UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF THE REPUBLIC OF INDIA'S MOTION TO DISMISS

WHITE & CASE
Nicolle Kownacki (D.C. Bar No. 1005627)
David Riesenberg (D.C. Bar No. 1033269)
Weiqian Luo (D.C. Bar No. 1613732)
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Phone: (202) 626-3600
Fax: (202) 639-9355
nkownacki@whitecase.com

Counsel for the Republic of India

September 23, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND 5

A. The 2005 Agreement Between Devas and Antrix 5

B. The 2011 Termination Based on India's National Security Requirements 9

C. The 2013 Arbitration 10

D. The 2021 Litigation Relating to Devas's Acts of Fraud and Collusion 12

ARGUMENT 17

I. This Case Should Be Dismissed Based on India and Germany's Selection of the Indian Courts for Enforcement of this Arbitral Award Under the India-Germany BIT 17

II. This Case Should Be Dismissed Because DT Cannot Satisfy Any Exception to India's Sovereign Immunity 23

A. India Did Not Offer to Arbitrate Petitioner's Dispute, and Did Not Exclude Judicial Review of the Arbitrators' Competence 24

1. India Offered to Arbitrate Only "Investment" Disputes, and Not Disputes Based upon "Pre-Investment" Activity 27

2. India Did Not Offer to Arbitrate Disputes with Indirect Investors over Indirect Investments 32

3. The Parties Did Not Exclude Judicial Review of the Existence of an Arbitration Agreement 36

B. India Has Not Waived Its Sovereign Immunity 42

CONCLUSION 45

TABLE OF AUTHORITIES

Page(s)

CASES

Argentine Republic v. Amerada Hess Shipping Corp.,
488 U.S. 428 (1989)....................23

Ashraf-Hassan v. Embassy of France,
40 F. Supp. 3d 94 (D.D.C. 2014)....................19

Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas,
571 U.S. 49 (2013)....................18, 22

AT&T Techs. v. Communs. Workers of Am.,
475 U.S. 643 (1986)....................26

Azima v. RAK Inv. Auth.,
926 F.3d 870 (D.C. Cir. 2019)....................17, 18, 22

Belize Soc. Dev., Ltd. v. Gov't of Belize,
794 F.3d 99 (D.C. Cir. 2015)....................42

Bell Helicopter Textron, Inc. v. Islamic Republic of Iran,
734 F.3d 1175 (D.C. Cir. 2013)....................23

**BG Grp. plc v. Republic of Argentina*,
572 U.S. 25 (2014)....................25, 27, 34, 40

Bode v. Grenier, LLP v. Knight,
808 F.3d 852 (D.C. Cir. 2015)....................34

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.,
137 S. Ct. 1312 (2017)....................2

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985)....................19

Burns v. Levy,
873 F.3d 289 (D.C. Cir. 2017)....................35

Cheney v. IPD Analytics, LLC,
583 F. Supp. 2d 108 (D.D.C. 2008)....................17

Chevron Corp. v. Republic of Ecuador,
795 F.3d 200 (D.C. Cir. 2015)....................3, 24, 36

Citigroup Glob. Mkts. v. Abbar,
761 F.3d 268 (2d Cir. 2014)....................41

CPConstruction Pioneers Baugesellschaft Anstalt v. Gov't of Republic of Ghana,
578 F. Supp. 2d 50 (D.D.C. 2008)....................19

**Creighton Ltd. v. Gov't of Qatar*,
181 F.3d 118 (D.C. Cir. 1999)....................4, 42, 45

D&S Consulting, Inc. v. Kingdom of Saudi Arabia,
961 F.3d 1209 (D.C. Cir. 2020)....................18

DDK Hotels, LLC v. Williams-Sonoma,
No. 20-2748-cv, 2021 U.S. App. LEXIS 21862
(2d Cir. July 23, 2021)....................37

E. Airlines, Inc. v. Floyd,
499 U.S. 530 (1991)....................34

Eckert Int'l v. Gov't of the Sovereign Democratic Republic of Fiji,
32 F.3d 77 (4th Cir. 1994)....................19

FAA v. Cooper,
566 U.S. 284 (2012)....................44

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995)....................37, 40

FSP, Inc. v. Societe Generale,
No. 02-CV-4786, 2005 U.S. Dist. LEXIS 3081
(S.D.N.Y. Feb. 28, 2005)....................41

Granite Rock Co. v. Int'l Brotherhood of Teamsters,
561 U.S. 287 (2010)....................3

Howsam v. Dean Witter Reynolds,
537 U.S. 79 (2002)....................40

Hulley Enters. v. Russian Fed'n,
211 F. Supp. 3d 269 (D.D.C. 2016)....................25

Infrared Envtl. Infrastructure GP Ltd. v. Kingdom of Spain,
No. 20-CV-817 (JDB), 2021 U.S. Dist. LEXIS 120489
(D.D.C. June 29, 2021)....................4, 25

In re Air Crash Over the S. Indian Ocean, on March 8, 2014,
352 F. Supp. 3d 19 (D.D.C. 2018)....................22, 23

In re Union Carbide Corp. Gas Plant Disaster at Bhopal,
809 F.2d 195 (2d Cir. 1987)....................20

**Ivanenko v. Yanukovich*,
995 F.3d 232 (D.C. Cir. 2021)....................43

Kilburn v. Socialist People's Libyan Arab Jamahiriya,
376 F.3d 1123 (D.C. Cir. 2004)....................24

LLC SPC Stileks v. Republic of Moldova,
985 F.3d 871 (D.C. Cir. 2021)....................36, 40

Medellin v. Texas,
552 U.S. 491 (2008)....................34

Pearce v. E.F. Hutton Grp., Inc.,
828 F.2d 826 (D.C. Cir. 1987)....................41

Peterson v. Royal Kingdom of Saudi Arabia,
416 F.3d 83 (D.C. Cir. 2005)....................23

Phoenix Consulting, Inc. v. Republic of Angola,
216 F.3d 36 (D.C. Cir. 2000)....................23, 24

**Process & Indus. Devs. v. Fed. Republic of Nigeria*,
962 F.3d 576 (D.C. Cir. 2020)....................2, 5, 45

Ramada Franchise Sys. v. Cusack Dev.,
96 Civ. 8085 (MGC), 1997 U.S. Dist. LEXIS 7888,
(S.D.N.Y. June 5, 1997)....................19

Raymond James Fin. Servs. v. Cary,
709 F.3d 382 (4th Cir. 2013)....................27, 41

Saudi Arabia v. Nelson,
507 U.S. 349 (1993)....................23

Schwartz v. Chow,
867 A.2d 230 (D.C. 2005)....................40

Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.,
549 U.S. 422 (2007)....................2, 17

Stanley v. George Washington Univ.,
394 F. Supp.3d 97 (D.D.C. 2019)....................35

Starr Int'l Co., Inc. v. United States,
910 F.3d 527 (D.C. Cir. 2018)....................35

Tatneft v. Ukraine,
771 F. App'x 9 (D.C. Cir. 2019) 4, 45

Tekway, Inc. v. Agarwal,
No. 19-cv-6867, 2020 U.S. Dist. LEXIS 186034,
(N.D. Ill. Oct. 7, 2020) 19

Transamerican S.S. Corp. v. Somali Democratic Republic,
767 F.2d 998 (D.C. Cir. 1985) 19

UBS Sec. LLC v. Voegeli,
684 F. Supp. 2d 351 (S.D.N.Y. 2010)...41

United States v. Park,
938 F.3d 354 (D.C. Cir. 2019) 34

World Wide Minerals, LTD. v. Republic of Kazakhstan,
296 F.3d 1154 (D.C. Cir. 2002) 42, 43

Zeevi Holdings Ltd. v. Republic of Bulgaria,
494 F. App'x 110 (2d Cir. 2012) 18, 23

STATUTES AND RULES

28 U.S.C. § 1604 23

28 U.S.C. § 1605 23

§ 1605(a)(1) .... *passim*

§ 1605(a)(6) .... *passim*

28 U.S.C. § 1607 23

Fed. R. Civ. P. 12(b)(1)..4

OTHER AUTHORITIES

Andreas Börner, Article III, *in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke, et al. eds., 2010) 44

Berschader v. The Russian Federation,
SCC Case No. 080/2004, Award, April 21, 2006 34

Chloro Controls (India) Private Ltd. v. Severn Trent Water Purification Inc. and Orgs.
(2013) 1 SCC 641 (India) 39

Christoph Schreuer et al., *The ICSID Convention – A Commentary* (2nd ed. 2009) 29

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 1

Article I(3) 44

Article V 1, 2

Devashish Krishan, India and International Investment Laws, *in* 2 *India and International Law*, (B.N. Patel ed., 2008) 29

Zachary Douglas, *The International Law of Investment Claims* (2009) 34

Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 374 21

German Civil Procedure Code

§§ 1040, 1059, 1061 38

H.R. Rep. No. 94-1487 (1976) 43

H.R. Rep. No. 91-1181 (1970) 45

League of Nations Treaties: 7. Convention on the Execution of Foreign Arbitral Awards (1927), https://treaties.un.org/pages/LON ViewDetails.aspx?src=LON&id=550&chapter=30&clang=_en 22

Mihaly v. Sri Lanka, ICSID Case No. ARB/00/02, Award dated Mar. 15, 2002 28

Mr. N. v. Czech Republic Min. of Transp. and Telecomm., Doc. No. 32 in Case No. T 9059-03 (Svea App. Ct. May 30 2005) (Sweden) 31

Nagel v. Czech Republic, SCC Case No. 49/2002, Final Award dated Sept. 9, 2003 30

North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 21

Petrobart Ltd. v. The Kyrgyz Republic,
SCC Case 126/2003,
Arbitral Award dated Mar. 29, 2005 29

Jeswald W. Salacuse,
The Law of Investment Treaties (2010) 28

S. Rep. No. 91-702 (1970) 45

S. Rep. No. 94-1310 (1976) 43

Slovak Republic v. Achmea B.V.,
ECLI:DE:BGH:2018:311018BIZB2.15.0, Judgment
(BGH Oct. 31, 2018) 38, 39

Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,
https://uncitral.un.org/en/texts/arbitration/
modellaw/commercial_arbitration/status 38

Swiss Federal Code on Private International Law

Articles 186, 190, 191 39

W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*,
2014 U. Ill. L. Rev. 67 (2014) 44

Yukos Capital v. Russian Federation,
Bundesgericht [BGer] [Federal Supreme Court]
July 20, 2017, Case No. 4A_98/2017 (Switzerland) 39

Zhinvali Dev. Ltd. v. Republic of Georgia,
ICSID Case No. ARB/00/1,
Award dated Jan. 24, 2003 29

**Authorities upon which counsel chiefly relies are marked with an asterisk*

The Republic of India ("India") respectfully submits this Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) based on this Court's lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, and, as a threshold issue, the doctrine of *forum non conveniens*.

In accordance with the unique treaty provisions of the 1995 Agreement Between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments, a bilateral investment treaty (the "Treaty," "BIT," or "India-Germany BIT") (ECF 1-5), only an Indian court can enforce an arbitral award against India—just as only a German court can enforce an arbitral award against Germany. In addition, the U.S. courts lack subject-matter jurisdiction over this case under the FSIA because India never waived its sovereign immunity and, likewise, never offered (let alone agreed) to arbitrate the present dispute with Petitioner. India also never "clearly and unmistakably" excluded judicial review or delegated exclusive competence to decide these questions to any arbitral tribunal, for the reasons detailed below. Petitioner thus cannot satisfy any exception to sovereign immunity, in particular under 28 U.S.C. §§ 1605(a)(1) and (a)(6).

PRELIMINARY STATEMENT

Petitioner Deutsche Telekom AG ("Petitioner" or "DT") seeks to confirm an arbitration award (the "Final Award," ECF 1-4), which was issued by a tribunal on May 27, 2020, purportedly under the 1995 India-Germany BIT. Pet. ¶¶ 1-2 (ECF 1). India disputes the validity of the Final Award based upon multiple grounds arising under Article V of the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517. India's Article V challenges may potentially include, but are not limited to, the grounds that Petitioner's claims were barred from arbitration under the India-Germany BIT's "essential security" clause, and that Petitioner's claims are precluded because the underlying 2005 contract

is invalid due to fraud and collusion. *See, e.g.*, New York Convention, arts. V(1)(a), V(1)(c), V(2)(a), V(2)(b).

Before addressing those issues under the New York Convention, however, India is entitled to this Court's assessment of several threshold issues. The first of these relates to the doctrine of *forum non conveniens*, which should be addressed at the outset under *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). As detailed below, the doctrine of *forum non conveniens* applies based on India's agreement with Germany for all litigation such as the present action to proceed exclusively in an Indian court. Article 9(2)(b)(v) of the India-Germany BIT explicitly requires all enforcement of arbitral awards against India to proceed under Indian law (amongst the India-Germany BIT's <u>eleven</u> different clauses specifying the applicability of Indian law). Moreover, unlike numerous other BITs and similar treaties, the India-Germany BIT contains no reference whatsoever to any multilateral convention—such as the New York Convention—that might contemplate any role for the U.S. courts in the present litigation. Taken together, these unique aspects of the India-Germany BIT reflect a conscious selection of an Indian forum for this litigation, which this Court should honor by dismissing the present action.

Moreover, as a foreign sovereign State, India is also entitled to "a threshold determination of immunity" under the FSIA "before the sovereign can be compelled to defend the merits" of any potential challenges under the New York Convention. *Process & Indus. Devs. v. Fed. Republic of Nigeria* ("*P&ID*"), 962 F.3d 576, 585 (D.C. Cir. 2020). The FSIA codifies India's sovereign immunity from suit, which gives rise to jurisdictional defenses that must be adjudicated "as near to the outset of the case as is reasonably possible." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1317 (2017).

In the present motion, India seeks dismissal of this action for lack of subject-matter jurisdiction under the FSIA. Although Petitioner has invoked two exceptions to India's immunity under the FSIA, neither exception applies in the present case, as detailed below. *See* Pet. ¶ 12 (ECF 1) (invoking the "waiver" and "arbitration" exceptions).

First, Petitioner purports to satisfy the "arbitration" exception under 28 U.S.C. § 1605(a)(6). The present case, however, does not involve any "agreement made by the foreign state" or "award made pursuant to such an agreement to arbitrate," as required under § 1605(a)(6). "Arbitration is strictly a matter of consent . . . and thus is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 299 (2010) (emphasis in original) (citations and quotation marks omitted). In the present case, India never even offered—let alone agreed—to arbitrate the present dispute with Petitioner. The "preponderance of the evidence" set forth herein is sufficient to rebut Petitioner's "prima facie showing" as to any purported arbitration agreement. *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205 (D.C. Cir. 2015) (describing the burden-shifting framework applicable to such an analysis).

Specifically, as demonstrated below, under Article 9(2) of the India-Germany BIT, India issued a unilateral standing offer to arbitrate disputes—but only where certain mandatory conditions are satisfied. Such conditions include that only an "investor," as defined by Article 1(c) of the Treaty, may bring a dispute involving an "investment," as defined by Article 1(b) of the Treaty. Petitioner's claims do not involve any "investor" or "investment," however, but only pre-investment activities—that is, preparations to make an investment. Moreover, Petitioner did not make any direct investment as required by the BIT, but rather, merely indirectly held shares in an

Indian entity through its interposed subsidiary. Such a dispute, therefore, did not fall within the explicit text of India's standing offer to arbitrate under Article 9 of the BIT.

In the absence of "any putative offer to arbitrate" this dispute with Petitioner, "the dominoes begin to fall." *Infrared Envtl. Infrastructure GP Ltd. v. Kingdom of Spain*, No. 20-CV-817 (JDB), 2021 U.S. Dist. LEXIS 120489, at *13 (D.D.C. June 29, 2021) ("If there was no agreement to arbitrate, the . . . tribunal never had jurisdiction, its award is not enforceable, and therefore it is not entitled to full faith and credit in this Court."). Of particular importance for the present Motion to Dismiss under Rule 12(b)(1), the absence of any "agreement made by the foreign state . . . to submit to arbitration" or "award made pursuant to such an agreement to arbitrate" renders the FSIA's arbitration exception under 28 U.S.C. § 1605(a)(6) inapplicable.

Second, Petitioner also has failed to identify any waiver of India's immunity, as required under 28 U.S.C. § 1605(a)(1). Arguing otherwise in its Petition, Petitioner has misconstrued *dicta* from *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019), as purportedly suggesting that India waived immunity merely by becoming a party to the New York Convention—regardless of whether India also purportedly agreed to arbitrate. Pet. ¶ 12 (ECF 1). This interpretation of *Tatneft* is incorrect, inasmuch as *Tatneft* did not (and indeed could not) contradict the D.C. Circuit's earlier precedent holding that the waiver exception under § 1605(a)(1) also requires that a state "had agreed . . . to arbitrate" as a separate jurisdictional element under the FSIA. *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999). As stated above, in the current case, there was no such an agreement to arbitrate. Significantly, the New York Convention never even mentions sovereign immunity, let alone any global waiver that supposedly would become effective even without an arbitration agreement. Further, to the extent the *dicta* in the *Tatneft* opinion could provide a basis for India's purported waiver (which it does not), in any event "*Tatneft* was an

unpublished disposition, so it does not bind" courts in future cases, as the D.C. Circuit emphasized in *P&ID*, 962 F.3d at 584. India's adherence to the New York Convention, therefore, cannot establish any explicit or implicit waiver under § 1605(a)(1).

Accordingly, absent any applicable exception to India's sovereign immunity, this case should be dismissed in its entirety for lack of subject-matter jurisdiction under the FSIA.

BACKGROUND

A. The 2005 Agreement Between Devas and Antrix

Petitioner DT is a company incorporated under the laws of the Federal Republic of Germany. Through its Singaporean subsidiary Deutsche Telekom Asia Pte Ltd. ("DT Asia"), Petitioner held a minority interest in Devas Multimedia Private Limited ("Devas"), an Indian-registered entity incorporated on December 17, 2004. Final Award ¶¶ 52-53 (ECF 1-4); *see also* Judgment of National Company Law Tribunal in case C.P. No. 06/BB/2021 ("NCLT Judgment") ¶ 2, May 25, 2021 (Kownacki Decl., Ex. 11). Antrix Corporation Limited ("Antrix") is an Indian-registered commercial entity incorporated on September 28, 1992, which is wholly owned by the Government of India and falls within the administrative jurisdiction of the Indian Space Research Organization ("ISRO") and the Indian Department of Space ("DOS"). Final Award ¶¶ 8, 48 (ECF 1-4); NCLT Judgment ¶ 2 (Kownacki Decl., Ex. 11).

The current dispute arises out of a 2005 agreement between Devas and Antrix (the "Devas-Antrix Agreement") (Kownacki Decl., Ex. 1), which concerned the lease of the so-called "S-Band spectrum" (2500-2690 MHz) and operation of commercial satellites. *See* Pet. ¶ 3 (ECF 1). The Devas-Antrix Agreement was never approved by the Government of India, the requisite licenses contemplated under the Agreement were never granted (as described below), and the Agreement was ultimately terminated in 2011 because of India's foreseeable policy decision to reserve the S-Band spectrum for national security purposes. *See* Interim Award ¶¶ 8, 183-185, 240 (ECF 1-7).

An Indian appellate body known as the National Company Law Appellate Tribunal ("NCLAT") has recently affirmed a ruling that Devas originally procured the Devas-Antrix Agreement through acts of fraud, including by means of collusion with corrupt Antrix executives. *See* Judgment of National Company Law Appellate Tribunal in Case No. Company Appeal (AT) (CH) No. 17 of 2021 ("NCLAT Judgment") (Kownacki Decl., Ex. 15); *see also* NCLT Judgment ¶ 2 (Kownacki Decl., Ex. 11).

The S-Band is a scarce and valuable portion of the electromagnetic spectrum that can be used to send and receive signals using small units (*e.g.*, mobile phones and laptop computers) without requiring such units' antennas to be pointed directly at the satellite. *See e.g.*, Interim Award ¶¶ 51, 243 (ECF 1-7); Pet. ¶ 16 (ECF 1). India originally obtained limited allocations of S-Band spectrum from the International Telecommunications Union ("ITU") through a complex inter-governmental process. Interim Award ¶ 51 (ECF 1-7). Any S-Band spectrum allocated for one operator cannot be simultaneously used by another operator without causing significant interference or even total unavailability of the service, and regulators thus must carefully allocate the limited shares of S-Band spectrum across sectors. *Id.* ¶¶ 53, 82. Significantly, India's military and defense agencies—including India's Navy, Air Force, and Ministry of Defence—have all required the use of S-Band capacity for national-security purposes for many years. *Id.* ¶¶ 185, 242; Direct Testimony of Mr. A. Vijay Anand, Joint Secretary, Department of Space, Government of India ("Anand Statement") ¶¶ 5-6, n.21, Oct. 27, 2016 (Kownacki Decl., Ex. 3).

On January 28, 2005, Devas and Antrix executed the Devas-Antrix Agreement, under which Antrix agreed to lease S-Band capacity to Devas in relation to a pair of satellites to be built and launched by the ISRO. *See* Devas-Antrix Agreement (Kownacki Decl., Ex. 1). As is typical for such projects, each of the parties undertook to obtain certain approvals and licenses before the

project could be implemented. *Id.* arts. 3(c), 12(b)(vii). In particular, Article 3(c) of the Devas-Antrix Agreement stipulated that responsibility for obtaining governmental and regulatory approvals would rest with Antrix, and that Antrix would assist Devas in obtaining any further necessary licenses, whereas Devas would bear the cost of obtaining these approvals. *Id.* art. 3(c). Article 12(b)(vii) further provided that Devas would be solely responsible for securing and obtaining all licenses and approvals for the delivery of services via satellite and terrestrial network. *Id.* art. 12(b)(vii).

The Devas-Antrix Agreement explicitly anticipated the possibility that Antrix might be denied approvals for the satellites' "orbital slot." Specifically, the parties agreed to a comprehensive set of provisions describing their rights and obligations in the event of failure to obtain the required governmental approval or licenses. *See id.* art. 7. Article 7(c) thus provided that Antrix could terminate the Agreement in the event that it would be "unable to obtain the necessary frequency and orbital slot coordination required for operating" one of the two satellites. *Id.* Art. 7(c). Under such circumstances, Antrix would be required to reimburse Devas only for certain "Upfront Capacity Reservation Fees," and "neither Party shall have any further obligation to the other Party under this Agreement nor be liable to pay any sum as compensation or damages (by whatever name called)." *Id.*

Devas and Antrix thus both were fully aware that the Devas-Antrix Agreement was only the first of many potential steps—and that the planned "investment" could not be realized without subsequent approvals and authorizations from the Government of India. This is further evidenced by the *force majeure* clause contained in the Devas-Antrix Agreement, which listed "acts of or failure to act by any governmental authority acting in its sovereign capacity" as one of the events

that would justify the relevant party's "failure or delay in performance of its obligations" without incurring any liability. *Id.* art. 11.

It should be emphasized that the Government of India was not itself a party to the Devas-Antrix Agreement. Rather, as was explicitly set forth in the text of the Agreement, the Government's exclusive role was that of a regulator. *Id.* Annexure I ¶¶ 16, 37 (defining "Governmental Regulatory Authority" as "any Government state or Central, municipality, local authority, town, village, court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of India," and "Regulatory Approval" as "any and all approvals, licenses, or permissions from Governmental or Regulatory Authorities").

Indeed, as observed by the NCLAT, Antrix officials took numerous steps to conceal even the existence of the Devas-Antrix Agreement from the Government of India beginning in 2005. NCLAT Judgment ¶¶ 252-57, at 171-173 (Kownacki Decl., Ex. 15); *see also* NCLT Judgment ¶ 2(26) (Kownacki Decl., Ex. 11). This fact—which corroborates other evidence of collusion between corrupt Antrix executives and Devas—has taken on additional importance in light of the fraud investigation and winding-up litigation before the NCLAT in India, as described below.

In or around October 2007, Devas approached DT to discuss a potential partnership. *See* Interim Award ¶ 66 (ECF 1-7). After reviewing Devas's business plan and financial model, as well as having discussions with Devas representatives—which undoubtedly put DT on notice that the "planned investment" under the Devas-Antrix Agreement could not yet be realized without subsequent approvals and authorizations from the Government of India—DT decided to invest in Devas through its Singaporean subsidiary, DT Asia, in early 2008. *Id.* ¶¶ 67-69. DT Asia made an initial contribution of US$ 75 million in Devas in August 2008, and a subsequent contribution of US$ 22.2 million in September 2009. *Id.* ¶¶ 69-70. DT itself never directly invested in Devas.

To the contrary, all investment purportedly made by DT in Devas was indirect and channeled through DT Asia. It is undisputed that, as a Singaporean entity, DT Asia had no rights or privileges under the India-Germany BIT, and therefore was not the subject of any offer of arbitration extended thereunder by India.

B. The 2011 Termination Based on India's National Security Requirements

In late 2009, allegations of irregularities relating to the Devas-Antrix Agreement prompted India's Department of Space ("DOS") to establish a committee to review the legal, commercial, procedural, and technical aspects of the Devas-Antrix Agreement. Interim Award ¶ 76 (ECF 1-7). This committee delivered its report in May 2010. *See* Report Submitted to the Indian Space Research Organization and Department of Space, May 2010 (Kownacki Decl., Ex. 5); *see also* Respondent's Counter-Memorial on Jurisdiction and Liability in PCA Case No. 2014-10 ("India's Counter-Memorial") n.88, Feb. 13, 2015 (Kownacki Decl., Ex. 6). The delivery of the committee's report coincided with concerns raised by the Department of Telecommunications ("DOT") and the Ministry of Defence regarding the Indian armed forces' projected needs for S-Band spectrum. Interim Award ¶¶ 79-81 (ECF 1-7).

In July 2010, based on input provided by multiple agencies and ministries, the Government concluded that India's national security needs could not be met if the Devas-Antrix Agreement were ultimately to be approved and licensed. *See* Department of Space, Note for the Cabinet Committee on Security, Annulling the Devas-Antrix Agreement (the "Note for the Cabinet Committee on Security") ¶ 28, Feb. 16, 2011 (Kownacki Decl., Ex. 4); *see also* Anand Statement ¶¶ 18-20 (Kownacki Decl., Ex. 3). In particular, a note prepared for India's Cabinet Committee on Security observed that "[s]pace spectrum is a vital national resource and it is of utmost importance to preserve it for emerging national applications for [s]trategic uses and societal applications. Given the limited availability of S-band spectrum, meeting the strategic and societal

needs is of higher priority than commercial / entertainment sectors." *See* Note for the Cabinet Committee on Security, ¶ 34 (Kownacki Decl., Ex. 4). Accordingly, the Note recommended that an orbital slot in the S-Band for commercial activities should not be provided to Antrix, thus necessitating the annulment of the Devas-Antrix Agreement. *Id.* ¶¶ 45.1-45.2.

On February 25, 2011, Devas was notified of the termination of the Devas-Antrix Agreement. *See* Final Award ¶ 62 (ECF 1-4). While the termination could have been based exclusively upon the *force majeure* clause under Article 11, Antrix also invoked Article 7(c) of the Agreement, and accordingly reimbursed Devas for the Upfront Capacity Reservation Fees. *Id.* ¶ 274, n.396. As explained above, the reimbursement of the Upfront Capacity Reservation Fees constituted the entirety of the compensation due to Devas under the termination provisions of the Devas-Antrix Agreement.

C. The 2013 Arbitration

On September 2, 2013, DT purported to accept India's offer of arbitration under the BIT by submitting a Notice of Arbitration. *See* Interim Award ¶ 10 (ECF 1-7). Geneva, Switzerland was chosen as the seat of the arbitration, and the Permanent Court of Arbitration was selected to administer the proceedings. *Id.* at ¶¶ 14, 107. India objected to the BIT tribunal's jurisdiction on multiple grounds, including because DT was not an offeree entitled to commence arbitration under the India-Germany BIT, in several respects.

First, India explained that the present dispute relates exclusively to Devas's pre-investment activities—*i.e.*, preparation to make an investment, not an actual "investment," as required under Article 1(b) and 1(c) of the BIT—and thus does not fall within India's offer of arbitration. As India demonstrated, Article 9 of the BIT contemplates arbitration of disputes commenced by genuine "investors" relating to genuine "investments," and thus excludes disputes relating to mere preparations or pre-investment activities. India's Counter-Memorial ¶¶ 73-95 (Kownacki Decl.,

Ex. 6). A commercial contract—for which no applicable license was ever formally granted by the relevant authorities—cannot constitute an established "asset" or "business concession[] conferred by law or under contract" arising under Article 1(b) of the India-Germany BIT. *Id.* ¶ 88. Nor does a party with an interest in such a commercial contract constitute an "investor" under Article 1(c) of the BIT. In the present case, the Devas-Antrix Agreement required Devas to seek a particular form of license (the "WPC License"), which Devas failed to obtain. *See id.* ¶ 88; *see also* Interim Award ¶¶ 68, 161 (ECF 1-7). For the purposes of the BIT, therefore, Devas's activities in connection with the Devas-Antrix Agreement were not "investments" at all. *See* India's Counter-Memorial ¶¶ 87-88 (Kownacki Decl., Ex. 6). As many international tribunals have previously held, such a commercial contract constitutes merely pre-investment activity, and thus falls outside the standing offer to arbitrate "investment disputes" with "investors" under Article 9. *See id.* ¶¶ 77-86.

Second, even if Devas's alleged contractual rights did constitute an "investment" (which they do not), DT would only qualify—at best—as an indirect investor by virtue of its ownership of the Singapore entity, DT Asia (which itself has no rights under the India-Germany BIT). To recall, DT's only connection to Devas involved corporate transactions performed in Singapore. Interim Award ¶¶ 67-69 (ECF 1-7). Under the explicit language of the India-Germany BIT's Article 1(c), therefore, DT does not qualify as an "investor" because DT never "effected . . . investment in the territory" of India. *See* India's Counter-Memorial ¶¶ 73-111, 120 (Kownacki Decl., Ex. 6). As India explained during the arbitration, when India or Germany intended to grant treaty protection to indirect investments or indirect investors, both of the States did so expressly. Such examples include India's BITs with, *inter alia,* the Netherlands, the U.K., France, Spain, and Kuwait, as well as Germany's BITs with Kuwait, Mexico, and China, all of which expressly noted

that protected investments under the treaties include both "direct and indirect investment." *Id.* ¶¶ 99-105. Unlike these same parties' other BITs, however, the India-Germany BIT does not offer to arbitrate with "indirect" investors regarding "indirect" investments. Such material distinctions must be given legal effect.

In its Interim Award rendered on December 13, 2017, however, the tribunal disregarded India's arguments and improperly upheld its jurisdiction. *See* Interim Award ¶¶ 137-157, 174-182 (ECF 1-7). The tribunal subsequently issued the Final Award on May 27, 2020, ordering India to pay damages totaling US$ 93.3 million, plus interest and attorneys' fees. *See* Final Award ¶ 357 (ECF 1-4).

D. The 2021 Litigation Relating to Devas's Acts of Fraud and Collusion

Relevant investigations and litigation in India have uncovered that Devas, in collusion with certain former officials of Antrix, obtained the 2005 Devas-Antrix Agreement by fraud and without the approval and knowledge of the Government of India. In this regard, the National Company Law Appellate Tribunal ("NCLAT") recently affirmed a first-instance tribunal's order approving the winding up (*i.e.*, corporate dissolution) of Devas based on evidence of fraudulent activity—including during the procurement and implementation of the Devas-Antrix Agreement. *See generally* NCLAT Judgment (Kownacki Decl., Ex. 15).

The winding-up proceedings against Devas resulted from a fraud investigation conducted in India in relation to the irregularities observed in connection with the negotiation and execution of the 2005 Devas-Antrix Agreement. As explained in a 2016 Final Report issued by India's Central Bureau of Investigation, a total of nine individuals and entities are implicated in the fraudulent scheme—including Devas itself, Devas's chief executive officer, two of Devas's directors, two Antrix executives, and several officers within the Department of Space. *See* Final Report No. 01/2016 issued by the Honorable Court of the Principal Special Judge for the

Government of India's Central Bureau of Investigation's Cases, New Delhi Branch, Aug. 11, 2016 (Kownacki Decl., Ex. 7). In 2017, these allegations were confirmed by India's anti-money-laundering authority, and a Supplementary Final Report was issued in 2019. Supplementary Final Report No. 01/2019 issued by Hon. Santosh Snehi Mann, Special Judge, PC Act (CBI-03), Patiala House Courts, New Delhi, Jan. 8, 2019 (Kownacki Decl., Ex. 10). Relevant criminal proceedings are now pending under the Prevention of Money Laundering Act ("PMLA") and Foreign Exchange Management Act ("FEMA") on the basis that Devas had participated in a criminal conspiracy and committed unlawful transactions involving the proceeds of fraud.[1] *See* Adjudicating Authority Order Under the Prevention of Money Laundering Act, Aug. 16, 2017 (Kownacki Decl., Ex. 8); Adjudicating Authority Order Under the Prevention of Money Laundering Act, Oct. 11, 2017 (Kownacki Decl., Ex. 9).

The winding-up proceeding before the National Company Law Tribunal ("NCLT") was commenced by Antrix on January 18, 2021, based on evidence that emerged during the criminal investigation. NCLT Judgment ¶ 19(9) (Kownacki Decl., Ex. 11). The NCLT granted Antrix's petition on May 25, 2021, and provisionally appointed a liquidator to take responsibility for Devas. *Id.* ¶ 38. In its order, the NCLT rendered findings regarding the evidence that Devas executives, acting "in connivance and collusion with the then officials of Antrix," had obtained the Devas-Antrix Agreement through a fraudulent scheme and without the approval or knowledge of the Government. *Id.* ¶ 14.

Devas appealed this decision to the NCLAT on May 28, 2021, and sought provisional relief from the Supreme Court of India (which was denied). *See* Devas's Appeal to the Supreme Court

---

[1] Additional proceedings are also pending before the Telecom Disputes Settlement and Appellate Tribunal (TDSAT), Customs Excise and Service Tax Appellate Tribunal (CESTAT), and Income Tax Appellate Tribunal (ITAT).

of India ("Devas Appeal") at 21-22, June 8, 2021 (Kownacki Decl., Ex. 12). After hearing arguments from both parties and examining extensive evidence, the NCLAT issued a Final Judgment on September 8, 2021, comprised of two detailed Opinions of 204 pages and 152 pages respectively. *See* NCLAT Judgment (Kownacki Decl., Ex. 15). In this Final Judgment, the NCLAT confirmed the existence of extensive fraudulent conduct engaged in by Devas during the procurement and operations of the Devas-Antrix Agreement. Three of the more significant examples of this fraudulent conduct that have been confirmed by the NCLAT are listed below.

First, Devas made representations to Antrix during negotiation of the 2005 Devas-Antrix Agreement—as reflected in Article 12(b) thereof—that it had "ownership" of certain intellectual property needed to design Digital Multimedia Receivers and Commercial Information Devices. Appellate Br. of Antrix Corp. Ltd & Ors. to the NCLAT ("NCLAT Appellate Br.") ¶ 27D, June 17, 2021 (Kownacki Decl., Ex. 13); NCLAT Judgment ¶¶ 239-44, at 166-68 (Kownacki Decl., Ex. 15). Devas, however, has now explicitly conceded that it never had such "ownership." NCLAT Appellate Br. ¶ 27D (Kownacki Decl., Ex. 13). Instead, Devas now takes the position that it merely possessed the "capability" subsequently to develop such technology and intellectual property in the future, and that its representations were consistent with such "capability." *Id.*; NCLAT Judgment ¶ 243, at 167 (Kownacki Decl., Ex. 15) (noting that Devas represented that it "had ample time to develop the [required] [t]echnology"); *see also* Devas's Appellate Rejoinder in Company Appeal (AT) (CH) No. 17 of 2021 ("Devas's Appellate Rejoinder") ¶ 169, June 2021 (Kownacki Decl., Ex. 14) ("Devas represented that it had the ability to design Digital Multimedia Receivers (DMR) and Commercial Information Devices (CID)" (emphasis added)). As correctly found by the NCLAT, this new litigation position cannot be reconciled with the reference to "ownership" set forth in Article 12(b) of the Devas-Antrix Agreement, or with the other evidence that Antrix

has set forth in the relevant submissions in the Indian litigation. NCLAT Judgment ¶¶ 239-44, at 166-68 (Kownacki Decl., Ex. 15).

Second, for almost eleven months after the conclusion of the Devas-Antrix Agreement, the relevant Antrix officials took multiple steps to conceal the existence of the Devas-Antrix Agreement from the Union Cabinet—*i.e.*, the supreme decision-making body in the Government of India—as the NCLT emphasized and as the NCLAT further confirmed in its Final Judgment. NCLT Judgment ¶ 2(6).iii (Kownacki Decl., Ex. 11) ("The existence of this contract was suppressed by the then officials, from various government authorities, while seeking approvals for the project."); NCLAT Judgment ¶¶ 252-57, at 171-73 (Kownacki Decl., Ex. 15) ("In the present case, on behalf of [Devas] there is no material produced to point out that the Cabinet Approval had mentioned the Devas[-Antrix] Agreement dated [January 28, 2005] and apart from that, the Cabinet was not apprised that an Agreement [] was signed with Devas."). The NCLT also considered it significant that "the SATCOM Policy mandates authorization" of such programs "only by the Indian Administration through its Ministries and Regulatory authorities," whereas "Antrix does not qualify as one falling under [the] Indian Administration of a Department of the Government or a regulatory authority . . ." NCLT Judgment ¶ 2(21) (Kownacki Decl., Ex. 11). As Antrix has explained in the Indian litigation, these events demonstrate that Devas was acting in "collusion" with the "then Antrix officials" to arrange "a back-door deal." NCLAT Appellate Br. ¶¶ 18D, 26A(e), 26A(g) (Kownacki Decl., Ex. 13).

Third, in February 2006, when Devas sought approval to bring funds into the country, Devas submitted an application describing a business model that was incompatible with the Devas-Antrix Agreement. *See* Devas Application to Government of India's Foreign Investment Protection Board ("FIPB Application"), Feb. 2, 2006 (Kownacki Decl., Ex. 2); *see also* NCLAT

Judgment ¶¶ 269-76, at 177-80 (Kownacki Decl., Ex. 15). The 2005 Devas-Antrix Agreement was never mentioned in the application. FIPB Application (Kownacki Decl., Ex. 2). Whereas the Devas-Antrix Agreement asserted that Devas already owned the relevant technologies and intellectual property, the FIPB application asserted that "[a]ll the technologies for providing the services are developed indigenously in India." *See id.* ¶ 10(a). Moreover, the FIPB Application states that services would be provided through a "broadband information download channel," whereas the Devas-Antrix Agreement never mentioned this mode of transmission. *See* NCLAT Judgment ¶ 269, at 177 (Kownacki Decl., Ex. 15); *see generally* Devas-Antrix Agreement (Kownacki Decl., Ex. 1). The FIPB application as a whole was also styled as seeking approval merely for "setting up Internet Service Provider (ISP) services," whereas the Devas-Agreement contemplated a significantly broader range of services. The NCLAT thus held that "the investment brought in through FIPB for ISP is not a valid one." NCLAT Judgment ¶ 276, at 180 (Kownacki Decl., Ex. 15). Significantly, Devas also diverted substantial funds within and outside India to be used for non-ISP purposes, which was incompatible with the approval received from the FIPB for providing ISP services only. *See id.* ¶ 272, at 178 ("In any event, for the purpose of investment, 'ISP Services' are only the approved one, the diversion of INR 180 + 75 Crores for 'Devas Services' for a 'non-ISP' purpose is a dishonest act."); *see also id.* ¶¶ 273-74, at 179.

Finally, the NCLAT found that DT, as an indirect owner of Devas, bears responsibility under Indian law for the fraudulent activities engaged in by Devas. *See id.* ¶¶ 206-24, at 121-29. As explained by the NCLAT, each of Devas's shareholders (*e.g.*, DT Asia) was represented on the "Board of Devas," which controlled "the affairs of Devas," and thus "whatever fraud has been committed, the shareholders of Devas were equally responsible as they were the entities who took decisions through the Board of Devas." *Id.* ¶¶ 206, 210, 222, at 121-22, 123, 128. The NCLAT

also elaborated on the fraudulent activities committed by Devas's shareholders themselves. In particular, according to the FIPB application, the purpose of the funds was for ISP services; however, the shareholders of Devas, diverted such funds for distinct purposes that were not mentioned in the FIPB application or approved by the FIPB, such as paying the upfront capacity reservation fee. *Id.* ¶¶ 213-15, at 124-26. The NCLAT also found that Devas's shareholders "aided Devas in perpetuating their fraudulent activities," including by making the misrepresentation that Devas "ha[d] all requisite license[s]" when "[n]o Governmental Department ever approved the [Devas-Antrix] Agreement." *Id.* ¶ 217, at 126-27.

ARGUMENT

I. This Case Should Be Dismissed Based on India and Germany's Selection of the Indian Courts for Enforcement of this Arbitral Award Under the India-Germany BIT

This case arises under a treaty in which India and Germany agreed that any litigation to enforce an arbitral award should proceed in the court of the state party where the investment was made—*i.e.*, India in the present case. Under the doctrine of *forum non conveniens* and well-established precedent, this Court must honor that forum-selection agreement by dismissing the present litigation. Significantly, the parties' choice of forum may be considered and given effect prior to this Court's assessment of its subject-matter jurisdiction based on the principles described in *Sinochem*, 549 U.S. at 433, as explained by the D.C. Circuit and many other courts. *E.g.*, *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 880 (D.C. Cir. 2019) (dismissing claim based on a choice-of-forum agreement and concluding that "we do not reach the question of whether dismissal was warranted under the FSIA"); *Cheney v. IPD Analytics, LLC*, 583 F. Supp. 2d 108, 117 (D.D.C. 2008) (acknowledging this Court's discretion to enforce a forum-selection agreement, while postponing consideration of the "many and complex" jurisdictional issues raised by the defendants).

As the Supreme Court has instructed, "the appropriate way to enforce a forum-selection [agreement] pointing to a . . . foreign forum is through the doctrine of *forum non conveniens*." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 60 (2013); *see also Azima*, 926 F.3d at 874 (explaining that "the defendant may enforce that agreement by moving to dismiss for *forum non conveniens*"). The parties' agreement to the choice of a particular forum, however, simplifies this Court's ordinary framework for analyzing *forum non conveniens* to a significant degree. Specifically, this Court "'need not ask whether the location it identifies is available, adequate, or best for the parties' private interests.'" *D&S Consulting, Inc. v. Kingdom of Saudi Arabia*, 961 F.3d 1209, 1214-15 (D.C. Cir. 2020) (quoting *Azima*, 926 F.3d at 875). This is because the parties "have already told us that [the selected forum] meets these criteria" by "agreeing to litigate" in the selected forum. *Id.* This Court must therefore "assume" that Germany and India selected a forum that was available and adequate to address each of the private-interest factors. *Id.* Accordingly, after confirming the existence of the forum selection agreement, this Court proceeds directly to the final step of the *forum non conveniens* inquiry and considers the parties' "arguments about public-interest factors only." *Id.* (quoting *Atl. Marine*, 571 U.S. at 64) (emphasis added).

To recall, Petitioners have asked this Court to enforce an arbitral award rendered purportedly under the India-Germany BIT. For the reasons explained below, it is evident that the BIT itself contemplates recognition and enforcement of the Award (if at all) exclusively in the Indian courts. *See, e.g.*, *Zeevi Holdings Ltd. v. Republic of Bulgaria*, 494 F. App'x 110, 113 (2d Cir. 2012) (affirming dismissal of a petition to enforce a foreign arbitral award where the parties selected Bulgarian law because, "under Bulgarian law, a foreign arbitral award cannot be executed upon in Bulgaria until it has been confirmed by a Bulgarian court. . . . [T]he parties necessarily

also required confirmation in Bulgaria . . . ."). This Court must therefore honor the expectations of India and Germany regarding their choice of forum by dismissing the present action. This outcome is required for the following three reasons.

First, it is well established that a choice-of-law clause may constitute evidence of the parties' expectations regarding their choice of forum. In this regard, "choice-of-law clauses designating U.S. law as applicable appear to contemplate a role for United States courts in resolving disputes." *Ashraf-Hassan v. Embassy of France*, 40 F. Supp. 3d 94, 100 (D.D.C. 2014) (citation and quotation marks omitted); *see also Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1006 (D.C. Cir. 1985) ("The courts of this country are clearly best able to interpret and apply the laws of this country.") (Wald, J., concurring); *Eckert Int'l v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 80 (4th Cir. 1994) ("It flies in the face of logic that [the parties] would expect to find that guidance in the courts of another country.").

This common-sense principle has been recognized and applied in a wide variety of contexts, including in judicial decisions analyzing personal jurisdiction, proper venue, *forum non conveniens*, and motions to stay during parallel litigation. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481 (1985) (acknowledging the significance of choice-of-law clauses for personal jurisdiction analysis); *CPConstruction Pioneers Baugesellschaft Anstalt v. Gov't of Republic of Ghana*, 578 F. Supp. 2d 50, 54 (D.D.C. 2008) (staying litigation because "it would have to decide an intricate point of Ghana law that is more properly decided by a Ghana court"), amended by 578 F. Supp. 2d 48, 49 (D.D.C. 2008); *see also Ramada Franchise Sys. v. Cusack Dev.*, 96 Civ. 8085 (MGC), 1997 U.S. Dist. LEXIS 7888, at *8 (S.D.N.Y. June 5, 1997) (explaining that "a forum's familiarity with the governing law is a factor to be considered in determining whether to transfer venue"); *Tekway, Inc. v. Agarwal*, No. 19-cv-6867, 2020 U.S. Dist. LEXIS 186034, at *17 (N.D.

Ill. Oct. 7, 2020) ("[A] choice-of-law provision can inform the reasonable expectations of the parties. The parties agreed that Illinois law would govern the contract. And the most common place to litigate Illinois law is Illinois.").

In the present case, the BIT contains not just a single choice-of-law clause—but eleven separate provisions mandating application of the "national laws of the Contracting Party where the investment has been made," or similarly worded references to the law of India or Germany. *See* India-Germany BIT, arts. 1(a), 1(b), 1(d), 1(f), 3(1), 5(1), 5(2), 9(2)(b)(ii), 9(2)(b)(v), 11, 13 (ECF 1-5). For purposes of this Motion to Dismiss, the most important of these eleven provisions is Article 9(2)(b)(v), which applies directly to the present litigation: "The award shall be enforced in accordance with national law of the Contracting Party where the investment has been made." *Id.* art. 9(2)(b)(v). In the present case, the alleged investment was made in the territory of the Republic of India. Any litigation to enforce the Award therefore must ("shall") be decided by applying Indian law, in accordance with the express agreement of Germany and India. Indeed, the sheer number of choice-of-law clauses found throughout the BIT, when taken together with the reference to enforcement under Indian law under Article 9(2)(b)(v), must be considered strong evidence that the parties intended for the present enforcement litigation to proceed before an Indian court. Needless to say, "Indian courts would be in a superior position to construe and apply applicable Indian laws and standards than would courts of the United States." *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 199 (2d Cir. 1987).

Second, the BIT also contains a striking and material omission. That is, the BIT does not contain even a single reference to any of the various multilateral conventions providing for enforcement of the Award in the United States. Significantly, many treaties with investor-state arbitration clauses—including treaties concluded contemporaneously with the 1995 India-

Germany BIT during the early to mid-1990s—provide that arbitral awards rendered against the host state may be enforced pursuant to the New York Convention. For example, the original version of the North American Free Trade Agreement ("NAFTA") was signed in 1992 and referred explicitly to enforcement of arbitral awards under the New York Convention. NAFTA, Can.-Mex.-U.S., art. 1136(6), Dec. 17, 1992, 32 I.L.M. 289 (later superseded by the U.S.-Mexico-Canada Agreement, Pub. L. No. 116-113, 134 Stat. 11 (2020)). A similar provision is found in the Energy Charter Treaty, which was signed in 1994. Energy Charter Treaty ("ECT"), art. 26(5), Dec. 17, 1994, 34 I.L.M. 360, 374.

The current versions of the "Model BITs" adopted by both India and Germany also make explicit reference to the New York Convention in multiple provisions. Model Treaty of the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments ("2008 Germany Model BIT"), art. 10(4), 2008 (Kownacki Decl., Ex. 24); Model Text for the Indian Bilateral Investment Treaty ("2015 India Model BIT"), arts. 13.7, 17.2, 20.1, 27.5, 2015 (Kownacki Decl., Ex. 25). In 1995, Germany's Model BIT referenced another multilateral convention that governs, *inter alia*, the enforcement of arbitral awards—specifically the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"). *See* Model Treaty of the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments ("1991 Germany Model BIT"), arts. 10(6), 11(2), 11(4), Feb. 1991 (Kownacki Decl., Ex. 23). So did many of the individual BITs concluded between India and other treaty partners in 1995—the same year as the India-Germany BIT's conclusion—and throughout the early 1990s. *See e.g.*, Agreement Between the Government of the Republic of India and the Government of Malaysia for the Promotion and Protection of Investments ("India-Malaysia BIT"), art. 7(3)(a), Aug. 3, 1995 (Kownacki Decl., Ex. [●]);

Agreement between the Republic of India and the Kingdom of the Netherlands for the Promotion and Protection of Investments ("India-Netherlands BIT"), art. 9(3)(a), Nov. 6, 1995 (Kownacki Decl., Ex. 17).

The India-Germany BIT, however, references neither the 1958 New York Convention nor the 1965 ICSID Convention—nor even the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, which India had implemented and applied for more than half a century. *See League of Nations Treaties: Convention on the Execution of Foreign Arbitral Awards (1927)*, https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=550&chapter=30&clang=_en (last visited Sept. 23, 2021). This noteworthy absence refutes the suggestion that India and Germany anticipated any role for foreign courts (*i.e.*, courts outside India and Germany) in entertaining litigation to enforce awards arising under the BIT. This absence, when considered together with the numerous clauses mandating application of Indian law, evidences the parties' intent for an Indian court to be the exclusive forum to hear enforcement litigation against India.

Third, in light of the choice of forum selected by Germany and India, this Court is obligated to dismiss this action. "'As the party acting in violation of the forum-selection clause,'" it is DT that "'must bear the burden of showing that public-interest factors overwhelmingly disfavor a transfer.'" *Azima*, 926 F.3d at 875 (quoting *Atl. Marine*, 571 U.S. at 66). Only in the most "'unusual'" or "'rare[]'" case will the strength of the public-interest factors warrant "'disrupt[ing] the parties' settled expectations'" regarding a choice of forum. *Id.* at 875 (quoting *Atl. Marine*, 571 U.S. at 66).

In the present case, however, all of the public-interest factors favor litigation in India, rather than in the United States. India has a strong public interest in "having localized controversies decided at home." *See In re Air Crash Over the S. Indian Ocean, on March 8, 2014*, 352 F. Supp.

3d 19, 36 (D.D.C. 2018) (granting a motion to dismiss based on *forum non conveniens* in favor of the Malaysian courts), *aff'd sub nom*, *In re Air Crash Over the S. Indian Ocean,* 946 F.3d 607 (D.C. Cir. 2020). Moreover, this Court is situated in a "community which has no relation to the litigation," given that the United States has no connection to the India-Germany BIT, the dispute between DT and India, or the arbitration seated in Switzerland. *See id.* Finally, this Court would be unnecessarily burdened with "the application of foreign law" in light of the India-Germany BIT's eleven clauses providing for application of Indian law. *See id.*

Accordingly, because Germany and India selected the Indian courts for this litigation, and all of the public-interest factors likewise favor the Indian courts, this litigation must be dismissed in accordance with the treaty parties' expectations under the doctrine of *forum non conveniens*. *See Zeevi Holdings*, 494 F. App'x at 113.

II. This Case Should Be Dismissed Because DT Cannot Satisfy Any Exception to India's Sovereign Immunity

The FSIA provides the exclusive basis for subject-matter jurisdiction over an action against a foreign sovereign State. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 86 (D.C. Cir. 2005) ("In the United States, there is only one way for a court to obtain jurisdiction over a foreign state and it is not a particularly generous one—the FSIA."). Under the FSIA, a foreign sovereign is immune from all actions in the United States unless one of the narrow enumerated exceptions to immunity is satisfied. *See* 28 U.S.C. §§ 1604–05, 07; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). "[T]he FSIA begins with a presumption of immunity, which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies[.]" *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). If no statutory exception applies,

the district court lacks subject-matter jurisdiction over the case. *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000).

Under the FSIA, moreover, this Court may not assert jurisdiction "merely by assuming the truth of the facts alleged by the plaintiff." *Id.* at 40. Rather, the Court "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Id.*; *see Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1131 (D.C. Cir. 2004) (courts must "ferret out the facts pertinent to jurisdiction" under the FSIA) (citations and quotation marks omitted).

In the present case, Petitioner has invoked two alleged exceptions to India's immunity, including the "arbitration" exception under 28 U.S.C. §1605(a)(6) and the "waiver" exception under §1605(a)(1). Pet. ¶ 12 (ECF 1). Neither exception applies in the present case, as detailed below.

A. India Did Not Offer to Arbitrate Petitioner's Dispute, and Did Not Exclude Judicial Review of the Arbitrators' Competence

In relevant part, the text of the FSIA's arbitration exception under § 1605(a)(6) provides as follows:

> "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship . . . or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards . . . ."

28 U.S.C. §1605(a)(6) (emphases added).

Accordingly, "[i]f there is no arbitration agreement . . . , the District Court lacks jurisdiction over the foreign state and the action must be dismissed" under §1605(a)(6). *Chevron*, 795 F.3d at 204.

DT invokes the 1995 India-Germany BIT as the purported arbitration agreement. Pet. ¶ 2 (ECF 1). It is important to emphasize, however, that the BIT is "an investment treaty" containing "a dispute-resolution provision" applicable to certain categories of disputes between either of the two States parties and "an investor from the other." *BG Grp. v. Republic of Argentina*, 572 U.S. 25, 28 (2014). The Supreme Court first analyzed such a treaty in *BG Group* in 2014, where all three opinions—majority, concurrence, and dissent—confirmed unanimously that a BIT is typically not an agreement to arbitrate between the disputing parties. *See generally id.*

To the contrary, as *BG Group* explained, a BIT typically contains a respondent State's standing "offer" to arbitrate, which the claimant investor may "accept" by submitting a notice of arbitration—thus concluding the arbitration agreement at the same moment that the arbitration commences. *See BG Grp.*, 572 U.S. at 42 (explaining "how an offer to arbitrate in an investment treaty can be accepted, such as through an investor's filing of a notice of arbitration") (emphasis added); *see also id.* at 46 (Sotomayor, J., concurring in part) ("[T]he treaty is not an already agreed-upon arbitration provision between known parties, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors.") (emphasis added); *id.* at 53 (Roberts, C.J., dissenting) (explaining that the BIT's arbitration clause "constitutes only a unilateral standing offer . . . an offer to submit to arbitration where certain conditions are met") (emphasis added). In the years since *BG Group*, therefore, this Court has also referred frequently to the "offer-and-acceptance mechanism" set forth in BITs and other investment treaties. *E.g.*, *Infrared Envtl. Infrastructure*, 2021 U.S. Dist. LEXIS 120489, at *5-6 (explaining that "the offer-and-acceptance

mechanism" involves "a standing offer by state parties to arbitrate disputes which investors may accept by submitting their consent to arbitration") (emphasis added); *Hulley Enters. v. Russian Fed'n*, 211 F. Supp. 3d 269, 274 (D.D.C. 2016) (referring to the "standing offer by parties . . . to arbitrate disputes arising under the treaty") (emphasis added).

As detailed below in Part II-A-1, Petitioner's request for arbitration fell outside of India's standing offer because DT had not made any "investment" in India and was not an "investor" as defined in the BIT but, rather, had engaged merely in pre-investment activities. Accordingly, Petitioner's acceptance failed to correspond to India's standing offer of arbitration. No agreement, therefore, was ever formed—and India retains immunity from this Court's jurisdiction under the FSIA.

Moreover, as further detailed below in Part II-A-2, Petitioner's connection to Devas was indirect and established only through its Singaporean subsidiary. As is clear from Article 1(c) of the BIT, Germany and India never offered to arbitrate with indirect "investors," but rather extended such offer exclusively to those investors who "effected . . . investment in the territory of the other Contracting Party." BIT, art. 1(c) (emphasis added). DT's activities through a subsidiary in Singapore are insufficient to bring DT within this clause. Indeed, unlike many other bilateral investment treaties entered into by Germany and India, the India-Germany BIT does not offer protection to both "direct and indirect" investments, but instead only covers direct investments.

Finally, as explained in Part II-A-3, the evidence in this case demonstrates that the parties never agreed to delegate the question of arbitrability exclusively to the arbitrators. It is incumbent upon this Court, therefore, to apply the fundamental principle that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 648 (1986).

1. India Offered to Arbitrate Only "Investment" Disputes, and Not Disputes Based upon "Pre-Investment" Activity

As detailed above, Petitioner submitted a Notice of Arbitration on September 2, 2013, purporting to accept India's offer to arbitrate under Article 9 of the India-Germany BIT. This Notice, however, did not raise any dispute concerning a genuine "investment," as defined under Article 1(b) of the BIT. As explained above, in its Interim Award rendered on December 13, 2017, the tribunal disregarded India's arguments and improperly upheld its jurisdiction. *See* Interim Award ¶¶ 137-157, 174-182 (ECF 1-7). In particular, the tribunal fundamentally erred in its analysis concerning the supposed "investment" contemplated under the 2005 Devas-Antrix Agreement. Although both Devas and Antrix undoubtedly engaged in a series of preparations to later implement an investment, such conduct constituted merely "pre-investment" activities.

The fact that DT had completed its investment in Devas does not change this analysis, because the shares in Devas were not the relevant, purported investment in the present dispute. The only alleged investment at issue is the establishment in India of a hybrid satellite-terrestrial communications system, as contemplated under the Devas-Antrix Agreement. As explained above, Devas never obtained the required license to establish or operate that communications system. *See* Pet. ¶¶ 41, 56, 58 (ECF 1); *see also* Interim Award ¶¶ 68, 161 (ECF 1-7). Because India never offered to arbitrate disputes over "pre-investment" activities, the present dispute fell outside India's standing offer to arbitrate under Article 9 of the BIT—such that Petitioner failed to accept India's circumscribed offer when Petitioner submitted the Notice of Arbitration. *See BG Grp.*, 572 U.S. at 28 (describing the typical offer-and-acceptance framework established under BITs); *see also*, *e.g.*, *Raymond James Fin. Servs. v. Cary*, 709 F.3d 382, 386 (4th Cir. 2013) (noting, in the context of a standing offer to arbitrate extended by licensed providers of financial services, that "[w]hether appellants are customers thus relates to the <u>existence</u> of a contract to

arbitrate, not the scope of that potential agreement") (emphasis in original) (citations and quotation marks omitted).

In this regard, the tribunal's limited discussion of this question reflects a number of errors. *See* Interim Award ¶¶ 174-82 (ECF 1-7). Three critical points warrant emphasis.

First, the tribunal incorrectly dismissed India's submission regarding the "admission clause model" adopted in many BITs worldwide, which "protects investments only once established and thus pre-investment activities fall outside its ambit." *Id.* ¶ 158. As explained by India, excluding pre-investment activities from the scope of an investment treaty is important, because it allows the host state to "retain control over the entry of foreign capital, to screen investment to ensure their compatibility with the state's national security, economic development, and public policy goals, and to determine the conditions under which foreign investments will be permitted, if at all." *See* India's Counter-Memorial ¶ 74 (Kownacki Decl., Ex. 6) (quoting Jeswald W. Salacuse, *The Law of Investment Treaties* 197 (2010)).

In line with the "admission clause model," Article 3(1) of the India-Germany BIT establishes an obligation pursuant to which "[e]ach Contracting Party shall . . . admit investments in its territory in accordance with its law and policy." BIT, art. 3(1) (ECF 1-5) (emphasis added). The BIT thus stipulates an obligation of admission subject to the law and policy of the host State. Article 1(b)(v) further provides that the offer of arbitration contemplates disputes involving "business concessions," where such concession are "conferred by law or under contract." *Id.*, art. 1(b)(v) (emphasis added).

This model of BITs has been frequently analyzed by investment tribunals and academic commentators. *Mihaly v. Sri Lanka*, ICSID Case No. ARB/00/02, Award dated Mar. 15, 2002 ¶ 60 (explaining that "in the absence of the consent of the host State to the implementation of the

project," "pre-investment and development expenditures" could not "automatically be admitted as 'investment[s]'"); *Petrobart Ltd. v. The Kyrgyz Republic*, SCC Case 126/2003, Arbitral Award dated Mar. 29, 2005, p. 69 (noting that "whatever discussions may have taken place between the parties about further business relations, they did not result in any binding undertakings in the Contract"); *Zhinvali Dev. Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award dated Jan. 24, 2003 (rejecting jurisdiction because in the absence of Georgia's express consent to treat claimant's development costs as an investment, the upfront costs did not qualify as an investment, but rather merely pre-investment expenditures); *see also* Christoph Schreuer et al., *The ICSID Convention – A Commentary* ¶ 175 (2d ed. 2009) ("Steps preparatory to an investment will not by themselves be accepted as an investment."); Devashish Krishan, *India and International Investment Laws*, *in* 2 *India and International Law* 301 (B.N. Patel ed., 2008) (explaining that offers to arbitrate under India's BITs "apply only once a protected investor has established a qualifying investment" and "do not apply to the acquisition or establishment of the investment," such that "[p]re-investment activities are outside the purview" of Indian BITs).

The tribunal, however, incorrectly held that the situation in the current dispute differed from the situations in *Mihaly*, *Petrobart*, and *Zhinvali*, because "Devas had a binding agreement contemplating the lease of valuable satellite spectrum." Interim Award ¶ 181 (ECF 1-7). This observation, however, is inconsistent with the explicit text of the Devas-Antrix Agreement. As explained above, Article 7(c) of that Agreement provided that Antrix could terminate the Agreement in the event that it would be "unable to obtain the necessary frequency and orbital slot coordination required for operating" one of the two satellites. *See* Devas-Antrix Agreement, art. 7(c) (Kownacki Decl., Ex. 1). Accordingly, both parties to the Devas-Antrix Agreement, when entering into the Agreement, were fully aware that the Agreement was only the first of many

potential steps—and that the planned "investment" could not be realized without subsequent approvals and authorizations from the Government of India.

Second, it is undisputed that Devas never obtained the requisite license from the Wireless Planning and Coordination Wing ("WPC") of the DOT. Interim Award ¶ 179 (ECF 1-7) (noting that it is "factually correct" that "Devas had not obtained the WPC license, which was crucial to roll out the Devas System"). Without the WPC license, Devas possessed no legally vested right to deliver signals to any terrestrial systems within India. The essential object and purpose of the 2005 Devas-Antrix Agreement thus could never be performed. *See, e.g.*, 2005 Devas-Antrix Agreement, arts. 3(c), 12(b)(vii) (contemplating delivery of services "via satellite and terrestrial networks" (emphasis added)); Annexure 1, Section 14 (defining "Devas Services" to mean "subscription multimedia packages . . . delivered via satellite and terrestrial systems" (emphasis added)).

Accordingly, the ultimate decision of the Government of India to deny Antrix the orbital slot for the satellites and annul the Devas-Antrix Agreement merely put an end to ongoing preparatory activities. There was no effect on any existing "investment," inasmuch as none had yet been admitted under Article 3(1) of the BIT.

The circumstances of the present case, therefore, are strikingly analogous to the situation considered in the arbitration case *Nagel v. Czech Republic*, SCC Case No. 49/2002, Final Award, dated Sept. 9, 2003 ("*Nagel* Award"). In that case, an eminent tribunal found that the claimant's rights under his agreement with a wholly-owned state enterprise did not constitute an "investment" within the meaning of the United Kingdom-Czech Republic BIT, because "the basic undertaking in the . . . Agreement was that the parties should work together for the purpose of obtaining a . . . licence." *Id.* ¶ 326. "There was not, and could not be, a guarantee that a licence would in

fact be obtained. That would depend on the Government, and the Government had made no undertaking in this regard." *Id.* The *Nagel* tribunal's reasoning, in this regard, was fully upheld by the Swedish courts on review. *See Mr. N. v. Czech Republic Min. of Transp. and Telecomm.*, Doc. No. 32 in Case No. T 9059-03 (Svea App. Ct. May 30, 2005) (Sweden). Similarly, in the present case, the Government of India was not a party to the Devas-Antrix Agreement, and the contractual language describing Antrix's commitments made explicit that Antrix could not speak on behalf of the Government with respect to licensing issues. Devas-Antrix Agreement, art 3(c) (Kownacki Decl., Ex. 1).

Third, the tribunal erred by finding that, because DT "contributed substantial financial resources . . . to obtain its indirect shareholding in Devas," DT's shares in Devas were a "protected investment" under the BIT. Interim Award ¶ 178 (ECF 1-7). The tribunal, while explicitly noting its "agree[ment] with [India] that the shares in Devas should not necessarily be viewed as an investment," found that the equity contributions made by DT were "protected investments under Article 1(b)(ii) of the BIT," given DT's financial contribution to Devas and India's purported "endors[ement] [of] DT's participation in Devas." *Id.* This reasoning is flawed, however, because as India pointed out during the arbitration, in order to determine the pre-investment issue, it is critical first to identify precisely the investment in question. India's Counter-Memorial ¶ 90 (Kownacki Decl., Ex. 6). As demonstrated above, the only investment at issue in the present dispute is the establishment of a hybrid satellite-terrestrial communications system as contemplated under the Devas-Antrix Agreement, and the fact that DT had completed its (indirect) equity contribution in Devas does not change this fact.

For the reasons stated above, the Notice of Arbitration thus related exclusively to pre-investment activities, and not to any genuine "investment," as required under Article 9 of the BIT.

Accordingly, Petitioner failed to accept India's standing offer to arbitrate, no arbitration agreement was ever "made by the foreign state" as required under 28 U.S.C. § 1605(a)(6), and this Court lacks subject-matter jurisdiction over any action against India under the FSIA.

2. India Did Not Offer to Arbitrate Disputes with Indirect Investors over Indirect Investments

As explained above, it is undisputed that DT never held any shares in Devas itself. Pet. ¶ 17 (ECF 1) (describing the structure of DT's equity contributions). Nor did DT hold any shares in any other relevant entity located within the territory of India. To the contrary, DT's ownership interest in Devas was purely indirect, and was implemented exclusively in the territory of Singapore through an intermediary, DT Asia. *Id.* ¶¶ 17, 38. Accordingly, because the BIT only provides protection for direct investments made by investors directly in the territory of India, DT was never in a position to accept India's offer of arbitration under the BIT.

The text of the India-Germany BIT provides that only investments made by an investor "in the territory of" India are protected under the BIT. Articles 1(c) and 2 both limit the BIT's applicability to those "investors" who "effected or are effecting investment" specifically "in the territory" of the host state. *Id.*, arts. 1(c), 2 (emphasis added). This understanding is confirmed by Article 5(3) of the BIT, which provides as follows:

> "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."

Id. art. 5(3) (emphasis added). Thus, pursuant to Article 5(3), only investors who "own shares" in a company in the territory of the other state may bring expropriation claims. Such a provision is fundamentally irreconcilable with the protection of indirect investors, thus demonstrating that the parties' intention was to protect direct investors exclusively.

This interpretation of the India-Germany BIT is likewise corroborated by the broader context of the parties' treaty practice. The following contemporaneous examples demonstrate that when India or Germany intended to grant BIT protection to indirect investments or indirect investors, they consistently did so in express terms:

- **The Germany-Kuwait BIT:** "The term 'investment' shall mean every kind of asset owned or controlled by an investor of a Contracting State and invested or channeled directly or indirectly in the territory of the other Contracting State in accordance with the legislation of that State." Agreement between the Federal Republic of Germany and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments ("Germany-Kuwait BIT"), art. 1(1), Mar. 30, 1994 (Kownacki Decl., Ex. 22) (emphasis added).

- **The India-Netherlands BIT**: "This Agreement shall apply to any investment made by investors of either Contracting Party in the territory of the other Contracting Party including an indirect investment made through another company, wherever located, which is fully owned by such investors, whether made before or after the coming into force of this Agreement." India-Netherlands BIT, art. 2, Nov. 6, 1995 (Kownacki Decl., Ex. 17) (emphasis added).

- **The India-Spain BIT**: "This Agreement shall apply to any investment made by investors of either Contracting Party in the territory of the other Contracting Party including an indirect investment made through another company, wherever located, which is fully owned by such investors, whether made before or after the coming into force of this Agreement." Agreement on the Promotion and the Reciprocal Protection of Investments between the Republic of India and the Kingdom of Spain ("India-Spain BIT"), art. 2, Sept. 30, 1997 (Kownacki Decl., Ex. 18) (emphasis added).

- **The India-France BIT:** "This Agreement shall apply to any investment made by investors of either Contracting Party in the area of the other Contracting Party, including an indirect investment made through another company, wherever located, which is owned to an extent of at least 51 per cent by such investors, whether made before or after the coming into force of this Agreement." Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments ("India-France BIT"), art. 2(1), Sept. 2, 1997 (Kownacki Decl., Ex. 19) (emphasis added).

- **The Germany-Mexico BIT:** "The term 'investments' means every kind of asset acquired or used directly or indirectly in order to achieve an economic objective or other management objectives." Agreement between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments ("Germany-Mexico BIT"), art. 1(1), Aug. 25, 1998 (Kownacki Decl., Ex. 20) (emphasis added).

- **The Germany-China BIT:** "The term 'investments' means every kind of asset acquired or used directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party." Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments ("Germany-China BIT"), art. 1(1), Dec. 1, 2003 (Kownacki Decl., Ex. 21) (emphasis added).

These material distinctions between the parties' BIT provisions must be given effect. As explained by one eminent arbitrator, "investment treaties generally either permit the claimant to exercise control over its investment directly or indirectly, or are silent on the question. The . . . canon of treaty interpretation requires that effect be given to the expansive terms 'directly or indirectly' so that treaties with this stipulation can be meaningfully distinguished from treaties without it." Zachary Douglas, *The International Law of Investment Claims* ¶¶ 578, 580 (2009). An arbitral tribunal similarly observed that "[i]t would seem likely that if the Contracting Parties had . . . intended" to extend offers of arbitration to indirect investors, "they would have expressly provided protection for such indirect investments in the terms of the Treaty." *Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, April 21, 2006 ¶¶ 137, 147.

These general principles of treaty interpretation also are reflected in U.S. case law. "[A] treaty is a contract . . . between nations," and its interpretation "normally is, like a contract's interpretation, a matter of determining the parties' intent." *United States v. Park*, 938 F.3d 354, 367 (D.C. Cir. 2019) (quoting *BG Grp.*, 572 U.S. at 36). Thus, "'[w]hen interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used,' applying all 'general rules of construction' to aid our understanding." *Id.* at 365 (quoting *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991)); *see also Medellin v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty . . . begins with its text."); *Bode v. Grenier, LLP v. Knight*, 808 F.3d 852, 862 (D.C. Cir. 2015) ("Interpretation of a contract, like statutory and treaty interpretation, must begin with the plain meaning of the language.") (citations and quotations omitted).

As evidenced by the text of the BIT, India and Germany did not intend to include indirect investments or indirect investors under the protection of the BIT. As explained above, the text of the BIT clearly indicates that only investments directly made by an investor "in the territory of" India are protected under the Treaty, without any reference to "indirect investor" or "indirect investment." *See* BIT, arts. 1(b), 1(c), 2 (ECF 1-5). In fact, the treaty parties specifically indicated their intention in Article 5(3) of the BIT that only investors who "own shares" in a company in the territory of the other state may bring expropriation claims, which would not have been necessary if indirect investors also were covered under the BIT. *See id.*, art. 5(3). Taking the text of the treaty as the most relevant evidence of the parties' intent, this Court thus must conclude that India and Germany did not intend for the BIT to protect DT's indirect contributions through a Singaporean subsidiary.

Even if the plain language of the BIT were ambiguous (which it is not), any ambiguities in the text of a contract or treaty must be resolved in consultation with "sources illuminating the shared expectations of the parties." *Starr Int'l Co., Inc. v. United States*, 910 F.3d 527, 537 (D.C. Cir. 2018); *see also Burns v. Levy*, 873 F.3d 289, 293-94 (D.C. Cir. 2017) ("A court must honor the intentions of the parties as reflected in the settled usage of the terms they accepted in the contract . . ."). The court should "determine what a reasonable person in the position of the parties would have thought the disputed language meant[given] the circumstances surrounding the making of the contract [and] the usages of the term which either party knows or has reason to know." *Stanley v. George Washington Univ.*, 394 F. Supp.3d 97, 106 (D.D.C. 2019). The multiple bilateral investment treaties signed by both India and Germany with other countries "illuminate" the "practical construction" of the India-Germany BIT. Had India intended to provide protection to

indirect investments and indirect investors under the India-Germany BIT, it would have done so expressly.

Accordingly, DT was not an "investor" within the definition of the BIT and did not make a protected "investment" under the BIT. Given that India never offered to arbitrate any dispute with an indirect investor over indirect investments, no arbitration agreement was ever made, as required under 28 U.S.C. § 1605(a)(6). Accordingly, this Court lacks subject-matter jurisdiction over any action against India under the FSIA.

3. The Parties Did Not Exclude Judicial Review of the Existence of an Arbitration Agreement

This Court has authority to review *de novo* whether India made a standing offer to arbitrate with Petitioner, and whether Petitioner accepted or failed to accept India's offer. As shown below, the parties did not exclude judicial review of these questions pertaining to the existence of an arbitration agreement.

First, the India-Germany BIT references the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"), which contain a so-called "competence-competence" clause under Article 21(1). UNCITRAL Rules, art. 21(1), G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) (Kownacki Decl., Ex. 26). This clause provides that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." *Id.* In two previous decisions, the D.C. Circuit has stated that at least some "parties' adoption of UNCITRAL's arbitration rules" may indeed be "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878-79 (D.C. Cir. 2021) (quoting *Chevron*, 795 F.3d at 204). In both of those cases, the D.C. Circuit found that subsequent judicial review of the arbitrators'

conclusions regarding their own arbitral jurisdiction was therefore precluded under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). The D.C. Circuit's conclusions in *Stileks* and *Chevron*, however, are not dispositive in the present case.

This is because, in the present case, there is ample evidence that the parties before the Court—India and DT—shared a distinct understanding of Article 21(1) of the UNCITRAL Arbitration Rules, which did not contemplate exclusion of judicial review. "[C]ontext matters," as the Second Circuit recently explained, because "[i]ncorporation of such rules into an arbitration agreement does not, per se, demonstrate clear and unmistakable evidence of the parties' intent to delegate threshold questions of arbitrability to the arbitrator where other aspects of the contract create ambiguity as to the parties' intent." *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, No. 20-2748-cv, 2021 U.S. App. LEXIS 21862, at *22 (2d Cir. July 23, 2021) (emphasis added). "Where . . . the arbitration agreement is narrower, vague, or contains exclusionary language suggesting that the parties consented to arbitrate only a limited subset of disputes, incorporation of rules that empower an arbitrator to decide issues of arbitrability, standing alone, does not suffice to establish the requisite clear and unmistakable inference of intent to arbitrate arbitrability." *Id.* at *24 (emphasis added).

In the present case, a key aspect of the context for understanding the parties' intent with respect to arbitrability is how the concept of "competence-competence" has been consistently understood in the parties' home jurisdictions (India and Germany) and in the seat of arbitration (Switzerland). All three relevant jurisdictions have interpreted an arbitral tribunal's "power to rule on objections that it has no jurisdiction" to mean only that the arbitral tribunal need not wait for a court's eventual assessment of the arbitral tribunal's jurisdiction before arbitration can begin. This

does not mean, however, that judicial review would be precluded after arbitration is completed, as detailed below.

Significantly, both Germany and India have adopted the 1985 Model Law on International Commerical Arbitration of the United Nations Commission on International Trade Law ("UNCITRAL Model Law"). *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited Sept. 23, 2021); U.N. Comm'n on Int'l Trade Law, 1985 Model Law on International Commerical Arbitration, U.N. Doc. A/40/17, Annex I, (1985) (Kownacki Decl., Ex. 27). Article 16 of this model statute addresses the "[c]ompetence of [the] arbitral tribunal to rule on its jurisdiction," and confirms that "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." *Id.* art. 16. At the same time, the UNCITRAL Model Law also explicitly preserves the availability of judicial review—both during "setting aside" under Article 34 and when considering "recognition or enforcement" under Article 36. *Id.* arts. 34, 36.

For example, in accordance with the UNCITRAL Model Law, Section 1040 of the German Civil Procedure Code ("GCPC") also provides that "[t]he arbitral tribunal may decide on its own competence, and in this connection also on the existence or validity of the arbitration agreement." At the same time, Sections 1059 and 1061 of the GCPC provide explicitly for judicial review of arbitral awards in both set-aside and enforcement proceedings, including on grounds that the arbitration agreement did not exist, was not valid, or did not contemplate the parties' dispute. Indeed, the German Supreme Court (the Bundesgerichtshof) addressed this issue in a 2018 decision in the case of *Slovak Republic v. Achmea B.V.*, which also involved an arbitral award

rendered under the 1976 UNCITRAL Arbitration Rules. As the German Supreme Court explained, the arbitration award in that case needed to be "annulled" under Section 1059 of the GCPC because the underlying arbitration agreement was "invalid" under the laws of Germany and the European Union—just as annulment would likewise have been required in the "absence of an arbitration agreement." *Slovak Republic v. Achmea B.V.*, ECLI:DE:BGH:2018:311018BIZB2.15.0, Judgment ¶¶ 14-15 (BGH Oct. 31, 2018) (attorney translation).

In 2013, the Indian Supreme Court likewise held that, in accordance with "the principle of 'Kompetenz kompetenz,'" the arbitral tribunal must "rule on its own jurisdiction . . . at the first instance," but "[t]he arbitrators are to be not the sole judge but first judge, of their jurisdiction." *Chloro Controls (India) Private Ltd. vs. Severn Trent Water Purification Inc. and Orgs.*, (2013) 1 SCC 641 ¶ 129 (India) (emphasis added). Like the 2018 *Achmea* decision, therefore, the 2013 *Chloro Controls* decision also demonstrates that the principle of competence-competence reflected in Article 21(1) of the 1976 UNCITRAL Arbitration Rules and Article 16 of the UNCITRAL Model Law does not preclude German or Indian courts from reviewing decisions regarding the existence, validity, and scope of an arbitration agreement after the conclusion of arbitration.

In Switzerland, where the arbitration took place, the legal principles are the same. Article 186 of the Swiss Federal Code on Private International Law provides that "[t]he arbitral tribunal shall rule on its own jurisdiction," while Articles 190 and 191 explicitly preserve the right to "set aside" the award on the basis that "the arbitral tribunal wrongly accepted or denied jurisdiction." The Swiss Federal Tribunal (*i.e.*, the highest court in Switzerland) thus addressed a case decided specifically under the 1976 UNCITRAL Arbitration Rules, and concluded that "[i]t goes without saying that, when the Arbitral Tribunal has ruled definitively on its jurisdiction, its decision may be challenged . . . including with regard to . . . grounds of incompetence." *Yukos Capital v. Russian*

Federation, Bundesgericht [BGer] [Federal Supreme Court] July 20, 2017, Case No. 4A_98/2017 (Switzerland) (attorney translation).

Accordingly, regardless of what Article 21(1) of the UNCITRAL Arbitration Rules may potentially have meant for other parties in other cases, *e.g.*, *Stileks*, 985 F.3d at 879, the context surrounding the arbitration in the present case shows that neither India nor DT understood the competence-competence clause to preclude judicial review. The present case therefore does not show "clear and unmistakable evidence" that the parties intended to delegate the question of the arbitrators' competence exclusively to the arbitrators under *First Options*, 514 U.S. at 944.

Second, the arguments presented above in Parts II-A-1 and II-A-2 are fundamentally directed toward the existence of an agreement to arbitrate, rather than the scope of any such purported agreement. BITs are not the only type of instrument where a potential respondent extends a standing offer to arbitrate "with an amorphous class" of prospective claimants. *Cf. BG Grp.*, 572 U.S. at 46 (Sotomayor, J., concurring in part). For example, both the federal courts and the D.C. courts have identified many instances where professional licensees—especially lawyers and financial professionals—extend standing offers to arbitrate certain categories of disputes with their "clients" or "customers."[2]

Indeed, all attorneys licensed in the District of Columbia have extended standing offers to arbitrate "disputes over fees" with "client[s]" under Rule XIII of the D.C. Bar Rules. *Schwartz v. Chow*, 867 A.2d 230, 232 n.7 (D.C. 2005) ("Rule XIII provides that an attorney who is a member of the District of Columbia Bar 'shall be deemed to have agreed to arbitrate disputes over fees for

2 Precedents concerning arbitration cases against professional licensees have been directly applied in BIT disputes. This was illustrated in *BG Group.*, 572 U.S. at 39, where the Supreme Court explicitly evaluated the Argentina-UK BIT under the "ordinary intent-determining framework" set forth in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83-85 (2002).

legal services . . . when such arbitration is requested by a present or former client . . . .'"). Similarly, as observed by the D.C. Circuit, licensed members of the New York Stock Exchange ("NYSE") have extended standing offers to arbitrate disputes with "customers" that arise "in connection with the business of such member[s]." *Pearce v. E.F. Hutton Grp., Inc.*, 828 F.2d 826, 828 (D.C. Cir. 1987) (analyzing Article XI of the NYSE Constitution and NYSE Rule 600(a)). Analogous standing offers have been extended by licensees of the Financial Industry Regulatory Authority ("FINRA") and the National Association of Securities Dealers ("NASD"). *See UBS Sec. LLC v. Voegeli*, 684 F. Supp. 2d 351, 355 n.7 (S.D.N.Y. 2010) ("Like FINRA Rule 12200, NASD Rule 10301(a) required arbitration of 'any dispute . . . between a customer and a member . . . arising in connection with the business of such member . . . upon the demand of the customer.'").

Over decades, therefore, the federal courts have developed a substantial body of case law analyzing these standing offers to arbitrate. Where the claimant's purported acceptance—the "demand for arbitration"—fails to correspond to the material terms of the standing offer, then <u>no arbitration agreement comes into existence</u>. *E.g.*, *Citigroup Glob. Mkts. v. Abbar*, 761 F.3d 268, 274 (2d Cir. 2014) ("Because the parties here are disputing the existence of an obligation to arbitrate, not the scope of an arbitration clause, the general presumption in favor of arbitration does not apply"); *Raymond James Fin. Servs.*, 709 F.3d at 386 ("[The respondent] agreed to arbitrate disputes with its customers, not with those who fall outside that category. . . . Whether appellants are customers thus relates to the <u>existence</u> of a contract to arbitrate, not the scope of that potential agreement.") (citations and quotation marks omitted) (emphasis in original); *FSP, Inc. v. Societe Generale*, No. 02-CV-4786, 2005 U.S. Dist. LEXIS 3081, at *15 (S.D.N.Y. Feb. 28, 2005) ("[T]he Court must still examine [the] answer and counterclaims to make a threshold determination of whether they legitimately raise matters that are properly subject to NYSE arbitration.").

In accordance with this case law, therefore, this Court must also determine whether the parties entered into an agreement to arbitrate when Petitioner purported to accept the offer of arbitration under Article 9 of the India-Germany BIT. If the Court ultimately concludes that no arbitration agreement exists, then § 1605(a)(6) cannot provide any basis for this Court's subject-matter jurisdiction as to claims against India under the FSIA. *See Belize Soc. Dev., Ltd. v. Gov't of Belize*, 794 F.3d 99, 103 (D.C. Cir. 2015) (explaining that the Court "would not be bound to honor the arbitral tribunal's determinations" if the Court itself concluded that the "arbitration provision of the contract is void" under the FSIA).

* * *

In light of the above, India's standing offer of arbitration in Article 9 of the BIT did not correspond to Petitioner's acceptance, such that no arbitration agreement was ever formed. The present case, therefore, does not fall within the FSIA's arbitration exception under 28 U.S.C. § 1605(a)(6). Accordingly, this Court should dismiss the present action for lack of subject-matter jurisdiction.

B. India Has Not Waived Its Sovereign Immunity

Petitioner's invocation of the waiver exception is equally inapposite here. Pet. ¶ 12 (ECF 1). Under the FSIA, a court can have subject-matter jurisdiction where a foreign state waives its sovereign immunity "either explicitly or by implication." 28 U.S.C. § 1605(a)(1).

In the D.C. Circuit, both explicit and implicit waivers are construed "narrowly." *See World Wide Minerals, Ltd. v. Republic of Kazakhstan,* 296 F.3d 1154, 1162 (D.C. Cir. 2002) ("[E]xplicit waivers of sovereign immunity are narrowly construed in favor of the sovereign and are not enlarged beyond what the language requires.") (citations and quotation marks omitted); *Creighton*

Ltd. v. Gov't of Qatar, 181 F.3d 118, 122 (D.C. Cir. 1999) (explaining that implicit waivers are likewise construed narrowly).

Because Petitioner has failed to identify any explicit waiver of immunity, *see* Pet. ¶ 12 (ECF 1), this Court need only evaluate Petitioner's arguments regarding a purported implicit waiver. Congress anticipated only three forms of implicit waiver under § 1605(a)(l): (1) waiver by arbitration agreement, (2) waiver by choice-of-law provision, and (3) waiver by answering a complaint without asserting sovereign immunity. H.R. Rep. No. 94-1487, at 18 (1976); S. Rep. No. 94-1310, at 18 (1976). The D.C. Circuit recently confirmed that only these "three circumstances" can provide the requisite evidence of a foreign state's intent to effect an implied waiver of sovereign immunity. *Ivanenko v. Yanukovich*, 995 F.3d 232, 239 (D.C. Cir. 2021) (emphasis added) (citation and quotation marks omitted); *see also World Wide Minerals*, 296 F.3d at 1161 n.11 ("[C]ourts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity.") (citation and quotation marks omitted). Accordingly, because Petitioner has not and cannot identify any of these three scenarios demonstrating India's implicit waiver of immunity—*i.e.*, any arbitration agreement, choice-of-law provision, or litigation conduct—this Court must reject Petitioner's invocation of the waiver exception under § 1605(a)(1).

Petitioner maintains, however, that India implicitly waived its sovereign immunity by signing the New York Convention. Pet. ¶ 12. This argument is untenable. The Convention does not even <u>mention</u> sovereign immunity, let alone any waiver. The Convention's fundamental purpose, moreover, was to govern the arbitration of "commercial" disputes involving ordinary, commercial entities—*i.e.*, not sovereign entities entitled to immunity—thus creating a context in which any implicit waiver of sovereign immunity by the drafters or the signatories would be highly

improbable. *See* New York Convention, art. I(3) (providing that signatory States may limit application of the New York Convention "to differences . . . which are considered commercial under the national law of the State"); United Nations General Assembly Resolution 40/72 (Dec. 11, 1985) (Kownacki Decl., Ex. 28) (observing that the New York Convention constitutes part of a "framework for the fair and efficient settlement of disputes arising in international <u>commercial</u> relations" (emphasis added)).

Accordingly, neither the text, nor the context, nor the object and purpose of the New York Convention suggests any intent by the drafter or signatory States to address issues of sovereign immunity, as academic writers have confirmed. *See* Andreas Börner, *Article III*, *in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* 126 (Herbert Kronke, et al. eds., 2010) ("The Convention does not contain any specific rules of international law regarding immunity in [recognition] proceedings."); W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. Ill. L. Rev. 67, 77 (2014) ("The New York Convention . . . does nothing to lift a sovereign's immunity from suit or execution.").

Indeed, if joining the New York Convention waived the state parties' sovereign immunity, such a waiver would apply equally to the United States' own immunity from suit. Such waivers by the United States, however, must also be "unambiguously expressed." *FAA v. Cooper*, 566 U.S. 284, 291 (2012) ("For the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign."). That standard is not met here—indeed, if the New York Convention were even plausibly to be construed as a waiver of immunity, then the U.S. legislative history concerning ratification would have analyzed or at least referred to the topic. But the Congressional record is entirely silent, thus demonstrating the inherent improbability of Petitioner's argument.

See generally S. Rep. No. 91-702 (1970) (never addressing any waiver of the United States' sovereign immunity); H.R. Rep. No. 91-1181 (1970) (same).

Finally, Petitioner cites *dicta* from a single case, *Tatneft*, 771 F. App'x at 10, suggesting that signing the New York Convention alone waives sovereign immunity. As the D.C. Circuit has recently emphasized, however, "*Tatneft* was an unpublished disposition, so it does not bind" this Court in the present case. *P&ID*, 962 F.3d at 583-84 (observing that there is no binding precedent interpreting the New York Convention itself to be a waiver of sovereign immunity).

In any event, contrary to Petitioner's argument, even the *Tatneft* panel did not rely solely on Ukraine's ratification of the New York Convention to determine that Ukraine had implicitly waived immunity. The *Tatneft* case involved a straightforward application of *Creighton Ltd. v. Qatar*, which recognized a waiver of sovereign immunity only where two separate and distinct requirements had been satisfied: (1) "the defendant sovereign was . . . a signatory to the [New York] Convention" and also (2) "had agreed . . . to arbitrate in the territory" of another signatory. 181 F.3d at 123. *Tatneft* could not and did not dispense with the second requirement under *Creighton*—*i.e.*, an agreement to arbitrate. In the present case, as explained above in Part II-A, no such agreement to arbitrate exists, such that India's adherence to the New York Convention itself does not independently result in any waiver under the FSIA.

Accordingly, this Court should also reject Petitioner's invocation of India's purported waiver of foreign sovereign immunity under § 1605(a)(1).

CONCLUSION

For the reasons stated above, India respectfully requests that the Petition be dismissed with prejudice on the grounds of *forum non conveniens* and for lack of subject-matter jurisdiction under the FSIA.

Dated: September 23, 2021
Washington, DC

Respectfully submitted,

WHITE & CASE

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

Counsel for the Republic of India