]ubject to these Rules"), in those cases in which the Rules themselves regulate the matter in dispute. This proviso also has the effect of subjecting the Tribunal's powers to Article 1 of the Rules.²⁰⁰ Pursuant to Article 1(1), the Rules may be subject to any modifications that the parties may agree in writing,²⁰¹ while pursuant to Article 1(2), the Rules (in their original version or as modified by the Parties) cannot derogate from the mandatory rules of the law applicable to the arbitration²⁰² (i.e., the *lex arbitri*, which in this case is Dutch law).²⁰³ As noted above, neither the

¹⁹⁶ PO2, ¶ 43.

¹⁹⁷ David Caron, Lee Caplan and Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (2006), p. 26, citing H. Bagner, "Enforcement of International Commercial Contracts by Arbitration: Recent Developments", 14 *Case Western Reserve Journal of International Law* (1982), p. 577.

¹⁹⁸ *Methanex Corporation v. United States of America* (UNCITRAL), Decision on Amicus Curiae of 15 January 2001, ¶¶ 26-27 (Exh. RLA-18). See also UNCITRAL Notes on Organizing Arbitral Proceedings (1996), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>, ¶ 31 (explaining that rules such as Article 15(1) "allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings", which "is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.")

¹⁹⁹ See, e.g., *S.D. Myers Inc. v. Canada* ("S.D. Myers"), Procedural Order No. 17 of 26 February 2011 (Exh. RLA-28), ¶ 7; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada*, PCA Case No. 2009-04 ("Bilcon v. Canada"), Procedural Order No 19 of 10 August 2015 (RLA-29), ¶ 16.

²⁰⁰ David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2010), pp. 34-35 (referring to analogous rules of the UNCITRAL Rules 2010).

²⁰¹ Article 1(1) of the Rules provides: "Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing."

²⁰² Article 1(2) of the Rules provides: "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

²⁰³ David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2010), pp. 34-35 (referring to analogous rules of the UNCITRAL Rules 2010).

BIT (containing the contracting parties' agreement) nor the Netherlands Arbitration Act contain an express rule authorizing the Tribunal to order a stay of the proceedings.

104. The Tribunal must thus turn to the remaining limitations set out in Article 15(1). As noted by the Claimants, the Tribunal is under a duty to exercise its procedural powers in such a way that respects the principles of equality (“provided that the parties are treated with equality”) and the right to be heard (“provided that [...] at any stage of the proceedings each party is given a full opportunity of presenting his case”). The Claimants also submit that the Tribunal’s powers are subject to a third limitation, which is the avoidance of unnecessary delay. This limitation is expressly contained in the 2010 version of the UNCITRAL Rules,²⁰⁴ and in the Claimants’ view is implied in the 1976 version that applies in this arbitration. The Claimants add that, under the Dutch Arbitration Law, the Tribunal’s procedural powers are expressly subject to these three core principles.
105. Article 1036 of the Dutch Arbitration Law provides as follows:
1. Without prejudice to the provisions of mandatory law of this title, the arbitral proceedings shall be conducted in such manner as agreed between the parties. To the extent that the parties have not agreed upon the conduct of the arbitral proceedings, the arbitral proceedings shall, without prejudice to the provisions of this title, be conducted in such a manner as determined by the arbitral tribunal.
 2. The arbitral tribunal shall treat the parties with equality. The arbitral tribunal shall give each party an opportunity of presenting and explaining its case and to respond to the other party's arguments and to comment on all records and other pieces of information that have been submitted to the arbitral tribunal during the arbitral proceedings. In its decision, the arbitral tribunal shall not to the detriment of one of the parties base its decision on records and other pieces of information on which the other party has not sufficiently been able to comment.
 3. The arbitral tribunal shall ensure that there will be no unreasonable delay of the proceedings and, if necessary, take measures at the request of a party or on its own initiative. The parties have an obligation towards each other to prevent unreasonable delay of the proceedings.²⁰⁵
106. While structured differently, this provision provides essentially the same limitations to the Tribunal’s procedural powers as Article 15(1) of the UNCITRAL Rules (with the exception of the last paragraph). It provides that, subject to the mandatory rules of the Netherlands Arbitration Act, the arbitral proceedings shall be conducted in accordance with the parties’ agreement or, absent such agreement, as determined by the arbitral tribunal. It then directs the tribunal to treat the parties with equality and to give each party an opportunity to plead its case. Finally (and this is the main difference with

²⁰⁴ Article 17(1) of the UNCITRAL Rules (2010) provides: “The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”

²⁰⁵ Article 1036 of the Netherlands Arbitration Act (unofficial translation).

Article 15(1)), it expressly provides that “[t]he arbitral tribunal shall ensure that there will be no unreasonable delay of the proceedings and, if necessary, take measures at the request of a party or on its own initiative.” It also provides that “[t]he parties have an obligation towards each other to prevent unreasonable delay of the proceedings.”

107. Given the use of the word “shall”, the Tribunal considers that the requirement of avoiding any unreasonable delay of the proceedings may very well be mandatory and such kind of provision would otherwise not make much sense. In any circumstances, if it should be hortatory, it would nevertheless recommend expeditiousness in express terms and should not be lightly disregarded. As a result, through the combined effect of Article 15(1) and 1(2) of the UNCITRAL Rules, the Tribunal understands that, in addition to the principles of equality and the right to be heard, the Tribunal’s procedural powers are limited by its duty to ensure that there will be no unreasonable delay in the conduct of the proceedings.
108. Even without this express provision, the Tribunal considers that the principle of no unreasonable delay is implicit in international arbitration. As noted in the *S.D. Myers* case, the “point of departure is the presumption that a party to an arbitration (whether claimant or respondent) is entitled to have the arbitration proceedings continued at a normal pace”.²⁰⁶ Indeed, “[a]n arbitral tribunal has no permanent, independent or institutional life of its own” and as a result “[t]here are strong policy reasons for not placing the performance of its functions ‘on hold’ (unless of course the parties so agree) [...]”.²⁰⁷ A suspension of the proceedings is thus an exceptional remedy, and for it to be granted the applicant must provide “compelling reasons” that a stay is warranted.²⁰⁸
109. The Tribunal concludes that it has the authority to order a stay of the proceedings, provided that the stay is not inconsistent with these three core principles.
110. This, however, is not the end of the inquiry. The Respondent submits that the *Cairn* and *Vedanta* arbitrations can be characterized as multiple, parallel or concurrent proceedings in international investment arbitration, and as such the Tribunal’s decision as to whether a stay should be granted should be guided by the ILA Paper on concurrent proceedings.²⁰⁹ As the Respondent recognizes, the ILA’s starting point is also that an arbitral tribunal in an ongoing arbitration (what the ILA Paper calls the “Current Arbitration”) that considers itself *prima facie* competent in accordance with the relevant arbitration agreement must proceed with the arbitration, regardless of any another proceedings pending before a national court or an arbitral tribunal “in which the parties and one or more of the issues are the same or substantially the same as the

²⁰⁶ *S.D. Myers Inc. v. Canada* (“S.D. Myers”), Procedural Order No. 17 of 26 February 2011 (Exh. RLA-28), ¶ 8.

²⁰⁷ *Id.*, ¶ 16.

²⁰⁸ *Id.*

²⁰⁹ De Ly and Sheppard, “ILA Final Report on Lis Pendens and Arbitration”, 25(1) *Arbitration International* (2009) (Exh. RLA-14).

ones before the arbitral tribunal in the Current Arbitration” (what the ILA Paper calls “Parallel Proceedings”).²¹⁰

111. That said, the ILA Paper recognizes that, when there are Parallel Proceedings, arbitral tribunals may face requests from a party to decline jurisdiction or stay the arbitration. The ILA Paper then recommends that, “in the interest of avoiding conflicting decisions, preventing costly duplication of proceedings or protecting parties from oppressive tactics”, tribunals facing such requests proceed in accordance with certain principles²¹¹. The ILA Paper goes on to set out these principles, but none of the situations covered fully corresponds to the situation in this case. The first two situations deal with Parallel Proceedings before courts of the place of arbitration or in a different jurisdiction.²¹² The third situation refers to proceedings pending before another arbitral tribunal, but assumes that the proceedings are “Parallel” in the ILA Paper’s definition (i.e., that they refer to the same parties and substantially the same issues), and that the Parallel Proceeding was commenced before the Current Proceeding.²¹³ None of these requirements is met in this case: Cairn and Vedanta are not affiliated parties, and Cairn initiated its arbitration first.
112. That being said, the ILA Paper does provide guidance (on which the Respondent expressly relies) for cases that do not qualify as Parallel Proceedings. Specifically, the ILA Paper recommends:

“[A]s a matter of sound case management, or to avoid conflicting decisions, to prevent costly duplication of proceedings or to protect a party from oppressive tactics, an arbitral tribunal requested by a party to stay temporarily the Current Arbitration, on such conditions as it sees fit, until the outcome, or partial or interim outcome, of any other pending proceedings (whether court, arbitration or supra-national proceedings), or any active dispute settlement process, may grant the request, whether or not the other proceedings or settlement process are between the same parties, relate to the same subject matter, or raise one or more of the same issues as the Current Arbitration, provided that the arbitral tribunal in the Current Arbitration is:

- not precluded from doing so under the applicable law;
- satisfied that the outcome of the other pending proceedings or settlement process is material to the outcome of the Current Arbitration; and
- satisfied that there will be no material *prejudice* to the party opposing the stay.”²¹⁴

113. This recommendation adds an additional element, beyond those set out in Articles 15(1) of the UNCITRAL Rules and 1036 of the Netherlands Arbitration Act, to the assessment of whether a stay should be granted: whether the outcome of the other

²¹⁰ *Id.*, ¶ 1.

²¹¹ *Id.*, ¶ 2.

²¹² *Id.*, ¶¶ 3-4.

²¹³ *Id.*, ¶ 5.

²¹⁴ *Id.*, ¶ 6 (emphasis in original).

pending proceedings is material to the outcome of the Current Arbitration. The Tribunal notes however that for cases that do not technically involve Parallel Proceedings (as defined by the ILA Paper), the ILA Paper uses permissive (as opposed to mandatory) language (“an arbitral tribunal [...] may grant the request”).

114. The Tribunal concludes that it has the authority to order a stay of the proceedings, provided that a stay is not precluded by the mandatory law applicable to the arbitration (the *lex arbitri*) or by agreement of the parties. In exercising such power, the Tribunal will consider the following factors, bearing in mind that a stay is an exceptional remedy and that for it to be granted the applicant must provide compelling reasons to show that it is warranted:
- a. Whether the stay creates an imbalance between the parties, or causes material prejudice to one of the parties, thus violating their right to equal treatment;
 - b. Whether the stay amounts to depriving a party from the right to present its case;
 - c. Whether the stay delays the proceedings unreasonably; and
 - d. Where (as here) the stay is premised on the finalization of other pending proceedings, whether the outcome of the other pending proceedings is material to the outcome of the arbitration.
115. The Parties have also referred to the “balance of equities”, “balance of prejudice” or “balance of convenience” as being the relevant test to determine if a stay must be granted. This term should not be interpreted to refer exclusively to the requirement of equality between the Parties; if that were the case, it would then be insufficient. In the Tribunal’s view, all of the factors listed above must be considered to determine if a stay may be ordered.

B. Applying this standard, is a stay warranted in the circumstances of this case?

116. The next question is whether, applying the standard set out above, a stay is warranted in the circumstances of this case. The Tribunal has considered the question carefully, and concludes that it is not, for the reasons set out below. Before proceeding to set out those reasons, the Tribunal emphasizes that it has taken no view whatsoever on the merits of the claim. Its focus in this Decision is rather on the relationship between the *Cairn* and *Vedanta* arbitrations and the impact of the attachment and other measures taken by the Respondent to protect its position in what it considers to be a failure to pay a lawful taxation measure. The latter remains to be evaluated in accordance with the terms of the Treaty and no further comment is required. However, the measures have had, and if maintained will continue to have, a significant impact on the Claimants and these effects cannot be ignored in resolving the Stay Application.
117. First, a stay would cause material prejudice to the Claimants. Irrespective of whether the Respondent breached the BIT, it has seized and is currently holding CUHL’s shares in CIL for a value of approximately USD 1 billion. While the seizure of those shares remains in place, CUHL cannot freely exercise its ownership rights over those

shares, and in particular it cannot sell them. The Claimants have represented that Cairn's market capitalization is approximately USD 1.5 billion, an estimate that the Respondent has not challenged. A seizure having a value of USD 1 billion creates a substantial impairment to the way in which Cairn can manage its business, including on the management of its investments. In the Tribunal's view, this causes material harm to the Claimants, a harm that would remain in place for several years if the proposed stay is granted, and could have repercussions on the relief requested in this case. Irrespective of the eventual outcome of the case, it is in the interest of all parties that the legality of the tax claim and the measures taken in relation thereto be determined in a final award.

118. Further, the Respondent's seizure of CUHL's shares in CIL carries with it the additional risk that the Respondent may decide to proceed with the forced sale of those shares. This risk prompted the Claimants to submit a Request for Interim Measures before the First Procedural Hearing.²¹⁵ After discussions at that hearing, the Respondent represented that it would "take no steps to purport to transfer, sell, encumber or in any other way dispose of the shares during the pendency of these arbitral proceedings, without giving [CUHL] three months' written notice of its intention to do so."²¹⁶ However, on 14 March 2017 the Claimants informed the Tribunal that, by letter of that same date, the Income Tax Authority had informed CUHL that it had until 15 June 2017 (i.e., three months) to comply with the recent order by the Income Tax Appellate Tribunal, or the Government would commence recovery proceedings against CUHL.²¹⁷ On 23 March 2017, the Respondent confirmed that, in its opinion, this letter constituted a "notice" for purposes of its representation of 11 May 2016.²¹⁸ The Tribunal understands from the Claimants' submissions that they intend to revive their Request for Interim Measures. Even if they do not do so immediately, the fact remains that the risk of harm to the Claimants due to a potential forced sale of CUHL's shares in CIL is current and real, and confirms the need for this arbitration to proceed at a normal pace for a swift resolution of this dispute. In addition, the volumes of the correspondence the Parties have exchanged with the Tribunal so far may show that a constant intervention, or at least availability, of the Tribunal seems necessary.
119. Then there is the harm caused by the tax assessment itself, which would remain outstanding during any stay. The principal amounts to approximately USD 4.4 billion, with the possibility of interest accruing at the rate of USD 44 million per month, as well as the possibility of penalties.²¹⁹ As a result, the size of the amount claimed to be owed by the Claimants is growing at a significant pace, and would continue to do so

²¹⁵ Claimants' Request for Interim Measures of 13 April 2016.

²¹⁶ Respondent's letter of 11 May 2016.

²¹⁷ Claimants' letter of 14 March 2016, referring to the letter from the Assistant Commissioner of Income Tax of the same date.

²¹⁸ Respondent's letter of 23 March 2017.

²¹⁹ While the Claimants have informed the Tribunal that the ITAT has determined that interest is not applicable under sections 234A and 234B of the Income Tax Act, it appears that it continue to accrue under Section 220(2) of that Act (see paragraph 70(a) above). Both Parties also confirm that penalties may also apply (see both the Parties' respective letters of 23 March 2017).

over the course of a stay which the Tribunal, agreeing with the Claimants, considers would likely be lengthy.

120. By contrast, continuing this arbitration would not unduly prejudice the Respondent. The Respondent has identified four potential harms that would be caused by continuing this arbitration at the same time as the *Vedanta* arbitration: (i) the risk of contradictory outcomes; (ii) the risk of double jeopardy (i.e., that, in the event of contradictory outcomes, the claimant who loses shall endeavor to avail itself of the other claimant's victory); (iii) the risk that, as a result of the indemnity between CUHL and CIL, Cairn may request to amend its request for relief to include any amounts claimed by CIL in the event that Vedanta loses its arbitration, and (iv) duplication of costs and effort. After careful analysis, the Tribunal concludes that (with the exception of item (iv)) a stay of this arbitration will not place the Respondent in a worse position with respect to these alleged risks than were the present arbitration to continue.
121. With respect to the first alleged harm, the Tribunal is not persuaded that staying this arbitration would eliminate the risk of inconsistent outcomes, or even decrease them significantly.
122. The Tribunal agrees with the Respondent that, to the extent possible, contradictory outcomes in investment arbitration should be avoided, to which the Tribunal would add that this is true "in any dispute resolution". This is especially true for Parallel Proceedings according to the ILA Paper's definition (i.e., those involving the same parties and substantially the same issues), or for the first category of concurrent proceedings identified by the UNCITRAL Secretariat's Note of 8 April 2016 (i.e., those in which "different entities within the same corporate structure have a right of action against a State or state-owned entity in relation to the same investment, with regard to the same State measure and for the benefit of substantially the same interests, as long as all entities qualify as investors under an applicable investment treaty, or have a right of action under a contract or under domestic investment law").²²⁰ In these cases, the effect is that there are "various parties, claiming in various forums and under different sources of law, yet seeking substantially the same relief for the same measure."²²¹ It is particularly important to devise reasonable ways to coordinate this type of concurrent proceedings, as there is a real possibility of double recovery. But that is not the concern here: Cairn and Vedanta are not affiliated companies (that they are both shareholders in CIL does not change this fact), and are each claiming for their own relief to compensate for their own harm.
123. The UNCITRAL Secretariat's Note identifies yet a second category of concurrent proceedings that arises "where a measure by a State has an impact on a number of investors which are not related."²²² The Note explains that "[w]hen a State takes a measure which potentially affects a number of investors, it may be faced with multiple

²²⁰ UNCITRAL Secretariat Note, Concurrent Proceedings in Investment Arbitration, UN Doc. A/CN.9/881 (8 April 2016) (Exh. CLA-73), ¶ 7.

²²¹ *Id.*

²²² *Id.*, ¶ 8.

claims from those unrelated investors in relation to that measure”.²²³ Here the risk is not one of double recovery, but of different investment tribunals reaching different conclusions as to whether the measure engages the State’s responsibility, thus jeopardizing the coherence of the investment arbitration system.

124. The Tribunal agrees that, ideally, investment tribunals should seek to preserve coherence in the investment arbitration system, especially in cases arising out of the same key facts, but as the UNCITRAL Note itself recognizes, “it is foreseeable that decisions rendered by separate tribunals may yield different outcomes”.²²⁴ This is not only because the tribunals deciding these cases will be different, but because the issues at stake, as well as the facts surrounding each investment, might also be different, thus yielding different results. As the Claimants have pointed out, in investment treaty arbitration there is not one single standard that can be used to measure the “legality” or “lawfulness” of a measure. Through the measure in question, the State can breach one or more of its obligations under the treaty, such as the obligation not to expropriate except under certain conditions, the obligation to treat the investor’s investments fairly and equitably, and the obligation not to impair those investments with discriminatory, and/or arbitrary and/or unreasonable measures. Some of these obligations set out absolute standards of conduct, while others are relative. Further, in some cases, such as when an investor alleges a breach of its legitimate expectations, the determination of whether there has been a breach hinges heavily on the particular facts of the case and of the specific investment. Short of both tribunals completely accepting or completely dismissing the claims, and adopting the same reasoning to do so, it is therefore difficult to completely avoid outcomes which might appear to be contradictory.
125. In the case of the *Cairn* and *Vedanta* arbitrations, two unaffiliated parties are bringing two separate claims against India under the same treaty, but they both allege different breaches of the treaty and request their own relief. While it is true that there is a core of common issues of fact, each arbitration refers to a separate and distinct dispute, in which each unrelated claimant seeks relief for its own harm. As a result, for justice to be served, each claimant has a right to a resolution of its own dispute, and the risk of different (if not contradictory) outcomes is virtually unavoidable, absent some form of coordination between both cases.
126. A stay of one arbitration in favor of the other, however, does not eliminate this risk. The risk will certainly remain for those issues that are specific to each case, such as an assessment of whether a particular measure constitutes an expropriation of an investor’s investment, or whether the measure violates the legitimate expectations of a particular investor. There may be issues, however, where the tribunals in both proceedings may be called upon to carry out similar or the same assessments, such as when investors allege that a particular measure is contrary to the same BIT obligation. It is in these cases where avoiding contradictory decisions is most desirable.

²²³ *Id.*

²²⁴ *Id.*

127. It was to address this situation that the Tribunal invited the Parties to consult in order to “seek to coordinate the present proceedings with the *Vedanta* proceedings so that, putting to one side what might be called the less central issues, the question of the lawfulness of the Respondent’s tax measure under the treaty could be briefed, argued and heard before both tribunals at the same time, and perhaps, if all parties consented, eventually decided by both tribunals jointly.”²²⁵ Indeed, the Claimants in this case have already argued that the Respondent’s amendment or clarification of Section 9 of the Indian Income Tax Law, 1961 (for purposes of this Order, the Tribunal will refer to it as the “2012 Amendment”²²⁶) breaches the Respondent’s obligation to accord fair and equitable treatment to investors of investments because, inter alia, it constitutes retroactive taxation that is contrary to the rule of law,²²⁷ and it is almost certain that Vedanta will raise a similar argument in its own arbitration. The Tribunal’s intention was thus to diminish the risk of contradictory decisions on this point, which (arguably) is less dependent on the circumstances of each investor’s investment, by allowing this issue to be briefed and argued jointly by both sets of parties and, eventually, deliberated and decided jointly by both tribunals.
128. If all parties had agreed, this “quasi-consolidation” could potentially have decreased the risk of inconsistent decisions on this point. Conversely, a stay of this arbitration would not have the same effect. What the Respondent is suggesting is that this Tribunal should await the decision of the *Vedanta* tribunal and adopt the same reasoning. While a decision from the *Vedanta* tribunal would certainly constitute persuasive authority for this Tribunal, it could not dispense this Tribunal from its obligation to discharge its own duties, namely to use its own reasoning to decide the case on the basis of the record before it.
129. The Tribunal thus concludes that staying this arbitration would not eliminate the risk of inconsistent outcomes, nor would it decrease this risk in a manner proportional to the harm suffered by the Claimants.
130. The second harm alleged by the Respondent is the risk of “double jeopardy”. The Tribunal understands this to mean that, if one investor were to prevail in its arbitration and the other were to lose, the losing investor would attempt to avail itself of the other investor’s victory to deny its liability vis-à-vis the Respondent. In particular, if Vedanta were to lose against India but Cairn were to win, Vedanta would argue that its secondary or contingent liability could not be established because the primary liability has not been established.²²⁸ It is not possible for the Tribunal to anticipate how this

²²⁵ Tribunal’s Letter 2 of 3 November 2017, p. 3.

²²⁶ The Tribunal attaches no value judgment and is not prejudging the nature of this measure. It notes that in their Statement of Claim the Claimants refer to it as the “Retroactive Amendment”, while in its Statement of Defence the Respondent refers to it as the “2012 Clarification”.

²²⁷ The Claimants also argue that they arise from different measures, because they respond to separate tax assessments brought separately by India against each investor. The Tribunal takes due note of this point, and, if necessary, will assess this statement in the appropriate phase of these proceedings. That said, it understands that both tax assessments are the direct consequence of the 2012 Amendment.

²²⁸ At the hearing, Counsel for the Respondent explained: “Vedanta loses, Cairn wins. Because it is the same tax measure, Vedanta will then undoubtedly try to say, ‘Well, how can I be liable? The capital gains tax is gone. You cannot be withholding tax without capital gains tax’ and vice versa. That does

hypothetical allegation, if it actually arose in fact, would play out in practice, or how it would concretely harm the Respondent: if Vedanta loses its arbitration, it means that it will have to suffer the effects of any taxation measures implemented by the Respondent without being able to obtain compensation from the Respondent under its treaty claim. Whether or not Cairn wins its own arbitration will not change this state of affairs. More importantly, granting a stay would in any event not eliminate this alleged risk; it would simply postpone it.

131. As a third alleged harm, the Respondent contends that “the existence of [the] indemnity creates the risk – in addition to all the other risks of inconsistency and prejudice noted by the Respondent – that (i) Vedanta may lose its proceedings against the Respondent; (ii) Vedanta (through CIL) will then pursue Cairn under the indemnity; (iii) with the result that Cairn will seek to recoup amounts paid out to Vedanta (via CIL) under the indemnity against the Respondent in this or further proceedings.”²²⁹ As a consequence, the Respondent contends that “the logical sequence of events is for the *Vedanta* arbitration to conclude (with all relevant proceedings, evidence and awards to be made available to the present Tribunal), for any indemnity proceedings to play out, and for the present arbitration to then resume with the benefit of the outcome of both sets of proceedings and of the reasoning of the *Vedanta* Tribunal.”²³⁰ As a result, the Respondent contends that “Vedanta’s claim and the fate of Vedanta’s claim will determine whether or not the indemnity will be triggered. Whether or not the indemnity will be triggered will, in turn, directly impact Cairn’s claims.”²³¹
132. The Tribunal has trouble following the Respondent’s argument. The Respondent has acknowledged that the primary tax liability lies with Cairn.²³² It is Cairn (as the seller) who would be primarily liable for paying capital gains tax on the sale of its shares; CIL’s derivative or contingent obligation to withhold that tax would only arise if the primary tax applies any capital gain made by Cairn. Likewise, any right that CIL may have to be indemnified from Cairn can only arise if CIL is forced to pay on Cairn’s behalf – a situation that can only arise if Cairn is liable in the first place. Accordingly,

not need the indemnity, that is just because they are two sides of the same coin.”) Tr., 85:9-15 (Mr. Moolan).

²²⁹ Respondent’s Reply, ¶ 18.

²³⁰ *Id.* See also Tr., 73:3-13 (Mr. Moolan) (“[T]he existence of the indemnity from CUHL to Vedanta makes it clear that there can be only one logical sequence of litigation. First, the *Vedanta* arbitration must conclude. Depending on the outcome of that arbitration, indemnity proceedings by Vedanta against Cairn may be triggered. It is in light of the result of that process that the Cairn arbitration can take place.”) See also Respondent’s Letter 1 of 15 February 2017, ¶ 8.

²³¹ Tr., 160:18-22 (Mr. Moolan).

²³² See note 228 above. See also Respondent’s Application, ¶ 22; Tr., 177:6-11 (THE PRESIDENT: May I understand that if the Indian Supreme Court, if it is the supreme body in those matters, eventually finds that Cairn has no tax liability then automatically Vedanta cannot have a liability? Do I understand properly? MR MOOLLAN: Yes, absolutely.”) See also Respondent’s Application, ¶ 22, where the Respondent refers to the “secondary liability of the resident buyer”. The characterization of the CUHL’s liability as “primary” and CIL’s liability as “secondary” is also confirmed in the indemnity provisions contained in the Share Purchase Deed dated 12 October 2006 by and between Cairn Energy PLC, Cairn UK Holdings Limited, Cairn India Limited and Cairn India Holdings Limited (Exh. C-7), Clause 9.1.

should one of the arbitrations be kept in abeyance pending the resolution of the other, in the Tribunal's view the logical sequence of litigation would be for the *Cairn* arbitration to move forward so that the legality of the 2012 Amendment vis-à-vis Cairn's primary liability could be determined first (from the prism of international law – the Tribunal is aware that the existence of Cairn's tax liability under Indian law is being determined by Indian courts). From this perspective, it seems to the Tribunal that if any arbitration had to be stayed (without conceding that any of them must be stayed), logically it would be the *Vedanta* arbitration. Indeed, considering that CIL's liability is contingent on CUHL's, a decision of this Tribunal could be useful to the *Vedanta* tribunal's eventual determination.

133. The Tribunal has also envisaged the possible scenarios that could unfold if the *Cairn* arbitration were to continue, none of which would leave the Respondent in a worse position than it is today:
- a. If Cairn loses this arbitration, the Respondent will be able to pursue Cairn for its tax liability without having to compensate it for any breach of the treaty. CIL would thus be released from any tax liability and would not need to trigger the indemnity (to the extent that it applies). Indeed, if the Respondent obtains payment of the tax from Cairn, Vedanta's entire arbitration could become moot (at least with respect to the principal – the Respondent has acknowledged that it could still demand interest and penalties from CIL).
 - b. If Cairn prevails in this arbitration, then it is likely that the Respondent will seek recovery from CIL. But if in turn Vedanta also wins its own arbitration (resulting in consistent outcomes, albeit prejudicial for the Respondent), it will not need to trigger the indemnity because arguably it should be able to obtain compensation from the Respondent.
 - c. The only situation in which the risk identified by the Respondent could arise is if Cairn prevails in this arbitration, but Vedanta loses its own. In that case, Vedanta would not be able to obtain redress from the Respondent for any amounts paid by CIL, and CIL would likely request Cairn to indemnify it. The risk identified by the Respondent is that Cairn will then seek to amend its request for relief so that it includes any amounts it needs to pay to CIL as a result of the indemnity. The Claimants deny that this is a risk, because they say that their request for relief already includes any such amounts. The Tribunal only notes at this stage that, if the *Cairn* arbitration is allowed to continue instead of being stayed as the Respondent requests, the risk identified by the Respondent would be greatly diminished: if the *Cairn* arbitration has ended before any indemnity litigation is finalized, Cairn will not be able to amend its request for relief or (if no amendment is required) update its quantification of damages to include any indemnities paid to CIL. The Respondent has argued that Cairn may decide to commence new litigation or arbitration against India to obtain redress for this indemnity, but has not articulated what cause of action the Claimants would have for such a case.

134. The Tribunal thus concludes that the third harm identified by the Respondent is not sufficiently established and, to the extent that it exists, would not be reduced by ordering a stay, and that it does not outweigh the harms to Cairn identified above.
135. Finally, the Respondent argues that proceeding with the *Cairn* and *Vedanta* arbitrations causes it to duplicate costs and effort. This may be so, but this harm is minor compared to the harm that a stay would cause the Claimants, and can be repaired by an award of costs. In addition, it bears noting that the reason why two separate investors have initiated two separate claims against the Respondent is simply because the Respondent has initiated two separate tax assessments against each of them in order to pursue the same tax that arises from the same transaction. The Tribunal is aware that the Respondent has alleged that Indian law requires that both seller (as the principal assessee) and buyer (as the withholding party) should be pursued, and the Tribunal emphasizes that it offers no value judgement in this regard. It merely notes that, even if this is permitted or indeed required of the tax authorities from an Indian tax law perspective, the possibility of separate claims by the two different affected parties, each claiming treaty rights, was a logical possible consequence.
136. In view of the above, the Tribunal concludes that a stay would cause significant prejudice to the Claimants, while it would not alleviate in any significant manner the harms identified by the Respondent. As a result, the requested stay would not be advisable under factor (a) of the standard set out in paragraph 114 above.
137. For the reasons set out above, regarding the risk of inconsistent decisions, the Tribunal is likewise not persuaded that the outcome of the *Vedanta* arbitration would be material to the outcome of this case. (It might or it might not; at this point it would be pure speculation to say otherwise.) The Respondent is not requesting the Tribunal to stay the proceedings pending the resolution of other proceedings which could define the Tribunal's jurisdiction (as was the case in *SPP v. Egypt*²³³ or the *Mox Plant* case, which is in point although was not submitted to arbitration²³⁴) or resolve the content or quantum of an underlying obligation in accordance with its proper law and forum (as happened in *SGS v. Philippines*²³⁵). The outcome of the *Vedanta* arbitration could certainly provide persuasive authority to this Tribunal, but it would not be determinative to the outcome of this case, especially with respect to any alleged treaty breaches that are not common to both cases. Accordingly, the Respondent's Stay Application does appear warranted in view of factor (d) of the standard set out in paragraph 114 above.
138. The Tribunal further finds that the stay requested by the Respondent would subject the procedural calendar to "unreasonable" delay. For the reasons set out above, the stay

²³³ *Southern Pacific Properties (Middle East) Ltd v. Egypt* (ICSID Case No ARB/84/3, Award of 20 May 1992) (Exh. RLA-21), ¶¶ 15-17.

²³⁴ *MOX Plant Case* (Ireland v United Kingdom), Procedural Order No 3 of 24 June 2003 (Exh. RLA-22), ¶¶ 20-28.

²³⁵ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/6 ("*SGS v. Philippines*"), Decision on Jurisdiction of 29 January 2004 (Exh. RLA-23), ¶ 170.

would cause a harm that would not be proportionate to the benefit it would bring. This would suffice to consider it unreasonable, but the sheer length of the requested stay also renders it unreasonable. The Respondent is requesting a stay pending the termination of multiple proceedings (the *Vedanta* arbitration and any cross-litigation between Vedanta/CIL and Cairn arising out of the indemnity). In practice, this would possibly take several years, especially if the indemnity litigation is not triggered until after the *Vedanta* arbitration is finalized, and if any set aside proceedings are commenced against an award rendered in that arbitration. Although perhaps the stay would not be indefinite, as the Claimants allege, it would most probably be lengthy. Respondent has furnished no precedent of a stay for a similarly lengthy period of time. The Tribunal thus concludes that the Respondent's Stay Application also appears unwarranted in light of factor (c) of the standard set out in paragraph 114 above.

139. Finally, a stay as lengthy as one proposed by the Respondent would amount to diminishing the Claimants' right to plead their case within a reasonable period of time, without a reasonable justification. The Respondent's Stay Application thus fails in light of factor (b) of the standard set out in paragraph 114 above.
140. The Tribunal cannot end its analysis without a brief comment on the Respondent's allegations that Cairn and Vedanta are communicating and coordinating their cases, in order to bring separate and deliberately uncoordinated arbitrations. The Respondent has clarified that it sees nothing untoward in both investors communicating; to the contrary, it has confirmed that this was to be expected of two parties linked by an indemnity.²³⁶ The Tribunal notes this clarification and therefore has nothing more to add on this point.
141. As to both investors bringing deliberately separate and uncoordinated claims, the Tribunal can only note that, to the extent that each investor considers that it has been harmed by a measure implemented by the Respondent, it is their right under the BIT for each of them to assert their own claim. Rights cannot be exercised in an abusive fashion, but on the basis of the information available to it as present the Tribunal has not seen any evidence of abuse. So far as is evident, Cairn has been cooperative with respect to a potential coordination of the two arbitrations. While it appears that it would not have accepted the Tribunal's invitation for a "quasi-consolidation" of the cases, it has shown itself amenable to a sharing of documents between both arbitrations.
142. The Tribunal thus denies the Respondent's Stay Application.

²³⁶ See paragraph 23 above.

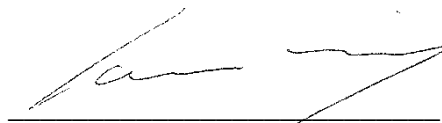
IV. DECISION

143. For the reasons set out above, the Tribunal:
- a. DENIES the Respondent's Stay Application; and
 - b. DEFERS its decision on costs to a later stage.

Seat of arbitration: The Hague, Netherlands

Date: 31 March 2017

For the Arbitral Tribunal:



Dr. Laurent Lévy
Presiding Arbitrator