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 RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S MAY 24, 2023 MINUTE ORDER

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I. India Ignores the Critical Distinction Between This Case and *Blasket*.

India misreads *Blasket Renewable Investments, LLC v. Kingdom of Spain*, Civil Case No. 21-3249 (RJL), 2023 WL 2682013 (D.D.C. Mar. 29, 2023) as requiring a *de novo* review of whether DT and India agreed to arbitrate to resolve India's sovereign immunity objection and rule on India's motion to dismiss.

A. India's objections concern the "scope of arbitrability."

India overlooks the critical distinction made in *Blasket* between challenges based on the *existence* of an arbitration agreement—which a court must evaluate *de novo* when deciding the question of sovereign immunity—and objections based on the "scope of arbitrability", *i.e.*, whether a dispute at issue qualified for arbitration under the terms of a valid and existing agreement. *See Blasket*, 2023 WL 2682013, at *5 ("Both *Stileks* and *Chevron* resolved questions about the 'scope of arbitrability . . . . However, neither challenge was predicated on an argument that, under the law applicable to them, the parties were *incapable* of entering into an agreement to arbitrate anything at all.") (citing *Chevron Corp. v. Ecuador*, 795 F.3d 200 (D.C. Cir. 2015) and *LLP SPC Stileks v. Republic of Moldova*, 985 F.3d 871 (D.C. Cir. 2021)). India's objections in this case likewise concern the "scope of arbitrability" and not the capacity to enter into an agreement to arbitrate. As such, India's objections may constitute defenses to enforcement, but they are not relevant to India's lack of immunity under the FSIA.[1]

India elides this distinction. It makes the conclusory assertion that its objections involve the "'antecedent question' of whether India's 'standing offer to arbitrate was void. . . .'" Resp.

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1 When it comes time for the Court to consider India's defenses to enforcement, *Blasket* further instructs that, under the controlling precedent of the D.C. Circuit, the Court "must defer to the tribunal's determination that the underlying dispute fell within the four corners of the agreement to arbitrate." *Blasket*, 2023 WL 2682013, at *5 (citing *Stileks*, 985 F.3d at 878-79 and *Chevron*, 795 F.3d at 207-08).

Supp. Br., ECF No. 33 at 2. But India asserted sovereign immunity and moved to dismiss on the grounds that DT did not make an "investment" and that it was not an "investor" as defined in the treaty. Resp. Br., ECF No. 11-1 at 27-36. India's objections are thus virtually identical to those made in both *Chevron* and *Stileks*. The law in this Circuit is clear. Such challenges do not implicate "antecedent question[s]" of "legal capacity," but rather concern the "scope of arbitrability." *Blasket*, 2023 WL 2682013, at *5-6; *see also* Pet. Supp. Br., ECF No. 32 at Section I.A.2. In such cases, moreover, Courts are to "defer to the tribunal's determination that the underlying dispute fell within the four corners of the agreement to arbitrate." *Blasket*, 2023 WL 2682013, at *5. India's argument ignores the Court's careful reasoning in *Blasket* in its application of controlling precedent to the unique facts of that case, which concerned Spain's legal capacity to agree to arbitrate.[2]

B. The foreign decisions India cites do not support a stay.

India's reliance on the decision of a court in Ontario, Canada in *Russian Federation v. Luxtona Ltd.*, 2023 ONCA 393 (June 2, 2023), ECF No. 33-2, is misplaced. That case involved an application to set aside an arbitral award at the seat of the arbitration in Canada under Canadian law. There, the Canadian court evaluated whether Ontario's statutory arbitration law permitted the introduction of new evidence when considering the underlying arbitration tribunal's jurisdiction. That is not at issue here, nor would Canada's interpretation of its own arbitral law

2 India's reliance on *Watkins Holdings S.A.R.L. et al. v. Kingdom of Spain*, Case No. 20-cv-1081 (D.D.C.) is misplaced for the same reasons. India ignores that *Watkins* also concerns the same issue regarding Spain's capacity to agree to arbitrate. *See* Pet. Supp. Br. at 8, n.5. India further omits to mention that in *Watkins* the parties *consented* to Judge Howell entering a stay pending the D.C. Circuit's ruling on the consolidated appeal. *See id*., Minute Order dated June 9, 2023. If anything, *Watkins* supports this Court following the course of action previously agreed between the parties in their Joint Status Report. *See* Joint Status Report, ECF No. 29 ("The parties agree that the Court should lift the stay and proceed to rule on Respondent's pending Motion to Dismiss."); Joint Status Report, ECF No. 31 (same).

override this Court's obligation to follow controlling precedent of the D.C. Circuit, discussed above. That precedent directs that India's objections be treated as challenges to the scope of arbitrability, and thus calls for deference to the tribunal.

The Berlin Court Decision also cannot displace the controlling precedent of the D.C. Circuit. In any event, India misreads the Berlin Court Decision. The Kammergericht held that "the existence of an arbitration agreement is to be examined autonomously by the state court." Berlin Court Decision, ECF No. 28-2 at 15. This holding is consistent with *Blasket*. To the extent that the Berlin Court Decision requires a *de novo* analysis of the arbitral tribunal's rulings as to whether DT was an "investor" with an "investment" under the BIT, that would be the Kammergericht's application of German law. Whatever German law might be on this point, the D.C. Circuit has been crystal clear that challenges as to whether the petitioner was an "investor" with an "investment" under an investment treaty concern the "scope of arbitrability," and that they do not implicate the existence or formation of an arbitration agreement.

However it is interpreted, the Berlin Court Decision has no bearing on India's immunity and this Court's subject matter jurisdiction under the FSIA. No foreign court can confer subject matter jurisdiction on a U.S. federal court. *See* 15 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 100,20[2] (3d ed. 2010) ("Only Congress can delineate the subject matter jurisdiction of the lower federal courts."). Federal courts must independently assess their subject matter jurisdiction. However, the Berlin Court Decision is relevant in one material respect: it rejected India's argument that India's treaty with Germany contemplated recognition and enforcement of the Final Award only in India, because the treaty did not refer to the New York Convention. The Kammergericht is a distinguished German appellate court and as it noted in interpreting a German treaty, "[i]t cannot be inferred from the provision in the BIT that enforcement would only be

possible in India . . . because this would contradict the spirit and purpose of the Convention and would amount to a thwarting of enforcement." ECF No. 28-2 at 12.

C. None of the appellants in the consolidated appeals are asking the D.C. Circuit to overrule its controlling precedent concerning *forum non conveniens*.

India also argues that this Court's decision in *Blasket* "implicates" a circuit split between the D.C. Circuit and the Second Circuit concerning the applicability of the *forum non conveniens* doctrine.[3] Although Spain preserved the issue "for further review," Spain also "acknowledges that Circuit precedent [*Stileks*] binds this panel." Significantly, Spain does not ask the panel hearing the consolidated appeal to overturn the "formidable precedent" in place in this Circuit that forecloses the use of *forum non conveniens* in proceedings to confirm foreign arbitral awards. *Gretton Ltd. v. Republic of Uzbekistan*, Civ. No. 18-1755 (JEB), 2019 WL 3430669, at *6 (D.D.C. July 30, 2019). As a result, the decision of the panel will not change the established law of this Circuit and thus cannot provide a basis for a stay. Nor does the theoretical possibility that either the D.C Circuit sitting *en banc* or the Supreme Court might elect one day to address this "split" provide a basis for a stay. If that were the case—as India effectively argues—then a stay would be appropriate in any case that involved an issue about which there was a Circuit split even though the issue was not the subject of a pending appeal, but rather was preserved for the theoretical possibility of appellate review that may never happen.

II. India's Request for a Stay Is Unmerited.

India cannot circularly invoke its sovereign immunity to further delay having its sovereign immunity actually adjudicated. In the parties' May 23, 2023 joint status report, India agreed "that

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3 Even under the standard in the Second Circuit, application of the *forum non conveniens* doctrine remains a discretionary exercise that must be considered on a case-by-case basis. *See Pain v. United Technology. Corp.*, 637 F.2d 775, 781-85 (D.C. Cir. 1980).

the Court may lift the stay and proceed to rule on Respondent's pending Motion to Dismiss." ECF No. 31; *see also* Joint Status Report, April 28, 2023, ECF 29 ("India also agrees that . . . India's Motion to Dismiss is ripe for decision."). The Court should respect the Parties' previous agreement. None of the appeals have the prospect of changing the established rule of law that India's objections in this case concern the "scope of arbitrability." The cases on appeal involve Spain's capacity to agree to arbitration and the Court's obligation to consider that "antecedent question" rather than defer to the arbitrators. No matter how the D.C. Circuit rules, *Chevron* and *Stileks* will remain applicable to this case. The D.C. Circuit will either (i) follow *Blasket* and distinguish legal capacity as an issue implicating a state's sovereign immunity under the FSIA; or (ii) hold that questions of capacity are defenses on the merits and do not implicate sovereign immunity.[4] There is no scenario in which the D.C. Circuit will reverse its well-established precedent that disputes over the "scope of arbitrability" do not implicate sovereign immunity. Even if that were a possibility, India's objections have now been rejected by the arbitral tribunal, the Swiss Federal Supreme Court, the Berlin Court, and the Singapore Court. Whether India's objections implicate its sovereign immunity or constitute defenses to enforcement under Article V of the New York Convention, the Court can dismiss these objections on the merits for the reasons set forth in DT's opposition, *see* Pet. Opp. Br, ECF No. 14 at 14-19, 35-38, which are the same reasons that India's arguments have been rejected by every adjudicatory body to have considered them.

4 Moreover, the D.C. Circuit may resolve the question differently depending on whether the award at issue arises under the New York Convention or the Washington Convention. Pet. Supp. Br. at 7-8, n.4.

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By: /s/
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