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

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On May 24, 2023, this Court issued a minute order requesting supplemental briefing from the Parties on two questions. First, the Court asked the Parties to "address pertinent legal developments since briefing on respondent's motion to dismiss was completed," particularly this Court's decision in *Blasket Renewable Investments, LLC v. Kingdom of Spain*, Civil Case No. 21-3249 (RJL), 2023 WL 2682013 (D.D.C. Mar. 29, 2023), *appeal filed* No. 23-07038 (D.C. Cir. Mar. 31, 2023). Second, the Court asked the Parties to address whether it makes sense to defer ruling on this case until the consolidated appeals in *Blasket*, *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, Civil Action No. 19-cv-01618 (TSC), 2023 WL 2016932 (D.D.C. Feb. 15, 2023), *appeal filed* No. 23-07031 (D.C. Cir. Mar. 20, 2023), and *9REN Holding S.A.R.L. v. Kingdom of Spain*, Civil Action No. 19-cv-01871 (TSC), 2023 WL 2016933 (D.D.C. Feb. 15, 2023), *appeal filed* No. 23-07032 (D.C. Cir. Mar. 21, 2023) (collectively, the "Appeals"), are decided.

ANSWERS TO THE COURT'S QUESTIONS

I. Legal Developments Since the Motion to Dismiss Was Briefed

"[L]egal developments since briefing on Respondent's motion to dismiss was completed" on November 12, 2021, both before this Court and in foreign courts, confirm that India's objection to the Court's subject matter jurisdiction are without merit and, in any event, do not implicate India's sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA") but are defenses under the New York Convention that have been rejected by the arbitral tribunal and courts in Germany, Singapore, and Switzerland.

A. Significant Legal Developments Before this Court

This Court has issued two decisions— *Blasket* and *Chiejina v. Federal Republic of Nigeria*, Civil Case No. 21-2241 (RJL), 2022 WL 3646377 (D.D.C. Aug. 24, 2022)—that apply D.C. Circuit precedent in a manner consistent with Deutsche Telekom AG's ("Petitioner" or

"DT") opposition to India's motion to dismiss pursuant to Rule 12(b)(1). Both decisions held that defenses, like the ones raised by India here, are defenses to the merits of Petitioner's petition and irrelevant to sovereign immunity under the FSIA. Both support the denial of India's pending motion to dismiss.

1. *Chiejina v. Federal Republic of Nigeria*

In *Chiejina*, Nigeria challenged the applicability of the arbitration agreement to an individual who was not a party to that agreement. *See generally Chiejina*, 2022 WL 3646377. Relying on *Chevron Corp. v. Ecuador*, 795 F.3d 200 (D.C. Cir. 2015) and *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871 (D.C. Cir. 2021), this Court concluded that this question "ultimately implicate[d] . . . arbitrability" and "arbitrability, in turn, is a question that goes to the *merits* of whether the award should be confirmed pursuant to the New York Convention, rather than a basis on which to conclude that the Court lacks jurisdiction under the FSIA." *Id*. at *4-5 (citing *Chevron*, 795 F.3d at 205). India's motion to dismiss raises similar questions of "arbitrability."

2. *Blasket Renewable Investments, LLC v. Kingdom of Spain*

In *Blasket*, the Court likewise applied the controlling precedents of the D.C. Circuit Court of Appeals in *Chevron* and *Stileks* to distinguish between challenges to agreements to arbitrate that implicate the court's subject matter jurisdiction under the FSIA and those that constitute defenses under the New York Convention. *See generally Blasket*, 2023 WL 2682013. In this case, India's motion to dismiss does not raise any issue relevant to India's sovereign immunity. Petitioner's petition asked this Court to apply the same controlling precedents and deny Respondent's motion to dismiss for lack of subject matter jurisdiction. *See* Pet. P. & A. in Opp'n to Resp. Mot. to Dismiss, Oct. 15, 2021, ECF No. 14 ("Pet. Opp. Br.") at 7-9. The Court should proceed to do so.

Blasket does not justify any further delay in resolving India's motion to dismiss. That case addressed the legal capacity of European Union ("EU") member states to agree to arbitrate investment disputes with investors from another EU member state after two decisions of Court of Justice of the European Union ("CJEU")— C-284/16, *Slovak Republic v. Achmea B.V.*, ECLI:EU:C:2018:158 (Mar. 6, 2018) ("*Achmea*") and C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 (Sept. 2, 2021) ("*Komstroy*"). India is not a member of the EU, and India has not challenged its legal capacity to agree to arbitration with German investors.

The Court's decision in *Blasket* is relevant to the present case only insofar as it affirms denying India's pending motion to dismiss under the controlling precedent of *Chevron* and *Stileks*. India's motion to dismiss—like those in *Chevron* and *Stileks*—raised "questions about the 'scope of arbitrability'" within an arbitration agreement that were irrelevant to the state's assertion of sovereign immunity and the Court's subject matter jurisdiction. *Blasket*, 2023 WL 2682013 at *5. Such challenges include arguments (like the ones raised by India in this case) that an arbitral tribunal lacked jurisdiction because there was no "investment" or "qualifying investor" under the applicable treaty.[1]

India's arguments that DT did not make an "investment" and was not an "investor" as defined by the BIT, Resp. P. & A. in Supp. of Mot. to Dismiss, Sept. 23, 2021, ECF No. 11-1 ("Resp. Br.") at 27-36; Pet. Opp. Br. at 7-9, are thus nearly identical to the challenges to the "scope of arbitrability" raised in *Stileks*, *Chevron*, and *Chiejina*. The controlling precedents of *Stileks* and *Chevron* require this Court to treat those objections as defenses to enforcement under

1 In *Blasket*, the District Court found that the holdings of *Chevron* and *Stileks* did not prevent the Court from considering Spain's challenge to "the validity of an arbitration clause on the grounds that the parties lacked the legal capacity to form an agreement to arbitrate." *id*. at *4.

the New York Convention and to "**defer to [the] arbitral tribunal's judgment that [DT's investment] fell within the scope of an arbitration provision that applies to disputes between two parties to that agreement.**" *Blasket*, 2023 WL 2682013 at *5 (emphasis added). The decision of the Swiss Federal Supreme Court affirming the arbitral tribunal's decision on jurisdiction further supports deference to the arbitral tribunal's decision on jurisdiction.[2] *See* ECF No. 28 and ECF No. 28-1. India's motion to dismiss should therefore be dismissed.

B. Significant Legal Developments Before Foreign Courts

The Singapore International Commercial Court ("Singapore Court") and the Berlin Kammergericht ("Berlin Court") have issued significant decisions granting enforcement of the Final Award in those jurisdictions after rejecting the same arguments India makes to this Court.

1. The Singapore Court Decision

On January 30, 2023, the Singapore Court issued a decision rejecting India's application to set aside the Court's order granting leave for DT to enforce the Final Award. A copy of the

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2 The same controlling D.C. Circuit precedent forecloses India's remaining *forum non conveniens* arguments. In *Blasket*, the Court held that a challenge to the Court's authority "under the doctrine of *forum non conveniens* without first establishing jurisdiction . . . is futile." *Blasket*, 2023 WL 2682013, at *3, n.3; *see also* Pet. Opp. Br. at 22-26 (citing *Stileks*, 985 F.3d at 876 n.1). On appeal, the appellant in *Blasket* has not asked the D.C. Circuit to revisit and overturn that controlling precedent. In its appellate brief in *NextEra*, Spain "acknowledges that Circuit precedent [*Stileks*] binds this panel." Spain goes on to "respectfully preserves its *forum non conveniens* argument for further review," presumably by the U.S. Supreme Court to resolve "a split" between the Second Circuit and the D.C. Circuit. Brief for Appellant, *NextEra*, Case No. 23-7032 (D.C. Cir. May 30, 2023) at 54. None of the appellants in the Appeals have asked the D.C. Circuit to overturn its holding in *Stileks* regarding the inapplicability of the doctrine of *forum non conveniens* in actions to enforce a foreign arbitral award. There is therefore no basis for a stay. The fact that Spain has preserved this argument for the theoretical possibility that the Supreme Court might exercise its discretion and grant a petition for writ of certiorari to reconcile this alleged split is no justification for a stay in what is supposed to be a summary proceeding. *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365, 369 (D.C. Cir. 2011) ("Confirmation proceedings under the Convention are summary in nature, and the court must grant the confirmation unless it finds that the arbitration suffers from one of the defects listed in the Convention.").

Singapore Court decision is submitted as Exhibit A to the Declaration of James Boykin. The Singapore Court considered and rejected the same arguments India makes here, namely, that DT's "investment" did not fall within the scope of the BIT. Singapore Court Decision, Exh. A, ¶¶ 97, 101.

The Singapore Court also rejected India's dubious and vexatious argument that DT's investment did not satisfy the requirement of Article 1(b) that defined an "investment" as one made "in accordance with the national laws" of India. BIT, ECF No. 1-5, Art. 1(b). Following a detailed analysis of India's arguments, the Singapore Court rejected them. Singapore Court Decision, Exh. A, ¶¶ 45-93. Significantly, the Singapore Court found no "cogent evidence" of any fraud by DT. *Id*., ¶¶ 90, 124. It flatly rejected India's reliance on Indian court decisions in domestic liquidation proceedings to which DT was not a party, finding that these were not "binding and conclusive as findings of fact" and to treat them as such "would, in our judgment, constitute a denial of elementary notions of natural justice and due process." *Id*., ¶ 123.

2. The Berlin Court Decision

On January 26, 2023, the Berlin Court granted DT's application to enforce the Final Award in Germany. *See* Pet. Notice, Apr. 13, 2023, ECF No. 28; Berlin Court Decision, ECF No. 28-2. The Berlin Court rejected India's argument, that it also makes in this proceeding, that the BIT contemplates recognition and enforcement of the Final Award only in India. The Berlin Court also rejected India's argument that DT's investment was "indirect" and, therefore, did not fall within the scope of the BIT. Berlin Court Decision, ECF No. 28-2 at 11. Finally, the Berlin Court expressed concerns similar to those raised by the Singapore Court about India asserting claims of illegality and fraud against DT without any supporting factual evidence. *Id*. at 16-18.

India has raised repeatedly specious allegations of "fraud" in connection with DT's purchase of shares in Devas. It has done so before the arbitral tribunal, before the Berlin Court,

before the Singapore Court, and now twice before the Swiss Federal Supreme Court. There can be no good faith basis for India to make this fatally flawed argument for a *sixth* time before this Court. For present purposes, we observe only that this baseless and vexatious argument does not implicate India's sovereign immunity under *Chevron* and *Stileks.*[3]

II. There Is No Basis To Prolong the Stay Of This Petition

The Court should not stay this case pending resolution of the Appeals, because none of the Appeals will decide any issue that is dispositive to this case. First, the central issue in the Appeals concerns challenges to the legal capacity of member states of the EU to enter into agreements to arbitrate with nationals or companies of other member states after two judicial decisions of the highest court in the European Union (the CJEU) found that member states lacked such capacity. None of the Appeals challenge the holdings of the D.C. Circuit in *Chevron* and *Stileks* that India's challenges to DT's status as an "investor" with an "investment" under the BIT concern the "scope of arbitrability" and thus do not implicate sovereign immunity under the FSIA. *Blasket*, 2023 WL 2682013, at *5; *9REN*, 2023 WL 2016933, at *6; *NextEra*, 2023 WL 2016932, at *7. Rather, in all three cases the issue at stake is the applicability of *Chevron* or *Stileks* to the extraordinarily unique circumstances of those cases in which Spain has contended that it lacked the legal capacity to enter into an agreement to arbitrate in light of its membership in the EU. Those cases require the Court of Appeals to consider what effect to give to binding decisions of the highest court of a supra-national legal order holding that its member states are without legal capacity to agree to arbitrate. The Court of Appeals resolution of this issue will make no difference in this case.

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3 Petitioner reserves it right to claim excess costs, expense, and attorneys' fees if India advances this argument for a sixth time before this Court without any supporting evidence or good faith basis for making it. 28 U.S.C. § 1927

Second, *NextEra* and *9REN* involve appeals by Spain of District Court orders granting preliminary injunctions against Spain to prevent Spain from pursuing anti-suit injunctions against *NextEra* and *9REN* before courts in EU member states. Similarly, *Blasket* involves an appeal of this Court's order denying a similar motion for a preliminary injunction. In each of those cases, Spain sought anti-suit injunctions from courts in various EU member states based on the decisions of the CJEU in *Achmea* and *Kolmstroy*. This case presents no such issues.

Third, there is only one question on appeal before the D.C. Circuit in *Blasket* that was raised by DT as an alternative argument and is unnecessary for the Court to reach. DT argued in the alternative that the Court had subject matter jurisdiction because India waived immunity from actions to enforce foreign arbitral awards when it signed the New York Convention. Pet. Opp. Br. at 19-22. *Blasket* rejected that argument. But critically, this Court need not reach the DT alternative "waiver" argument The Court can deny India's motion to dismiss and affirm its subject matter jurisdiction based on the portions of the holdings from the controlling precedents of *Chevron* and *Stileks* that are not challenged in any of the Appeals. There is therefore no reason to further delay resolution of India's motion to dismiss, which has been fully briefed since November 12, 2021.

There is an additional reason not to stay this case pending resolution of this issue. On this question, *Blasket* is not in tension with *9REN* and *NextEra*, because those cases concern recognition of awards rendered under the Convention on the Settlement of Investment Disputes (the "Washington Convention" or "ICSID Convention") and not (as in *Blasket* and this case) recognition of an award rendered pursuant to the New York Convention.[4] Any determination by

4 For this reason, the ultimate outcome of the decision in *Blasket* can be harmonized with the outcome of the decisions in *9REN* and *NextEra* because the awards at issue in those three cases arose under two different international treaties, one of which specifically prohibits

the Appeals concerning waiver in *9REN* and *NextEra* will apply only to the Washington Convention and not the New York Convention, and thus offer no instruction for the instant case.

There is no issue in any of the Appeals that would be dispositive of India's motion to dismiss and thus no basis for a stay. Indeed, both Parties agreed in their Joint Status Report of April 28, 2023, that the Court should lift the stay and proceed to rule on India's pending motion to dismiss for lack of subject matter jurisdiction.[5] Joint Status Report, ECF No. 29.

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domestic court review of arbitration awards. In *9REN* and *NextEra*, the arbitration awards were rendered under Washington Convention, which creates a self-contained system for the enforcement of arbitration awards that specifically excludes any review of the arbitral award by the domestic courts in any jurisdiction where enforcement is sought. *See* Article 53(1), Washington Convention, Oct. 14, 1966, 575 U.N.T.S. 194 ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention"). The Federal Arbitration Act ["FAA"] does not apply to arbitration awards rendered under the Washington Convention, and the "more robust form of judicial review" under the FAA "shall not apply to enforcement awards rendered" under the Washington Convention." *NextEra*, 2023 WL 2016932 at *11; The American Law Institute has explicitly recognized "that actions against a foreign state . . . . to enforce an **ICSID award are not subject to a defense of sovereign immunity**, **since jurisdiction is founded on the ICSID implementing legislation itself and the FSIA therefore does not apply**." Restatement (Fourth) of Foreign Relations Law of the United States § 458, Reporters Notes 5 (Am. L. Inst. 2018) (emphasis added). Conversely, *Blasket* is the only one of the three District Court cases on appeal that concerns an award rendered pursuant to the New York Convention. Accordingly, the award in *Blasket* was the only one subject to a defense of sovereign immunity under the FSIA and the defenses to enforcement contained in Article V of the New York Convention.

5 In *Watkins Holdings and others v. Spain*, Case No. 20-cv-1081 (D.D.C.), Judge Howell issued a minute order on June 9, 2023 granting a stay of an action to enforce another arbitration award rendered under the Washington Convention in which the petitioner had moved the court for preliminary injunctive relief against Spain. Judge Howell granted the stay in that case "[g]iven that both parties agree that the appeals [in *9REN*, *NextEra* and *Blasket*] will be dispositive as to th[e] merits" and of "petitioners' likelihood of success on the merits of this litigation." Minute Order, *Watkins*, Case No. 20-cv-1081 (D.D.C. June 9, 2023).

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court not stay the current proceedings pending the Appeals and that it deny India's motion to dismiss and grant Petitioner's petition to enforce the Award.

Dated: June 14, 2023

By: /s/

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