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 MEMORANDUM PURSUANT TO THE COURT'S MINUTE ORDER OF MAY 24, 2023

The Republic of India ("India") respectfully submits this Supplemental Memorandum as directed in the May 24, 2023 Minute Order. As the Court indicated, several pertinent legal developments have occurred since India's Motion to Dismiss ("MTD") (ECF 11-1). These include this Court's decision in *Blasket Renewable Investments, LLC v. Kingdom of Spain*, No. 1:21-cv-03249, 2023 WL 2682013 (D.D.C. Mar. 29, 2023), and recent decisions by the Canadian and German courts. These developments provide further support for India's arguments concerning the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(1) and § 1605(a)(6), as well as other critical aspects of the present litigation, as detailed below in **Part I**.

The D.C. Circuit likely will address some or all of the key holdings of *Blasket* during the pending appeal (No. 23-7038), which is being heard together with *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, No. 23-7031 (D.C. Cir.), and *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 23-7032 (D.C. Cir.). In its sound discretion, therefore, this Court indeed should "defer ruling on this case until the consolidated appeals . . . are resolved" by the D.C. Circuit. *See* Minute Order (May 24, 2023). The appropriateness of this approach is confirmed,

for example, in Judge Howell's recent order staying litigation to recognize an arbitral award because the D.C. Circuit's anticipated decisions in *Blasket*, *NextEra*, and *9REN* potentially will "be dispositive as to . . . whether this Court has subject matter jurisdiction," as explained further below in **Part II**. *See* Minute Order, *Watkins Holdings S.À.R.L. et al. v. Kingdom of Spain*, No. 1:20-cv-01081 (D.D.C. June 9, 2023).

I. The Recent Legal Developments Confirm India's Arguments

A. *Blasket* Confirms That, Under § 1605(a)(6), This Court Owes No Deference to the Arbitrators as to Whether the Parties Agreed to Arbitrate

Blasket confirms India's argument that this Court may exercise jurisdiction over India under § 1605(a)(6) only after evaluating *de novo* the "antecedent question" of whether India's "standing offer to arbitrate was void as to [any prospective claimant]" individually—irrespective of whether the applicable treaty incorporated the 1976 UNCITRAL Arbitration Rules ("UNCITRAL Rules," ECF 12-26). *Blasket*, 2023 WL 2682013, at *1, 4-7 (ruling that the claimants' EU nationality voided Spain's offer to arbitrate "*as to them*" specifically, such that "no arbitration agreement" was formed under the FSIA, notwithstanding that the arbitrators reached a different conclusion during arbitration conducted under the UNCITRAL Rules); *see also* MTD 36-42; Reply in Support of Mot. to Dismiss ("Reply") 10-15 (ECF 17).

As *Blasket* recognizes (at *4), such *de novo* analysis is mandatory under *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200 (D.C. Cir. 2015), in which the D.C. Circuit interpreted the FSIA as directing this Court to "satisfy itself" that the foreign State genuinely "formed an agreement [to arbitrate] with . . . potential . . . investors." *See* 795 F.3d at 205-08 & n.3 (completing this "jurisdictional task" in Part II-B of the opinion, before separately considering the UNCITRAL Rules as part of the "arbitrability" analysis in Part III). Other courts likewise have conducted this

same *de novo* analysis, including in cases arising under the UNCITRAL Rules and other (supposed) exclusive "delegation" clauses.[1]

Relatedly, two recent decisions by the Canadian and German courts confirm India's argument that, in the specific "context" of the present case, the UNCITRAL Rules do not provide "clear and unmistakable evidence" that the parties exclusively delegated arbitrability questions to the arbitrators. *See* MTD 37 (quoting *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308, 318 (2d Cir. 2021), for the principle that "context matters" in determining the parties' understanding of a purportedly exclusive "delegation" clause).

Specifically, as India has explained, both treaty signatories in the present case—India and Germany—have adopted the same model statute, the 1985 UNCITRAL Model Law ("UNCITRAL Law," ECF 12-27). MTD 37-40. The UNCITRAL Law contains a so-called "competence-competence" clause at Article 16(1)—which is materially identical to Article 21(1) of the UNCITRAL Rules, which Petitioner has invoked as purportedly excluding judicial review in the present case.[2] Both the Canadian decision and the German decision explicitly reject Petitioner's interpretation of the "competence-competence" clause—and thus provide further evidence that neither India nor Germany actually understood the UNCITRAL Rules' "competence-competence" clause as excluding courts from conducting *de novo* review of arbitrability questions.

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[1] *See Republic of Iraq v. BNP Paribas USA*, 472 F. App'x 11, 13 (2d Cir. 2012) (finding that a contract's "incorporation of UNCITRAL rules" did not exclude independent judicial evaluation of "whether [a specific litigant] may invoke the arbitration clause"); *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 287-88 (3d Cir. 2003) (joined by Alito, J.) (remanding for *de novo* consideration of whether a valid arbitration agreement existed, despite a clause granting "arbitrators the power to determine their own jurisdiction"); *Oehme, van Sweden & Assocs., Inc. v. Maypaul Trading & Servs., Ltd.*, 902 F. Supp. 2d 87, 96-97 (D.D.C. 2012) (proceeding to "independently decide whether" a specific litigant "is bound to arbitrate," because "rules giving an arbitrator power to decide arbitrability" do "not necessarily" show that the specific litigant "clearly and unmistakably" agreed to such rules in the first place).

[2] *Compare* UNCITRAL Law, Article 16(1) *with* UNCITRAL Rules, Article 21(1).

First, in *Russian Federation v. Luxtona Ltd.*, 2023 ONCA 393 (June 2, 2023) (Kownacki Decl. Ex. 1), one of Canada's highest appellate courts interpreted the "competence-competence" clause in Article 16(1) of the 1985 UNCITRAL Law, which states that "the arbitral tribunal may rule on its own jurisdiction, including any objections . . . to the existence or validity of the arbitration agreement." The Canadian court identified "strong international consensus" that such a "competence-competence" clause "promotes efficiency" only at the beginning of arbitration "by limiting a party's ability to delay arbitration through court challenges." *Luxtona*, ¶¶ 30-34, 43-49. After the arbitral award has been issued, however, such a clause "does not require any special deference . . . to an arbitral tribunal's determination of its own jurisdiction" and, rather, allows the reviewing court to conduct "a *de novo* hearing" of this issue. *Id.* (emphasis added).

Second, in the German decision (which Petitioner itself previously exhibited), the German court reached the same conclusion: "the state court is not bound by the arbitral tribunal's decision on competence . . . but the existence of an arbitration agreement is to be examined autonomously by the state court." Berlin Judgment 15 (ECF 28-2). As the German decision reveals, Petitioner apparently never attempted in the German litigation to invoke any supposed agreement to delegate questions of the tribunal's jurisdiction exclusively to the tribunal itself. Indeed, there is no evidence that Petitioner ever attempted to invoke such an allegedly exclusive "delegation" agreement anywhere other than before this Court.

B. *Blasket* Confirms That, Under § 1605(a)(6), This Court Owes No Deference to the Swiss Court

Blasket also forecloses Petitioner's argument that this Court here must "recognize the Swiss Court's findings rejecting the arbitrability arguments." *See* Opp'n to Mot. to Dismiss ("Opp'n") 4-7 & n.2 (ECF 14). In its application of § 1605(a)(6), *Blasket* held explicitly that

"courts are not required to accord preclusive effect to foreign judgments in petitions pursuant to the New York Convention." *Blasket*, 2023 WL 2682013, at *5 n.4.

This same understanding of the FSIA—and of the international arbitration system as a whole—is also reflected in *Chevron* and other appellate decisions. *Chevron*, 795 F.3d at 203, 205 n.3 (concluding that the FSIA required the district court "to satisfy itself" that an arbitration agreement existed, even though Ecuador's challenge had already been "rejected by . . . the Dutch Supreme Court"); *VRG Linhas Aereas S/A v. Matlinpatterson Glob. Opportunities Partners II L.P.*, 605 F. App'x 59, 61 (2d Cir. 2015) (declining to enforce a Brazilian arbitral award despite the Brazilian court's finding that the award was valid); *Sarhank Grp. v. Oracle Corp*, 404 F.3d 657, 662 (2d Cir. 2005) (holding that a U.S. court must evaluate the validity of an Egyptian arbitral award *de novo*, without merely relying upon the Egyptian court's prior decision).

The German decision exhibited by Petitioner explicitly confirms the same principle. Berlin Judgment 15 (ECF 28-2) ("The court is also not bound by the decision of the Swiss Federal Court . . . [which] does not release the court in the enforceability declaration proceedings from its own examination of the facts . . ."). This principle is also recognized by multiple other foreign courts and the leading commentaries on international arbitration.[3]

[3] *See, e.g.*, *Karaha Bodas Co. v. Negara*, 335 F.3d 357, 367-68 (5th Cir. 2003) (observing that a Hong Kong court disregarded earlier findings by an Indonesian court); *Kazakhstan v. Stati*, No. 2020/AR/252, Judgment 14-15 (Brussels Ct. of Appeal, Nov. 16, 2021) (Kownacki Decl. Ex. 2) (holding that, in post-arbitration litigation, it was not bound by prior decisions of Swedish and Italian courts in the same case); Emmanuel Gaillard, *International Arbitration as a Transnational System of Justice*, *in* Arbitration—The Next Fifty Years (Albert Jan van den Berg ed. 2012) (Kownacki Decl. Ex. 3) (explaining that "positions taken by the courts of the seat with respect to the validity of the award do not have a binding effect in other legal systems"); Gary Born, International Commercial Arbitration § 27.02 (3d ed. 2021) (Kownacki Decl. Ex. 4) ("[A]lthough the courts of the arbitral seat may properly consider [the arbitration agreement's existence], . . . those decisions cannot properly bind . . . other national courts . . . . [M]ost national courts have declined to accord preclusive effect to prior recognition decisions in other Contracting States.").

C. *Blasket* Confirms India Did Not "Waive" Sovereign Immunity Under § 1605(a)(1)

In *Blasket*, the petitioners argued that Spain purportedly waived sovereign immunity under § 1605(a)(1) merely by signing the New York Convention—that is, regardless of whether Spain ever concluded any arbitration agreement. *See Blasket*, 2023 WL 2682013, at *7–8. Here, Petitioner makes this same argument. *See* Opp'n 19 ("By becoming party to the New York Convention, India implicitly waived its immunity in enforcement actions brought against it pursuant to the Convention.").

This Court correctly rejected that argument in *Blasket*, 2023 WL 2682013, at *7–8, and agreed with the interpretation of *Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999) that India argues here. As India has shown, *Creighton* "recognized a waiver of sovereign immunity only where two separate and distinct requirements had been satisfied: (1) 'the defendant sovereign was . . . a signatory to the [New York] Convention' and also (2) 'had agreed . . . to arbitrate in the territory' of another signatory." MTD 45 (quoting *Creighton*, 181 F.3d at 123). *Blasket* reached the same conclusion. 2023 WL 2682013, at *8 (explaining that where "[n]o such agreement [to arbitrate] exists," then under *Creighton*, the New York Convention itself is "insufficient to establish jurisdiction" under § 1605(a)(1)); *see also id.* (holding that *Tatneft v. Ukraine*, 771 F. App'x 9 (D.C. Cir. 2019) did not and, indeed, could not "overrule[] the requirement for a valid agreement to arbitrate").

This interpretation of § 1605(a)(1) accords with recent *amicus* submissions by the European Union (whose views are entitled to "'respectful consideration,'" *see Blasket*, 2023 WL 2682013, at *8 n.6 (quoting *Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 138 S.Ct. 1865, 1868 (2018))). According to the European Union, the New York Convention does not "evince [any] sovereign's intent to waive immunity from an action to enforce an award that was not

premised on valid consent to arbitration." Brief for European Union as Amicus Curiae at 20-21, 2023 WL 2682013 (D.D.C. Mar. 29, 2023) (No. 1:21-cv-03249) (Kownacki Decl. Ex. 5). This interpretation also accords with the United States' view, which is entitled to "great weight" on matters of treaty interpretation. *Abbott v. Abbott*, 560 U.S. 1, 15 (2010). The United States has emphasized that Article 17 of the U.N. Convention on Jurisdictional Immunities of States and their Property ("U.N. Convention," Kownacki Decl. Ex. 7)—to which India is a signatory—weighs against finding any waiver based on the New York Convention alone. Brief for the United States as Amicus Curiae at 15, *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771 (D.C. Cir. 2022) (No. 21-7003) (Kownacki Decl. Ex. 6).[4]

Accordingly, because India did not offer to arbitrate with Petitioner in the present case (as described above), India likewise did not waive sovereign immunity under § 1605(a)(1). The New York Convention does nothing to change this analysis. *See Blasket*, 2023 WL 2682013, at *7–8 ("The FSIA's waiver exception does not allow prospective litigants to make an end run around the requirement for a valid arbitration agreement.").

D. *Blasket* Implicates the Circuit Split on *Forum Non Conveniens*

Blasket also implicates the deepening split of authority between the D.C. Circuit and the Second Circuit as to whether the doctrine of *forum non conveniens* is applicable in litigation to enforce arbitral awards—an issue that Spain "preserves . . . for further review" either by the D.C. Circuit sitting *en banc* or by the Supreme Court. Brief for Appellant Kingdom of Spain at 54, No. 23-7031 (D.C. Cir.) (Kownacki Decl. Ex. 8). The future course of the *Blasket* case, therefore,

[4] Specifically, Article 17 of the U.N. Convention recognizes only that a foreign State's "arbitration agreement" can abrogate sovereign immunity. Neither Article 17 nor any other provision of the U.N. Convention contemplates—explicitly or implicitly—any type of waiver based on merely signing the New York Convention.

may ultimately foreclose Petitioner's extensive (though ultimately misplaced)[5] reliance on *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005), and similar cases to rebut India's *forum non conveniens* argument. *See* Opp'n 23-26. Inasmuch as Petitioner also has relied on the German court's recent decision to contradict India's argument concerning the forum selection agreement (*see* Notice of Supp. Authority 1-2 (ECF 28)), India respectfully disagrees with the German court. Finally, the German decision has no preclusive effect (as explained above) and, moreover, has been timely appealed.

II. The Pertinent Developments Justify Deferring This Court's Ruling

As explained above, the present case implicates multiple key questions of law that are being considered by the D.C. Circuit on appeal in *Blasket* (No. 23-7038), *NextEra* (No. 23-7031), and *9REN* (No. 23-7032). This understanding is confirmed by the appellate briefs exchanged in those cases by Spain, the *Blasket* petitioners, and the European Union on May 30 and June 6.

Under such circumstances, this Court frequently has recognized the need to defer ruling in a first-instance litigation until after the D.C. Circuit has resolved the potentially dispositive questions. For example, Judge Howell recently issued a stay of litigation to enforce an arbitral decision pending the D.C. Circuit's consideration of the *Blasket* appeal. *See* Minute Order, *Watkins Holdings S.À.R.L. et al. v. Kingdom of Spain*, No. 1:20-cv-01081 (D.D.C. June 9, 2023) (acknowledging that the *Blasket* appeal will potentially "be dispositive as to . . . whether this Court has subject matter jurisdiction over this matter" under the FSIA and "whether *forum non conveniens* dismissal is warranted"). Deferring a ruling on India's Motion to Dismiss also comports with this Court's practice more broadly, as detailed below.

[5] India reiterates its position (Reply 1-3) that the *TMR Energy* framework on *forum non conveniens* is inapplicable here, given that none of the D.C. Circuit's post-arbitration cases involved forum selection agreements resembling the agreement between Germany and India in the present case.

Where jurisdictional questions are at issue under the FSIA and other statutes, this Court frequently has "stayed . . . cases pending resolution" by the D.C. Circuit of "the same jurisdictional question[s]." *Vallejo Entm't LLC v. Small Bus. Admin.*, No. 1:22-cv-01548, 2023 WL 3275634, at *1 (D.D.C. May 4, 2023) (Leon, J.) (collecting cases); *see also* Minute Order, *Toren v. Fed. Republic of Germany*, No. 1:16-cv-01885 (D.D.C. July 9, 2018) (Leon, J.) (staying litigation *sua sponte* while two cases presenting similar issues regarding the scope of the FSIA's expropriation exception were pending before the D.C. Circuit); *Boumediene v. Bush*, 450 F. Supp. 2d 25, 28 (D.D.C. 2006) (Leon, J.) (identifying "eight additional cases that are currently stayed pending the outcome of the overarching jurisdictional issues on appeal in our Circuit").

In this regard, it is worth emphasizing that India—much like Spain—is explicitly asserting jurisdictional immunity from "'the attendant burdens of litigation, and not just a defense to liability on the merits.'" *See In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) (emphasis added)). The jurisdictional nature of India's challenges, therefore, weighs strongly in favor of deferring any decision in the present case until after the D.C. Circuit resolves the potentially dispositive questions under the FSIA. *See, e.g.*, *Philipp v. F.R.G.*, 436 F. Supp. 3d 61, 68 (D.D.C. 2020) (where sovereign immunity is at issue on appeal, the "burden of defending against a lawsuit is irreversible and constitutes harm").

Moreover, deferring the Court's ruling on India's Motion to Dismiss will serve the interests of judicial economy and preserve the parties' resources, as reflected in many previous decisions. *See, e.g.*, *P.J.E.S. v. Mayorkas*, No. 1:20-cv-02245, 2023 WL 387570, at *5 (D.D.C. Jan. 25, 2023) (staying litigation to "preserve everyone's resources" and the Court's interest in "judicial economy" (citations omitted)); *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 233 F. Supp. 3d

69, 87-88 (D.D.C. 2017) (explaining that a stay "would serve the interests of judicial efficiency" because a separate case "pending on appeal" potentially would have "preclusive effect over the instant proceedings").

At the same time, any modest delay from deferring a decision on India's Motion to Dismiss will not cause Petitioner cognizable prejudice or irreparable harm, as India has explained previously. *See, e.g.*, India's Reply in Support of Motion to Stay 14-15 (ECF 22). This Court has observed in many cases that a petitioner's interest in "quickly collecting" under an arbitral award is "less acute" where, as here, the arbitral award continues to accrue post-award interest. *RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain*, No. 1:19-cv-03783, 2021 WL 1226714, at *3 (D.D.C. Mar. 31, 2021); *see also Hulley Enters. v. Russian Fed'n*, 502 F. Supp. 3d 144, 163 (D.D.C. 2020) (observing that any hardship from delayed payment "is tempered . . . by the fact . . . that post-award interest will compensate for any delay").

Notably, briefing in *Blasket* and in Spain's related appeals is already well under way. *See* Order, *Blasket Renewable Investments, LLC v. Kingdom of Spain*, No. 23-7038 (D.C. Cir. Apr. 20, 2023) (setting the deadline for the reply briefs for July 20).

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For the reasons stated above, this Court should grant India's Motion to Dismiss in accordance with *Blasket*. Alternatively, this Court should defer any resolution of India's Motion to Dismiss until the D.C. Circuit's decision in *Blasket* and Spain's related appeals.

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Washington, DC

Respectfully submitted,

WHITE & CASE

/s/ Nicolle Kownacki
Nicolle Kownacki (D.C. Bar No. 1005627)
David P. Riesenberg (D.C. Bar No. 1033269)
Ena Cefo (D.C. Bar No. 1044266)
Weiqian Luo (D.C. Bar No. 1613732)
701 Thirteenth Street, NW
Washington, DC 20005
Telephone: + 1 202 626 3600
Facsimile: + 1 202 639 9355
nkownacki@whitecase.com

Counsel for the Republic of India