UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

THE REPUBLIC OF INDIA'S SUPPLEMENTAL REPLY
PURSUANT TO THE COURT'S MINUTE ORDER OF MAY 24, 2023

The Republic of India ("India") respectfully submits this Reply to the Supplemental Brief ("DT Supp. Br.") (ECF 32) filed by Petitioner ("DT"). As explained below, DT's Supplemental Brief provides further confirmation that potentially dispositive issues in India's Motion to Dismiss ("MTD") (ECF 11-1) overlap extensively with Spain's arguments before the D.C. Circuit.

I. DT Concedes—and Judge Howell Confirms—That Two of India's Principal Arguments Overlap with Spain's Arguments Before the D.C. Circuit

As India has explained (ECF 33 at 8), Judge Howell recently stayed enforcement of an arbitral award pending the D.C. Circuit's resolution of appeals in *Blasket Renewable Investments, LLC v. Kingdom of Spain* (No. 23-7038) and two related cases. Minute Order, *Watkins Holdings S.À.R.L. v. Kingdom of Spain*, No. 1:20-cv-01081 (D.D.C. June 9, 2023) ("*Watkins* Order"). Specifically, Judge Howell explained that a stay was justified because three distinct "questions" of law—each of which is potentially "dispositive" in the *Watkins* case—overlap with Spain's arguments now "pending before the D.C. Circuit." *Id*.

Here, DT acknowledges that India's MTD also involves at least two of these potentially "dispositive" issues, as detailed below.

First, the *Watkins* Order found that deferral was justified in part because the D.C. Circuit is now considering whether "the Waiver Exception" to the Foreign Sovereign Immunities Act ("FSIA") at 28 U.S.C. § 1605(a)(1) establishes jurisdiction based solely on a foreign State's signature of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). As DT acknowledges (ECF 32 at 7), this same "waiver" argument was also raised in DT's Petition (ECF 1 ¶ 12) and addressed in India's MTD. Just as in *Watkins*, the "waiver" issue is potentially dispositive here. *E.g.*, DT Opp'n 22 (ECF 14) ("India's objection to this Court's subject matter jurisdiction can be dismissed on this basis as well.").

Second, the *Watkins* Order also found that deferral was justified in part because Spain's arguments include "whether *forum non conveniens* dismissal is warranted," given that Spain explicitly plans to seek "further review" of this issue before either the D.C. Circuit *en banc* or the U.S. Supreme Court. *See* DT Supp. Br. 4 n.2 (acknowledging that Spain maintains this challenge). While DT concedes there is overlap between this aspect of Spain's case and "India's remaining *forum non conveniens* arguments," DT characterizes Spain's recourse to "further review" as merely a "theoretical possibility" in light of circuit precedent. *Id.*

As DT also acknowledges, however, a well-known "split" has emerged between the Second Circuit and D.C. Circuit on this point, which Spain is now raising (*see* ECF 33-9 at 29, 53-54). A recognized circuit split, as this Court has held, significantly increases the likelihood of further review through *en banc* rehearing under Federal Rule of Appellate Procedure 35(b)(1)(B) or a grant of certiorari under the Supreme Court's Rule 10(a). *See, e.g.*, *Philipp v. F.R.G.*, 436 F. Supp. 3d 61, 67 (D.D.C. 2020) (granting a stay and predicting that certiorari was likely due to a "circuit split"); *F.R.G. v. Philipp*, 141 S. Ct. 185 (2020) (granting certiorari); *F.R.G. v. Philipp*, 141 S. Ct. 703 (2021) (reversing the D.C. Circuit's precedent on the FSIA jurisdictional issue).

Accordingly, as DT's Supplemental Brief confirms, at least two of India's potentially dispositive arguments concerning (1) the FSIA's "waiver" exception and (2) *forum non conveniens* dismissal are presently at issue in the D.C. Circuit. These same two arguments supported Judge Howell's deferral of a decision in *Watkins*, and likewise justify deferral here.

II. DT Mischaracterizes India's § 1605(a)(6) Argument and Relies on Multiple Decisions by Lower Courts That Also Have Been Appealed

Much of DT's supplemental brief discusses India's § 1605(a)(6) argument—*i.e.*, the inapplicability of the FSIA's "arbitration" exception. None of DT's arguments on this point, however, undermines the appropriateness of deferring a decision on India's MTD.

Most fundamentally, DT mischaracterizes India's argument (*see* DT Supp. Br. 3) as relating only to "the 'scope of arbitrability,'" rather than the "existence" of any purported arbitration agreement. Spain and the *Blasket* appellant are struggling over precisely the same question before the D.C. Circuit—*i.e.*, whether the identity of the claimant (usually the "offeree" in an investor-State arbitration) should be framed as a jurisdictional "existence" question under the FSIA or a non-jurisdictional "scope" question under the New York Convention.[1]

Significantly, just as Spain's argument concerns the offeree's identity as an "EU investor," India has raised—among other challenges—arguments concerning DT's status as an "indirect investor." *Compare Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 1:21-cv-03249, 2023 WL 2682013, at *2 (D.D.C. Mar. 29, 2023) (explaining that "no EU Member State could make a

[1] *Compare* Brief for Appellant Kingdom of Spain at 33-37, Nos. 23-7031, 23-7032 (D.C. Cir. May 30, 2023) (framing the issue as "whether an arbitration agreement exists") *with* Brief for Appellant Blasket Renewable Investments, LLC at 28-31, No. 23-7038 (D.C. Cir. May 30, 2023) (framing the issue as "implicating . . . the *scope* of that agreement"). Spain is correct—as India has explained, courts routinely examine the identity of an "offeree" as an issue of "existence," not "scope." MTD 41 (collecting cases from the Second Circuit and Fourth Circuit).

valid offer to arbitrate" with an "EU investor") *with* MTD 11, 32 (explaining why "the parties' intention was to protect direct investors exclusively" and why "DT does not qualify").

To be sure, Spain—and India—are correct. As explained in *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205-06 & n.3 (D.C. Cir. 2015), the "jurisdictional task" under § 1605(a)(6) requires the court to "satisfy itself" that a petitioner in an investment-treaty arbitration was indeed among the eligible class of "potential . . . investors" under the investment treaty. At present, however, it is sufficient merely to recognize that the D.C. Circuit is considering the same question ("scope" versus "existence") raised by India's MTD—which DT struggles to explain away. *See* DT Supp. Br. 3 (characterizing Spain's argument as concerning the status of "investors from another EU member state" and India's argument as likewise concerning whether DT was a "qualifying investor").

DT also cites (ECF 32 at 2-3) this Court's decision in *Chiejina v. Federal Republic of Nigeria*, No. 1:21-cv-02241, 2022 WL 3646377 (D.D.C. Aug. 24, 2022), and yet fails to respond to India's previous explanations as to the irrelevance of *Chiejina*.[2] In any event, reliance on *Chiejina* is particularly misplaced for present purposes because *Chiejina* has also been appealed to the D.C. Circuit.[3] Accordingly, if the *Chiejina* decision were relevant here (and it is not), the status of the *Chiejina* appeal would provide further grounds to defer a decision on India's MTD.

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[2] *See* India's Response to DT's Notice of Foreign Judicial Decisions 2 n.2 (ECF 30) (explaining that *Chiejina* is "distinguishable because it did not involve any purported 'offer' or 'acceptance' under an international treaty—but rather a concluded arbitration contract" which Nigeria conceded, whereas here "India emphasizes that no agreement was ever formed").

[3] According to Nigeria, this Court's ruling in *Chiejina* also creates a split of authority with the Fifth and Second Circuits. Reply Br. 6-9, *Chiejina v. Fed. Republic of Nigeria*, No. 22-7146 (D.C. Cir. June 13, 2023) (collecting cases where third-party claimants' rights and third-party respondents' obligations under arbitration agreements are analyzed as jurisdictional questions under the FSIA at § 1605(a)(6)).

As to DT's substantive arguments, DT relies heavily on foreign courts' decisions (ECF 32 at 4-6), even though many authorities confirm (ECF 33 at 4-5 & n.3) and this Court has held that "courts are not required to accord preclusive effect to foreign judgments in petitions pursuant to the New York Convention" under § 1605(a)(6). *Blasket*, 2023 WL 2682013, at *5 n.4. Accordingly, because this Court must revisit those same issues *de novo* in any event, the foreign courts' rulings do nothing to reduce the burden on this Court's resources and judicial economy. Moreover, the German and Singapore rulings were rendered by lower courts—and both have been timely appealed.[4] The Swiss decisions, finally, rely heavily on procedural deadlines (applicable to the Swiss litigation and the original arbitration)[5] which are necessarily irrelevant to any of the questions now facing this Court.

Finally, as reflected in each relevant decision rendered in Germany (ECF 28-2), Singapore (ECF 32-3), and Switzerland (ECF 28-1, ECF 1-8), DT has never alleged before any other court that the parties actually excluded judicial review of arbitrability under the UNCITRAL Arbitration Rules. This silence speaks volumes—and undermines DT's central assertions (*e.g.*, ECF 14 at 9-14) before this Court.

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Accordingly, this Court should grant India's MTD in accordance with *Blasket* or defer decision until the D.C. Circuit's resolution of *Blasket* and the related appeals.

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[4] India appealed the German court's decision on February 27, 2023, and appealed the Singapore court's decision on April 19, 2023. If necessary, India is prepared to submit relevant documentation after obtaining translations and/or resolving potential confidentiality issues.

[5] *E.g.*, Swiss Judgment No. 4A_184/2022 (Mar. 8, 2023) (ECF 28-1 ¶ 4.3) (holding that India's application was not "filed . . . in due time with regard to the new facts invoked"); Swiss Judgment No. 4A_65/2018 (Dec. 11, 2018) (ECF 1-8 ¶¶ 2.2, 4.5) (holding that, under Swiss procedural law, "the Appellant may not rely on arguments . . . that were not submitted in a timely manner" before the arbitral tribunal and that India's "evidence in dispute" supposedly "was not submitted in a timely manner")).

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Washington, DC

Respectfully submitted,

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