UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

RESPONSE TO PETITIONER'S NOTICE OF FOREIGN JUDICIAL DECISIONS (ECF 28)

On April 13, 2023, Petitioner Deutsche Telekom AG ("DT") filed a Notice of Foreign Judicial Decisions (ECF 28). Respondent Republic of India ("India"), by and through its counsel White & Case LLP, respectfully submits the following response. The supplemental authorities referenced in DT's Notice of Foreign Judicial Decisions (ECF 28) confirm at least three elements of India's (and not DT's) arguments in this case, as detailed below.

First, DT's authorities support India's position that deference is not owed to the decisions of the Swiss Federal Supreme Court. DT previously asked this Court to "recognize the Swiss Court's findings rejecting the arbitrability arguments." *See* Pet. MTD Opp'n 4-7 & n.2 (ECF 14). But this argument is directly foreclosed by *Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 21-cv-3249, 2023 U.S. Dist. LEXIS 54502, at *15 n.4 (D.D.C. Mar. 29, 2023) ("[C]ourts are not required to accord preclusive effect to foreign judgments in petitions pursuant to the New York Convention."). Further, to the extent there is any relevance in this proceeding to the German Court decision that DT has exhibited, that decision also confirms this point. *See* 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 . . . . " (emphasis added)); *see also* Resp.'s MTD Reply 8-10 (ECF 17) (collecting further case law).[1]

Second, DT's authorities also underscore India's position on the lack of deference owed to the findings of the arbitral tribunal on questions of arbitrability. The *Blasket* decision expressly confirmed this Court's obligation under the Foreign Sovereign Immunities Act ("FSIA") to evaluate *de novo* whether DT was individually eligible to accept any offer to arbitrate (and, therefore, whether a valid arbitration agreement exists), as India consistently has explained. *See Blasket*, 2023 U.S. Dist. LEXIS 54502, at *1-2, 11-21 (distinguishing "both *Stileks* and *Chevron*," and reasoning that "Spain's standing offer to arbitrate was void as to the Companies" individually, such that "no valid agreement to arbitrate exists, and this Court therefore lacks . . . subject matter jurisdiction" under the FSIA's arbitration exception at 28 U.S.C. § 1605(a)(6)).[2]

Further, the German Court decision rejects DT's argument that the Parties purportedly agreed to exclude post-arbitration judicial review under the 1976 UNCITRAL Rules.[3] *See* Pet. MTD Opp'n 9-14 (ECF 14). Berlin Judgment 15 (ECF 28-2) ("[T]he state court is not bound by

[1] In any event, the Swiss Federal Supreme Court's most recent decision on the revision application (ECF 28-1 at 8) denied India's application purely based on a Swiss procedural deadline—*i.e.*, because an "application for review must be filed within 90 days of the discovery of the grounds for review." The Swiss deadline is necessarily irrelevant in this U.S. litigation.

[2] There is no contradiction between *Blasket* and *Chiejina v. Federal Republic of Nigeria*, No. 21-cv-2241, 2022 U.S. Dist. LEXIS 152675 (D.D.C. Aug. 23, 2022). Specifically, *Chiejina* is distinguishable because it did not involve any purported "offer" or "acceptance" under an international treaty—but rather a concluded arbitration contract. In the present case, India emphasizes that no agreement was ever formed, whereas Nigeria conceded that "the Contract's arbitration provision creates an agreement to arbitrate . . . as to the parties to the Contract." *See Chiejina*, 2022 U.S. Dist. LEXIS 152675, at *8-9.

[3] India respectfully disagrees with the German Court's substantive conclusions as to the proper interpretation of this specific treaty. Accordingly, India has now filed a timely appeal—as of right—on February 27, 2023, to the highest court in Germany. In any event, as noted above, under *Blasket*, such "foreign judgments" are not entitled to deference as to whether the parties agreed to arbitrate. *See Blasket*, 2023 U.S. Dist. LEXIS 54502, at *15 n.4.

the arbitral tribunal's decision on competence . . . , but the existence of an arbitration agreement is to be examined autonomously by the state court" (emphasis added)); *see also* Resp.'s MTD 36-42 (ECF 11-1); Resp.'s MTD Reply 13-15 (ECF 17) (explaining DT's failure to show "clear and unmistakable evidence" of any agreement to exclude judicial review).

Third, DT's authorities support India's argument on the lack of an implied waiver of sovereign immunity. DT has argued that India waived sovereign immunity under 28 U.S.C. § 1605(a)(1) merely by signing the 1958 New York Convention. *See* Pet. MTD Opp'n 19-22 (ECF 14). *Blasket* rejected this argument in its entirety, and fully agreed with India's reasoning. *See Blasket*, 2023 U.S. Dist. LEXIS 54502, at *23-24 ("[T]his Court will not read *Tatneft* as having overruled the requirement for a valid agreement to arbitrate. The FSIA's waiver exception does not allow prospective litigants to make an end run around the requirement for a valid arbitration agreement.").

Accordingly, for these reasons and those stated in India's Motion to Dismiss and Reply, this Court should grant the Motion and dismiss the Petition.

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Washington, DC

Respectfully submitted,

WHITE & CASE

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