UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DEUTSCHE TELEKOM AG

Petitioner,

- against -

THE REPUBLIC OF INDIA

Respondent.

Civil Action No. 1:21-cv-01070-RJL

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION TO STAY

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TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 4

I. India Received Full Judicial Review 5

II. The Parties Have Fully Briefed India's Pending Rule 12(b)(1) Motion....................6

III. The Extraordinary Relief India Seeks in Switzerland is Unlikely to Succeed 6

A. The Proceedings to Wind Up Devas were intended to evade enforcement of three arbitral awards concerning Devas..10

B. India Persists in Its Attempts to Evade Payment of the Award 14

ARGUMENT 15

I. India's Jurisdictional Objections are Ripe for Resolution and will not be Affected by the Swiss Revision Proceedings..15

II. A Stay Is Not Warranted..19

A. India's Cited Case Law is Inapposite...20

B. Legal Standards Governing a Motion for a Stay 22

C. The Relevant Legal Factors Weigh Decidedly Against a Stay.............................23

1. Expeditious Resolution of Disputes..23

2. Status and Length of Foreign Proceedings 24

3. The Award will Receive Lesser Scrutiny in Switzerland under a Similarly Deferential Standard of Review 26

4. The Characteristics of the Swiss Proceedings Militate Against a Stay, and Evidence Indicates India Initiated Them with Intent to Delay 27

5. The Balance of Hardships Favors Petitioner 29

III. Any Stay Should be Conditioned on India Posting Security 30

A. The Court Is Not Precluded from Ordering Security..31

B. An Order of Security would be Necessary and Appropriate 33

CONCLUSION..35

TABLE OF AUTHORITIES

Page(s)

Cases

Banco de Seguros del Estado v. Mutual Marine Offices, Inc., 230 F. Supp. 2d 362 (S.D.N.Y. 2002) 30

Caribbean Trading & Fid. Co., No. 90 Civ. 4169, 1990 U.S. Dist. LEXIS 17198 (S.D.N.Y. Dec. 18, 1990) 30

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09....................10, 18

CC/Devas (Mauritius) Ltd. v. Republic of India, No. 1:21-cv-106-RCL, 2022 U.S. Dist. LEXIS 53416 (D.D.C. Mar. 24, 2022)....................30

Chevron Corp. v. Republic of Ecuador, 949 F.Supp.2d 57 (D.D.C. 2013) 19, 21, 22

Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 697 F. Supp. 2d 46 (D.D.C. 2010) 19, 24

Deutsche Telekom AG v. Air India, 1:21-cv-09155-UA (S.D.N.Y. Feb. 4. 2022) (ECF No. 33)....................32

Deutsche Telekom AG v. Air India, 1:21-cv-09155-UA (S.D.N.Y Jan. 27, 2022) (ECF No. 31)....................32

DRC, Inc. v. Republic of Honduras, 774 F. Supp. 2d 66 (D.D.C. 2011)....................32

Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310 (2d Cir. 1998) .... *passim*

G.E. Transp. S.P.A. v. Republic of Albania, 693 F. Supp. 2d 132 (D.D.C. 2010)....................19, 21

Getma Int'l v. Republic of Guinea, 862 F.3d 45 (D.C. Cir. 2017)....................22, 23

Gold Reserve Inc. v. Bolivarian Republic of Venezuela, 146 F. Supp. 3d 112 (D.D.C. 2015) 19, 22

Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas, 314 F. Supp. 3d 95 (D.D.C. 2018)....................19

Hulley Enterprises Ltd. v. Russian Federation, 502 F.Supp.3d 144 (D.D.C. 2020) ...21, 30, 32, 33

Hulley Enters. Ltd. v. Russian Fed'n, Civil Action No. 14-1996, 2022 WL 1102200 (D.D.C. Apr. 13, 2022) .... *passim*

International Ins. Co. v. Caja Nacional de Ahorro y Seguro, 2001 WL 322005 (N.D. Ill. Apr. 2, 2001) 30

Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1985) 25, 26

Landis v. North American Co., 299 U.S. 248 (1936)....................19, 20, 24

LLC Komstroy v. Republic of Moldova, 985 F.3d 871 (D.C. Cir. 2021) 20, 31

LLC Komstroy v. Republic of Moldova, No. 14-cv-01921, 2018 WL 5993437 (D.D.C. Nov. 13, 2018), *aff'd* 985 F.3d 871 (D.C. Cir. 2021) 19

LLC SPS Stileks v. Republic of Moldova, Case No. 14-cv-01921, 2021 WL 5318029 (D.D.C. Nov. 16, 2021)....................19

Novenergia II — Energy & Env't (SCA) v. Kingdom of Spain, No. 18-cv-01148, 2020 U.S. Dist. LEXIS 12794 (D.D.C. Jan. 27, 2020) 32

Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria, 506 F. Supp. 3d 1 (D.D.C. 2020) 19

Process and Indus. Dev. Ltd. v. Fed. Republic of Nigeria, 27 F.4th 771 (D.C. Cir. 2022) 16, 17

Rusoro v. Venezuela, 300 F.Supp.3d 137 (D.D.C. 2018) 19

Science Applications Int'l Corp. v. Hellenic Rep., 13 Civ. 1070 (GK), 2017 WL 65821 (D.D.C. Jan. 5, 2017) .... *passim*

Skandia Am. Reinsurance Corp. v. Caja Nacional de Ahorro y Seguro, No. 96 Civ. 2301, 1997 U.S. Dist. LEXIS 7221 (S.D.N.Y. May 23, 1997)....................29, 30

Tatneft v. Ukraine, 301 F.Supp.3d 175 (D.D.C. 2018)....................19

TECO Guatemala Holdings v. Guatemala, 414 F.Supp.3d 94 (D.D.C. 2019)....................19

Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, NO. 1:19-CV-02424 (TNM), 2022 WL 715215 (D.D.C. Mar. 10, 2022) 17, 19, 28

Union Fenosa Gas, S.A. v. Arab Republic of Egypt, 2020 WL 2996085 (D.D.C. June 4, 2020)....................18

Statutes and Rules

9 U.S.C. § 207....................25

28 U.S.C. § 1609....................29

Companies Act 271(c), 2013 11

Fed. R. Civ. P. 12(b)(1)....................1, 5, 18, 32

Illinois Insurance Law....................30

National Company Law Tribunal 10

§ 1610 of the FSIA....................14, 29, 30, 31

Article 190*a*(1)(a) of the Swiss Private International Law Act 8

Others/ Miscellaneous

Air India: Tata Sons conglomerate seals $2.4bn takeover deal, THE GUARDIAN (Oct. 8, 2021) 32

INTRODUCTION

India's Motion to Stay ("Stay Motion") is premature and frivolous. India's own motion to dismiss for lack of subject matter jurisdiction is currently fully briefed and awaiting decision by this court. The question on which the disposition of that motion turns – which India apparently now desperately does not want the Court to answer – is whether the Court lacks jurisdiction over this action because of sovereign immunity or *forum non conveniens*. As explained in Petitioner's Opposition, the Court has subject matter jurisdiction over the Petition and controlling precedent in this Circuit does not permit dismissal of a petition to confirm a foreign arbitral award on the basis of *forum non conveniens*. ECF No. 14. India has presented no good reason to delay the Court's decision on its pending motion any longer.

The recently initiated Swiss revision proceedings – with which Petitioner was served only *today*, June 1, 2022 – have no bearing whatsoever on the question of the Court's subject matter jurisdiction. No matter how the Swiss court may rule on India's revision application, it cannot affect this Court's subject matter jurisdiction over a petition to confirm a foreign arbitral award. Indeed, India's own Stay Motion concedes that the Swiss revision proceedings are relevant only to defenses to enforcement under Article V of the New York Convention that India explicitly specifically reserved its right to raise *after* this court rules upon India's Rule 12(b)(1) motion. ECF No. 17 at 30-31.

The Court should deny India's Stay Motion. Judicial economy can only be served by resolving the threshold question of this Court's subject matter jurisdiction now. To do otherwise will unnecessarily extend resolution of a legal question of the Court's jurisdiction on which the Swiss proceedings have no bearing whatsoever. The Court should deny India's Stay Motion on that basis alone. (Argument Part I).

The Court should also deny the Stay Motion because the revision application to the Swiss Court upon which the Stay Motion is based is frivolous and has almost no chance of success. India already sought judicial review in Switzerland of the Interim Award, which rejected India's challenges and affirmed the award. India had a right to challenge the Final Award, but it chose not to do so. Instead, only after Petitioner successfully began to collect against the Final Award in Switzerland, did India file an application for the extraordinary relief of revision of both the Interim and Final Award (together the "Awards").

In the past 30 years, the Swiss Federal Supreme Court – the highest court in Switzerland – has granted the extraordinary relief India now seeks only twice (out of 45 applications), and both of those cases involved proven allegations of criminal activity by the prevailing party in the arbitration that affected the outcome of the arbitration. India does not even come close to making such a showing in its application to the Swiss court. On the contrary, India's revision application – based on purportedly "new" "relevant" "evidence" (as the facts demonstrate, it is none of those) – in fact concerns unproven allegations, most of which India has been aware of since 2009, regarding the conduct of third parties other than Petitioner and including India's *own* officials.

India's own conduct in the Swiss proceedings belies its assertion that the revision application has even the slightest chance of succeeding: indeed India had a right to ask the Swiss Court to issue a stay of enforcement of the award pending a ruling on its revision application, but, tellingly, it chose not to seek a stay from that court. Presumably, India did not do so because it would not be able to meet the standard for obtaining such a stay, which requires India (1) to make a *prima facie* showing of irreparable harm and (2) to demonstrate that the Revision Application stands more than a "fanciful" chance of success. Declaration of James H. Boykin In

Support Of Petitioner's Opposition To Respondent's Motion To Stay, ("Second Boykin Decl."), Ex. A, Affidavit of Matthias Scherer[1] ("Scherer Aff."), ¶ 22. "In other words, India uses the Swiss Revision Application to obtain from courts in Singapore and in Washington DC what it did not dare ask from the Swiss Court." Scherer Aff., ¶ 24. This Court should not grant the very relief that India chose not to seek from the Swiss court where the revision application and enforcement proceedings are currently pending. The principles of comity on which India relies in support of it Stay Motion would only apply if India had sought and obtained an order from the Swiss Federal Supreme Court staying enforcement of the Final Award pending resolution of India's revision application.

The *Europcar* factors – which India's Stay Motion completely ignores – make clear that a stay of these proceedings is not warranted. (Argument Part II).

In the alternative, if the Court is even the slightest bit inclined to entertain India's Stay Motion, then the Court should require India to post security for the award as a condition for granting the stay. Petitioner is currently seeking to enforce the Awards in Washington D.C., New York, Germany, Singapore, and Switzerland. The Swiss action – and this stay motion – are an attempt to forestall those enforcement actions and represent another sad installment in the story of the decline in India's commitment to the rule of law. India's strategy of delay appears designed to buy it time to continue divesting itself of foreign assets against which the Awards could be enforced. India's recalcitrance and attempts to avoid enforcement justify conditioning any stay on India posting security for the award pending the resolution of the Swiss proceedings,

1. Mr. Scherer is a Swiss attorney who has practiced international arbitration for more than 25 years. His firm is assisting petitioner in enforcement proceedings in Switzerland. He submitted the Scherer Affidavit in a parallel enforcement proceeding in Singapore in response to India's application to that court to stay those proceedings.

and this Court has the power to condition a stay upon India posting security for the award. (Argument Part III).

Petitioner offered to consent to the stay of the enforcement proceedings if India would post security for the full face value of the Final Award (including post-award interest) pending the resolution of the Swiss revision proceedings. Petitioner proposed that, if India prevailed in the Swiss court, India would get its security back. If Deutsche Telekom prevailed, Deutsche Telekom would enforce the Award against the security. In other words, Petitioner offered to let enforcement of the Final Award hinge entirely on the outcome of the Swiss revision proceedings as a condition for consenting to a stay of these proceedings. But India refused Petitioner's offer. India rejected this reasonable proposal because it knows its revision application to the Swiss Court has almost no chance of success and its only objective is to delay paying what it owes Petitioner while it insulates its assets from enforcement. If India had any confidence in its arguments before the Swiss Federal Supreme Court, it would have either embraced Petitioner's proposal or asked the Swiss court to stay enforcement of the Award pending its revision application. India lacks that confidence and rightly so.

BACKGROUND

India has spent the last eleven years engaged in a campaign to avoid paying the compensation it owes to Petitioner for the destruction of Petitioner's investment in Devas Multimedia Private Limited ("Devas"), an Indian company. In February 2011, India deprived Petitioner of its investment, in violation of the 1995 Agreement Between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments (the "Treaty"). *See* Declaration of James H. Boykin In Support Of Petition To Confirm Foreign Arbitral Award, April 19, 2021 ("First Boykin Decl."), Ex. D, Interim Award, ECF No. 1-7, ¶¶ 91, 390. Petitioner attempted to resolve the dispute amicably and obtain compensation

through negotiations, but India ignored Petitioner's overtures. *Id.*, ¶¶ 95-96. Petitioner therefore initiated arbitration to recover its damages on September 2, 2013; on December 13, 2017, the Arbitral Tribunal issued its Interim Award, which unanimously found that India had breached its obligations to Petitioner under the Treaty. *Id.*, ¶¶ 10, 424.

I. India Received Full Judicial Review

India received full judicial review of the Interim Award before the Swiss Federal Supreme Court. These proceedings included two rounds of written submissions by each Party, as well as an exceptional public oral deliberation. *See* First Boykin Decl., Ex. E, Swiss Court Decision, ECF No. 1-8; *see also* First Boykin Decl., ECF No. 1-3, ¶¶ 12-13. The Swiss Court reviewed India's arbitrability arguments *de novo*. Swiss Court Decision, ¶ 2.4.1. It refused to set aside the Interim Award. Its decision, spanning 59 single-spaced pages, meticulously analyzed each of India's arguments, surveyed the relevant international law authorities and case-law, and provided detailed reasoning for its decision. *See generally* Swiss Court Decision; Petition to Recognize and Confirm Foreign Arbitral Award, ("Pet."), ECF No. 1, ¶¶ 47-53.

After the Swiss Federal Supreme Court affirmed the arbitral tribunal's rulings in the Interim Award in its decision of December 11, 2018, the Tribunal issued its Final Award on May 27, 2020 and fixed the amount of compensation India owed Petitioner. *See* First Boykin Decl., Ex. A, Final Award, ECF No. 1-4. Swiss law provides a 30-day window during which India could have sought to set aside the Final Award. Pet., ¶ 7. India chose not to avail itself of this opportunity. The Swiss Federal Supreme Court issued a certificate of non-appeal on August 7, 2020, and the Civil Court for the Republic and Canton of Geneva certified that the Final Award is enforceable on August 20, 2020. *See* First Boykin Decl., Ex. F, Certificate of Enforceability, ECF No. 1-9.

II. The Parties Have Fully Briefed India's Pending Rule 12(b)(1) Motion

On April 19, 2021, Petitioner filed its petition to enforce the Final Award against India in this Court. On September 23, 2021, India filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See* India's Motion to Dismiss, ECF No. 11 and Statement of Points and Authorities in Support of India's Motion to Dismiss ("India's MTD"), ECF No. 11-1. Petitioner filed its opposition to that motion on October 15, 2021. *See* Petitioner's Opposition to Respondent's Motion to Dismiss, ("Pet. Opp. to MTD"), ECF No. 14. Among other things, Petitioner pointed out that, under the settled case-law of this Circuit, India's arguments about the alleged lack of an arbitration agreement are not sovereign immunity arguments bearing on the court's subject matter jurisdiction; rather, they are potential defenses to enforcement under Article V of the New York Convention. *See* Pet. Opp. to MTD, I.A.2. India filed its Reply on November 12, 2021. India's Reply in Support of Motion to Dismiss ("MTD Reply"), ECF No. 17. India's motion to dismiss has been fully briefed for over six months.

III. The Extraordinary Relief India Seeks in Switzerland is Unlikely to Succeed

Because India refused to comply with the Final Award (*see infra* at 14-15), Petitioner has initiated enforcement actions in Germany, Switzerland, Singapore, the Southern District of New York, and before this Court in Washington D.C. In an effort to prevent the enforcement proceedings in Singapore and Washington D.C. from advancing, India now seeks an extraordinary form of relief in the Swiss Federal Supreme Court, namely the revision of the Interim Award and the Final Award. The grounds for revision are "even narrower than those available for setting aside an award." Scherer Aff., ¶ 39. Furthermore, several circumstances of India's revision application show that it is not a serious attempt to obtain relief, but rather, a delay tactic to avoid enforcement in this Court and in Singapore.

First, although India uses its revision application as the basis for motions to stay enforcement proceedings before this Court and in Singapore, ***it has not asked the Swiss Federal Supreme Court to issue a stay of enforcement of the Final Award even though Swiss procedure would have allowed India to request such a stay in its Revision Application***. Scherer Aff., ¶ 21. However, the Swiss Federal Supreme Court would grant a stay of enforcement of the Final Award only if India could (1) make a *prima facie* showing of irreparable harm and (2) demonstrate that the revision application stands more than a "fanciful" chance of success. Scherer Aff., ¶ 22. It is particularly telling that India has not applied to the Swiss Federal Supreme Court for a stay of enforcement of the Final Award. The fact that Petitioner has successfully attached funds due to India in Switzerland in ongoing enforcement proceedings there should have provided it with an incentive to seek such a stay from the Swiss Federal Supreme Court. Scherer Aff., ¶ 21.

There is only one inference to draw from India's decision not to seek a stay of enforcement of the award from the Swiss Federal Supreme Court pending a ruling on India's revision application. As Petitioner's Swiss lawyer and witness in the enforcement proceedings in Singapore explained, "[i]n other words, India uses the Swiss Revision Application to obtain from courts in Singapore and in Washington DC what it did not dare ask from the Swiss Court." Scherer Aff., ¶ 24. India did not want to take the risk that the Swiss Federal Supreme Court would reject the stay application and issue a written decision finding that India's prospects of success were – to use a Swiss term of art – "fanciful."

India's prospects for success on its revision application are indeed "fanciful." Scherer Aff., ¶ 34. India seeks relief on the grounds of alleged new evidence. In the thirty years since the Swiss Federal Supreme Court began recognizing revision as a remedy (first in case law and

later by statute), this extraordinary relief has been granted on these grounds only twice. Scherer Aff., ¶¶ 43-44. The extreme circumstances that justified granting the extraordinary remedy of revision in those two cases are not present in the instant case. Scherer Aff., ¶¶ 55-60. Both cases illustrate the high evidentiary threshold an applicant must meet before it can receive the extraordinary relief of revision of an arbitral award. It is little wonder therefore that India's revision application does not refer to either case.

Furthermore, India's application on its face does not meet the statutory requirements for revision. Article 190*a*(1)(a) of the Swiss Private International Law Act (the ground invoked by India) allows revision based on facts that existed before the arbitral award was rendered, but that were discovered afterwards. Scherer Aff., ¶ 49. India's application is based on a Judgment of the Indian Supreme Court dated 17 January 2022 (the "Indian Supreme Court Judgment"), ECF No. 19-4. On its face, the Indian Supreme Court Judgment post-dates the Final Award of 27 May 2020 and therefore cannot serve as a basis for revision under Art. 190*a*(1)(a). Scherer Aff. ¶ 64. India claims that evidence post-dating the award "but shedding light on facts pre-dating" the award could be a ground for revision. Boog Decl., ¶¶ 27-28. Mr. Scherer clarifies that ***there has never been a Swiss court decision upholding this interpretation, and India is in fact asking for an extension of existing law***. Scherer Aff., ¶ 65.

Nor does India's application meet the requirement that the newly discovered evidence be material to the outcome of the arbitration. Both the Arbitral Tribunal and Swiss Federal Supreme Court already rejected India's allegations of illegality. Scherer Aff., ¶¶ 69-70 (citing Interim Award, ¶¶ 118-19; Swiss Court Decision, ¶¶ 4.4.2-4.4.3).

Lastly, India's application is untimely. Under Swiss law, the revision application must be made within 90 days of discovery of the evidence. Scherer Aff. ¶ 49. As an affidavit filed in the

enforcement proceedings makes clear, India began investigating the alleged "illegality" in 2009. Second Boykin Decl., Eh. B, Fourth Affidavit of Dr. Ina Roth ("4th Roth Aff."), ¶ 87. Moreover, as another affidavit submitted in the Singapore enforcement proceedings makes clear, Indian investigative authorities "prepared a First Information Report [] dated March 16, 2015 ("FIR") (some 7 years ago) and the Charge Sheet was issued by the CBI Indian Central Bureau of Investigations on 11 August 2016 (more than five years ago), with a supplementary charge sheet issued on 8 January 2019 (more than three years ago) [collectively referred to as 'CBI Charge Sheets']. No one from DT or DT Asia was charged, whether under the FIR or the CBI Charge Sheets." Second Boykin Decl., Ex. C, Expert Opinion of Harish Salve QC, SA, ("Salve Op."), ¶ 24.[2]

In October 2016, well into the arbitration (after the hearing on jurisdiction and merits), India sought to introduce the August 11, 2016 Charge Sheet into evidence in the arbitration. The Arbitral Tribunal declined to admit the Charge Sheet for several reasons, including that India's attempt to introduce the Charge Sheet was untimely and that the allegations contained in the Charge Sheet did not implicate Petitioner. Interim Award, ¶¶ 115-19. When India subsequently asked the Swiss Court to set aside the Interim Award, the Swiss Court instead affirmed the arbitral tribunal's decision to disregard those allegations for those same reasons. *See* Swiss Court Decision, ECF 1-8, ¶¶ 4.4.2-4.4.3. The fact that, in January 2022, the Indian Supreme Court affirmed a judgment of a lower court, the National Company Law Tribunal (the "NCLT"),

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2. Mr. Salve is an Indian lawyer and former Solicitor General of India. Throughout his career, he has practiced before the Indian Supreme Court and has extensive international arbitration experience. He represented Devas and Devas shareholders (but not Petitioner) in related arbitrations. *See* Affidavit of Harish Salve, QC, SA. He submitted his opinion along with an affidavit in the parallel enforcement action in Singapore.

winding up Devas in insolvency proceedings on the basis of the Charge Sheet does not make the still unproven allegations in the Charge Sheet "new evidence" or renew the time-limit for filing a revision application. Simply put, "the Revision Application was made out of time." Scherer Aff., ¶ 78.

India does not state that the Indian Supreme Judgment uncovered new facts. Nor can it. The Indian Supreme Court Judgment merely affirmed the Judgment of the NCLT (the "NCLT Judgment"), which was issued on May 25, 2021. *See* Declaration of Nicolle Kownacki, Ex. 11, NCLT Judgment, ECF No. 12-11. As the highest appellate court in India, the Indian Supreme Court Judgment ruled on issues of law and did not find any new facts that had not been found by the NCLT. *See* Indian Supreme Court Judgment, ECF No. 19-4, ¶ 12.7 ("the appeal before us . . . is only on a question of law . . . it is not open to this Court to re-appreciate evidence."). As such, it is questionable whether a court decision on issues of law can even be considered "evidence" at all. Even if India were right as a matter of Swiss law that a judicial decision could "shed[] light on facts pre-dating" the Final Award, it cannot be contested that India has been aware of the NCLT's Judgment since May 25, 2021 when it was issued. In fact, India cited (and discussed at length) both the NCLT's decision and the decision of the intermediate appellate court (the National Company Law Appellate Tribunal) in its Motion to Dismiss. *See* India's MTD, ECF 11-1, at 13-14, 20-25. None of the alleged "facts" contained in the NCLT Judgment and discussed in India's Motion to Dismiss implicate Petitioner, and India was aware of these "facts" during the arbitration.

A. The Proceedings to Wind Up Devas were intended to evade enforcement of three arbitral awards concerning Devas

India's unlawful actions toward Devas have given rise to three international arbitration awards. First, on September 14, 2015, a three-person commercial arbitration tribunal ordered

Antrix, a company wholly owned by India, to pay Devas over half a billion dollars, because Antrix violated its contractual obligation towards Devas (the "ICC Award"). Interim Award, ¶ 102. Second, on October 13, 2020, a three-member arbitral tribunal issued a final award in *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, awarding Devas's Mauritius based shareholders $121 million (the "Mauritius Award").[3] Third, on May 27, 2020, the Tribunal issued its Final Award in favor of Petitioner.

In response to this series of awards, on January 18, 2021, Antrix filed an application to wind up Devas before the NCLT in India. Thus, in an upside-down application of India's bankruptcy law, an award debtor (Antrix) was allowed to commence involuntary liquidation proceedings against the award creditor (Devas). Second Boykin Decl., Ex. D, Expert Opinion of Justice (Retd.) Sudhansu Jyoti Mukhopadhaya, ("Mukhopadhaya Op."), ¶ 3.14;[4] Salve Op., ¶ 12.

India's NCLT conducted the winding up proceeding, with the National Company Law Appellate Tribunal ("NCLAT") and Supreme Court providing review. On the substance, these courts applied a "remarkably anomalous and novel concept of fraud," which is "new jurisprudence, and has no other basis in Indian law." Salve Op., ¶ 35. The allegedly fraudulent allegations are extremely general, concern statements made before Devas was incorporated, and do not purport to have induced Antrix into signing the contract. *Id.* To take one example, the Indian courts found that the minutes of a government meeting where it was decided to award

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3. The arbitral awards rendered in this case are still pending initial review by the courts at the seat of the arbitration in The Hague.

4. Mr. Mukhopadaya is a retired Justice of the Indian Supreme Court. He submitted two expert opinions in the Singapore enforcement proceedings.

Devas a license had been "manipulated," because the list of attendees was later changed. Indian Supreme Court Judgment, ¶ 12.8(xiii). Yet, "[t]he conclusion that [Devas] acted 'fraudulently' because a government committee had mixed up its minutes and gotten the attendees wrong . . . can only be understood as a special notion of 'fraud' hitherto fore undefined and found for the first time in s 271(c) of the Companies Act, 2013." Salve Op., ¶ 55. Furthermore, the findings of fraud were made based on the same Charge Sheet that the Arbitral Tribunal had rejected because the allegations therein were just that, unproven allegations that did not implicate Petitioner. *Id.* ¶ 77 ("Thus, in my understanding, the Supreme Court has now held that a company can be wound up under s 271 of the Company Act . . . the moment a charge sheet is filed alleging corruption against the company.").

On procedure, the proceedings before NCLT and NCLAT breached due process (or "natural justice" as it is known in India and in Singapore). Devas was not given proper notice of the winding-up petition, its shareholders did not have an opportunity to be heard, nor was cross-examination of government witnesses permitted. 4th Roth Aff., ¶¶ 146, 150.

Giving the game away, the Indian Supreme Court explicitly stated that the goal of preventing enforcement of the ICC Award, the Mauritius Award, and the Final Award justified these violations of "natural justice." For example, the Supreme Court rationalized the failure to give Devas notice as follows: "This is a case of fraud and all stakeholders are fully aware of the proceedings and they have even shown extreme urgency in enforcing an ICC Arbitration award and 2 BIT awards, before the conclusion of the winding up proceedings. Therefore, we are unable to sustain the argument that the failure of the Tribunal to order the publication of an advertisement rendered the entire proceedings unlawful." Supreme Court Judgment, ¶ 7.30. Likewise, it explained away the failure of the shareholders to be heard: "Taking advantage of

their citizenship/residence abroad, these [Mauritius] shareholders are prosecuting proceedings for the enforcement of (i) ICC Arbitral Tribunal Award in India; and (ii) BIT Awards overseas, even while making it impossible for CBI to serve summons on them for the past five years. It is not open to such persons to raise the bogey of failure to afford an opportunity." *Id.*, ¶ 11.11.

Therefore, the allegations of "fraud" underlying the revision application are completely unsubstantiated, and the motive underlying the proceedings to wind up Devas is clear: to try to prevent enforcement of the Final Award.

Furthermore, and perhaps most important, the unproven allegations remain unconnected to Petitioner. As mentioned, the shareholders of Devas, including Petitioner, were not a party to the winding up proceedings, and as a matter of Indian law cannot be bound by the NCLT's *in personam* judgment in such proceedings. Mukhopadhaya Op. ¶¶ 4.1-4.1.9. In fact, the NCLT was clear on the limited scope of its holding: "since fraudulent activities are attributed to ***Devas and its officers*** from the date of its incorporation, as detailed *supra*, ***its shareholders have no role in the instant proceedings*** at the present stage, as their liability is limited to their share-holding." *Id.* ¶ 4.4 (emphasis added). Therefore, as a matter of Indian law, the allegations, even if they were ever to be substantiated, simply do not implicate Petitioner in any misconduct.

The NCLT issued its judgment on May 25, 2021. Shortly thereafter, India was served in this action and in another action by Devas's other shareholders to enforce an arbitration award arising out of the same conduct. *See* 1:21-cv-00106-RCL, ECF No. 10. With the goal of preventing the enforcement of the Final Award, the appellate court (NCLAT) and Supreme Court both included gratuitous dicta that contradicted the NCLT's finding that the alleged fraud did not implicate Devas's shareholders, like Petitioner, and instead attributed responsibility to Petitioner, even though Petitioner purchased its shares in Devas three years after the alleged fraud took

place. *Id.* ¶ 4.7; *see also* Indian Supreme Court Judgment ¶ 12.8(xiv)-(xv) (Devas shareholders allegedly were "fully aware" of the alleged fraud and therefore "must take the blame for the misdeeds of the directors."). As a former judge on the NCLAT and Justice of the Indian Supreme Court testified on behalf of Petitioner in proceedings in Singapore, these remarks implicating Petitioner were *dictum* and have no legal effect, particularly since neither the appellate tribunal nor Supreme Court made new findings of fact. Mukhopadhaya Op. ¶¶ 4.7, 4.9. The allegations in the Charge Sheet remain unproven to this day, and there is still no evidence that Petitioner – which acquired an indirect interest in Devas three years after the alleged fraud occurred – ever knew about (let alone participated in) any alleged misconduct.

B. India Persists in Its Attempts to Evade Payment of the Award

The Final Award provides, "The Republic of India ***shall*** pay to Deutsche Telekom AG the amount of USD 93.3 million, together with interest." Final Award, ¶ 357(a) (emphasis added). It is plainly phrased in mandatory terms. Other legal instruments make clear that paying this amount is an obligation of India's under international law. Article 9(2)(b)(v) of the Treaty provides, "The decision of the arbitral tribunal shall be final and binding ***and the parties shall abide by and comply with the terms of its award***." (emphasis added). Likewise, Article 32(3) of the 1976 UNCITRAL Rules, under which the arbitration was conducted, provides, "The award shall be . . . final and binding on the parties. The parties ***undertake to carry out the award without delay***." (emphasis added). Finally, after India failed to challenge the Final Award, the Civil Court for the Republic and Canton of Geneva declared the Final Award "legally binding." *See* Certificate of Enforceability, ECF No. 1-9.

Therefore, India's obligation to pay the amount due under the Final Award is conclusively established. However, India has failed to comply with its legal obligation.

Rather than pay the Award, India has forced Petitioner to chase its assets around the

world. In Swiss enforcement proceedings, Petitioner successfully attached funds held for India's benefit by the International Air Transport Association ("IATA"), an organization that collects fees from airlines for the use of a country's airspace and distributes them to the relevant country. Petitioner obtained that attachment on January 7, 2022. In response, on April 1, 2022, India withdrew from the IATA to prevent the attachment of additional funds. Second Boykin Decl., Ex. E, Sixth Affidavit of Dr. Ina Roth ("6th Roth Aff."), ¶ 32. India's attempt to put its assets beyond the reach of Petitioner justifies denying the stay motion and ordering India to post security for the full amount of the award.

ARGUMENT

I. India's Jurisdictional Objections are Ripe for Resolution and will not be Affected by the Swiss Revision Proceedings

India asserts that a stay is necessary because resolution of the Swiss revision proceeding "would alter or render entirely moot many of the legal and factual questions at issue in this case." Stay Motion at 7. This is not true. The motion currently before the Court concerns whether the Court has subject matter jurisdiction over this action to enforce the Final Award.[5] Before reaching the merits of this case, India has presented to the Court two threshold jurisdictional questions: (1) whether the matter should be dismissed under *forum non conveniens*; and (2) whether India has waived its sovereign immunity under the FSIA. India's MTD, ECF No. 11-1,

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[5] In its Opposition to India's Motion to Dismiss under Rule 12(b)(1), Petitioner observed how, under the settled law of this Circuit, India's arguments constituted defenses to enforcement and did not bear on India's immunity. *See* Pet. Opp. to MTD, I.A.2; *see also LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021) ("arbitrability of a dispute is not a jurisdictional question under the FSIA. . . . We construe Moldova's arbitrability argument as a defense under Article V(1)(c) of the Convention."). Because India's arguments do not raise jurisdictional questions under the FSIA but rather constitute defenses to enforcement, Petitioner urged this Court to proceed to grant the Petition. Pet. Opp. to MTD at 9.

at 2. These questions have been fully briefed and are ripe for adjudication. *See* Pet. Opp. to MTD, ECF No. 14; MTD Reply, ECF No. 17.

India's Stay Motion is based on a revision application in Switzerland that affects whether or not India has a basis ***to resist enforcement of the Award*** under Article V(1)(e) of the New York Convention, which gives courts discretion (but does not require them) to refuse enforcement of an award that "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." India itself concedes the same, explaining that "[a]waiting the result of the revision proceeding before any further action in this case is prudent because the Swiss Federal Supreme Court's decision to annul the Awards would render the Awards unenforceable under the New York Convention, Article V(1)(e)." Stay Motion at 10; *see also id.* at 8 ("Here, revision of the Awards would have the same legal effect as annulment or set-aside under Swiss law—that is, voiding the Awards such that they may be refused enforcement under the New York Convention. See Boog Decl. ¶ 17; ***New York Convention, art. V(1)(e)***" (emphasis added)); Boog Decl. ¶ 17 ("Under Swiss law, revision of an arbitral award is equivalent in effect to set-aside or annulment proceedings of the same award.").

Mr. Boog never addresses in his affidavit India's tactical decision not to seek a stay of enforcement of the Final Award from the Swiss Federal Supreme Court, and he overstates the legal effect of any revision of the Final Award. Article V(1)(e) of the New York Convention does not require this Court to refuse enforcement of the Final Award. Rather, it provides that "recognition and enforcement of the [Final Award] *may* be refused" if the Final Award "has been set aside or suspended" by the Swiss Federal Supreme Court. The Swiss Court has neither set aside nor suspended the Final Award. India chose not to seek a suspension of the enforcement of the Final Award and, as explained below, the Swiss Federal Supreme Court is extremely unlikely

to grant India's revision application and set aside the Final Award. Even if either were to happen, this Court would not be bound by such a decision and retains discretion as to whether or not to recognize and enforce the Final Award.

In any event, India has made clear that the issues it is raising in its revision application have no bearing on the question of its immunity under the FSIA, but rather concern potential defenses to enforcement of the Final Award, including that "Petitioner's claims are precluded because the underlying 2005 contract is invalid due to fraud and collusion." India's MTD at 1-2; MTD Reply at 24 (describing the allegations of fraud as "public-policy defenses" under the New York Convention). Indeed, at no point does India state in its Stay Motion that the revision in Switzerland would affect its sovereign immunity or impact its arguments under *forum non conveniens*. Nor can it. The possibility that the Award may be annulled is relevant only to whether India can resist enforcement under the New York Convention.[6] Moreover, India has repeatedly insisted that it cannot be compelled to assert its defenses under Article V of the New York Convention until after its motion to dismiss is decided.

Indeed, this Circuit's recent case-law makes clear that whether an arbitral award is annulled or set aside has no impact on a state's sovereign immunity or the U.S. court's jurisdiction. In March 2022, the D.C. Circuit upheld the district court's denial of Nigeria's motion to stay pending set-aside proceedings in London. *Process and Indus. Dev. Ltd. v. Fed.*

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6. India's concession proves too much. India claims that the fraud allegations before the Swiss court bear on whether Petitioners had a protected "investment" under Treaty. *See* Stay Motion at. 9. It then states that this is relevant to a defense to enforcement under the New York Convention. *Id*. at 10. This proves Petitioners' point that India's "sovereign immunity" defenses – which likewise alleged that Petitioners lacked a protected "investment" under the Treaty – are defenses to enforcement under the New York Convention, *not* questions of sovereign immunity bearing on this Court's subject-matter jurisdiction. Pet. Opp. to MTD at 7-9.

Republic of Nigeria, 27 F.4th 771, 772-73 (D.C. Cir. 2022). In that case, Nigeria had initiated set-aside proceedings in London which were dismissed as untimely. *Id*. at 772-73. Nigeria then commenced a criminal investigation into the petitioner – reminiscent of India's actions in this case – and applied to the English court to extend the deadline to challenge the award based on "what it characterized as new evidence of fraud in the arbitration and underlying contract negotiations." *Id*. at 773. The English court granted Nigeria's request and scheduled a trial to decide the issues. *Id*. The U.S. District Court for the District of Columbia declined to stay the case pending the London set-aside proceedings because "the implications of the set-aside order were arguably irrelevant to the jurisdictional analysis and properly suited for consideration at the merits stage." *Id*. at 774. The D.C. Circuit agreed, explaining that "the *validity or enforceability* of an arbitral award is a merits question" and therefore "Nigeria's argument is foreclosed . . . and the district court need not determine the validity of the arbitral award as part of its jurisdictional inquiry." *Id*. at 776 (emphasis in original); *see also id.* at 772 ("We conclude that a foreign court's order ostensibly setting aside an arbitral award has no bearing on the district court's jurisdiction and is instead an affirmative defense properly suited for consideration at the merits stage.").

One month later, the D.C. District Court similarly denied Russia's motion to stay pending set-aside proceedings in the Netherlands. *Hulley Enters. Ltd. v. Russian Fed'n*, Civil Action No. 14-1996 (BAH), 2022 WL 1102200 (D.D.C. Apr. 13, 2022). In *Hulley*, Russia had appealed a Dutch court's decision not to set aside the arbitration award on the basis of "procedural frauds" that took place during the arbitration. *Id*. at *1, 5. Before the district court, Russia argued that "because its allegations of procedural fraud are relevant to its jurisdictional defense, this Court should wait for the [Dutch court] to first rule on those allegations." *Id*. at *8. The district court

disagreed. Relying on *Process and Industrial Development*, the court held that "assessment of this Court's jurisdiction is independent of any Dutch court ruling to set-aside—or not—the award. Indeed, the Russian Federation's motion to dismiss on sovereign immunity grounds is fully briefed and ripe for resolution." *Id*.

Even though set-aside proceedings have already concluded with the Swiss Federal Supreme Court affirming the Interim Award and India electing not to challenge the Final Award, *Process and Industrial Development* and *Hulley* are nevertheless instructive. India has applied for the extraordinary remedy of revision in a foreign court based on allegations of fraud and is attempting to use the exceedingly remote potential for revision of the Awards to delay this Court's decision on its ***subject matter jurisdiction***, despite the fact that the jurisdictional questions have been fully briefed and are not impacted by the Swiss revision proceedings. There is no reason for this Court to wait to decide issues that have been fully briefed. *Tethyan Copper Company Pty Ltd. v. Islamic Republic of Pakistan*, NO. 1:19-CV-02424 (TNM), 2022 WL 715215, *4 (D.D.C. Mar. 10, 2022) (denying motion to stay pending revision application to ICSID and holding that "[t]he Court need not wait to decide fully briefed issues. Indeed, judicial economy also favors swift adjudication.").

It would be the height of inefficiency for this Court not to proceed to rule on India's Rule 12(b)(1) motion. Consistent with this Circuit's prior decisions in *Process and Industrial Development* and *Hulley*, this Court should deny India's motion to stay and proceed with a determination on India's motion to dismiss for lack of jurisdiction. At best, India's Stay Motion is premature and should only have been made after this Court affirms its subject matter jurisdiction over the Petition. But, as explained below, a motion for a stay following this Court's ruling on India's Rule 12(b)(1) motion would, in any case, fail on the merits.

II. A Stay Is Not Warranted

A. India's Cited Case Law is Inapposite

India notes that there are "eighteen previous decisions where this Court has stayed enforcement proceedings . . . pending the results of annulment or set-aside proceedings in another forum." Stay Motion at 7-8 (emphasis in original). All of these cases are inapposite. In every single one of these eighteen cases, including *Devas v. India*, the foreign sovereign was pursuing the first round of judicial review of the arbitral award.[7] In *Devas v. India*, on which India places particular reliance, the court granted a stay based on two pending set-aside proceedings in the Netherlands challenging both the merits award (on appeal before the Dutch Supreme Court) and the quantum award (before The Hague District Court). *Devas v. India*, 1:21-cv-00106-RCL, 2022 WL 873620 (D.D.C. Mar. 24, 2022) at *2-3, 7, 12. In that case, Judge Lamberth noted that "India began the set-aside proceedings *years before this present case*" and that "India appears to be pursuing potential remedies in the Netherlands on a timely basis." *Id*. at *7 (emphasis added).

The instant case presents a very different factual circumstances than *Devas v. India* and the other cases cited by India—India has already had its judicial review of the Interim Award and lost, and India expressly chose not to pursue judicial review of the Final Award. The Swiss Federal Supreme Court issued a certificate of non-appeal on August 7, 2020, and the Civil Court for the Republic and Canton of Geneva certified that the Final Award is enforceable on August 20, 2020. *See* First Boykin Decl., Ex. F, Certificate of Enforceability, ECF No. 1-9. After

7. Furthermore, in some, there were special circumstances that indicated the first-instance review would result in the award being set-aside. *See Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, 2020 WL 2996085, at *4 (D.D.C. June 4, 2020) (noting that the arbitral award contained a dissent).

Petitioner began to have success enforcing the Final Award, and over a year after the present enforcement proceedings were initiated, India suddenly now seeks an extraordinary second form of judicial review based on alleged "new" facts that are not at all new. India does not present a single case that involved the procedural posture similar to the one at issue in this case.

In any case, the weight of authority is far less unanimous than India claims. India ignores at least <u>fourteen cases</u>[8] in which this Court has declined a foreign sovereign's request for a stay pending foreign set-aside proceedings. More important, these cases are far more apposite to the present one, because the procedural posture in several of them was similar to the posture here: namely, the foreign sovereign had already had one instance of judicial review of the award and sought a stay of enforcement while it conducted appellate rounds of judicial review or a "revision" based on allegedly "new" evidence of fraud. *See e.g.*, *Hulley*, 2022 WL 1102200, at *1; *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 506 F. Supp. 3d 1, 3 (D.D.C. 2020); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 119 (D.D.C. 2015).

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8. *Chevron Corp. v. Republic of Ecuador*, 949 F.Supp.2d 57 (D.D.C. 2013); *Hulley Enterprises Ltd. v. Russian Federation*, Civil Action No. 14-1996 (BAH), 2022 WL 1102200 (D.D.C. Apr. 13, 2022); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 121-22 (D.D.C. 2015); *G.E. Transp. S.P.A. v. Republic of Albania*, 693 F. Supp. 2d 132, 137-38 (D.D.C. 2010); *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 697 F. Supp. 2d 46, 59-60 (D.D.C. 2010); *LLC Komstroy v. Republic of Moldova*, No. 14-cv-01921, 2018 WL 5993437, at *4 (D.D.C. Nov. 13, 2018), *aff'd* 985 F.3d 871 (D.C. Cir. 2021); *LLC SPS Stileks v. Republic of Moldova*, Case No. 14-cv-01921 (CRC), 2021 WL 5318029 (D.D.C. Nov. 16, 2021); *Rusoro v. Venezuela*, 300 F.Supp.3d 137 (D.D.C. 2018); *Science Applications Int'l Corp. v. Hellenic Rep.*, 13 Civ. 1070 (GK), 2017 WL 65821, at *4 (D.D.C. Jan. 5, 2017); *Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas*, 314 F. Supp. 3d 95, 105–08 (D.D.C. 2018); *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 506 F. Supp. 3d 1, 5–6 (D.D.C. 2020); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, NO. 1:19-CV-02424 (TNM), 2022 WL 715215, *4 (D.D.C. Mar. 10, 2022); *TECO Guatemala Holdings v. Guatemala*, 414 F.Supp.3d 94 (D.D.C. 2019); *Tatneft v. Ukraine*, 301 F.Supp.3d 175 (D.D.C. 2018).

B. Legal Standards Governing a Motion for a Stay

In general, a court evaluating whether to use its inherent power to issue a stay weighs two considerations: judicial economy, and the balance of hardships between the parties. *See Landis v. North American Co.*, 299 U.S. 248, 255 (1936). In the context of a stay under the New York Convention, courts consider the six *Europcar* factors:

> (1) the general objectives of arbitration–the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;
>
> (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;
>
> (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
>
> (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;
>
> (5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the Convention, the party seeking enforcement may receive "suitable security" and that, under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country, ...; and
>
> (6) any other circumstances that could tend to shift the balance in favor of or against adjournment.

Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 317-18 (2d Cir. 1998).

However, the D.C. Circuit and this Court have also analyzed the *Europcar* factors when assessing whether to issue a stay under their inherent powers, because they recognize that the *Landis* and *Europcar* frameworks are easily synthesized, and that the first two *Europcar* factors

are the most closely-aligned with the *Landis* considerations. *LLC Komstroy v. Republic of Moldova*, 985 F.3d 871, 880 (D.C. Cir. 2021) ("We agree with the Europcar court that a district court would abuse its discretion if it failed to consider the first and second factors. We think these factors directly implicate the court's responsibility to balance the Convention's policy favoring confirmation of arbitral awards against the principle of international comity embraced by the Convention. . . . We thus focus our attention on the district court's analysis of the first two factors."); *Hulley Enterprises Ltd. v. Russian Federation*, 502 F.Supp.3d 144, 153-54 (D.D.C. 2020) ("the *Europcar* factors neatly comport with and explicate the more general considerations guiding the exercise of the Court's inherent authority to issue a stay in the context of an arbitral award enforcement action. To be more precise, the first four *Europcar* factors focus on considerations of "economy of time and effort for [the court], for counsel and for the litigants," and the fifth and sixth factors highlight the "benefit and hardship" to the parties). India does not even mention the *Europcar* factors, perhaps because it is aware that these favor Petitioner. *See Chevron*, 949 F.Supp.2d 57, 72 (D.D.C. 2013) (noting Ecuador's initial failure to cite *Europcar* while denying its motion for a stay).

C. The Relevant Legal Factors Weigh Decidedly Against a Stay

While the law of this Circuit makes clear that the first two *Europcar* factors predominate the inquiry, each of the factors favors Petitioner and makes clear that a stay is not warranted.

1. Expeditious Resolution of Disputes

This factor strongly favors Petitioner. In general, "[s]tays are undesirable because 'the adjournment of enforcement proceedings impedes the goals of arbitrations—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation.'"); *Science Applications Int'l Corp. v. Hellenic Rep.*, 13 Civ. 1070 (GK), 2017 WL 65821, at *2 (D.D.C. Jan. 5, 2017) (quoting *Europcar*, 156 F.3d at 317). India breached the Treaty in 2011, and Petitioner

first filed its Request for Arbitration in 2013 after India refused to compensate Petitioner for its damages. This underlying dispute has been ongoing for eleven years, and the Parties have already gone through a seven-year arbitration and a one-year set-aside proceeding in Switzerland. Courts have routinely found that the first factor weighs in favor of petitioners in cases where the litigation has spanned shorter time periods. *G.E. Transp. S.P.A. v. Republic of Albania*, 693 F.Supp.2d 132, 139 (D.D.C. 2010) (arbitration proceedings of four years "plainly weigh in favor of confirmation rather than adjournment"); *Chevron Corp. and Texas Petroleum Co. v. Republic of Ecuador*, 949 F.Supp.2d 57, 72 (D.D.C. 2013) (in a case submitted to arbitration six years earlier, further delay would "surely . . . not constitute 'expeditious resolution' of the dispute"); *Gold Reserve, Inc. v. Bolivarian Republic of Venezuela*, 146 F.Supp.3d 112, 135 (D.D.C. 2015) (first factor certainly favors enforcement where petitioner filed for arbitration more than six years earlier); *Science Applications Int'l Corp. v. Hellenic Rep.*, 13 Civ. 1070 (GK), 2017 WL 65821, at *2 (D.D.C. Jan. 5, 2017) (noting "there can be little disagreement on the issue" that the first factor favors petitioner where the most recent request for arbitration was filed seven years prior).

2. Status and Length of Foreign Proceedings

This factor also weighs heavily in favor of Petitioner. The foreign proceedings will not impact the instant case, and therefore do not counsel in favor of a stay. As Mr. Scherer explains in detail, India's chances of success with the revision application are "fanciful." Scherer Aff., ¶ 34. Specifically, its allegations are neither timely, new, nor material, and India depends on the Swiss Supreme Court making new law in order to prevail on its application. Scherer Aff., ¶¶ 61-78. Furthermore, the facts that India did not seek a stay of the enforcement proceedings in Switzerland and wrote the application in English rather than any of the four national languages of Switzerland suggest that the application is nothing more than an attempt to fabricate a

roadblock to this Court's ruling on its motion to dismiss and subsequent rulings on the merits. Scherer Aff., ¶¶ 21-33.

Even in the unlikely event that the Swiss Federal Supreme Court were to annul the Awards, that would not be dispositive of India's motion to dismiss. U.S. courts may enforce an annulled award "if the annulment is repugnant to fundamental notions of what is decent and just in the United States." *Getma Int'l v. Republic of Guinea*, 862 F.3d 45, 48 (D.C. Cir. 2017); New York Convention, Art. V(1)(e) (enforcement of the award "may" be refused if it has been set aside). That high bar would be met in this case for two reasons.

First, as detailed above, the *ex parte* process of winding up Devas that is the basis of the revision application was conducted in violation of Indian substantive law and fundamental due process. *See supra* at 10-14. In fact, the Indian Supreme Court justified these deviations on the grounds that Petitioner was seeking to enforce the Final Award. *Id.*

Second, the alleged fraud has nothing to do with Petitioner. The relevant conduct occurred—if at all—before Petitioner invested in Devas. India tries to paper over this fact with the Indian Supreme Court's gratuitous remark that Devas's shareholders "must bear equal responsibility for the fraud." Stay Motion at 5. As noted above, this was a statement in *dicta* that the Supreme Court was not authorized to make (and, the timeline suggests, it made specifically with an eye towards these proceedings). Mukhopadhaya Op. ¶ 4.7. Such a statement does not bind this Court. Moreover, a foreign court's *ex parte* application of retroactive vicarious liability on shareholders certainly has no equivalent in U.S. law, and appears to be "repugnant to fundamental notions of what is decent and just in the United States." *Getma*, 862 F.3d at 48.

Another relevant consideration under the "status of the foreign proceedings" factor is whether this Court will have to hear the same allegations as in the foreign proceedings. *Hulley*,

2022 WL 1102200 at *7-8. India has made clear that it has reserved its right to raise before this Court the same allegations it has raised in its revision application after this Court's ruling on India's Motion to Dismiss. *See* MTD at 2 (India's "Article V challenges may potentially include, the grounds that . . . Petitioner's claims are precluded because the underlying 2005 contract is invalid due to fraud and collusion."). Just as in *Hulley*, India "undercuts its own argument to let the [Swiss] courts go first in ruling on these fraud allegations by representing that these same allegations will have to be examined de novo by this Court too[.]" *Hulley*, 2022 WL 1102200 at *8. In *Hulley*, this Court held that "fraud allegations now subject to review before a [Swiss] court may have to be confronted and dealt with here, too, and thus waiting for this foreign litigation to conclude would simply delay, not eliminate, the need for this Court's consideration of the issues." 2022 WL 1102200 at *8. But in this case, both the arbitral tribunal and the Swiss Federal Supreme Court in its review of the Interim Award have already held that the fraud allegations did not implicate Petitioner. Swiss Court Decision, ¶¶ 4.1, 4.4-4.5. Thus, even more so than in *Hulley*, this factor counsels against a stay.

Therefore, the first two factors, which implement *Landis* and are the most important, strongly weigh against a stay. The remaining factors only reinforce why a stay is unwarranted.

3. The Award will Receive Lesser Scrutiny in Switzerland under a Similarly Deferential Standard of Review

This factor weighs against a stay unless a foreign court applies "substantially less deferential" review to the award as would the U.S. court in enforcement proceedings. *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 697 F. Supp. 2d 46, 61 (D.D.C. 2010).

The Award will receive lesser scrutiny in Switzerland than before this Court. While this Court may apply any of the seven grounds listed in Article V of the New York Convention, *see* 9 U.S.C. § 207, the Swiss Federal Supreme Court will apply only one narrow basis for review:

whether the allegedly "new" evidence India invokes could have had a material impact on the outcome of the arbitration. *See* Scherer Aff., ¶¶ 49, 66.

Furthermore, since the Swiss Federal Supreme Court has already affirmed the Interim Award once after applying *de novo* review, the review in the revision application proceeding will be deferential. At least, India has not produced any evidence to suggest that the Swiss Court's review will be "substantially less deferential" than the review by this Court.

Therefore, this factor weighs against a stay.

4. The Characteristics of the Swiss Proceedings Militate Against a Stay, and Evidence Indicates India Initiated Them with Intent to Delay

This factor asks four "simple" questions about the foreign proceedings, each of which clearly favors Petitioner. *See Science Applications Int'l Corp. v. Hellenic Rep.*, 13 Civ. 1070 (GK), 2017 WL 65821, at *3-4 (D.D.C. Jan. 5, 2017).

First Question: Was the foreign proceeding brought to enforce an award, which favors a stay, or was it brought to set the award aside, which weighs against a stay? *Europcar*, 156 F.3d at 318. It is undisputed that India submitted its revision application to set the award aside and remand the case to the arbitral tribunal, restarting a years-long process that will only drag this dispute on further. This sub-factor favors Petitioner.

Second Question, Was the foreign proceeding initiated before the underlying enforcement action so as to raise concerns of international comity? *Europcar*, 156 F.3d at 318. This question makes clear that it is the first-filed action that matters. India, which did not discuss this question (or any of the *Europcar* factors in its Motion), distorts the notion of international comity by ignoring the significance of the sequence of actions. Stay Motion at 13-14. It cites *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1985) for the proposition that the "central precept of comity . . . fosters international cooperation and

encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations." Stay Motion at 13. This is correct, which is why the *Laker* court chided a UK court for ***not*** respecting the principles of comity by refusing to defer to the ***first-filed*** case in the United States.[9] *See Laker*, 731 F.2d at 939 ("Since the action . . . was first instituted in the United States, the initial opportunity to exercise comity, if this were called for, was put to the United Kingdom courts. . . . The appellants' claims of comity now asserted in United States courts come burdened with the failure of the British to recognize comity.").

Furthermore, the *Laker* court was acutely aware that the parties seeking to use comity to secure deference to a later-filed action were doing so to obstruct the American proceedings in bad faith. "There never would have been any situation in which comity . . . would have become an issue if some of the defendants involved in the American suit had not gone into the English courts to generate interference with the American courts." *Laker*, 731 F.2d at 939-40. India has done the exact same thing here, and this Court should not be fooled by this tactic.

It is undisputed that this action was filed before the revision application. This action was filed on April 19, 2021, whereas the Swiss revision application was filed on May 2, 2022. Moreover, principles of comity could only conceivably be implicated in this case if India had sought and obtained a stay of enforcement from the Swiss Federal Supreme Court in connection with its revision application. India did not seek a stay of enforcement from the Swiss court,

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9. The plaintiff in *Laker* brought antitrust claims against various international airlines in US District Court. Several of the defendants went to a UK court to secure a declaration that they were not engaged in a conspiracy and an injunction prohibiting plaintiff from taking any action in US courts to redress alleged violations of US antitrust laws. The District Court issued a competing injunction to protect its jurisdiction. The case went before the DC Circuit when the defendants invoked principles of comity to appeal this injunction. *See Laker*, 731 F.3d at 917-21.

presumably because it feared the court would not issue a stay. Scherer Aff., ¶ 24. It is a perverse notion of comity that would require this court to grant relief that the movant expressly chose not to seek from a foreign court. This sub-factor favors Petitioner.

Third Question: Was the foreign proceeding initiated by the party now seeking to enforce the award in federal court, which weighs in favor of a stay? *Europcar*, 318 F.3d at 318. It is undisputed that India, not Petitioner, initiated the foreign proceeding. This sub-factor favors Petitioner.

Fourth Question: Was the foreign proceeding initiated under circumstances that indicate an intent to hinder or delay resolution of the dispute? *Europcar*, 156 F.3d at 318. As explained above, the content and language of India's revision application, India's failure to ask for a stay of enforcement in Switzerland, which it was entitled to do but avoided requesting from the Court, and the context leading up to the application (namely, India's deployment of its criminal investigators and courts in violation of Indian law), suggest that the revision application was made with intent to delay. This sub-factor favors petitioner.

With each of the sub-factors indisputably favoring Petitioner, the fourth *Europcar* factor weighs heavily in Petitioner's favor.

5. The Balance of Hardships Favors Petitioner

If this action is stayed, Petitioner will be prejudiced and India will not be. A stay would give India the opportunity to continue and expand its efforts to divest international assets and resist enforcement of the Final Award. India has already taken unilateral steps to thwart Petitioner's successful attempts to collect its debt. Specifically, India has withdrawn from the IATA after Petitioner successfully attached India's interest in funds held by the association and divested its interest in Air India in New York after Petitioner sought enforcement of the Awards against Air India. *See supra* at 14-15.

When the delay caused by a stay would increase the difficulty a petitioner faces in identifying and securing a sovereign debtor's assets, the petitioner is prejudiced and this fact weighs against a stay. *See Hulley*, 2022 WL 1102200 at *9. This is further magnified when the sovereign debtor has already demonstrated its willingness to flout procedural rules in order to hide assets and avoid paying. *See Tethyan*, 2022 WL 715215 at *5 (Pakistan's refusal to comply with ICSID's requirement to post a letter of credit for 25% of the award in order to obtain a stay "credits Tethyan's worry that Pakistan might use a stay to avoid preserving its US assets while the annulment proceedings continue"). This creates a balance that tips heavily in Petitioner's favor.

Moreover, Petitioner invested nearly a hundred million dollars in India and lost that investment as a result of India's Treaty breach. *See* Final Award, ¶ 293. India's eleven-year failure to compensate Petitioner has caused and is continuing to cause hardship to Petitioner. *See Science Applications Int'l Corp. v. Hellenic Rep.*, 13 Civ. 1070 (GK), 2017 WL 65821, at *4 (D.D.C. Jan. 5, 2017) ("it is certainly clear that Respondent . . . will not have to endure possible hardship given the fact that it is a country with a treasury and all the resources that a government has, whereas, the Petitioner is a private firm that may well suffer hardship for not gaining access to the substantial amount of money [it is owed]".)

With each *Europcar* factor weighing in Petitioner's favor, it is clear that a stay is not warranted even after the resolution of India's jurisdictional objections.

III. Any Stay Should be Conditioned on India Posting Security

In any event, if this Court is at all inclined to grant a stay notwithstanding the above, it should condition such a stay on India posting security for the full face value of the Final Award (plus post-Award interest) pending the resolution of the Swiss proceedings.

A. The Court Is Not Precluded from Ordering Security

Citing § 1610 of the Foreign Sovereign Immunities Act ("FSIA"), India argues that this Court may not order it to post security because it has not waived its immunity from pre-judgment attachment. Stay Motion at 17. This argument is misguided.

By citing § 1610 of the FSIA, India skips over § 1609. Section 1609 exempts actions under the New York Convention from the FSIA's provisions on pre-judgment attachment. Section 1609 provides that foreign states' immunity from pre-judgment attachment is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. § 1609. The FSIA was enacted in 1976. The United States acceded to the New York Convention in 1970 and remained party to it when adopting the FSIA six years later. *See* Declaration of the United States of America, Sept. 30, 1970, 21 U.S.T. 2566, 751 U.N.T.S. 398. The carve-out in FSIA § 1609 therefore applies to the New York Convention. The Convention, in turn, explicitly empowers courts to order award debtors to post security as a condition of a stay on enforcement proceedings pending the debtor's attempts to set-aside the award. *See* N.Y. Convention, Art. VI ("If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, *order the other party to give suitable security*." (emphasis added)).

Several courts have found that the New York Convention, read together with the carve-out in § 1609 of the FSIA, allows them to order sovereign award debtors to post security when the debtors seek to stay enforcement of the award pending set-aside proceedings. *See Skandia Am. Reinsurance Corp. v. Caja Nacional de Ahorro y Seguro*, No. 96 Civ. 2301, 1997 U.S. Dist. LEXIS 7221, at *16 (S.D.N.Y. May 23, 1997) ("I find that Article VI of the New York

Convention allows me to require sovereigns to post pre-judgment security if they move to set aside or suspend an arbitration award."); *International Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 2001 WL 322005 *3 (N.D. Ill. Apr. 2, 2001) ("Accordingly, pursuant to the New York Convention, defendant is not immune from the posting requirement of the Illinois Insurance Law."); *Banco de Seguros del Estado v. Mutual Marine Offices, Inc.*, 230 F. Supp. 2d 362, 374 (S.D.N.Y. 2002) (arbitral tribunal that ordered sovereign to post pre-award security did not manifestly disregard applicable American law because "the Panel could have reasonable inferred from *Skandia* and *Caja* that it could lawfully impose prejudgment security on Banco. Uruguay, like Argentina, is a signatory to the New York Convention."); *cf. Caribbean Trading & Fid. Co.*, No. 90 Civ. 4169, 1990 U.S. Dist. LEXIS 17198, at *17, 22 (S.D.N.Y. Dec. 18, 1990) (requiring a "statutory corporation owned entirely by the Government of Nigeria" and entitled to FSIA protections to post security under the New York Convention). Therefore, the FSIA does not protect India from pre-judgment attachment in cases under the New York Convention. Therefore, India's only stated argument for avoiding posting security is meritless.

Petitioner recognizes that this Court has been reluctant to order security from foreign sovereigns in the exercise of its case management discretion while jurisdictional objections based on sovereign immunity are pending. *Hulley Enterprises Ltd. v. Russian Fed'n*, 502 F. Supp. 3d 144, 164 (D.D.C. 2020); *CC/Devas (Mauritius) Ltd. v. Republic of India*, No. 1:21-cv-106-RCL, 2022 U.S. Dist. LEXIS 53416 at *19 (D.D.C. Mar. 24, 2022). However, there are two reasons why the Court should exercise its case management discretion and order India to post security.

First, as Petitioner explained, India has not put forward actual jurisdictional objections before this Court. India's Motion to Dismiss argues that there was no arbitration agreement because Petitioner was not a protected "investor" with a protected "investment" under the Treaty.

As Petitioner explained in its Opposition to the Motion to Dismiss, under the settled law of this Circuit, such arguments are not sovereign immunity questions bearing on this Court's jurisdiction, but rather are arbitrability questions that are possible defenses to enforcement under Article V of the New York Convention. *See* Pet. Opp. to MTD, I.A.2; *see also LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021) ("arbitrability of a dispute is not a jurisdictional question under the FSIA. . . . We construe Moldova's arbitrability argument as a defense under Article V(1)(c) of the Convention."). India's mischaracterization of defenses to enforcement under the Convention as jurisdictional objections based on sovereign immunity does not deprive this Court of authority to order it to post security.

Second, even if the Court were to accept India's mischaracterization of its defense against enforcement as implicating its immunity, the issue will be moot after the Court rules on India's Motion to Dismiss. As explained above, the Motion to Dismiss has been fully briefed, is ripe for resolution by this Court, and (as conceded by India) will not be affected by the Swiss revision proceedings. *See supra* at 15-19. Once this Court rules on (and denies) the Motion to Dismiss, it could then freely order the posting of security as a condition for granting any renewed request for a stay by India.

Therefore, if this Court were at all inclined to stay these proceedings, either now or upon a renewed request by India after the Court's ruling on the Motion to Dismiss, it should order India to post security as a condition of granting any stay.

B. An Order of Security would be Necessary and Appropriate

An order of security is not only legally permissible, but necessary and appropriate under the circumstances in light of India's refusal to pay the Final Award and persistent attempts to shield its worldwide assets from enforcement. Petitioner recognizes that "courts in this Circuit generally have not required foreign sovereigns to post security because they are 'presumably . . .

solvent and will comply with legitimate orders issued by courts in this country or in [their home jurisdiction.].' *Novenergia II — Energy & Env't (SCA) v. Kingdom of Spain*, No. 18-cv-01148, 2020 U.S. Dist. LEXIS 12794 at *16 (D.D.C. Jan. 27, 2020) (citing *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 76 (D.D.C. 2011)). However, there is ample evidence to rebut this presumption in this case.

First, India has been divesting itself of foreign assets specifically in response to Petitioner's attempts to enforce the Final Award. In Switzerland, after Petitioner successfully attached certain payments held by the IATA for India's benefit, India withdrew from the IATA to prevent the attachment of additional funds. 6th Roth Aff. ¶ 32. In the United States, after Petitioner began proceedings to enforce the Final Award against its alter ego, Air India, India suddenly concluded a deal with Tata Group to privatize that airline after years of trying to find a buyer. After the announcement of the pending sale of Air India to Tata Group but prior to closing, Air India took the position in enforcement proceedings in New York that the privatization would render Petitioner's enforcement claim moot. *See Deutsche Telekom AG v. Air India*, 1:21-cv-09155-UA (S.D.N.Y Jan. 27, 2022) (ECF No. 31) ("India's divestment of Air India will necessarily prevent plaintiffs from enforcing their as-yet unconfirmed arbitration awards against Air India's U.S. assets . . . Air India is prepared to move to dismiss on the basis that the closing of the [divestment] sale renders plaintiff's actions moot.").[10] Through its deliberate actions India is transforming itself from "a sovereign country with economic tendrils

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10. *Air India: Tata Sons conglomerate seals $2.4bn takeover deal*, THE GUARDIAN (Oct. 8, 2021)), https://www.theguardian.com/business/2021/oct/09/air-india-tata-conglomerate-in-24bn-takeover-deal. The court in New York has stayed those enforcement proceedings pending this Court's ruling on India's Rule 12(b)(1) motion. *See Deutsche Telekom AG v. Air India*, 1:21-cv-09155-UA (S.D.N.Y. Feb. 4. 2022) (ECF No. 33), at 2.

that cross the globe" to "an insecure potential debtor that must be required to post security lest there be no assets to seize at a later date." *Hulley Enterprises Ltd. v. Russian Fed'n*, 502 F. Supp. 3d 144, 164 (D.D.C. 2020). This weighs in favor of an order to post security.

Second, as demonstrated above, India has shown no inclination to pay the Final Award, and there is no indication it will do so even upon an eventual order by this Court. Rather than comply with its obligations under the Treaty and the Award, India marshalled its full suite of sovereign investigatory and judicial resources to try to create court judgments – trampling over its own substantive and procedural law in the process – to serve as the basis for its revision action in Switzerland. Such "troubling points about [India's] respect for, and compliance with, orders issued by [international tribunals] would weigh heavily in favor of requiring a bond." *Hulley*, 502 F. Supp. 3d at 164.

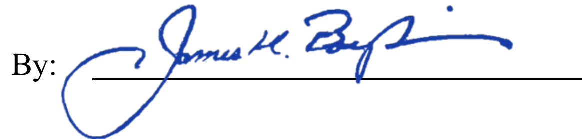
Therefore, this Court should condition any stay of these enforcement proceedings on India posting security in the full amount of the Final Award (including post-Award interest through May 31, 2022).

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests the Court enter an order denying India's Motion to Stay. In the alternative, if the Court is inclined to grant a stay, Petitioner respectfully requests that the Court condition a stay on India's posting full security for the amount owed to Petitioner.

Dated: June 1, 2022

HUGHES HUBBARD & REED LLP

By: 

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