UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEUTSCHE TELEKOM AG, *Petitioner*, v. REPUBLIC OF INDIA, *Respondent*.	Civil Action No. 1:21-cv-01070-RJL

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

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May 18, 2022

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The Republic of India ("India") respectfully moves this Court to stay the present action for the duration of ongoing related litigation in Switzerland, which concerns an application for the revision of the two arbitration awards, the Interim Award (ECF 1-7) and the Final Award (ECF 1-4) (together, "the Awards"), at issue in this case.[1] Switzerland was the place of the underlying arbitration (*i.e.*, the "seat" or "primary jurisdiction"). The revision proceeding may result in the annulment of both Awards—including the Final Award, which the Petitioner is seeking to enforce in the present action. If the Awards are annulled, Petitioner will have nothing to enforce.

The Republic of India initiated the Swiss revision proceeding by filing a revision application at the Swiss Federal Supreme Court on May 2, 2022. *See generally* Revision App. (Boog Decl. Ex. 1). In its application, India seeks revision of the Awards based upon new facts and evidence that emerged after the Awards were rendered that could have led to a different outcome during the arbitral proceeding. *See* Revision App. ¶¶ 19-20; Boog Decl. ¶¶ 13-16. As further explained in the accompanying declaration of India's Swiss counsel in the revision proceeding, Dr. Christopher Boog, if the revision application is granted, the Awards will be "annulled" and rendered unenforceable as a matter of Swiss law. Boog Decl. ¶¶ 17-18; *see also* Revision App. ¶ 150.

India therefore asks this Court to exercise its inherent power to stay the current proceeding for the duration of the revision proceeding pending in Switzerland. *See Landis v. North American Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). Swiss counsel has explained that such

[1] In submitting this Motion to Stay, India does not waive—and expressly reserves—any rights or defenses, including its sovereign immunity.

proceedings are likely to take only 8-12 months, and there is no opportunity for either side to appeal. Boog Decl. ¶ 29. In view of the new Swiss revision proceeding, India's Motion to Stay is justified by judicial economy, international comity, and the balance of hardships, as further elaborated below.

This Court routinely grants motions to stay enforcement proceedings where there is a risk that parallel litigation will result in the annulment of the underlying arbitral award. In fact, just this year, another court in this District granted India's motion to stay pending the conclusion of the set-aside proceedings in the Netherlands in the related *CC/Devas (Mauritius) Ltd. v. Republic of India* proceeding ("*Devas v. India*"), No. 1:21-cv-106-RCL, 2022 U.S. Dist. LEXIS 53416 (D.D.C. Mar. 24, 2022). In *Devas v. India*, Judge Lamberth stated that the Court "will not short-circuit the pending litigation in the Netherlands by sticking its hands into this dispute," and he granted the stay "in light of the interest of judicial economy, respect for international comity, and potential hardship to the parties." *Id*. at *19–20. The same reasoning and relief is appropriate here, where the ongoing revision proceeding in Switzerland could result in the annulment of the Awards underlying the current proceeding. *See* Boog Decl. ¶¶ 17-18.

BACKGROUND

Petitioner Deutsche Telekom AG ("Petitioner" or "DT") is a German company that indirectly held a minority interest in Devas Multimedia Private Limited ("Devas"), an Indian company. *See* Final Award ¶¶ 52–53 (ECF 1-4). DT is seeking to collect more than US$ 101.6 million from India in accordance with the Awards, which were rendered by an arbitral tribunal seated in Switzerland on the basis of the 1995 Agreement Between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments, a bilateral investment treaty (the "Germany-India BIT") (ECF 1-5). *See* Pet. at 34 (ECF 1). A detailed

summary of the facts leading to this dispute and DT's Awards are set forth in India's Motion to Dismiss (ECF 11-1), at 5-17.

On April 19, 2021, DT submitted a Petition to this Court (ECF 1) seeking confirmation of the Final Award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). In response, on September 23, 2021, India filed a Motion to Dismiss on the grounds of *forum non conveniens* and for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611. *See* Mot. to Dismiss (ECF 11); Points and Authorities in Supp. of Mot. to Dismiss (ECF 11-1). India's Motion to Dismiss remains *sub judice*.

In parallel to DT's efforts to enforce the Final Award, proceedings have been ongoing in India in relation to the winding-up of Devas based upon newly-emerged evidence that Devas engaged in fraudulent conduct during the acquisition and operation of the Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft of January 28, 2005 (the "Devas-Antrix Agreement") (ECF 12-1). In particular, on January 18, 2021, Antrix Corporation Limited ("Antrix"), a commercial entity that is wholly owned by the Government of India, commenced the winding-up proceeding against Devas before the National Company Law Tribunal ("NCLT"), based on evidence that emerged during relevant criminal investigations against Devas. NCLT Order ¶ 19(1) (ECF 12-11). The NCLT granted Antrix's petition on May 25, 2021, and appointed an official liquidator to take responsibility for Devas. *Id.* ¶ 38. Subsequently, on September 8, 2021, the National Company Law Appellate Tribunal (the "NCLAT"), an appellate quasi-judicial body, upheld the NCLT Order and confirmed the existence of extensive fraudulent conduct engaged in by Devas during the procurement and operation of the Devas-Antrix Agreement. NCLAT Order ¶ 249 (ECF 12-15). Devas and one of its shareholders, Devas Employees Mauritius

Private Limited, then appealed the NCLAT Order to the Supreme Court of India.

On January 17, 2022, after hearing arguments from both parties and examining the underlying evidence of fraud, the Indian Supreme Court issued a final judgment dismissing Devas's and its shareholder's appeal. Sup. Ct. of India Judgment ¶ 14 (Boog Decl. Ex. 4). The Indian Supreme Court decision is final, binding, and unappealable. *See* Constitution of India, Nov. 26, 2021, art. 141, *available at* https://legislative.gov.in/sites/default/files/COI...pdf ("The law declared by the Supreme Court shall be binding on all courts within the territory of India.").

In its judgment, the Indian Supreme Court concluded that Devas had been formed "for a fraudulent and unlawful purpose" and that "the affairs of the company were conducted in a fraudulent manner," in violation of India's 2013 Companies Act. Sup. Ct. of India Judgment ¶¶ 12.8(ix), (x). Among other determinations, the Indian Supreme Court, the first judicial body to hear the fraud issues, concluded that Devas made fraudulent representations about its ownership of the intellectual property rights to the technology necessary to carry out the alleged investment, that the vast majority of funds purportedly "invested" in Devas were siphoned offshore, and that Devas's shareholders were "fully aware" and responsible for Devas's fraud. *Id.* ¶¶ 12.8(vii), (viii), (x), (xiv), (xv).

In detail, the Indian Supreme Court concluded that:

> **(i)** Antrix officials took multiple steps to conceal the existence of the Devas-Antrix Agreement from the Government of India. In particular, in the course of obtaining authorizations and licenses for Devas, the then-officials of the Department of Space acted "in collusion" with Antrix to conceal Devas's involvement and the existence of the Devas-Antrix Agreement, and manipulated meeting minutes in connection with the grant of those licenses. *Id.* ¶¶ 12.8(xii), (xiii).
>
> **(ii)** Devas fraudulently misrepresented in the Devas-Antrix Agreement that it could and would deliver a "bouquet of services via satellite," when in fact the technology necessary to deliver those services had never been developed, and Devas did not even own the intellectual property rights to it. *Id.* ¶¶ 12.8(iv), (vii), (viii). The Indian Supreme Court

concluded that the technology necessary to perform the Devas-Antrix Agreement "did not exist[] at the relevant point of time or ever thereafter." *Id.*

(iii) Devas fraudulently agreed to provide certain services that it was not allowed to provide under Indian law, because those services fell outside the scope of relevant government approvals and contravened rules governing satellite communications in India. While Devas obtained several authorizations and licenses, the Indian Supreme Court noted that those licenses were obtained "for completely different services" than those envisaged under the Devas-Antrix Agreement. *Id.* ¶ 12.8(vi)(c).

(iv) Devas's application to the India Foreign Investment Protection Board ("FIPB") to bring foreign funds into India described a business model that was fundamentally different from what was contemplated in the Devas-Antrix Agreement. *Id.* ¶¶ 12.8(v), (x).

(v) The vast majority of funds (85%) purportedly "invested" in Devas were in fact siphoned "out of India" to Devas's subsidiary in the United States, Devas Multimedia America Inc. ("Devas Delaware"), or to fund litigation services. *Id.* ¶ 12.8(x).

(vi) "[E]ach shareholder [of Devas] had a representative in the board of directors" that was "fully aware" of Devas's fraudulent scheme, and thus the shareholders must bear equal responsibility for the fraud. *Id.* ¶ 12.8(xiv), (xv).

As explained above, the Indian Supreme Court's judgment is final and binding on Devas and its shareholders. *See* Constitution of India, Nov. 26, 2021, art. 141; *see also* Sup. Ct. of India Judgment ¶¶ 12.8(xiv), (xv).

The evidence of fraud that was confirmed by the final judgment of the Supreme Court of India forms the basis of India's revision application to the Swiss Federal Supreme Court to annul the Awards. As India explains in its revision application before the Swiss Federal Supreme Court, the arbitral tribunal did not have the opportunity to examine the Indian Supreme Court's judgment or the full extent of the evidence of fraud. Revision App. ¶¶ 10-11, 68-70; *see also* Boog Decl. ¶ 24. The full extent of the fraud conclusively established in the Indian Supreme Court judgment—including evidence establishing that Devas misrepresented having ownership over the technology necessary to perform under the Devas-Antrix Agreement and siphoned most of its "invested" funds offshore—only emerged during the course of the liquidation proceedings and after the Awards were rendered. *See* Revision App. ¶¶ 155-63; *see also* Sup. Ct. of India Judgment ¶¶ 3.12-3.18.

While India had promptly notified the arbitral tribunal of certain evidence of fraud that had emerged from ongoing criminal investigations of Devas during the arbitration, the tribunal observed that, at the time, the available evidence consisted of "mere allegations that [had] not yet been tried, let alone upheld, in court." Interim Award ¶ 119 (ECF 1-7); *see also* Boog Decl. ¶ 24. As a result, the tribunal never fully considered the merits of whether DT's indirect investment in Devas was made in accordance with the national laws of India. This new evidence regarding Devas and its shareholders' fraud that was established in the Indian Supreme Court judgment directly calls into question the arbitral tribunal's jurisdiction over DT's claims under the Germany-India BIT, which cannot be invoked to protect investments made in violation of the host country's national laws. *See* Germany-India BIT, art. 1(b) (ECF 1-5) (providing that the BIT only protects investments made "in accordance with the national laws of the Contracting Party where the investment is made") (emphasis added). Moreover, such evidence also would also have been relevant to the tribunal's finding of liability against India, as well as its findings regarding the amount of compensation awarded to DT. *See* Boog Decl. ¶¶ 27-28; Revision App. ¶¶ 166-182.

The pending revision proceeding in Switzerland therefore directly concern the legality of DT's alleged investment, which would have impacted the arbitral tribunal's jurisdictional findings and called the validity of the Awards into question. *See* Boog Decl. ¶¶ 25-26. In considering India's application, the Swiss Federal Supreme Court has the authority to annul and render the Awards unenforceable, which would be likely to alter or render entirely moot many of the legal and factual questions in this case. *Id.* ¶ 17.

ARGUMENT

This Court has "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing *Landis*, 299 U.S. at 254). In determining whether to grant a stay, courts should "weigh competing interests and maintain an even balance between the court's interests in judicial economy and any possible hardship to the parties." *Belize Soc. Dev., Ltd. v. Gov't of Belize*, 668 F.3d 724, 732–33 (D.C. Cir. 2012). Courts in this District have also repeatedly acknowledged the significance of "the interest of international comity" in this analysis. *See, e.g.*, *Hulley Enters. v. Russian Fed'n* ("*Hulley II*"), 502 F. Supp. 3d 144, 158 (D.D.C. 2020); *Cef Energia, B.V. v. Italian Republic*, 2020 U.S. Dist. LEXIS 130291, at *22 (D.D.C. July 23, 2020).

India's Motion to Stay should be granted pending the resolution of the Swiss revision proceeding, which could result in the annulment of the Awards in light of the new and conclusive evidence that DT's alleged investment in Devas was tainted by fraud and illegality. Such a result would alter or render entirely moot many of the legal and factual questions at issue in this case. As elaborated below, awaiting the final decision of the primary jurisdiction as to the enforceability of the Awards would best serve the interests of judicial economy, international comity, and the balance of hardships.

A stay would also be in conformity with this Court's prior rulings in analogous circumstances. In at least eighteen previous decisions,[2] this Court has stayed enforcement

[2] *See* Mem. Op., *Devas v. India*, 2022 U.S. Dist. LEXIS 53416, at *19–20; Mem. Op. and Order, *Cube Infrastructure Fund v. Kingdom of Spain*, No. 20-CV-1708 (EGS) (D.D.C. May 17, 2021) (ECF No. 24); *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, No. 1:19-CV-03783 (CJN), 2021 U.S. Dist. LEXIS 63261, at *8 (D.D.C. Mar. 31, 2021); Min. Order, *Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, No. 1:19-cv-00046 (KBJ) (RMM) (D.D.C. Nov. 17, 2020); *NextEra Energy Global Holdings B.V. v. Spain*, No. 19-CV-1618 (TSC), 2020 U.S. Dist. LEXIS 180119, at *6 (D.D.C. Sept. 30, 2020); *9REN Holding S.A.R.L. v. Spain*, No. 19-CV-1871 (TSC),

proceedings where a foreign sovereign State has requested a stay pending the results of annulment or set-aside proceedings in another forum. As noted above, this includes a stay recently granted by a court in this District in *Devas v. India*—while annulment proceedings are pending in the Netherlands with respect to arbitral awards arising from the same dispute (and same underlying fraudulent contract) at issue here. *See* Mem. Op., *Devas v. India*, 2022 U.S. Dist. LEXIS 53416, at *11. 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). The same interests in judicial economy, international comity, and the balance of hardships thus necessitate a stay here.

I. Judicial Economy Will Be Served by a Stay

Judicial economy favors a stay in this case. A stay would conserve judicial resources by safeguarding a judgment of this Court from further remand and reconsideration. In particular, if the award enforcement action is allowed to proceed before the Swiss court enters a final decision on revision, any judgment issued by this Court will remain vulnerable to being upended in the event that the Swiss court annuls the Awards. *See TermoRio S.A. E.S.P. v. Electranta S.P*, 487

2020 U.S. Dist. LEXIS 180117, at *6 (D.D.C. Sept. 30, 2020); *Cef Energia*, 2020 U.S. Dist. LEXIS 130291, at *13-14; Order, *Eiser Infrastructure Ltd. v. Kingdom of Spain*, No. 1:18-CV-1686 (CKK) (D.D.C. Feb. 13, 2020) (ECF No. 51); Min. Order, *Infrastructure Servs. Luxembourg S.a.r.l. v. Kingdom of Spain*, No. 1:18-CV-1753 (EGS) (D.D.C. July 15, 2020); *Hulley II*, 502 F. Supp. 3d at 158 (D.D.C. 2020); *Unión Fenosa Gas S.A. v. Arab Republic of Egypt*, No. 18-CV-2395 (JEB), 2020 U.S. Dist. LEXIS 98645, at *5–6, *15 (D.D.C. June 4, 2020); Order, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, No. 1:18-CV-2254 (JEB) (D.D.C. Sept. 18, 2019) (ECF No. 29); Min. Order, *Karkey Karadeniz v. Islamic Republic of Pakistan*, No. 1:18-cv-01461(RJL) (D.D.C. July 24, 2019); *Gretton Ltd. v. Republic of Uzbekistan*, No. 18-CV-1755 (JEB), 2019 U.S. Dist. LEXIS 18990, at *19-20 (D.D.C. Feb. 6, 2019); Min. Order, *Stati v. Republic of Kazakhstan*, No. 14-CV-1638 (ABJ) (ZMF) (D.D.C. Aug. 15, 2017); *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 193 (D.D.C. 2016); *Hulley Enters. v. Russian Fed'n* ("*Hulley I*"), 211 F. Supp. 3d 269, 288 (D.D.C. 2016); *Getma Int'l v. Republic of Guinea*, 142 F. Supp. 3d 110, 119 (D.D.C. 2015).

F.3d 928, 936 (D.C. Cir. 2007) (quoting *Baker Marine, Ltd. v. Chevron, Ltd.*, 191 F.3d 194, 197 n.2 (2d Cir. 1999)) (observing that "'mechanical application of domestic arbitral law'" to enforce a foreign award that has been annulled at the seat "'would seriously undermine finality and regularly produce conflicting judgments'").

As explained in the accompanying declaration of Swiss counsel Dr. Christopher Boog, the Swiss Federal Supreme Court presently considering India's revision application has the authority to annul the Awards and render them unenforceable. Boog Decl. ¶ 17. The Swiss court may very well exercise this authority in light of the significance of the new evidence of fraud.

As explained above, the liquidation proceedings against Devas and the Indian Supreme Court's final judgment concern the legality of the alleged investment underlying this dispute. The Indian Supreme Court's conclusion that the alleged investment was procured by fraud has important implications for the arbitral tribunal's jurisdiction, which assumed the existence of a legitimate investment made pursuant to a valid agreement. *See* Interim Award ¶¶ 119, 176 (ECF 1-7). The arbitral tribunal did not have the opportunity to examine the evidence of fraud and to fully consider the merits of whether DT's shareholding in Devas violated the national laws of India. Indeed, the tribunal stressed that the limited evidence of fraud available to it at the time consisted of "mere allegations that [had] not been tried, let alone upheld, in court"—a circumstance which is no longer the case. *Id.* at ¶ 119. The tribunal further observed that the evidence before it did not "relate to actions or conduct of DT" as a shareholder of Devas. *Id*. Had the tribunal been aware of the conclusive evidence of fraud made available by the Indian Supreme Court decision—including the court's finding that all of Devas's shareholders were aware of and responsible for the fraud (Sup. Ct. of India Judgment ¶ 12.8(xiv), (xv))—it could have decided differently. Boog Decl. ¶ 27. Given the new and conclusive evidence of fraud, and its relevance for the outcome of

the arbitration, a finding by the Swiss Federal Supreme Court that the Awards were tainted by fraud and illegality may very well lead to the annulment of the Awards. Boog Decl. ¶¶ 23-28.

Awaiting 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). As the D.C. Circuit held in *TermoRio*, "an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made." 487 F.3d at 935; *see also Diag Human S.E. v. Czech Rep. - Ministry of Health*, 907 F.3d 606, 611 (D.C. Cir. 2018) (explaining that whether or not an award is binding for purposes of enforcement is determined with reference to the law of the rendering jurisdiction); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997) ("Under the [New York] Convention, the power and authority of the local courts of the [primary jurisdiction] remain of paramount importance."). Thus, if the Awards are annulled by the Swiss Federal Supreme Court, DT would have "no cause of action" to enforce them, and the scope of the task facing this Court would be significantly reduced. *See Hulley I*, 211 F. Supp. 3d at 282 (citing *TermoRio*, 487 F.3d at 930) (holding that if the awards sought to be enforced were annulled in the primary jurisdiction, petitioners "may have 'no cause of action'" and "resolving jurisdictional issues in this case 'may be a fruitless exercise'").

Another court in this District recently acknowledged the importance of ensuring judicial economy in similar circumstances by granting India's motion to stay in the related *Devas v. India* proceeding—a case brought by Devas's three Mauritian shareholder companies. *See* Mem. Op., *Devas v. India*, 2022 U.S. Dist. LEXIS 53416, at *11. Specifically, the *Devas v. India* stay is to last for the duration of the annulment proceedings that are pending in the Netherlands (the seat of

that arbitration). *Id.* In that case, the Court recognized that staying enforcement was necessary because any delay resulting from the stay "'would still likely be shorter than the possible delay that would occur if this Court were to confirm the award and the [court of the seat] were to then set it aside.'" *Id.* (quoting *Masdar Solar & Wind Coop. U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 39 (D.D.C. 2019)).

Other cases further demonstrate the wisdom of staying enforcement proceedings during parallel litigation that could result in the annulment of an award. In *Thai-Lao Lignite (Thail.) Co. v. Gov't of the Lao People's Democratic Republic*, the Court of Appeals for the Second Circuit upheld the district court's recognition of a Malaysian arbitral award under the New York Convention. 864 F.3d 172, 178-79 (2d Cir. 2017). Shortly thereafter, the Malaysian courts set aside the Malaysian arbitral award under Malaysian law. *Id.* at 180. The U.S. district court thus was obliged to vacate its prior judgment under Rule 60(b)(5) of the Federal Rules of Civil Procedure. *Id.* at 180-81. The U.S. proceedings then returned for a second time to the Court of Appeals, where vacatur was affirmed. *See id.* at 191. In this second decision, the Court of Appeals recognized in broad terms that a judgment invalidating an award generally affects a prior judgment confirming it. *See id.* at 186. However, by the time the Court of Appeals finally vacated the judgment enforcing the arbitral award, the *Thai-Lao Lignite* case had already wasted the U.S. courts' time and resources for seven years.

By contrast, in the recent case of *Eiser Infrastructure Ltd. v. Kingdom of Spain*, a district judge prudently stayed enforcement while a parallel annulment proceeding was pending, and the petitioner ultimately withdrew the U.S. enforcement proceeding after the annulment was successful. *See* Stipulation of Dismissal at 2, *Eiser Infrastructure Ltd. v. Kingdom of Spain*, No. 1:18-cv-1686 (CKK) (D.D.C. June 4, 2021) (ECF No. 63) ("Due to the annulment of the Award,

the Parties agree that this case is now moot."). There are many such examples. *See, e.g.*, *Getma Int'l v. Republic of Guinea*, 191 F. Supp. 3d 43, 45 (D.D.C. 2016) (imposing a stay pending the outcome of annulment, which was ultimately successful and led to refusal of enforcement under the New York Convention, Article V(1)(e)).

Significantly, courts have been compelled to revisit prior judgments when an award is annulled in the primary jurisdiction even where annulment occurs through a petition for extraordinary relief outside of ordinary annulment proceedings, such as the Swiss revision proceeding at issue here. In *Corporación Mexicana de Mantenimiento Integral. S. de R.L. de C.V. v. Pemex Exploración y Producción*, for instance, the Court of Appeals for the Second Circuit remanded a judgment enforcing an award because, while the appeal was pending, a court in the primary jurisdiction "nullif[ied]" the award by granting Pemex's application for *amparo*—an extraordinary constitutional appeal limited to declaring that a governmental action (such as a judicial decision) violated the applicant's constitutional rights. *See* No. 10-4656-cv, 2012 U.S. App. LEXIS 27054 (2d Cir. Feb. 16, 2012).

In light of these cautionary tales, courts in this District consistently have embraced the more prudent approach of staying enforcement where there is a risk that pending litigation in the primary jurisdiction could annul an award. *See RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261, at *8 ("If this Court were to affirm an award that [the parallel proceeding] later annuls, '[m]ore expensive litigation involving more complex issues would result.'") (quoting *Getma*, 142 F. Supp. 3d at 114); *Hulley II*, 502 F. Supp. 3d at 155 ("[A]ny decision predicated even remotely on [a pending annulment proceeding] . . . would necessarily result in more litigation than otherwise would occur if the instant proceedings were halted pending the outcome of [the annulment]."). A stay thus provides the best means of conserving judicial resources and mitigates the risk of issuing

a decision that is subsequently undermined by annulment of the Awards.

II. International Comity Will Be Served by a Stay

Principles of international comity further support a stay. This case involves a Swiss arbitration regarding a dispute between India and a German company under an international treaty to which the United States is not a party. The Awards underlying this dispute are at risk of being annulled in the primary jurisdiction due to the discovery of new evidence establishing that Devas's alleged investment in India was procured by fraud, and thus by extension, DT's indirect shareholding in Devas was also tainted by fraud. Boog Decl. ¶¶ 23-28. It would be contrary to the precept of international comity for this Court to grant premature enforcement of the Final Award without giving consideration to any forthcoming decision of the Swiss Federal Supreme Court pertaining to the validity of the Awards under Swiss law. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (explaining that the "central precept of comity . . . fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations"); *Hulley II*, 502 F. Supp. 3d at 157 (finding that denying a stay would "risk the possibility of inconsistent results in the primary and secondary jurisdictions, which would undermine important international comity interests"); *see also Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F. Supp. 948, 962 (S.D. Ohio 1981) ("[I]n order to avoid the possibility of an inconsistent result, this Court has determined to adjourn its decision on enforcement of the . . . [a]ward until the Indian courts decide with finality whether the award is correct under Indian law.").

Considerations of international comity are particularly acute here given that the United States is not a party to the Germany-India BIT and lacks the Swiss court's interest as the seat of the underlying arbitration. *See Hulley II*, 502 F. Supp. 3d at 157 (explaining that "another aspect of international comity militating in favor of a stay" is the fact that the case involves "the proper

interpretation and application of [a treaty], to which the United States is not a signatory"). Moreover, as Judge Lamberth observed in the *Devas v. India* proceeding, "[d]eciding the issue in this present [enforcement proceeding] may require assessing foreign law. Opining on these issues before the conclusion of the foreign set-aside proceedings would disregard [legal precedent's] focus on international comity." Mem. Op., *Devas v. India*, 2022 U.S. Dist. LEXIS 53416, at *17.

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

III. The Balance of Hardships Overwhelmingly Favors a Stay

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

First, India would suffer severe hardship if the Final Award is enforced and the Swiss court then annuls the Award in light of the new evidence of DT's fraud, which could eliminate India's liability for any damages. In this regard, courts in this District have consistently recognized the "very real harm" of a foreign State's assets being seized during the potential execution of a judgment where the primary jurisdiction's courts could later "determine that the award was improper." *Getma*, 142 F. Supp. 3d at 118 (quoting *Jorf Lasfar Energy Co., S.C.A. v. AMCI Exp. Corp.*, No. 05-CV-0423, 2005 U.S. Dist. LEXIS 34969, at *10 (W.D. Pa. Dec. 22, 2005)); *see also RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261, at *8 ("[I]f the Court were to confirm the award now, Spain could face the arduous task of trying to recover seized assets if its annulment application before the ICSID proves successful."); *Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain*, No. 18-CV-01148 (TSC), 2020 U.S. Dist. LEXIS 12794, at *10 (D.D.C. Jan. 27, 2020) ("[T]he risk of premature enforcement could result in [a foreign State] trying to recover assets seized during this action if it were to prevail in the [set aside] proceedings."); *Masdar Solar*, 397 F. Supp. 3d at 40 (emphasizing the burden to a foreign State arising from "ultimately having

to recover assets seized during this action should the annulment proceeding go its way"). If the Court were to prematurely confirm the Final Award, India could face the onerous task of trying to recover seized assets. *Hulley II*, 502 F. Supp. 3d at 156 (describing "costly proceedings to retrieve the property when the Awards were set aside by the Dutch District Court"). This would be particularly burdensome given the size of the Awards, which have a total value of over US$ 101.6 million. Pet. at 34 (ECF 1).

Second, without a stay, India will be forced to expend significant resources challenging the validity of the Awards in multiple fora. In this regard, courts have noted that a foreign State would "undeniably be burdened by having to attack the validity of [an] arbitral award in two forums" simultaneously, particularly where the primary jurisdiction is outside of the United States. *Masdar Solar*, 397 F. Supp. 3d at 40. Here, without a stay, as noted above, India would have to challenge the validity of the Awards in at least three different forums—including this proceeding, the Swiss revision proceeding, and also an ongoing enforcement action in the courts of Singapore. Moreover, related proceedings seeking to enforce the DT Award against Air India in the District Court for the Southern District of New York are currently stayed, but could resume if this Court proceeds to determine India's immunity without awaiting the decision of the Swiss Federal Supreme Court. *See* Mem. Op. & Order, *Deutsche Telekom AG v. Air India*, No. 1:21-cv-9155-PGG, at *25 (S.D.N.Y. Feb. 4, 2022) (ECF No. 33) (staying the proceeding "until the Republic of India's motions to dismiss in the D.C. actions have been resolved"). Although the S.D.N.Y. proceeding is against Air India, the overall burdens of attendant litigation could further increase if this Court does not grant a stay.

The size of the Awards and the fact that the Swiss Federal Supreme Court has the authority to annul the Awards in the pending revision proceeding—rendering them unenforceable in other

jurisdictions—therefore weigh in favor of a stay. *See Unión Fenosa Gas, S.A*, 2020 U.S. Dist. LEXIS 98645, at *12-13 (concluding that "[t]he Court is loath to plunge so deeply into a sovereign's treasury . . . if there is a chance that the award might be set aside or mitigated to some extent").

Conversely, DT will experience no substantial hardship if the Court stays these proceedings until clarity emerges from the revision proceeding in Switzerland. The accrual of post-award interest can easily compensate for any delay should India be unsuccessful in the revision proceeding. *RREEF Infrastructure*, 2021 U.S. Dist. LEXIS 63261, at *8-9 (holding that the importance of "quickly collecting [an] arbitral award" is "less acute" where interest continues to accrue on the award); *Novenergia II*, 2020 U.S. Dist. LEXIS 12794, at *9-11 (finding that set-aside proceedings lasting more than four years did not outweigh hardships on foreign State and that any delay in obtaining the award could be compensated with interest). And, as Swiss counsel has explained, the revisions proceedings are likely to last only 8-12 months from this month's filing of the revision application. Boog Decl. ¶ 29. Moreover, any concerns of delay in enforcement are "outweighed by the potential waste of time and resources to the parties if this action is allowed to proceed," where there is a possibility that enforcement of the Final Award "may have to be undone" should the Swiss court annul the Awards in whole or in part. *Hulley II*, 502 F. Supp. 3d at 163.

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

* * *

Pursuant to Rule 7(m) of the Civil Rules of the United States District Court for the District of Columbia, India discussed the relief sought in this motion with counsel for Petitioner. Counsel

advised that Petitioner is willing to agree to a stay only on the condition that India post security for the full face value of the award plus interest through April 30, 2022. India did not agree to this proposal. There is no basis for an order of security as a condition of the stay, particularly given that India has not waived its immunity from pre-judgment attachment under 28 U.S.C. § 1610(d)(1). *See De Sousa v. Embassy of Angola*, 229 F. Supp. 3d 23, 27 (D.D.C. 2017) (quoting *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983)) (holding that for purposes of § 1610(d)(1), a petitioner seeking pre-judgement attachment over a sovereign state's assets "'must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this country'"); Order, *Metropolitan Municipality of Lima v. Rutas de Lima S.A.C.*, No. 20-cv-2155 (FYP) (D.D.C. Jan. 31, 2022) (ECF No. 44) (denying a party's request for security as a condition of a case management stay and stating that the request for security "must be denied because" the foreign-sovereign party that obtained the stay "has not explicitly waived its immunity from prejudgment attachment, and the Court therefore may not require [it] to post security"). As noted above, India does not waive—and expressly reserves—any arguments and defenses with respect to its sovereign immunity, including its immunity from prejudgment attachment.

CONCLUSION

For the reasons stated above, India respectfully requests that the Court stay this U.S. action pending resolution of the revision proceeding in the Swiss Federal Supreme Court.

Dated: May 18, 2022
Washington, DC

Respectfully submitted,

WHITE & CASE

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