UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

PETITIONER'S POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

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INTRODUCTION

Petitioner Deutsche Telekom AG ("Deutsche Telekom" or "DT") respectfully submits this memorandum of Points and Authorities in Opposition to Respondent's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) and under the doctrine of *forum non conveniens*. In its motion, Respondent, the Republic of India ("India"), repeatedly ignores controlling case law in this Circuit applicable to proceedings to enforce foreign arbitral awards, and this Court should deny the motion.

The D.C. Circuit has repeatedly held that the immunity arguments India advances in support of its motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) are properly considered defenses to enforcement under Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C. §§ 201-208) ("New York Convention"), rather than sovereign immunity objections implicating the court's subject matter jurisdiction. *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878-79 (D.C. Cir. 2021); *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205-06 (D.C. Cir. 2015). This Court should treat India's objections to this Court's subject matter jurisdiction as defenses against enforcement in accordance with that case law and proceed to reject them (as did the Arbitration Tribunal and the highest court in Switzerland, the Swiss Federal Supreme Court) notwithstanding India's attempt to further delay enforcement by improperly recasting them as objections to the Court's subject matter jurisdiction.

The D.C. Circuit has also repeatedly held that *forum non conveniens* is not appropriate in an action to enforce a foreign arbitration award. *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 298, 303 (D.C. Cir. 2005); *BCB Holdings Ltd. v. Gov't of Belize*, 650 F. App'x 17, 19 (D.C. Cir. 2016). Moreover, India's *forum non conveniens* argument is based on a deliberate misinterpretation of the bilateral investment treaty between Germany and India

("Treaty")[1] as including a mandatory forum selection clause for the enforcement of arbitral awards. India's interpretation of the Treaty is wrong and would gut the Treaty of one of its most essential protections: the availability of international arbitration to investors for the resolution of investment disputes with India arising out of India's breaches of the Treaty.

To support its spurious argument India relies on a provision of the Treaty, Article 9(2)(b)(v), that itself specifically obligates India "to abide by and comply with" the terms of the Final Award. India deliberately does not cite to its obligation to comply with and abide by the terms of the Final Award, presumably in the hope that doing so will cause the Court to overlook the obvious inequity of India invoking a provision of the Treaty to argue that the Petition should be dismissed while, at the same time, India continues to be in breach of its obligations under that provision. The Court should not countenance such hypocrisy.

India's motion to dismiss is a transparent delay tactic. India has attempted to reserve for some later date a right to invoke two other defenses against enforcement of the Final Award. One of those two defenses (an argument that Petitioner's claims were foreclosed by the "essential security" clause in Article 12 of the Treaty) has already been considered as a defense on the merits and rejected by the Arbitration Tribunal (and properly declared as an unreviewable substantive question by the Swiss Federal Supreme Court). India is not entitled to another bite at the apple, and this Court should proceed to reject it.

The second defense against enforcement India raises—that India determined in 2021 that a fraud occurred in 2005 in connection with the contract between Devas and Antrix—is a "public policy" defense under Article V(2)(b) of the New York Convention that, even if true, cannot

1. Boykin Decl., Ex. B, Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments, July 10, 1995, 2071 U.N.T.S. 121 [ECF No. 1-5].

apply to Petitioner, which only became an indirect shareholder in Devas years after the alleged fraud occurred. Although it purports to reserve this defense for a later date, India devotes nearly five pages of its motion to describing its supposed discovery of the alleged fraud. Those allegations make clear that Petitioner was not involved with whatever India now alleges happened in 2005. As a result, this Court has before it all it needs to proceed to dismiss this defense against enforcement too.

Accordingly, for the reasons stated below, Petitioner respectfully requests that the Court deny India's motion to dismiss in its entirety, grant Petitioner's Petition to Recognize and Enforce the Final Award, and enter judgment in favor of Petitioner in the amount claimed therein.

ARGUMENT

I. INDIA DOES NOT ENJOY SOVEREIGN IMMUNITY

Deutsche Telekom demonstrated in the Petition that India does not have sovereign immunity, because both the "arbitration" and "waiver" exceptions in the Foreign Sovereign Immunities Act ("FSIA") apply to this action. *Cf.* 28 U.S.C. § 1605(a)(1), (6); Pet. ¶ 12 [ECF No. 1]. India's arguments to the contrary fail.

A. There is an Arbitration Agreement

Under the guise of challenging this Court's jurisdiction under the FSIA, India attempts to litigate for a third time, *de novo*, the question of whether it agreed in Article 9 of the Treaty to arbitrate its dispute with Deutsche Telekom. India's argument suffers from several defects.

- First, India fully litigated this question—and lost—when it attempted to set-aside the Interim Award before the Swiss Federal Supreme Court. The Swiss court's findings are binding against India before this Court as a matter of *res judicata* and international comity. (Section II.A.1).

- Second, India's arguments against the arbitrability of the underlying dispute with Deutsche Telekom are not objections to this Court's jurisdiction under the FSIA, but instead are potential—albeit unfounded—defenses to the enforcement of the Final Award under Article V of the New York Convention. (Section I.A.2).
- Third, India agreed to arbitrate the arbitrability question, and the Tribunal concluded that the Parties had an arbitration agreement (as would the Swiss Federal Supreme Court), because Deutsche Telekom was a protected "investor" with a qualifying "investment" under the Treaty. India is therefore not entitled to *de novo* review of that question from this Court, and it has not adduced any evidence to overcome the substantial deference that this Court owes to the Tribunal's finding. (Section I.A.3.).
- Fourth, India's contentions concerning the Treaty and its agreement to arbitrate with Deutsche Telekom are incorrect on the substance. (Section I.A.4).

1. Comity and *Res Judicata* Preclude India from Relitigating the Question of Whether it Agreed to Arbitrate this Dispute with Deutsche Telekom

India had its day in court in Switzerland and lost. Per the doctrines of comity and *res judicata*, it cannot now ask this Court to effectively collaterally attack the Swiss Court's judgment. "[T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity. . . ." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir.1984). As the Supreme Court has long held, under principles of international comity, a foreign court's judgment on a matter is "conclusive" in a federal court where "the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and

opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence." *Hilton v. Guyot*, 159 U.S. 113, 159-160 (1895).

Likewise, "[u]nder the doctrine of *res judicata*, also known as claim preclusion, 'a judgment on the merits in a prior suit bars a second suit involving identical parties or their privies based on the same cause of action.'" *Camp v. Kollen*, 567 F. Supp. 2d 170, 172 (D.D.C. 2008) (Leon, J.) (quoting *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004). *Res judicata* applies if the following elements are satisfied: "(1) an identity of parties in both suits; (2) a judgment rendered by a court of competent jurisdiction; (3) a final judgment on the merits; and (4) an identity of the cause of action in both suits." *Id.* (citation omitted).

These doctrines apply to a judgment by a court at the seat of an international arbitration declining a request to set-aside the award from the arbitration. For example, in *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, a federal court gave preclusive effect to a decision by the Swiss Federal Supreme Court—the same court as in this case—that refused to set-aside an arbitration award at the request of the party that lost the arbitration. 288 F. Supp. 2d 783 (N.D. Tex. 2003). In that case, the arbitral tribunal seated in Geneva had ruled that the claimant lacked standing to claim under the relevant contract, and the Swiss Federal Supreme Court refused to set-aside this decision. *Id.* at 785-86. The claimant nonetheless then attempted to recover under the contract before the United States federal court. However, the federal court gave effect to the Swiss court's ruling that the claimant lacked standing: "Because the issue has already been decided by the Swiss court, a review of that issue by this court would violate principles of *res judicata* and international comity." *Id.* at 794. In deferring to the Swiss court, the federal court noted that "[the claimant] itself invoked the jurisdiction of the Swiss court system to appeal the Final Award." *Id.* at 795. The court also noted that under the New York

Convention it had a "limited, distinct role[]" as a court of secondary jurisdiction, as opposed to the Swiss Federal Supreme Court that was the court of primary jurisdiction competent to review requests to set-aside the award. *Id.* n.20 (citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 356, 373 n.62 (5th Cir.2003)).[2]

The same result applies here. India invoked the jurisdiction of the Swiss court system in an attempt to set-aside the Interim Award. The Swiss Federal Supreme Court was the competent court to hear a set-aside request concerning the Geneva-seated arbitration. Boykin Decl., Ex. E Bundesgericht [BGer] [Swiss Federal Supreme Court] Dec. 11, 2018, Case No. 4A_65/2018, ¶ 2.1 [ECF No. 1-8] ("Swiss Court Decision"); N.Y. Convention, Art. V(1)(e). India litigated before the Swiss Court the same arbitrability arguments that it attempts to relitigate here—that its consent to arbitration did not extend to indirect investments, and that Deutsche Telekom allegedly engaged only in "pre-investment" activity. *See* Swiss Court Decision at ¶¶ 3.1.1, 3.1.2. The Swiss Court reviewed these arbitrability questions *de novo*. Swiss Court Decision at ¶ 2.4.1 ("[T]he First Civil Law Court freely examines the matters of law . . . which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal."). It analyzed these arguments in detail and provided both Deutsche Telekom and India with a full opportunity to be heard. *See id.* ¶¶ 3.2.1.2.4-3.2.1.25, 3.2.2.2. It then issued a final judgment rejecting these arbitrability questions on their merits. *See id.* ¶ 3 (noting that it was analyzing the "*merits* . . . of the

2. Similarly, where a court at the arbitral seat issues a judgment affirmatively confirming an award (under the process of "*exequatur*," which exists in some foreign jurisdictions), United States courts readily enforce the judgment. *See Seetransport Wiking Trader Schifffahrsgesellschaft MBH&Co. v. Navimpex*, 29 F.3d 79 (2d Cir. 1994) (enforcing as money judgment French court judgment conferring '*exequatur*' on award from Paris-seated arbitration); *Continental Transfert Technique Ltd. v. Fed. Gov't Nigeria*, 800 F.Supp.2d 161 (D.D.C. 2011) (enforcing judgment of United Kingdom High Court of Justice recognizing as final and enforceable arbitration award from London-seated arbitration), *aff'd* 603 Fed.Appx. 1 (D.C. Cir. 2015). In this case, the Civil Court for the Republic and Canton of Geneva issued a certificate of enforceability of the Final Award on August 20, 2020. *See* Boykin Decl. Ex. F [ECF No. 1-9].

grievance relating to the jurisdiction of the Arbitral Tribunal" (emphasis added)).

Therefore, the requirements of international comity and *res judicata* are satisfied. This Court should recognize the Swiss Court's findings rejecting the arbitrability arguments that India presents in its Motion, and preclude India from litigating them again.

2. Arbitrability Questions are Potential Defenses to Enforcement under the New York Convention, Not Objections to the Court's Jurisdiction under the FSIA

The party resisting confirmation of an arbitral award under Article V of the New York Convention bears a "heavy burden" of establishing that one of the grounds for denying confirmation in Article V applies. *See Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, 300 F. Supp. 3d 137, 146 (D.D.C. 2018) (Leon, J.); *Pao Tatneft v. Ukraine*, Civil Action No. 17-582 (CKK), 2020 WL 4933621, at *4 (D.D.C. Aug. 24, 2020); *LLC Komstroy v. Republic of Moldova*, Case No. 14-cv-01921 (CRC), 2019 WL 3997385, at *4 (D.D.C. Aug. 23, 2019); *cf. Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011) ("[T]he showing required to avoid summary confirmation is high.").

In an attempt to avoid this heavy burden, India has improperly presented two of the arbitrability objections rejected by the Swiss Federal Supreme Court as implicating this Court's subject matter jurisdiction under the FSIA. However, both this Court and the D.C. Circuit have repeatedly held that the validity, existence, or scope of an arbitration agreement—including the question of whether a foreign investor is a qualifying "investor" with a qualifying "investment" under an investment treaty—is a question of recognition and enforcement under Article V of the New York Convention, not a question of jurisdiction under the FSIA.

For example, in *Chevron Corp. v. Ecuador*, Ecuador, like India, "argue[d] that the FSIA required the District Court to make a *de novo* determination of whether Ecuador's offer to arbitrate in the Treaty encompassed Chevron's [activities that were allegedly 'investments']. . . .

In Ecuador's view, the arbitrability question is therefore a jurisdictional question that must be addressed by the District Court." 795 F.3d at 205. The D.C. Circuit rejected this argument: "Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention." *Id.* It concluded, "The dispute over whether [Chevron's activities] were 'investments' for purposes of the treaty is properly considered as part of review under the New York Convention." *Id.* at 206.

The D.C. Circuit reiterated this point in another case involving an investment treaty. *See Stileks*, 985 F.3d 871. In that case, Moldova argued that the arbitral claimant did not have a qualifying "investment" under the treaty. The D.C Circuit, however, found:

> If Moldova is correct, it might have a defense to confirmation under the New York Convention [art. V(1)(c)]. We have held, however, that the arbitrability of a dispute is not a jurisdictional question under the FSIA. Moldova's brief uses Article V(1)(c) to bolster its claim of sovereign immunity, and, in so doing, it "conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention." The FSIA's arbitration exception therefore applies and we reject Moldova's immunity claim. We construe Moldova's arbitrability argument as a defense under Article V(1)(c) of the Convention.

Id. at 878 (citing *Chevron*, 795 F.3d at 205-06).

This Court has also noted "a lack of authority for the proposition 'that the Court must conduct an independent, *de novo* determination of the arbitrability of a dispute to satisfy the FSIA's arbitration exception.'" *Belize Soc. Dev. Ltd v. The Gov't of Belize*, 5 F. Supp. 3d 25, 34 (D.D.C. 2013) (Leon, J.) (citation omitted).

> Indeed, the FSIA jurisdictional inquiry is a 'cabined' one that focuses on the authority of the court, not the contractual rights and obligations of the parties. And regardless of whether I consider contract validity now, the question will be addressed anyway—as it always is, though under a deferential standard—when I turn to the Article V(1)(a) exception to the New York Convention.

Id. (citation omitted). "Inquiring into the merits of whether this dispute was rightly submitted to arbitration is beyond the scope of the FSIA's jurisdictional framework. . . . Regardless, the Court

considers the merits of the [State's] argument pursuant to Article V of the Convention in [a later section of the opinion]." *BCB Holdings Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 244 (D.D.C. 2015); *see also LLC Komstroy*, 2019 WL 3997385 at *5 ("Guided by [*Chevron*], the Court concludes that Moldova has failed to rebut Petitioner's prima facie showing of an agreement to arbitrate and leaves any questions of arbitrability to whether to enforce the Award."); *Pao Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 190 (D.D.C. 2018) (deferring resolution of Ukraine's arbitrability argument—including argument that as a state-owned entity Tatneft was not a qualifying "investor"—to the section of decision concerning defense to enforcement under Article V of the Convention); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 109 n.12 (D.D.C. 2017) (same).

Therefore, under the controlling case law of this Circuit, India was obligated to present these arbitrability objections as defenses to enforcement under Article V of the New York Convention. These objections are not, however, objections to this Court's jurisdiction under the FSIA. For the reasons explained in Section III, below, the Court should affirm its subject matter jurisdiction over the Petition, treat these arguments as defenses to enforcement of the Final Award, reject them, and grant the Petition to confirm the Final Award.

3. India and Deutsche Telekom Agreed that the Tribunal Would Resolve Questions of Arbitrability

India argues that this Court has the authority to review *de novo* the question of whether India agreed to arbitrate its dispute with Deutsche Telekom. This is incorrect. Because India and Deutsche Telekom agreed that the Tribunal would resolve arbitrability questions, this Court must accord substantial deference to the Tribunal's finding that India and Deutsche Telekom agreed to arbitrate their dispute.

India concedes that the Parties agreed to arbitrate arbitrability. *See* Statement of Points

and Authorities in Support of The Republic of India's Motion to Dismiss ("Resp. Br.") at 36 [ECF No. 11-1]. It acknowledges that its standing offer of arbitration in Article 9(2) of the Treaty provided that arbitration would occur in accordance with the 1976 UNCITRAL Rules. It further acknowledges that Article 21(1) of these rules contains a 'competence-competence' provision,[3] and that the D.C. Circuit has twice found that the incorporation of the UNCITRAL Rules constitutes "clear and unmistakable evidence" within the meaning of the Supreme Court's jurisprudence that the parties agreed to arbitrate arbitrability. *Id.*; *see Stileks*, 985 F.3d at 878-79; *Chevron*, 895 F.3d at 207-08. This Court has made a similar finding many times as well, *see Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144, 157-58 (D.D.C. 2018); *Tatneft*, 301 F. Supp. 3d at 188-90, as has the Supreme Court. *See BG Grp. PLC v. Rep. of Argentina*, 572 U.S. 25, 40-41 (2014) (incorporation of UNCITRAL Rules in BIT reinforced ordinary presumption that parties intended for arbitrators to rule on procedural condition precedent to arbitration).[4]

However, India attempts to avoid the consequence that flow from this fact—which is that the Court must accord substantial deference to the Tribunal's ruling on arbitrability—through three maneuvers.

First, India argues that Deutsche Telekom and India "did not exclude judicial review" of arbitrability. *See* Resp. Br. at 36, heading 3. This is a red herring. The U.S. Supreme Court has established that as a matter of law, if the parties agreed to arbitrate arbitrability, then substantially deferential judicial review applies to the arbitrators' decision, regardless of whether

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3. That is, a provision affirming the tribunal's authority to rule on its own jurisdiction.

4. This Court has made the same finding regarding the ICSID Additional Facility Rules, which are materially the same as the UNCITRAL Rules. *See Crystallex*, 244 F. Supp. 3d at 111-12 (same, regarding ICSID Additional Facility Rules), *aff'd* 760 F. App'x 1, 2-3 (D.C. Cir. 2019); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 121-22 (D.D.C. 2015); *Rusoro*, 300 F.Supp.3d at 147-48.

the parties explicitly mentioned such deference in their agreement or not. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. *That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances*." (emphasis added) (citations omitted)); *BG Grp.*, 572 U.S. at 41 ("The interpretation and application of the local litigation provision is primarily for the arbitrators. Reviewing courts cannot review their decision *de novo*. Rather, they must do so with *considerable deference*." (emphasis added)).

In fact, the Supreme Court recently used language that—in the interpretation of the D.C. Circuit—indicates that there is no judicial review at all of an arbitrability determination that has been reserved for arbitrators. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses *no power* to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." (emphasis added)); *Stileks*, 985 F.3d at 878-79 ("That standard is more than mere deference. A recent, unanimous opinion of the Supreme Court drove this point home. . . . The conjunction of *Chevron* and *Henry Schein* means that we *must accept* the arbitral tribunal's determination that Energoalliance's claim fell within the ECT." (emphasis added));[5] *cf. Chevron*, 795 F.3d at 207 ("The District

5. Petitioner notes, however, that *Henry Schein* did not discuss judicial review as such of a completed arbitration, but made its finding in the context of a motion to compel arbitration.

Court did not need to reach the question of whether Chevron's lawsuits fell within the terms of submission to arbitration because the Treaty allows the arbitration tribunal to make that determination.").

Therefore, the fact that India and Deutsche Telekom were silent in their arbitration agreement about the extent of judicial review only means that existing U.S. law applies. That law is one of substantial (or complete) deference to the determination of the arbitrators.

Second, against this well-established case law of this Circuit, India cites only one case from another circuit, which it misapplies. *See* Resp. Br. at 37 (citing *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F. 4th 308 (2d Cir. 2021)). In that case, the Second Circuit stated that incorporation of arbitral rules analogous to the UNICTRAL Rules may not provide clear and unmistakable evidence of the parties' intent to arbitrate arbitrability "where *other aspects of the contract create ambiguity* as to the parties' intent." *DDK*, 6 F. 4th at 318 (emphases added). India ignores both underlined criteria in the sentence it quotes: other aspects of the agreement, and the existence of an ambiguity.

India does not look to "other aspects of the [parties' agreement]" for its argument, but instead relies on sources extrinsic to its and Deutsche Telekom's arbitration agreement, namely the laws of Germany, India and Switzerland. *DDK* did not provide for resort to such extrinsic evidence.[6] And this Court has rejected a state's attempt to use extrinsic evidence to override a provision that delegates arbitrability questions to the arbitrators. *See Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, 300 F.Supp.3d at 147-48 (Leon, J.) (refuting Venezuela's reliance on the Canadian Attorney General's statements in unrelated litigation in order to

6. In that case, the Second Circuit looked to the text of other portions of the contract. *DDK*, 6 F. 4th at 318-20; see Section II.B.1, below, discussing the interpretation of treaties as analogous to the interpretation of contracts under U.S. law.

override the effect of a competence-competence provision in the ICSID Additional Facility Rules incorporated into the arbitration agreement).

Nor does India explain how the domestic laws it cites "create ambiguity" about the parties' intentions regarding arbitrability. There is no such ambiguity: India offered to arbitrate according to the 1976 UNCITRAL Rules, Article 21(1) of which gives the Tribunal the power to rule on objections to its jurisdiction, "including any objections with respect to the existence . . . of the separate arbitration agreement." In any event, even if India did not understand this provision to preclude *de novo* review of the question of the existence of the arbitration agreement, India received such *de novo* review from the Swiss Federal Supreme Court.

Third, India takes a detour through arbitration cases involving professional licensees and their clients or customers. *See* Resp. Br. at 40-42. It is unclear how these cases are relevant to India's argument on deference, because the courts' authority to rule on arbitrability in these cases was undisputed, and there was no provision analogous to the UNCITRAL Rules in the relevant arbitration clause. *See, e.g.*, *Citigroup Glob. Mkts. v. Abbar*, 761 F.3d 268, 274 (2d Cir. 2014) ("In the absence of an agreement by the parties to submit the matter of arbitrability to the arbitrator, the question of whether or not a dispute is arbitrable is one for the court."). Furthermore, India's analogy between these professional licensing rules and investment treaties fails.[7]

Thus, in light of the Parties' agreement to arbitrate arbitrability, this Court must afford substantial (or complete) deference to the Tribunal's ruling that the Parties' agreed to arbitrate

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7. The professional licensing rules are promulgated by a governing body (*e.g.*, the D.C. Court of Appeals) and are then binding on the licensees (*e.g.*, lawyers barred in D.C.). The governing body that makes the rules is not a party to any resulting arbitration agreement. These rules are therefore more akin to statutes promulgated by a legislature with venue provisions. By contrast, in an investment treaty, one of the disputing parties itself (the sovereign) offers the rules, which are accepted by another disputing party (the investor). This is why one can speak of an arbitration "agreement" between an investor and a host state.

this dispute. India has not provided any material to cause the Court to depart from the Tribunal's finding, and largely repeats its arguments from the arbitration, even exhibiting its arbitral pleadings. *See* Resp. Br. at 28-36; Konwacki Decl., Ex. 6 [ECF No. 12-6]. The Court should therefore adopt the Tribunal's finding.

4. The Tribunal and Swiss Court Were Correct in Finding that India Agreed to Arbitrate

Although India is not entitled to another review of the substance of its arbitrability arguments for the three reasons above, India's arguments are incorrect in any event. Petitioner met the requirements of India's offer to arbitrate in Article 9 of the Treaty, as correctly found by both the Tribunal and the Swiss Federal Supreme Court.

(a) Deutsche Telekom had an "Investment" under the Treaty, not merely "Pre-investment" Activity

India argues that Petitioner did not have an "investment" under the Treaty, but had engaged only in "pre-investment" activity. Resp. Br. at 27-32. This is incorrect. Article 1(b)(ii) of the Treaty defines "investment" to include "shares in . . . a company, and any other forms of such interests in a company." Petitioner plainly satisfied this definition through its acquisition of an equity interest in Devas for USD 97 million. India tries to get around this fact by re-characterizing what was 'actually' the investment in this case, arguing that "the relevant, purported investment in the present dispute" or the "only investment at issue in the present dispute" is the completion of the project foreseen by the Devas-Antrix Agreement (whose completion India prevented). Resp. Br. at 27, 31. As the Swiss Court found, India "ignores the very definition of investment given by the treaty in question." Swiss Court Decision at 23. The Treaty by its terms defines "investment." It does not leave it to one of the Contracting States to insert its own definition based on the particulars of its dispute with an investor.

India also relies on Article 3(1) of the Treaty.[8] That article does not purport to define what is or is not an "investment" covered by the Treaty. Only Articles 1—titled "Definitions"—and 2—titled "Scope of the Agreement"—do so. Instead, Article 3(1) obliges India to admit German investments in accordance with its laws. As the Tribunal found, Article 3(1) "is not a permissive clause authorizing [India] not to admit investments . . . That provision says nothing about the consequences of a lack of admission; it certainly does not imply that Treaty protection depends on admission." Boykin Decl., Ex. D, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, ¶ 175 (Dec. 13, 2017) [ECF No. 1-7] ("Interim Award").

Finally, India emphasizes that Devas did not reach the stage of actually providing telecommunications services. Setting aside the fact that it was India's breach that eliminated any hope of Devas reaching that stage, *cf.* Swiss Court Decision at 25 (observing the lack of good faith in India's argument), the Treaty's definition of "investment" does not require that a given project reach the operations stage in order to be protected. *See* Interim Award, ¶ 179. Such a requirement would incentivize the state to seize a project right before it began operating and generating revenue. This would be inconsistent with the object and purpose of the Treaty to "creat[e] conditions favourable for fostering greater investment by nationals and companies of [the other State]," *see* Treaty pmbl., as investors would not risk their capital to create or (as Deutsche Telekom did) invest in existing ventures. Tribunals routinely find that an investor's contractual rights in a pre-operational project is a protected investment under an investment

8. "Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party and also admit investments in its territory in accordance with its laws and policy."

treaty, even when the project required additional licenses to reach the operations stage.[9]

Here, Devas had a binding contract that gave it the right to lease satellite spectrum, which it intended to use to provide telecommunications services throughout India. *See* Interim Award at ¶ 181; Kownacki Decl., Ex. 1, Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft by Devas Multimedia Pvt. Ltd., dated January 28, 2005, Art. 2 [ECF No. 12-2] ("Devas-Antrix Agreement").[10] While there remained steps (including licensing) that Devas had to fulfill in order to carry out its intention and "monetize" this right, the likelihood of Devas doing so may affect the *value* of Deutsche Telekom's interest in the right, but not its existence as an "investment" protected by the Treaty. *See* Interim Award at ¶ 180; Swiss Court Decision at 25; Boykin Decl., Ex. A, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Final Award, ¶¶ 123-24, 131 (May 27, 2020) ("Final Award") [ECF No. 1-4].

Therefore, Deutsche Telekom did not merely engage in "pre-investment" activities, but had an "investment" protected by the Treaty.

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9. *See, e.g.*, *PSEG Global Inc. et al. v. Republic of Turkey,* ICSID Case No. ARB/02/5, Decision on Jurisdiction, ¶¶ 79-105 (June 4, 2004) (cited by Swiss Court Decision at 23-24); *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, ¶¶ 295-98 (Nov. 30, 2017); *Crystallex Int'l Corp. v. Bolivarian Rep. of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, ¶¶ 659-65 (Apr. 4, 2016); *Tethyan Copper Co. v. Islamic Rep. Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, ¶¶ 631-33, 1303, 1328-29 (Nov. 10, 2017).

10. The existence of this right distinguishes this case from cases (including those cited by India) where the tribunals found that the investors did not move beyond "pre-investment" activities. *Cf. Joseph Houben v. The Republic of Burundi*, ICSID Case No. ARB/13/7, Award, ¶ 129 (Jan. 12, 2016). In those cases, the investors did not conclude a contract that gave them a right to any asset or activity in the state. *See* Interim Award at ¶ 181; Swiss Court Decision at 23-24. In particular, the 'cooperation agreement' in *Nagel* was a three-page preparatory document that did not have any enforceable content; it merely provided that the parties would jointly seek to obtain through a consortium (yet to be formed) the right to engage in various commercial activities. *See Nagel v. Czech Republic*, SCC Case No. 49/2002, Final Award, ¶ 151 (Sept. 9, 2003).

(b) India's Arbitration Offer Encompassed Indirect Investors and Indirect Investments

India's attempt to exclude from its arbitration offer investors who hold their investment indirectly fares no better. *See* Resp. Br. at 32-36. Neither the Treaty's definition of "investors" or "investments" explicitly exclude indirectly held investments or distinguish between directly and indirectly held investments. *See* Treaty, Art. 1(b), (c). Tribunals have consistently found that a treaty's silence on this matter cannot be construed as a restriction.[11] Furthermore, given the ubiquity of indirect investments and their ability to "stimulate[] . . . individual business initiative," *see* Treaty pmbl., reading in an implied restriction would not serve the object and purpose of the Treaty. Interim Award at ¶¶ 142-43.

India's attempt to read in such an exclusion fails. India emphasizes Article 5(3) of the Treaty.[12] Resp. Br. at 32. That provision merely provides that if a Contracting State expropriates the assets of an investor's company (instead of the shares of the company), it still must pay compensation. This provision gives effect to Article 5(1), which concerns not only direct expropriations (*i.e.*, taking title to shares of the company) but also "measures having effect equivalent" to expropriations (*i.e.*, taking the company's assets but leaving its shares intact).

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11. *See Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, ¶¶ 34-35 (July 11, 1997); *ConocoPhillips Petrozuata B.V. and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, ¶¶ 282-85 (Sept. 2, 2013); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction, ¶ 137 (Aug. 3, 2004); *Ioannis Kardassopoulos v. Georgia*, ICISD Case No. ARB/05/18, Award on Jurisdiction, ¶¶ 123-24 (July 6, 2007); *Mobil Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 165 (June 10, 2010); *Guaracachi America, Inc. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, ¶¶ 352-57 (Jan. 31, 2014); *Vladislav Kim v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Award on Jurisdiction, ¶ 317 (Mar. 8, 2017); *CEMEX Caracas Investments B. V v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶¶ 156-157 (Dec. 30, 2010). The lone commentator India cites (Resp. Br. at 34) is therefore an outlier.

12. "Where a Contracting Party expropriates the assets of a company in its own territory, in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraphs 1 and 2 of this Article are applied in the same manner to provide compensation in respect of the investment of such investors of the other Contracting Party who are owners of those shares."

Article 5(3) does not aid India's argument.

India then misquotes the *Berschader v. Russian Federation* case. It claims that the tribunal stated, "'[i]t would seem likely that if the Contracting Parties had . . . intended' to extend offers of arbitration *to indirect investors*," they would have done so expressly. Resp. Br. at 34 (emphasis added) (citing *Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, ¶ 147 (Apr. 21, 2006)). In fact, the *Berschader* tribunal did not refer to "indirect investors" generally, but rather to "the kind of indirect investments relied upon [by] the Claimants." SCC Case No. 080/2004, Award, April 21, 2006, ¶ 147.[13] The "kind of indirect investments relied upon [by] the Claimants" were ones that were channeled through a company in the claimant's home state. This was decisive, because the applicable treaty in that case mentioned indirect investments made "by the intermediary of an investor of a *third* state," but not indirect investments through the investor's home state. *Id.* ¶ 138 (emphasis added). This unique text—absent from the Germany-India Treaty—drove the *Berschader* tribunal's reasoning. *Id.* Indeed, both the Tribunal and the Swiss Court distinguished *Berschader* on this basis. *See* Interim Award, ¶ 145; Swiss Court Decision at 17. Attempting to rely on this case for a third time before this Court, India tries to obfuscate the case's distinguishing characteristic.[14]

Thus, India's offer of arbitration extended to Petitioner and its investment in Devas.

For all of the above reasons, the exception in § 1605(a)(6) of the FSIA applies, because

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13. The full quote provides: "Nonetheless, such contrasting approaches do render it unlikely that, in the absence of specific evidence to the contrary, both Contracting Parties intended that the Treaty would encompass *the kind of indirect investments* relied upon [by] the Claimants. It would seem likely that if the Contracting Parties had so intended, they would have expressly provided protection for *such indirect investments* in the terms of the Treaty[.]" (emphases added)).

14. India's remaining argument—a reference to other investment treaties it and Germany concluded—was likewise refuted by the Tribunal and Swiss Court. *See* Resp. Br. at 33-34; Interim Award, ¶¶ 146-47; Swiss Court Decision at 18.

this action seeks to confirm a Final Award that was made pursuant to an agreement to arbitrate between India and Petitioner. India's objection to the subject matter jurisdiction of this Court must be dismissed.

B. India has Waived Sovereign Immunity

In addition, India has waived its sovereign immunity in this action "by implication." *See* 28 U.S.C. § 1605(a)(1). By becoming party to the New York Convention, India implicitly waived its immunity in enforcement actions brought against it pursuant to the Convention. *See Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999). The D.C. Circuit in *Creighton* found that it was "correct[]" that "when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states." *Id.* In *Tatneft v. Ukraine*, the D.C. Circuit affirmed that "*Creighton* controls," and held, "[b]ecause Ukraine and the United States have both signed the Convention, Ukraine falls within the waiver exception as *Creighton* construed it." 771 F. App'x 9, 10 (D.C. Cir. 2019); *see also Stati v. Republic of Kazakhstan*, 199 F.Supp.3d 179, 189 (D.D.C. 2016) (citing *Creighton* and finding that Kazakhstan implicitly waived its sovereign immunity because it was party to the Convention and the action was to enforce a Convention award).

India once again ignores this well-established law. It cites *Creighton* for a different proposition, *see* Resp. Br. at 42-43, and focuses only on *Tatneft*, *id.* at 45. Although it dismisses the holding in *Tatneft* as "*dicta,*" as the quote in the previous paragraph shows, Ukraine's status as a party to the New York Convention was the dispositive basis for the D.C. Circuit's holding. India also misquotes a different case as having said, "'*Tatneft* was an unpublished disposition, so it does not bind' this Court in the present case." Resp. Br. at 45 (citing *Process & Ind. Developments Ltd. v. Fed. Rep. of Nigeria*, 962 F.3d 576, 583-84 (D.C. Cir. 2020)). However,

the full quote from *P&ID* is that "*Tatneft* was an unpublished disposition, so it does not bind *future panels*" of the D.C. Circuit. 962 F.3d at 584 (emphasis added). *This Court*, by contrast, must follow the D.C. Circuit's decision. *Cf.* D.C. Cir. R. 32.1(b)(1)(B) (unpublished decisions entered on or after January 1, 2002 "may be cited as precedent"). Indeed, in *P&ID* the D.C. Circuit did not purport to overrule *Tatneft* (and cited *Creighton* favorably, *see P&ID*, 962 F.3d at 583), but remanded to this Court – and on remand, *this Court followed Tatneft*. *See* 506 F.Supp.3d 1, 11 (D.D.C. 2020) ("All told, Nigeria offers no convincing reason to depart from the persuasive reasoning of *Seetransport*, *Creighton*, and *Tatneft*. The Court will therefore follow those precedents, hold that Nigeria has waived its sovereign immunity as to this case, and assert jurisdiction under the FSIA."). Finally, the Supreme Court denied Ukraine's petition for certiorari to overrule *Tatneft*. *See Ukraine v. Pao Tatneft*, No. 19-606, Order denying Petition for Writ of Certiorari (Jan. 13, 2020), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-606.html.[15] India's attempt to dismiss the authority of *Tatneft* fails.[16]

India also addresses the Convention itself. It observes that "the Convention does not even mention sovereign immunity, let alone any waiver." Resp. Br. at 43. This is another red herring, because the FSIA provides that a sovereign need not waive immunity "explicitly," but

15. Indeed, *Tatneft* is consistent with decisions of other Circuits. *See Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir. 1993) ("Thus, when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory State must have contemplated enforcement actions in other signatory States."); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F. 3d 1292, 1301 (11th Cir. 2000) (agreeing that "a sovereign's agreement to arbitrate in a Convention State is not a waiver of immunity to suit in the U.S. unless the foreign sovereign is also a party to the Convention").

16. India cites *Ivanenko v. Yanukovich* for the proposition that there are "only" three enumerated circumstances of implied waiver under the FSIA. *See* Resp. Br. at 43. However, the D.C. Circuit in *Yanukovich* was not confronted with an action to enforce an award under the New York Convention. It did not purport to overrule *Creighton*, which it cited favorably, or *Tatneft*, which it never mentioned. *See* 995 F.3d 232, 240 (D.C. Cir. 2021).

may do so "by implication." 28 U.S.C. § 1605(a)(1). Furthermore, the Supreme Court has found that the relevant consideration for whether an international agreement can effect an implicit waiver is not just whether the agreement mentions waiver, but also whether it provides "the availability of a cause of action in the United States." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989). Providing a cause of action in the United States is exactly what the New York Convention does. *See* N.Y. Convention, Art. III; 9 U.S.C. §§ 201, 208.

India claims that the Convention's reference to "commercial" disputes suggests that it is not meant to be used against sovereign states. Resp. Br. at 43. This is also incorrect. First, the D.C. Circuit has recognized that the term "commercial" in the New York Convention has a "broad compass," and applies in cases involving investments in foreign states and with foreign governments. *See Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 104 (D.C. Cir. 2015); *Customs and Tax Consultancy LLC v. Democratic Republic of the Congo*, Civil Case No. 18-1408 (RJL), 2019 WL 4602143, at *4 (D.D.C. Sept. 23, 2019) (Leon, J.); *Digoil v. Democratic Republic of the Congo*, Civil Case No. 20-1130 (RJL), Mem. Op. at 7-8 (D.D.C. Sept. 14, 2021) (Leon, J.). Second, the Federal Arbitration Act explicitly eliminates the Act of State doctrine as a bar to the enforcement of arbitral awards against sovereign states. *See* 9 U.S.C. § 15; *cf. Belize Soc. Dev.*, 5 F. Supp. 3d at 41 n.27 (Section 15 does not conflict with the New York Convention). Thus, the Convention, as incorporated in U.S. law and interpreted by U.S. courts, fully contemplates enforcement litigation against sovereign states.

Finally, India warns that if this Court were to find implicit waiver, that would threaten the United States' ability to invoke sovereign immunity in future cases. Resp. Br. at 44. India need not worry. While U.S. law provides that the immunity of foreign states can be waived "by

implication," *see* 28 U.S.C. § 1605(a)(1), it provides that the waiver of immunity of the federal government "cannot be implied." *See United States v. King*, 395 U.S. 1, 4 (1969).

Therefore, by becoming party to the New York Convention, India has implicitly waived its immunity in this action to enforce a Convention award. India's objection to this Court's subject matter jurisdiction can be dismissed on this basis as well.

II. INDIA'S *FORUM NON CONVENIENS* ARGUMENT FAILS

India's attempt to escape confirmation of the Award through the *forum non conveniens* doctrine is meritless. India advances an untenable interpretation of the Treaty to argue that the Treaty contains a forum selection clause mandating the enforcement of any award rendered under the Treaty to take place in the host state, *i.e.*, India. India submits that this purported forum selection agreement requires the dismissal of this action under the doctrine of *forum non conveniens*. Resp. Br. at 1, 17-18.

India's invocation of *forum non conveniens* suffers from a number of deficiencies, each of them fatal to India's argument. At the outset, India's arguments are incoherent by trying to have it both ways: India invokes *forum non conveniens* as a threshold issue to be resolved even before this Court reaches the issue of jurisdiction. Resp. Br. at 17-18. Yet India's *forum non conveniens* argument is predicated on the existence of an arbitration agreement between the parties in which they included a choice of forum for the enforcement of any resulting arbitral awards, while India's sovereign immunity defense argues that India never agreed to arbitrate with Deutsche Telekom to begin with. By advancing an argument premised on the existence of an arbitration agreement, India inadvertently affirms that the arbitration exception to the FSIA has been satisfied in this case and that India does not enjoy sovereign immunity.

As discussed below (Section II.B), India's attempt to imply a mandatory forum selection clause—a mechanism typically found in commercial contracts—into Article 9 of the Treaty is

wrong. There is no evidence that Germany and India ever intended to impose such a limitation, which would be contrary to the ordinary meaning of the text, in context, and in light of the object and purpose of the Treaty and other applicable rules of international law in the relations between the states.

But India's *forum non conveniens* effort is doomed for an even more fundamental reason: it is the well-settled law of the D.C. Circuit that *forum non conveniens* does not apply to a petition to confirm and enforce a foreign arbitral award against a sovereign in the United States.

A. *Forum Non Conveniens* Is Unavailable In an Action to Confirm an Award against a Foreign State

In *TMR Energy Ltd. v. State Property Fund of Ukraine*, TMR sought to confirm an arbitral award entered in its favor against the state-owned State Property Fund of Ukraine. 411 F.3d at 298. When the District Court confirmed the award, the State Property Fund appealed, arguing, in part, that the district court improperly failed to consider the public and private interest factors to be applied under the *forum non conveniens* doctrine. *Id.* at 303. The D.C. Circuit rejected that complaint, finding that the unique nature of an action to confirm and enforce an arbitration award in the U.S. justified side-stepping the *forum non conveniens* framework altogether. As the D.C. Circuit reasoned, a "district court need not weigh any factors favoring dismissal . . . if no other forum to which the plaintiff may repair can grant the relief it may obtain in the forum it chose." *Id.* Critically, the D.C. Circuit explained, "only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States." *Id.* The same reasoning holds true even if the foreign nation does not have assets in the U.S. at the time, because "it may own property here in the future, and [the petitioner's] having a judgment in hand will expedite the process of attachment." *Id.* In sum, the D.C. Circuit concluded, "[b]ecause there is no other forum in which TMR could reach the SPF's

property, if any, in the United States, we affirm the district court's refusal to dismiss this action based upon the doctrine of *forum non conveniens*." *Id.* at 304.

TMR's holding is by now a "formidable precedent" (*Gretton Ltd. v. Republic of Uzbekistan*, Civil Action No. 18-1755 (JEB), 2019 WL 3430669, at *6 (D.D.C. July 30, 2019); courts in this circuit—at both the district and appellate level—have repeatedly affirmed it and refused to apply the doctrine of *forum non conveniens* to petitions to confirm foreign arbitral awards against sovereigns. *See Belize Soc. Dev. Ltd.*, 5 F. Supp. 3d at 34 ("there is no adequate alternative forum for this case because 'only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States.' . . . This is the controlling law in our Circuit, and I will therefore apply it faithfully."); *Gretton*, 2019 WL 3430669, at *6 (citing *TMR* in rejecting *forum non conveniens* argument brought by Uzbekistan which was represented in that case by the same counsel as India here); *see also Stileks*, 985 F.3d at 876 n.1 (confirming *TMR's* holding that "*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States."); *BCB Holdings*, 650 F. App'x at 19 ("Belize contends that the District Court should have dismissed the enforcement action on *forum non conveniens* grounds. That argument is squarely foreclosed by our precedent. . . the doctrine of *forum non conveniens* does not apply to actions in the United States to enforce arbitral awards against foreign nations."); *Balkan Energy*, 302 F. Supp. 3d at 155 (rejecting *forum non conveniens* argument, including a claim that *TMR* had been overruled by the Supreme Court's decision in *Sinochem Int'l Co. v. Malaysia Int'l. Shipping Corp.*, 549 U.S. 422 (2007) and observing, "[t]he D.C. Circuit continues to apply *TMR*, and so too must this court."); *Tatneft*, 301 F. Supp. 3d at 192-194 (same holding).

A forum selection clause and the doctrine of *forum non conveniens* therefore cannot operate to bar Deutsche Telekom from enforcing the Final Award against India in U.S. courts as authorized by U.S. law. To do so would prevent Deutsche Telekom from seeking attachment of India's U.S. assets in the only jurisdiction capable of doing so. Put another way, enforcing a forum selection clause (were one to exist) as India suggests would render the clause "substantially deficient" because it is "unable to afford the plaintiff any relief." *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 875 (D.C. Cir. 2019).[17]

India fails to address any of the above authorities in its submission. Instead, in addition to several cases that do not involve *forum non conveniens* at all, India relies on case law involving contract disputes in which the parties explicitly agreed to litigate the merits of any disputes in a predesignated forum. Resp. Br. at 18.[18] India's sole authority involving *forum non*

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17. Typically, "[i]n deciding forum non conveniens claims, a court must decide (1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal." *Agudas Chasidei Chabad of U.S. v. Russian Fedn.*, 528 F.3d 934, 950 (D.C. Cir. 2008); *see generally Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). Outside of the context of a petition to confirm a foreign award, when the parties to a contract have already agreed to a forum by negotiating a *mandatory* (not merely permissive) choice of forum clause, the Supreme Court has explained that this traditional *forum non conveniens* analysis is modified by assuming that the contractually selected forum is adequate, and omitting consideration of private interest factors altogether. *See Atl. Marine Const. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 63 (2013); *D & S Consulting, Inc. v. Kingdom of Saudi Arabia*, 961 F.3d 1209, 1212 (D.C. Cir. 2020) (discussing the difference between "mandatory" and "permissive" forum selection clauses and the impact of a mandatory clause to the *forum non conveniens* calculus). In such circumstances, the contractually selected forum will typically prevail, albeit with exceptions. "If the preselected forum is substantially deficient—for instance, because it is effectively inaccessible *or unable to afford the plaintiff any relief*—then the clause is not enforceable." *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 875 (D.C. Cir. 2019) (emphasis added).

18. *See Atl. Marine*, 571 U.S. at 49-50 (where a Virginia corporation and a Texas corporation entered into a construction contract, and the plaintiff filed suit in Texas, holding that the suit should have been transferred to Virginia when the contract contained a choice of forum clause directing all disputes under the contract to be litigated in Virginia); *Azima.*, 926 F.3d at 876-877 (D.C. Cir. 2019) (dismissing case on *forum non conveniens* grounds where a plaintiff's statutory and tort claims arose out of a settlement agreement requiring the parties to "submit to the exclusive jurisdiction of the courts of England and Wales"); *D&S Consulting, Inc. v. Kingdom of Saudi Arabia*, 961 F.3d 1209, 1211-1212, 1213 (D.C. Cir. 2020) (affirming dismissal for *forum non conveniens* where a New Jersey corporation brought a breach of contract claim against Saudi Arabia in District of Columbia, despite contract provision mandating that a Saudi administrative court "'shall be assigned for settlement of any disputes or claims arising from the execution of this cont[r]act, or related to this contract, or resulting from its dissolution.'").

conveniens in an action to confirm a foreign award, *Zeevi Holdings Ltd. v. Republic of Bulgaria*, 494 F. App'x 110, 113 (2d Cir. 2012), is a factually distinct case in which a provision to the parties' contract expressly provided that enforcement of an award could "only" take place in Bulgaria. Moreover, in affirming the dismissal of the petition in *Zeevi*, the Second Circuit was following its own precedent, which conflicts with the D.C. Circuit's categorical prohibition on applying *forum non conveniens* in the context of petitions to confirm an award against a foreign state. *See id.* at 112 (citing *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 495 (2d Cir.2002), deciding that *forum non conveniens* should apply to dismiss a petition to confirm an arbitral award against an alleged alter ego of Ukraine)).

India cannot rely on *Monegasque De Reassurances* and its progeny to escape its obligations in this jurisdiction. Courts in the D.C. Circuit are well aware of the Second Circuit's conflicting view and have repeatedly rejected it in favor of binding precedent. *See Stileks*, 985 F.3d at 876 n.1 (rejecting application of Second Circuit case law in favor of *TMR* and noting, "we are bound by our precedent"); *Belize Soc. Dev.*, 5 F. Supp. 3d at 34 n.9 (rejecting the application of *Monegasque De Reassurances*, noting "*TMR Energy* is binding, unlike Second Circuit case law"); *Gretton*, 2019 WL 3430669, at *6 (concluding the same because "even if this Court believed the Second Circuit's holding more persuasive than our own precedent, its hands are tied"); *Tatneft*, 301 F.Supp. 3d at 194 (distinguishing *Monegasque De Reassurances* and applying *TMR*).

B. The Treaty Does Not Contain a Forum Selection Clause for Enforcing Awards

Notwithstanding the clarity of the above precedent, this Court does not need to concern itself with circuit splits or navigating the *forum non conveniens* framework, because the Treaty

does not in any event contain a forum selection clause for enforcing awards, much less a mandatory one.

India's case does not rest on an express contractual provision mandating an exclusive choice of forum between two parties to an arbitration, in sharp contrast to the three cases that it cites that actually involved forum selection clauses.[19] Rather, India *infers* through various treaty provisions that the Treaty between Germany and India obligated investors to arbitrate their disputes with investment host states through international arbitration, and then, remarkably, forces them to return hat in hand to the domestic courts of the host state to enforce the award even when, as here, the host state refuses to honor its obligations under the award. Tellingly, India cites to no other bilateral investment treaty or case law confirming this type of purported limitation on the enforcement of an investment treaty arbitral award. That is because this absurd evisceration of the Treaty's protections is inconsistent with its text, context, and the very object and purpose of bilateral investment treaties.

Specifically, India relies upon the Treaty's references to the domestic law of the Contracting Parties to the Treaty (Germany and India) as evidence "that the parties intended for the present enforcement litigation to proceed before an Indian court." Resp. Br. at 20. India describes the second sentence of Article 9(2)(b)(v) as "the most important" of those provisions and presents it out of context as "strong evidence that the parties intended for the present enforcement litigation to proceed before an Indian court." *Id.* India misinterprets the Treaty in a self-serving ploy to avoid complying with its own obligation under Article 9(2)(b)(v) of the

19. *See Zeevi* 494 F. App'x at 113; *Azima*, 926 F.3d at 876; *D&S Consulting*, 961 F.3d at 1211. The remainder of the cases India cites did not concern *forum non conveniens* at all. Rather, several of them arose in the FSIA context, where the court found that the sovereign state had waived its immunity by agreeing to a contract that contained a choice-of-law clause referring to U.S. law.

Treaty "to abide by and comply with the terms" of the Final Award. The application of well-established principles of treaty interpretation to the Treaty demonstrates that Petitioner may enforce the Final Award in any of the 168 states party to the New York Convention in which India may have assets.

1. Applicable Principles of Treaty Interpretation

As an international treaty, the Germany-India Treaty "is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 306(1) (Am L. Inst. 2018); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 325(1)) (Am L. Inst. 1986). The principles of interpretation applicable to treaties set forth in subsections (1) through (4) of § 306 of the Restatement (Fourth) of the Foreign Relations Law of the United States are in accord with the principles of interpretation found in Articles 31 and 32 of the Vienna Convention of the Law of Treaties (the "VCLT"). *See* RESTATEMENT, § 306(1), comment a ("Subsections (1) through (4) of this Section describe general principles of interpretation that accord with Article 31 of the Vienna Convention on the Law of Treaties for determining the meaning of a treaty.").

When interpreting the arbitration clause of a bilateral investment treaty between the United Kingdom and Argentina, the United States Supreme Court has held that "[t]reaties are to be interpreted upon the principles which govern the interpretation of contracts[.]" *BG Grp.,* 572 U.S. at 37 (citation omitted). A treaty's "interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *Id.* The U.S. Supreme Court has also held that treaties "are to be executed in the utmost good faith, with a view to making effective the purpose of the high contracting parties." *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921). "The

principle of good faith underlies the most fundamental of all the norms of treaty law – namely, the rule *pacta sunt servanda* [agreements must be kept]." Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, 119 (2d. ed.) (1984).

2. The Treaty Does Not Limit Where An Arbitration Award May Be Enforced

Although India describes Article 9(2)(b)(v) as the "most important" of the Treaty's provisions, India omits the first sentence of that provision from its Memorandum. The complete text of Article 9(2)(b)(v) is reproduced here:

> The decision of the arbitral tribunal shall be final and binding and the parties shall abide by and comply with the terms of its award. The award shall be enforced in accordance with national laws of the Contracting Party where the investment has been made.

(a) Good Faith Interpretation of the Text

The text of Article 9(2)(b)(v) makes clear that it is not a forum selection clause. First and foremost, Article 9(2)(b)(v) obligates India to "abide by and comply with the terms" of the Final Award. Such a "clause makes explicit that an award is *res judicata* and not subject to appeal. It also obligates the host state to comply with the award. The failure of the host state to comply would give rise to a claim under the state-state disputes provision." See Kenneth J. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION, Chapter 10.2.1.7 (2010). The second sentence of Article 9(2)(b)(v) is subordinate to the state's primary obligation to comply with the award. It requires that India enforce the Final Award in accordance with its law. The natural reading of this language is that India is constrained from imposing additional requirements not otherwise found in its laws on the enforcement of an award rendered under the Treaty. India's law on the enforcement of arbitral awards is, in fact, the New York Convention,

which India has ratified into its domestic law.[20] But Article 9(2)(b)(v) nowhere requires an enforcement action to be brought exclusively in India. It does not even refer to a specific forum.[21] Article 9(2)(b)(v) therefore does not exclude enforcement in other jurisdictions in accordance with the laws applicable in those jurisdictions.

If Germany and India had intended for arbitral awards under Article 9 of the Treaty to be enforceable only in their respective territories, then they would have explicitly stated that intention. Even if one were to interpret the reference to Indian law in Article 9(2)(b)(v) as a choice of forum clause, it would be a permissive one rather than a mandatory one. *See e.g.*, *Byrd v. Admiral Moving & Storage, Inc.*, 355 F. Supp. 2d 234, 238-39 (D.D.C. 2005) (finding forum selection clause that stated that venue "shall lie in Broward County, Florida" to be permissive rather than mandatory, because it did not say that venue "shall ONLY lie" in Broward County, Florida.); *cf. Azima*, 926 F.3d at 876 ("The clause is mandatory because it provides for 'exclusive jurisdiction' in England and Wales."). Likewise, and by contrast, India's sole supporting authority in which a contract was found to contain a mandatory forum selection clause for the enforcement of an arbitral award was unmistakably exclusive, providing that "'[t]he execution of an award against the [the Privatization Agency of the Republic of Bulgaria] may be conducted *only in Bulgaria* in accordance with the provisions of Bulgarian law.'" *Zeevi Holdings*, 494 F.

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20. *See* The Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961, available at https://www.newyorkconvention.org/implementing+act+-+india; *see also* The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE, available at https://www.indiacode.nic.in/handle/123456789/1978?view_type=browse&sam_handle=123456789/1362.

21. In the sentence, "The award shall be enforced in accordance with national laws of the Contracting Party where the investment has been made," the phrase "where the investment has been made" modifies "in accordance with national laws of the Contracting Party Contracting Party," not "The award shall be enforced." Furthermore, the reference to Indian law does not displace the application of U.S. law in this action. As noted above, Indian law includes the New York Convention, and Article 3 of the New York Convention provides that the enforcement forum's law shall apply in an enforcement action. *See* N.Y. Convention, Art. III ("Each Contracting State shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure of the territory where the award is relied upon*, under the conditions laid down in the following articles." (emphasis added)).

App'x at 113 (emphasis added).

India is in breach of its obligation under Article 9(2)(b)(v) to "abide by and comply with the terms" of the Final Award. Because India will not honor its obligation to pay the Final Award, Petitioner now seeks to enforce it against India's assets in the United States, where, as discussed above, the U.S. courts are solely capable of providing relief. The second sentence of Article 9(2)(b)(v) cannot be read, as India does, to abrogate Petitioner's rights under U.S. law to enforce an international arbitration award against India's assets in the United States.

(b) Context

India relies on eleven references in the Treaty to the national laws of the Contracting Parties to imply a "forum selection clause" into the Treaty. *See* Resp. Br. at 20 (citing Treaty, Articles 1(a), 1(b), 1(d), 1(f), 3(1), 5(1), 5(2), 9(2)(b)(ii), 9(2)(b)(v), 11, and 13). A closer look at each of these provisions reveals India's argument as hollow. Bilateral investment treaties routinely refer to domestic law, especially for the purposes of defining central terms that are necessary to establish the scope of the treaty's application. *See* Vandevelde, *supra*, Chapter 4. The India-Germany Treaty is no different. Articles 1(a), 1(b), 1(d), and 1(f) define the terms "companies," "investment," "nationals," and "territory" with reference to national law and thereby establish who and what is entitled to the protections of the Treaty. These are among the most common provisions found in bilateral investment treaties and are not indicative of any intention to impose limitations on where an arbitral award rendered under Article 9 may be enforced.

Nor do the references to national law in Articles 3 and 5 of the Treaty support India's argument. Article 3(1) imposes an obligation upon India and Germany to "admit investments in its territory in accordance with its law and policy " while Article 5(1) requires that any expropriation carried out by the host state be "in public interest, authorized by the laws of that

Party[.]" Such positive obligations on the Contracting Parties cannot reasonably be interpreted as an intention to limit the jurisdictions in which an arbitral award rendered under Article 9 can be enforced.[22]

Finally, India relies upon, yet fails to quote, Article 13 ("Application of other Rules"). Article 13 is fatal to India's argument that the Treaty contains an implied "choice of forum" clause for the enforcement of arbitral awards because, even if India's argument were correct, Article 13 would allow Petitioner to rely on more favorable enforcement provisions in other treaties, such as the New York Convention, to enforce the Final Award.

Article 13 permits Petitioner to rely on "obligations under international law existing at present or established hereafter between the Contracting Parties . . . entitling investments by investors of the other Contract Party to a treatment more favorable than is provide for by the present Agreement." Investment arbitration tribunals have held that arbitral awards, like the Final Award, are investments under bilateral investment treaties.[23] The limitation India seeks to

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22. Article 5(2) further undermines India's argument. It provides that an investor whose investment has been expropriated "may, under the laws of the Contracting Party making the expropriation or nationalization, seek review of expropriation or nationalization measures by a judicial or other independent authority of that Contracting Party." Because Article 5(2) creates a right to seek judicial review of an expropriation in Indian courts but does not impose an obligation on investors to go before Indian courts, Article 5(2) militates against implying any "forum selection clause" into the Treaty as India does. It is not unusual for investment treaties to provide investors with the option of pursuing local remedies. Nor is it unheard of for investment treaties to contain a choice of law provision in the investor-state dispute resolution clause as the Treaty does in Article 9(2)(b). Vandevelde, *supra*, Chapter 10.2.1.5. ("The investor-state disputes provision sometimes includes a choice of law clause."). Article 11 is another typical provision that merely requires that, "[a]ll investments shall, subject to this Agreement, be governed by the laws in force in the territory of the Contracting Party in which such investments are made." None of these provisions support an inference that the Contracting Parties intended to limit enforcement of arbitral awards to Germany and India.

23. *See*, *e.g.*, *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, ¶ 7.6.10 (Nov. 30, 2011) ("the Tribunal concludes that rights under the Award constitute part of White's original investment (*i.e.*, being a crystalisation of its rights under the Contract) and, as such, are subject to such protection as is afforded to investments by the [Australia-India] BIT"); *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, ¶ 114 (May 18, 2010) (finding that an award could constitute an investment under the applicable treaty); *see also Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* (PCA Case No. 2007-02), Interim Award (Dec. 1, 2008), ¶¶ 184-85 (finding that a protected investment continued to exist in the form of legal claims).

imply into the Treaty—limiting enforcement of the Final Award to only one jurisdiction (India), and the very jurisdiction that has failed to comply with the Final Award (thus making enforcement necessary)—is undeniably less favorable treatment of the Final Award than permitting enforcement of it in any of the 168 states party to the New York Convention. As a result, if India's interpretation of the Treaty were correct, then the Final Award would be covered by Article 13 and Petitioner would be entitled to rely on the New York Convention to enforce it to the extent that its provisions are more favorable than those of the Treaty. Of course, India's interpretation of the Treaty is wrong, and the Final Award is subject to enforcement under the New York Convention for the reasons explained below.

(c) Other Relevant Rules of International Law Applicable Between the Parties

India ratified the New York Convention on July 13, 1960. Germany ratified it on June 30, 1961.[24] When India and Germany entered into the Treaty in 1995, they did so knowing that they were both bound by the terms of the New York Convention. The New York Convention thus contains "relevant rules of international law applicable between the parties" that the Court should "take into account, together with the context" when interpreting the Treaty. RESTATEMENT (FOURTH), § 306(3).

The New York Convention obligates its parties to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon[.]" N.Y. Convention, Art. III. The New York Convention does not require an arbitration agreement to make reference to the Convention in order for an award to be enforceable under the Convention. On the contrary, Article 1 of the New York Convention

24. *See* Contracting States, New York Arbitration Convention, https://www.newyorkconvention.org/countries.

makes the Convention broadly applicable to "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[25] As the text of the New York Convention makes clear, Germany and India did not need to refer to the New York Convention in Article 9 of the Treaty in order for arbitral awards to be enforceable in any of the 168 states party to the Convention.

India tries to compensate for the dearth of textual support for its argument by leaning heavily on how the Treaty does not expressly refer to the New York Convention. Resp. Br. at 20-22. India's argument has it backwards. If Germany and India had intended to restrict enforcement of arbitral awards rendered under Article 9 of the Treaty only to Germany and India, and to exclude such awards from enforcement under the New York Convention, then they needed to state that intention explicitly. The only "striking and material omission" in the Treaty is the absence of any expression of such intention.

(d) Object and Purpose

India's reading of the Treaty as containing an implied "forum selection clause" for enforcement proceedings would frustrate one of the Treaty's central objects and purposes, namely to internationalize disputes in connection with investments by allowing investors to "refer such dispute to arbitration in accordance with the United Nations Commission on International Trade Law Rules on Arbitration, 1976[.]" Treaty, Art. 9(2). Indeed, the U.S.

25. In contrast, for an arbitration award to be enforceable under the ICSID Convention, the Parties must have expressly consented to ICSID arbitration. In the United States, ICSID awards are not subject to the provisions of the Federal Arbitration Act. Pursuant to 22 U.S.C. § 1650a, ICSID awards are "enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."

Supreme Court has recognized "that dispute resolution mechanisms allowing for arbitration are a 'critical element' of modern day bilateral investment treaties." *BG Grp.,* 572 U.S. at 32 (citing Vandevelde, *supra*, 430-432). Petitioner spent seven years arbitrating its dispute with India and defending the Partial Award before the Swiss Federal Supreme Court. It would make little sense to interpret the Treaty as giving investors the right to resolve disputes through international arbitration only to require aggrieved investors to go to the courts of the noncompliant host state for enforcement of the award once they have prevailed both in the arbitration and before the courts with primary jurisdiction to review the award.

III. INDIA'S DEFENSES TO ENFORCEMENT FAIL

As discussed in Section I.A.2. above, India's immunity objection to this Court's subject matter jurisdiction on the grounds that India is immune from jurisdiction based on an alleged lack of an agreement to arbitrate should have been brought as a defense to enforcement under Article V(1)(c) of the New York Convention under well-established case law in this Circuit. In light of this controlling law, India's immunity objection is not colorable, and the Court is entitled to treat India's objections as defenses against enforcement. *See Process & Indus. Devs. Ltd. v. Federal Republic of Nigeria*, 962 F. 3d 576, 583 (D.C. Cir. 2020) (holding that a state's underlying immunity assertion must be colorable in order for a state to be entitled to have its immunity objection considered before it can be forced to brief the merits of a petition to confirm an arbitral award but finding Nigeria's immunity assertion colorable because the award had been set-aside by the court with primary jurisdiction).

In addition to affirming its subject matter jurisdiction, the Court should issue an order that considers and rejects India's arguments that the Tribunal did not have jurisdiction over the dispute because India did not offer to arbitrate disputes based upon "pre-investment" activity or disputes over indirectly held investments as defenses against enforcement under Article V of the

New York Convention. As discussed above, both the Tribunal and the Swiss Federal Supreme Court considered and rejected these same objections to the Tribunal's jurisdiction. The Tribunal's finding is entitled to substantial or complete deference, and the Swiss Federal Supreme Court's finding is entitled to comity and *res judicata* effect. India has now presented these same objections for a third time to this Court. Additional briefing is unnecessary and would be inefficient in what is supposed to be a summary proceeding.

India has attempted to reserve two additional "defenses" to enforcement of the Final Award. India argues that "Petitioner's claims were barred from arbitration under the [Treaty's] 'essential security' clause, and that Petitioner's claims are precluded because the underlying 2005 contract is invalid due to fraud and collusion." Resp. Br. at 1-2. The Court should also proceed to reject these defenses. With respect to the "essential security" clause defense, the Tribunal considered and rejected it. *See* Interim Award at ¶¶ 240-91. This was a substantive defense on the merits, and was presented as such by India to the Tribunal. *See* Swiss Court Decision at pp. 28-30. The Tribunal's ruling on this issue is therefore *res judicata*. *See Camp*, 567 F. Supp. 2d at 173-74 (arbitrators' ruling on merits question is *res judicata*); *Century Int'l Arms, Ltd. v. Fed. State Unitary Enter. State Corp.*, 172 F. Supp. 2d 79, 95-97 (D.D.C. 2001) (same); *see also Bryson v. Gere*, 268 F. Supp. 2d 46, 57-60 (D.D.C. 2003) (arbitrators' ruling on merits question gives rise to issue preclusion/collateral estoppel on the decided issue).

Although India's defense that "the underlying 2005 contract is invalid due to fraud and collusion," Resp. Br. at 1-2, was not raised before the Tribunal or the Swiss Federal Supreme Court, this Court should nevertheless proceed to consider and reject it. India devotes five pages to this alleged "defense," but it does not contain a single allegation that Deutsche Telekom, an indirect shareholder of Devas, knew about or participated in any alleged "fraud." Nor could it.

All of the factual allegations concern events in 2005 and 2006. But Deutsche Telekom first acquired its indirect interest in Devas in 2008. *See* Interim Award at ¶¶ 66-70; Final Award at ¶¶ 49-55. Nevertheless, India alleges, in conclusory fashion, that Petitioner, as a shareholder, "bears responsibility under Indian law for the fraudulent activities engaged in by Devas." Resp. Br. at 16.

This assertion—that Deutsche Telekom can be held vicariously liable as a shareholder for an alleged fraud committed by other people (including Indian officials) years before Petitioner became a shareholder—raises serious concerns about fairness and the rule of law in India.[26] Even if Indian law is that draconian, India's need to rely on such an extreme theory of vicarious liability is an acknowledgment that Deutsche Telekom did not commit the purported underlying fraud. That should be enough for this Court to rule on and dismiss this spurious defense, which India has raised under the "public policy" exception under Article V(2)(b) of the New York Convention. Resp. Br. at 1-2. India's allegations cannot satisfy the high burden for sustaining a public policy defense against enforcement under controlling case law in this Circuit. *See Newco v. Belize*, 650 F. App'x 14, 16 (D.C. Cir. 2016) (public policy defense requires a "'clear-cut

26. India's allegations of fraud against Devas appear to be a delay tactic. In February 2021, the NCLAT issued its report allegedly discovering that a fraud had occurred in 2005. Of course, this "discovery" occurred only after India and its wholly state-owned subsidiary Antrix lost all three of the international arbitration proceedings concerning Devas, and Judge Thomas S. Zilly entered Devas's arbitration award of $1.3 billion against Antrix as a judgment of the United States District Court for the Western District of Washington. *Devas Multimedia Private Ltd., v. Antrix Corp.,* Case No. 2:18-cv-01360-TSZ, Judgment (Nov. 4, 2020) [ECF No. 52]. In that same proceeding, Judge Zilly later granted a motion to intervene brought by Devas' U.S. shareholder after the NCLAT issued an order stripping the Devas Board of Directors of authority and appointing a government official as "Provisional Liquidator," who proceeded to fire all of Devas' counsel in the enforcement proceeding. *Id.*, Order (Feb. 24, 2001) [ECF No. 76]. Judge Zilly also issued a Temporary Restraining Order against Devas (now under control of the "Provisional Liquidator") to prevent the Provisional Liquidator from "jeopardize[ing] enforcement of the Award in the United States." *Id.* Most recently, Judge Zilly chastised Antrix in a minute order for its repeated attempts to delay enforcement proceedings, observing, "the Court has repeatedly emphasized, this matter has been subjected to hindrance and delay largely on the part of Respondent," *id.*, Minute Order (Aug. 9, 2021), ECF No. 132, and granted the Intervenors' motion to compel Antrix to answer their interrogatories. *Id.*, Order (Aug. 16, 2021) [ECF No. 133].

case[]' where 'enforcement would violate the forum state's most basic notions of morality and justice.'" (citation omitted)); *Belize Soc. Dev. v. Belize*, 5 F. Supp. 3d at 43 (in light of the "emphatic federal policy in favor of arbitral dispute resolution . . . U.S. courts have enforced arbitral awards in the face of public policy interests at least as weighty as the policy against corruption abroad" (citations omitted)). This Court should proceed to consider and reject India's alleged public policy defense.

Petitioner respectfully requests that the Court affirm the summary nature of these enforcement proceedings by considering and ruling on each of the defenses against enforcement raised by India, including the "jurisdictional objections" that should have been presented as defenses against enforcement.[27] Further briefing on any of India's defenses against enforcement of the Final Award will only result in additional expense and delay and compound the substantial injury India has already caused Petitioner.

CONCLUSION

India is seeking to delay paying what it owes Petitioner under the Final Award. It is doing so despite having undertaken, in an international treaty, to "abide by and comply with" the Final Award. The arguments India has presented are wholly without merit. Both the arbitral tribunal and the Swiss Federal Supreme Court have considered these arguments (with the exception of the newly discovered fraud argument) and rejected them. In fact, the Swiss Federal Supreme Court went so far as to find that one of India's arguments was not made in good faith.

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27. Even if the Court should determine that India is entitled to brief these same defenses yet again in an opposition to the Petition, the Court is nevertheless entitled to conclude at this stage that India's allegations of fraud fail to satisfy the high bar to enforcement, which would become the law of the case and thereby more efficiently and economically resolve any further efforts by India to stymie enforcement of the Final Award by reasserting the same defenses under Article V in any subsequent proceedings. *See Thomas v. Gandhi*, 650 F. Supp. 2d 35, 39 (D.D.C. 2009) (Leon, J.) ("the law of the case doctrine provides, in part, that 'the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result.*'" (emphasis in original)).

Swiss Court Decision at 25. Despite that admonition, India has the temerity to advance that same argument for a third time before this Court. Enough is enough. India has had its day in court. This Court should not countenance any further delay when India has not made a *prima facie* demonstration that it has a serious defense against enforcement of the Final Award.

Petitioner respectfully requests that the Court enter an order affirming its subject matter jurisdiction over this action, denying India's motion to dismiss on the grounds of *forum non conveniens*, confirming the Final Award, and entering judgment in favor of Petitioner in the amount requested in the Petition's Prayer for Relief.

Dated: October 15, 2021

Washington, D.C.

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