UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DEUTSCHE TELEKOM AG,

Friedrich-Ebert-Allee 140
53113 Bonn
Germany

Petitioner,

- against -

THE REPUBLIC OF INDIA,

South Block, Raisina Hill,
New Delhi, India-110
101

Respondent.

Case No. _____

PETITION TO RECOGNIZE AND CONFIRM FOREIGN ARBITRAL AWARD

HUGHES HUBBARD & REED LLP
James H. Boykin
Alexander S. Bedrosyan
Sean F. Mason
1775 I Street, N.W., Suite 600
Washington, D.C. 20006
(202) 721-4751

Attorneys for Petitioner
Deutsche Telekom AG

OVERVIEW

1. This is a petition pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention"), codified in Chapter 2 of the Federal Arbitration Act ("FAA"), *see* 9 U.S.C. § 201. Petitioner Deutsche Telekom AG ("Petitioner" or "DT"), a company incorporated under the laws of the Federal Republic of Germany, by and through its attorneys, Hughes Hubbard & Reed LLP, seeks recognition and confirmation of the final, binding arbitration award rendered on May 27, 2020 by a distinguished three-member arbitral tribunal ("Tribunal") sitting in Geneva, Switzerland under the auspices of the Permanent Court of Arbitration ("PCA"). *See* Declaration of James H. Boykin dated April 19, 2021 ("Boykin Decl."), Exhibit A (*Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Final Award (May 27, 2020) ("Final Award")).[1]

2. The Tribunal issued the Final Award pursuant to a bilateral investment treaty between Germany and India, entitled the Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments and signed on July 10, 1995. *See* Exh. B (2071 U.N.T.S. 121 ("Treaty")). In the Treaty, India undertook binding obligations towards German investors with qualifying "investments" in its territory, *see id.* Arts. 1-7, and made a standing offer to arbitrate any disputes it might have with such investors with respect to their investments in its territory, *see id.* Art. 9.[2] Petitioner filed a Notice of Arbitration on September 2, 2013, in which it accepted India's standing offer to arbitrate. *See* Exh. C (Deutsche Telekom Notice of Arbitration dated 2 September 2013). Article 9 of the Treaty and

1. All references herein to exhibits ("Exh.") are references to exhibits to the Boykin Declaration.

2. Germany made the same commitments to Indian investors with investments in Germany.

Petitioner's Notice of Arbitration together constitute the Parties' agreement to arbitrate their investment dispute.

3. The arbitration arose out of breaches by India of its obligations under the Treaty in respect of Petitioner's investment, its minority shareholding in the Indian company Devas Multimedia Private Limited ("Devas"). In particular, in February 2011 India annulled the 2005 agreement between Devas and Antrix Corporation Ltd., an Indian state-owned company, under which Devas would lease from Antrix 70 MHz of "S-Band" electromagnetic spectrum on two satellites, which Devas would use to provide broadband wireless access and audio-visual services throughout India. In an Interim Award rendered on December 13, 2017, the Tribunal unanimously found that India's decision to annul that contract, the reasons therefor, and the non-transparent way in which India made this decision, constituted a breach of India's obligation under Article 3(2) of the Treaty to "accord to [German] investments as well as to investors in respect of such investments at all times fair and equitable treatment." *See* Exh. D (*Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award (Dec. 13, 2017) ("Interim Award")), ¶¶ 330, 390.

4. On January 29, 2018, India applied to the Swiss Federal Supreme Court to set-aside the Interim Award. The Swiss Federal Supreme Court – the highest court in Switzerland – has original jurisdiction to hear challenges to awards in arbitrations seated in Switzerland. On December 11, 2018, the Swiss Court announced its decision rejecting India's annulment application, finding that the Tribunal had correctly concluded that it had jurisdiction under the Treaty, and that it had conducted the arbitration proceedings fairly. *See* Exh. E (Case No. 4A_65/2018, Swiss Federal Supreme Court, Judgment of December 11, 2018 ("Swiss Court Decision")).

5. Meanwhile, the arbitration proceeded to the final phase, which concluded on May 27, 2020 when the Tribunal issued its unanimous Final Award ordering India to pay Petitioner damages totaling approximately USD 132 million as of May 27, 2020 and consisting of the following amounts:

5.1 USD 93.3 million, plus interest at a rate of 6-month USD LIBOR plus 2%, compounded semi-annually from February 17, 2011 "until payment in full." *See* Exh. A, Final Award, ¶ 357(a). Between February 17, 2011 and the date of the Final Award (May 27, 2020), USD 31,094,236 million of interest accrued on that amount for a total amount of USD 124,394,236 million as of May 27, 2020.

5.2 The Tribunal's Final Award also ordered India to compensate Petitioner EUR 730,272.32 in arbitration costs, and GBP 5,250,011.70 and EUR 33,977.00 and USD 10,000.00 in legal fees and associated expenses. *Id.* ¶ 357(b) and (c). The Tribunal further held that interest would accrue on the amounts awarded for fees and costs at a rate of 6-month LIBOR plus 2%, compounded semi-annually "starting to run 30 days after the date of this award [June 26, 2020] until payment in full." *Id.* ¶ 357(c).

6. India has refused to pay the amounts due under the Final Award and interest has continued to accrue on the amounts awarded to Petitioner in paragraphs 357(a) and 357(c) of the Final Award such that the total amount owed by India as of the date of the filing of this Petition is **USD 135,829,857**, on which interest continues to accrue "until paid in full" as required by the Final Award:

6.1 Between the issuance of the Final Award on May 27, 2020 and the filing of this Petition, another USD 3,004,480 of interest has accrued, so that as of the filing

of this Petition, interest on the principal amount due under the Final Award of USD 93.3 million (*see supra* ¶ 5.1) is equal to USD 34,098,716, so that the amount due to Petitioner under Paragraph 357(a) of the Final Award currently is equal to USD 127,398,716, with interest continuing to accrue at the rate set by the Final Award "until payment in full."

6.2 The Tribunal further held that interest would accrue on the award of fees and costs at a rate of 6-month LIBOR plus 2%, compounded semi-annually "starting to run 30 days after the date of this award [June 26, 2020] until payment in full." Between June 26, 2020 and the filing of this Petition, interest on the award of Petitioner's fees and costs (*see supra* ¶ 5.2) has accrued so that the total amount due under paragraph 357(c) converted into U.S. dollars is USD 8,431,141 as of April 19, 2021, with interest continuing to accrue at the rate set by the Final Award "until payment in full."

7. India did not seek to set-aside the Final Award, and the 30-day deadline for it to do so under Swiss law has long passed. *See* Boykin Decl., ¶ 9. On August 20, 2020, the Civil Court for the Republic and Canton of Geneva certified that the Final Award was enforceable (after the Swiss Federal Supreme Court had delivered to the Geneva tribunal a "certificate of non-appeal" on August 7, 2020). *See* Exh. F (Certificate of Enforceability of the Civil Court for the Republic and Canton of Geneva (Aug. 20, 2020) ("Certificate of Enforceability")).

8. The Final Award is subject to the New York Convention. Pursuant to the FAA, which implements the New York Convention into U.S. law, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the

award specified in the said Convention." 9 U.S.C. § 207. There are no such grounds for refusal or deferral of recognition here. The Court, accordingly, should confirm the Final Award.

PARTIES, JURISDICTION, AND VENUE

9. Petitioner Deutsche Telekom AG is a corporation organized and existing under the laws of the Federal Republic of Germany. It is one of the largest telecommunication companies in the world. The Government of the Federal Republic of Germany owns a 31.9% shareholding in Petitioner.

10. Respondent is the Republic of India, a foreign state within the meaning of the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1603. It was the respondent in the arbitration at issue.

11. This Court has subject matter jurisdiction over this proceeding, because it is an action to enforce an international arbitration award under the New York Convention and therefore is "deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203. This Court also has subject matter jurisdiction because this action is brought against a foreign state within the meaning of 28 U.S.C. § 1603 and, as explained below, the state does not enjoy immunity from jurisdiction under the FSIA. 28 U.S.C. § 1330(a).

12. India is not entitled to foreign sovereign immunity from the Court's jurisdiction for two independent reasons. First, India entered into the New York Convention and an agreement to arbitrate; it thereby waived any immunity it may have otherwise possessed with respect to actions in other state parties to the New York Convention (including the United States) to confirm any award resulting from the arbitration. 28 U.S.C. § 1605(a)(1) (no immunity where "the foreign state has waived its immunity either explicitly or by implication"); *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (waiver exception applies where sovereign is a party to the New York Convention and the confirmation action is in another state that is party the

Convention (citing *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999))). Second, India does not have sovereign immunity because this proceeding is an action "to confirm an [arbitration] award" and the award is "governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards," *i.e.*, the New York Convention. *See* 28 U.S.C. § 1605(a)(6).

13. This Court will have personal jurisdiction over India as soon as service is effected. *See* 28 U.S.C. § 1330(b) ("[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under 1608 of this title."); *see also Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 n.11 (D.C. Cir. 1987) ("under the FSIA, subject matter jurisdiction plus service of process equal personal jurisdiction"); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002) ("foreign states are not 'persons' protected by the Fifth Amendment"); *id.* at 302 (recognizing "the unavailability of constitutional due process protections [to] foreign states"); *accord TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 299-300 (D.C. Cir. 2005) (Ginsburg, C.J.) (foreign states who lack sovereign immunity by operation of the exceptions in the FSIA need not have constitutionally sufficient "minimum contacts" with the United States or a given state in order to be subject to the personal jurisdiction of federal courts).

14. Venue is proper in this District since "the action is brought against a foreign state or political subdivision thereof." 28 U.S.C. § 1391(f)(4).

15. This petition was timely filed, because the Final Award was made less than three years ago, on May 27, 2020. 9 U.S.C. § 207.

STATEMENT OF FACTS

A. The Underlying Dispute: India destroyed Petitioner's Investment

16. In January 2005, Devas entered into a twelve-year agreement with Antrix Corporation Limited ("Antrix"), an Indian state-owned enterprise ("Devas-Antrix Agreement"). Exh. D, Interim Award, ¶ 59. The Chairman of Antrix is simultaneously the Chairman of the Indian Space Research Organization ("ISRO") and Secretary of the Department of Space ("DOS"). *Id.* ¶ 56. The Devas-Antrix Agreement provided that Antrix would lease 70 MHz of electromagnetic spectrum, specifically "S-band" capacity, on two satellites to be manufactured and launched by the ISRO, to Devas, which the latter would use to provide broadband wireless access and audio-visual services throughout India. *See id.* ¶¶ 3, 59. The contract allowed for termination in the event of a "Force Majeure Event," defined as one "that is beyond the reasonable control of the party affected," including "acts of or failure to act by any governmental authority acting in its sovereign capacity." *Id.* ¶ 65. The contract officially entered into force according to its terms on February 2, 2006, because on that date, Antrix notified Devas that Antrix had received necessary governmental approval for building, launching, and leasing the capacity of S-band satellite. *Id.* ¶ 62.

17. Petitioner had not yet invested in Devas at the time the Devas-Antrix Agreement entered into force. Rather, one of Petitioner's subsidiaries was first approached by Devas in October 2007. *Id.* ¶ 66. Devas was looking for a "strategic investor" with experience in the industry and know-how to help it build its business. Exh. A, Final Award, ¶¶ 239, 250. Petitioner, for its part, was looking to invest in early-stage players in emerging markets to which it could add value through its expertise in planning and designing terrestrial networks. Exh. D, Interim Award, ¶ 67. After conducting due diligence, on March 19, 2008, Petitioner agreed to provide through its Singaporean subsidiary a USD 75 million equity contribution in exchange for

17.2% of the shares of Devas. *Id.* ¶ 69. The following year, on September 29, 2009, Petitioner made a further equity contribution in Devas of USD 22.2 million and increased its shareholding to 20.73% of Devas's paid up share capital. *Id.* ¶ 70. Following subsequent minor changes in Devas's shareholding, Petitioner's shareholding in Devas decreased to 19.62%. *Id.* India was fully aware of Petitioner's investment, as its Foreign Investment Protection Board and Department of Telecommunications ("DOT") sent five letters to Devas (in August 2008, September 2009, and January 2010) approving Petitioner's indirect equity participation in the company. *Id.* ¶ 178.

18. However, unbeknownst to Devas or its shareholders, India had already begun the process of scuttling the project around the same time. In October 2009, Dr. K.R. Radhakrishnan assumed the positions of DOS Secretary, Chairman of ISRO, and Chairman of Antrix. *Id.* ¶ 247. He did so after allegations surfaced in Indian media that the DOS had engaged in corrupt dealings in allocating 2G spectrum to terrestrial mobile operators, which allegations culminated in the raid of the DOS offices on October 22, 2009. *Id.* ¶ 75. This 2G scandal was wholly "unrelated to the allocation of S-band leased to Devas." *Id.*

19. Nonetheless, on December 8, 2009, Dr. Radhakrishnan constituted a committee to conduct a covert review of "'the legal, commercial, procedural and technical aspects' of the Devas Agreement." *Id.* ¶ 247.[3] While this review was ongoing, in May and June 2010 the Indian media, in covering the 2G scandal, had also begun focusing on and criticizing the Government's allocation of S-band spectrum to Devas. *Id.* ¶ 249. Internal governmental documents reveal that "the news reports on Devas appeared to be taken seriously by a number of

3. The DOS allegedly had received a complaint on November 8, 2009 that the Antrix-Devas Agreement was also concluded on the basis of corrupt practices. "The complaint was anonymous, apparently not in writing and not submitted in evidence." *Id.* ¶ 76.

senior officers within the Government," as they directed their subordinates to promptly provide comments on the reports or "look into the matter personally." *Id.* ¶ 250.

20. On 7 June 2010, Dr. Radhakrishnan's committee submitted the results of its review. It stated that the Devas-Antrix Agreement should have clauses that give explicit preferential use of the satellites to ISRO in case urgent strategic or other essential needs arose; and it criticized as "severe" the USD 5 million penalty fee that Antrix would have to pay in case it failed to tender use of the satellites to Devas in time. *Id.* ¶ 247. However, the committee did not recommend annulling the Agreement. *Id.* ¶ 366.

21. Upon receiving this report, Dr. Radhakrishnan sent two memoranda, one to the DOT Secretary and one to the Advisor to the Law Minister, asking for their "legal opinion on whether ANTRIX-Devas contract need [sic] to be annulled." *Id.* ¶¶ 251-52. The Tribunal found that the use of the word 'whether' in these memoranda was misleading and could not be read in context as a request for policy advice:

> Dr. Radhakrishnan was seeking advice about *how* to annul the Agreement, i.e. he wanted to identify a legally permissible basis for terminating it. This is also how the MOJ understood the request. In reply to Dr. Radhakrishnan's request, it provided legal advice on the possible basis for terminating the Agreement, rather than any policy advice as to 'whether' the Agreement needed to be annulled.

Id. ¶ 350. The Advisor to the Law Minister replied to Dr. Radhakrishnan days later, on June 18, 2010; the advisor stated that if the DOS, "in exercise of its sovereign power and function," took "a policy decision" to prohibit the ISRO from providing the relevant S-band capacity on the satellites "due to the needs of strategic requirements," then Antrix could invoke that policy as a force majeure event within the meaning of the Antrix-Devas Agreement and terminate the contract. *Id.* ¶ 254. Dr. Radhakrishnan instructed the DOS to prepare a note reflecting such a 'policy decision,' which the latter did on June 30, 2020. *Id.* ¶ 81.

22. Secretary Radhakrishnan likewise sought advice from India's Additional Solicitor General on how to annul the contract with the least legal risk. *Id.* ¶ 83. Like the Advisor to the Law Minister, the Additional Solicitor General recommended that the Government take a decision to terminate the contract "as a matter of policy, in exercise of its sovereign power," in order to provide grounds for Antrix to invoke force majeure. *Id.* ¶ 83.

23. On February 2, 2011, the former Minister of Telecommunications and two other officials were arrested in connection with the 2G scandal. *Id.* ¶ 85. This arrest triggered criticism from the opposition, including in connection with the Government's allocation of the S-band spectrum to Devas. *Id.*

24. Two weeks later, on February 16, 2011, Secretary Radhakrishnan sent a note on behalf of the DOS to the Cabinet Committee on Security, stating that there was "an imminent need to preserve the S band spectrum for vital strategic and societal applications." *Id.* ¶ 89. The following day, based on the note, the Cabinet Committee on Security issued a press release stating that the Devas-Antrix Agreement "shall be annulled forthwith." *Id.* ¶ 91. On February 25, 2011, referring to the Cabinet's decision, Antrix notified Devas of the termination of the contract due to a force majeure event. *Id.* ¶ 92.

25. While this internal process was unfolding, no Indian official apprised Devas (or its shareholders) of any concerns the Government and/or Antrix had about the Devas-Antrix Agreement. *Id.* ¶ 376. On the contrary, in December 2009 (i.e. the same month that Secretary Radhakrishnan had commenced the review of the Devas-Antrix Agreement), Antrix (of which Secretary Radhakrishnan was Chairman) assured Devas that "Antrix / ISO is putting all efforts to meet the [satellite] launch schedule of July 2010." *Id.* ¶ 305. Similar assurances were repeated during the following months; indeed, on January 10, 2011 – weeks before the termination –

Antrix's Executive Director told Devas that the satellite would be completed within three to four months. *Id.*

26. Devas responded to Antrix's February 25, 2011 notice of termination of the Devas-Antrix Agreement three days later, claiming that the termination was unlawful because "Antrix could not rely on a self-induced *force majeure*." *Id.* ¶ 93. However, Antrix did not agree to restore the Devas-Antrix Agreement.

27. On June 19, 2011, Devas began an arbitration against Antrix before the International Chamber of Commerce ("ICC"), as provided for in the arbitration clause of the Devas-Antrix Agreement (the "ICC Arbitration"). On September 14, 2015, the tribunal in the ICC Arbitration issued a final award that ordered Antrix to pay Devas USD 562.5 million, plus interest, for the damages caused by the wrongful termination of the Devas-Antrix Agreement. *Id.* ¶ 502. Antrix filed an action for annulment of the ICC award before Indian courts on December 7, 2015. Exh. A, Final Award, ¶ 322. That annulment action is still pending, and Antrix has not made any payment to Devas pursuant to the award. *Id.* ¶ 329.[4]

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4. Meanwhile, Mauritius-based entities who collectively held 37.2% of the shares of Devas began a separate arbitration against India under the Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments. On July 26, 2016, the arbitral tribunal in that arbitration issued an Award on Jurisdiction and Merits affirming its jurisdiction and finding India liable under the treaty. *See* Interim Award, ¶ 35. India attempted to set-aside this award in The Netherlands before The Hague District Court. *Id.* ¶ 44. That court rejected India's challenge on November 14, 2018. India appealed the District Court's decision to The Hague Court of Appeal. That appeal is pending. Any decision by The Hague Court of Appeal is subject to still further review by the Supreme Court of The Netherlands. As these challenge proceedings unfolded, the tribunal in the underlying arbitration issued a final award on October 13, 2020, in which it ordered India to pay the claimants USD 111,296,000 in damages, plus pre- and post-award interest, as well as USD 10,000,000 in legal and arbitration costs. The claimants in that arbitration have sought to enforce that award in proceedings currently pending before this Court. *See* CC/Devas (Mauritius) Ltd et al v. Republic of India, Case No. 1:21-cv-00106-RCL.

B. The Arbitration

28. In accordance with Article 9(1) of the Treaty, on May 15, 2012, Petitioner notified the Prime Minister of India in writing of the existence of an investment dispute within the meaning of the Treaty. Exh. D, Interim Award, ¶ 95.[5]

29. On September 2, 2013, after waiting six months as required by Article 9(2) of the Treaty, Petitioner filed a Notice of Arbitration, in which it accepted India's standing offer to arbitrate this dispute in accordance with the 1976 Arbitration Rules of the United Nations Commission for International Trade Law.[6] *See* Exh. C, Notice of Arbitration, ¶ 1. India's standing offer is contained in Article 9(2) of the Treaty.[7]

30. In accordance with Article 9(2)(b)(i) of the Treaty, Petitioner and India each appointed one member of the arbitral Tribunal, and the two appointed arbitrators mutually agreed on the Presiding Arbitrator. *See* Exh. B, Treaty, Art. 9(2)(b)(i). Petitioner designated Mr. Daniel M. Price as its appointed arbitrator in the proceedings; India appointed Professor Brigitte Stern;

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5. Article 9(1) of the Treaty provides: "Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute. The party intending to resolve such dispute through negotiations shall give notice to the other of its intentions." *See* Exh. B, Treaty.

6. A sovereign's accession to an investment treaty that provides for arbitration "constitutes a standing offer to arbitrate disputes covered by the Treaty; a foreign investor's written demand for arbitration completes the 'agreement in writing' to submit the dispute to arbitration." Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 392-93 (2d Cir. 2011).

7. Article 9(2) of the Treaty provides: "If the dispute cannot be thus resolved as provided in paragraph 1 of this Article within six months from the date of notice given thereunder, then the dispute may be referred to conciliation in accordance with the United Nations Commission on International Trade Law Rules on Conciliation, 1980, if both parties agree. If either party does not agree to conciliation or if conciliation fails, either party may refer such dispute to arbitration in accordance with the United Nations Commission on International Trade Law Rules on Arbitration, 1976, subject to the following provisions: . . . ." *See* Exh. B, Treaty.

and Professor Gabrielle Kaufmann-Kohler was the mutually agreed Presiding Arbitrator. Exh. D, Interim Award, ¶ 11. The Tribunal appointed Dr. Michele Potesta as Secretary to the Tribunal. *Id.*, ¶ 12.

31. Each of the three arbitrators is eminently qualified and highly distinguished.

31.1 Professor Kaufmann-Kohler is a Professor Emerita at Geneva University Law School and founder of the prestigious Geneva LLM in International Dispute Settlement, a joint program of the Graduate Institute of International and Development Studies and Geneva Law School. A 2016 study that measured the number of cited decisions and arbitral appointments named Professor Kaufmann-Kohler the "most influential arbitrator in the world."[8] In December 2020, she was appointed by the European Union to its list of persons who are able and willing to serve as members of an Arbitration Panel to arbitrate disputes between the European Union and the United Kingdom under the Brexit Withdrawal Agreement.[9] She has sat as an arbitrator in seventy-five publicly-reported investor-state treaty arbitrations.[10]

31.2 Professor Brigitte Stern is the Emeritus Professor of International Law at the University of Paris I – Panthéon Sorbonne and former Professor at the Geneva Graduate Institute for International and Development Studies. She is a recipient of

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8. *See* https://globalarbitrationreview.com/benchmarking/gar-100-11th-edition/1167598/levy-kaufmann-kohler; https://globalarbitrationreview.com/article/1035051/who-is-the-most-influential-arbitrator-in-the-world (Tbl. 7).

9. *See* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D2232&from=EN.

10. Figures on publicly-reported arbitrator appointments were taken from this website: https://www.iareporter.com/arbitrator-profiles-directory/.

the French Ordre national du Mérite, former Vice President of the United Nations Administrative Tribunal, and former member of the Administrative Tribunal of the Asian Development Bank. She served as counsel before the Iran-United States Claims Tribunal, and for states in proceedings before the International Court of Justice. She has sat as an arbitrator in 140 publicly-reported investor-state treaty arbitrations.[11]

31.3 Mr. Daniel M. Price served in the Administration of George W. Bush as the senior White House official responsible for international trade and investment. He was also the United States' lead negotiator of investment treaties with countries from the former Soviet Union. In the private sector, he founded the 60-member International Trade & Dispute Resolution group of the law firm Sidley Austin LLP.[12] He has sat as an arbitrator in twenty-one publicly-reported investor-state treaty arbitrations.

32. On May 22, 2014, the Tribunal issued Procedural Order No. 1 detailing the rules of procedure and the procedural calendar. Exh. D, Interim Award, ¶ 15. In this procedural order, the Tribunal decided to bifurcate the proceedings into a first phase, to address jurisdiction and liability, and a second phase to address the amount of compensation owed to the Petitioner in the event that the Tribunal found in the first phase that it had jurisdiction and that India had breached its obligations under the Treaty. *Id.*, ¶ 105.

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11 *See* https://www.pantheonsorbonne.fr/fileadmin/IREDIES/CV_professeurs/Brigitte_STERN/CVtrescourtnew.pdf; https://www.iaiparis.com/profile/brigitte.stern.

12 *See* https://www.transnational-dispute-management.com/about-author-a-z-profile.asp?key=769; https://rockcreekadvisors.com/daniel-m-price/.

33. The parties agreed that the legal seat of the Arbitration would be Geneva, Switzerland and that this arbitration would be subject to the Swiss Private International Law Act. *Id.*, ¶ 107.

34. During the first phase of the proceedings on jurisdiction and liability, the Petitioner and India each filed two written briefs, and exchanged documents. *Id.* ¶¶ 17-25. From April 6 to April 11, 2016, a hearing on jurisdiction and liability was held at the ICC Hearing Centre in Paris. *Id.*, ¶ 29. The parties then submitted post-hearing briefs, *id.* ¶ 33, and made submissions concerning the award on jurisdiction and merits that the tribunal in the treaty arbitration between Devas' Mauritian shareholders and India had issued on July 26, 2016. *Id.* ¶¶ 33-36.

C. The Interim Award: The Tribunal Unanimously Affirms its Jurisdiction and finds India Liable under the Treaty

35. The Tribunal issued the Interim Award on December 13, 2017. *See* Exh. D, Interim Award. In a 144-page, 424-paragraph reasoned decision, the Tribunal affirmed that Petitioner and its investment were entitled to protection under the Treaty, that the Tribunal had jurisdiction over the dispute between Petitioner and India, and that India had violated its Treaty obligations towards Petitioner and its investment.

36. The Tribunal first addressed an outstanding evidentiary matter. On October 24, 2016, India had applied to admit into the record of the arbitration charging documents its criminal authorities had filed against certain Indian Government officials, Devas, and some of Devas' officers and directors. *Id.* ¶ 115. The Tribunal rejected India's application. It reasoned that, first, to the extent that India intended to use these documents to support a new jurisdictional objection (that DT had made its investment illegally), such an objection – raised long after the parties' written submissions and seven months after the hearing – would be untimely according

to the procedural calendar established in the arbitration. *Id.* ¶ 118. Second, the Tribunal found that the documents would not have sufficiently substantiated the objection even if India had timely raised it. The documents India proposed to introduce into the record contained only allegations that had not been proven. Moreover, these allegations did not suggest any illegal conduct by DT, let alone any illegal conduct by DT in connection with its purchase of shares in Devas (which was DT's "investment" under the Treaty). *Id.* ¶ 119.

37. The Tribunal then addressed three threshold objections India had raised, including two objections to the Tribunal's jurisdiction.

38. First, the Tribunal considered India's jurisdictional objection that the Treaty contained its consent to arbitrate disputes only in respect of investments in India that German investors held directly, and that India's consent to arbitration of investment disputes in Article 9 of the Treaty did not extend to DT's investment, because DT held its interest in Devas indirectly through its Singaporean subsidiary DT Asia. The Tribunal rejected this argument. It found that the Treaty contains a broad definition of "investment," which does not distinguish between investments held directly and those held indirectly through intermediary companies. *Id.*, ¶¶ 139-41. The Tribunal declined to read any such limitation into the Treaty's definition of investment. *Id*. The Tribunal noted that indirect investments are very common, and it would not comport with the object and purpose of the Treaty to limit the categories of protected investments to only those investments directly held by the foreign investor. *Id.*, ¶¶ 142-43.

39. The Tribunal separately analyzed the question of whether DT had standing to claim damages for measures affecting a company it indirectly holds. The Tribunal found that DT was properly asserting claims for losses that it itself suffered due to India's measures (namely,

for the loss in value of its shareholding); it was not stepping into the shoes of Devas. *Id.*, ¶¶ 154-56.

40. Second, the Tribunal considered India's jurisdictional objection that it consented to arbitrate disputes only in respect of investments that have been "established" and specifically admitted by the host state, whereas DT had not moved past the "pre-investment" stage. *Id.* ¶¶ 158-65. The Tribunal dismissed India's objection. It found that, while the Treaty speaks of the "admission" of investments,[13] it does so in the context of requiring the host state to admit investments in accordance with its laws. It does not impose an obligation on investors to obtain such admission as a precondition to an investment being protected by the Treaty. *Id.* ¶¶ 174-77. In any event, the Tribunal found that India's Foreign Investment Protection Board and DOT had specifically approved DT's purchase of shares in Devas. *Id.* ¶ 178.

41. The Tribunal also found that DT had moved beyond the "pre-investment" stage. Even though Devas did not have all of the relevant licenses to begin operations,

> the Treaty's definition of "investment" is not restricted to going concerns holding all the relevant authorizations to carry out their business. If the Treaty applied only to businesses with all necessary permits and licenses, it would for instance leave out a valid concession contract until the concessionaire obtained the last authorization to commence its activity. Such restrictive interpretation would not be warranted in light of the text and the object and purpose of the Treaty.

Id., ¶ 179. To move beyond the "pre-investment" stage, it was sufficient that Devas had obtained rights under a contract (the Devas-Antrix Agreement) that had entered into force. *Id.* ¶ 181.

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13. Specifically, Article 3(1) provides: "Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party and also admit investments in its territory in accordance with its law and policy." *See* Exh. B, Treaty.

42. Third, the Tribunal considered India's argument that, under Article 12 of the Treaty, India's "essential security interests" operated as an absolute defense to DT's claims of breach. *Id.* ¶ 183. Article 12 of the Treaty states,

> Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests.

Exh. B, Treaty, Art. 12. This provision, if it were satisfied, precluded the application of the Treaty's substantive provisions to the host state's challenged conduct. Exh. D, Interim Award, ¶¶ 227, 291. India claimed that this provision was triggered in this case, because nullification of the Devas-Antrix Agreement was necessary so that it could reserve the S-band spectrum for military and other strategic uses. *Id.* ¶ 185.

43. The Tribunal rejected this argument. It exhaustively surveyed the evidence regarding the motives for India's decision to cancel the Devas-Antrix Agreement. *Id.* ¶¶ 241-91. It drew the following conclusions from that evidence:

43.1 While the Indian military did present ISRO with requirements to use the S-band spectrum, the military never suggested that its needs "were irreconcilable with the Devas [-Antrix] Agreement." *Id.* ¶ 244. In fact, the military indicated that there were a number of options by which its spectrum demands could be satisfied without intruding on the spectrum allocated to Devas. *Id.* ¶¶ 244-45.

43.2 Several non-military factors "played a determinant role in the events leading to the [Cabinet] decision" to cancel the agreement. *Id.* ¶ 246. These included concerns about certain commercial terms of the agreement (¶ 248), political criticism from the media alleging that Devas was given preferential treatment (¶ 249), concern about Devas' foreign ownership (¶ 257), a desire to create a level playing field for

other operators (¶ 282), and reserving the S-band spectrum for societal uses like emergency communications, train tracking, tele-education, and tele-health (¶ 260).

43.3 The Cabinet decision itself did not reserve the spectrum for any "essential security interests"; its only effect was to take away the spectrum from Antrix/Devas. *Id.* ¶ 286.

43.4 After terminating the Devas-Antrix Agreement, India did not in fact allocate or earmark the S-Band spectrum to the military or Ministry of Defense. *Id.* ¶ 273. Rather, there was a four-year debate within the Government over whether to allocate the S-band spectrum "for strategic and societal purposes, on the one hand, or commercial auctioning purposes, on the other hand." *Id.*, ¶ 287. Meanwhile, the Government allowed other existing parts of the spectrum that were already being used for commercial purposes to continue being used for this purpose. *Id.* ¶ 290.

44. The Tribunal concluded from this evidence that India had not proven that its measure to take back the S-band spectrum was necessary for the protection of its essential security interests. *Id.* ¶ 291. As a result, the exception created by Article 12 of the Treaty did not apply and the Tribunal found that "the [Treaty's] substantive standards apply to DT's investment." *Id.*

45. The Tribunal then found that India had breached those substantive standards, in particular its obligation under Article 3(2) of the Treaty to "accord to [German] investments as well as to investors in respect of such investments at all times fair and equitable treatment."[14] The Tribunal again set forth the evidence showing the motive for, and nature of, India's decision

14. The same facts gave rise to a breach of Article 5 of the Treaty (Expropriation or Nationalization). However, "[f]or reasons of judicial economy, the Tribunal can dispense with addressing these claims, since even if the same facts were found to also constitute an expropriation, the ensuing damages would not be greater." Exh. D, Interim Award, ¶ 416.

to cancel to Devas-Antrix Agreement. *Id.* ¶¶ 339-60. It drew two conclusions from that evidence that demonstrated a breach of the 'fair and equitable treatment' standard in Article 3(2) of the Treaty:

> 45.1 "*First,* [India's] decision to annul the Agreement was arbitrary and unjustified inasmuch as it was manifestly not based on facts, but on conclusory allegations, and was the product of a flawed process." *Id.* ¶ 363. In particular, neither the committee that Dr. Radhakrishnan constituted to review the Agreement, nor the Indian military, recommended annulment of the Agreement. *Id.* ¶¶ 340, 347. Rather, in response to critical press reports, Dr. Radhakrishnan rushed to ask the Ministry of Justice for advice on how to annul the Agreement. *Id.* ¶ 350. Insofar as the Agreement was annulled for "societal needs," "there is nothing in the record documenting these needs." *Id.* ¶ 368.
>
> 45.2 Second, "[e]ven *if* there were proof of any military and societal needs irreconcilable with the Agreement, *quod non*, the Tribunal is of the opinion that it was incumbent upon India to raise the issues it had identified in the Agreement with Devas/DT." *Id.* ¶ 375. However, "not only did India fail to engage with a view to attempting to reach an acceptable solution with its counterparty or an amendment of the Agreement (as recommended by [Dr. Radhakrishnan's committee]), but it positively misled the investor on a number of occasions." *Id.* ¶ 376.

46. Thus, the Tribunal found that India violated its Treaty obligation towards Petitioner and owed Petitioner compensation for the resulting damages suffered by Petitioner. To determine the compensation owed to Petitioner, the Tribunal decided to "take the necessary steps for the continuation of the proceedings toward the quantum phase." *Id.* ¶ 424.

D. The Swiss Federal Supreme Court Rejects India's Challenge to the Interim Award

47. On January 29, 2018, India applied to set-aside the Interim Award before the Swiss Federal Supreme Court, the court with original jurisdiction over such a challenge in respect of the Swiss-seated arbitration. India raised the same three preliminary objections before the Swiss Court that it had raised to the Tribunal. In addition, India also argued that the Tribunal's decision refusing to admit evidence of the Indian criminal proceedings in respect of Devas breached India's right to be heard. On December 11, 2018, after a public oral deliberation,[15] the Swiss Court issued a decision rejecting India's challenge. *See* Exh. E, Swiss Court Decision.

48. The Swiss Court Decision spanned 59 single-spaced pages. For each of India's arguments, the Swiss Court surveyed the relevant international law authorities and case-law, and distinguished those on which India relied. *See, e.g.*, *id.* ¶¶ 3.2.1.2.4 (pp. 16-18), 3.2.2.2.2 (p. 23), 3.2.3.3.3 (p. 30). In several instances the Swiss Court addressed the subsidiary limbs of each of India's arguments even though it had already rejected that argument's premise. *See id.* ¶¶ 3.1.2, 4.4.3. The decision also provided important legal context for the dispute; for example, it explained that although India's policy towards foreign investment has evolved to impose more

15. Although most Swiss Federal Supreme Court cases are decided based only on written submissions, Article 58(1) of the Swiss Federal Supreme Court Act provides for public oral deliberations among the judges if they are not unanimous or if a judge requests it. In such cases, the judges will deliberate in open court, but they will not hear argument from the parties. No transcript of such proceedings is made. In this case, public oral deliberations occurred before the five judges of the First Civil Law Division of the Swiss Federal Supreme Court. To the extent that any of the five judges may have expressed disagreement with their colleagues during the oral public deliberations, such statements have no legal effect. Swiss law does not recognize dissenting opinions and the Court ultimately issues one opinion. *See* Boykin Decl., ¶¶ 12-13.

stringent requirements on foreign investors wishing to obtain treaty protection, the Treaty represents the 'first generation' of India's policy that preceded this evolution. *Id.* ¶ 3.2.1.2.1.

49. The Swiss Court first rejected India's argument that the Tribunal lacked jurisdiction because DT held its investment in India indirectly through DT's Singaporean subsidiary. The Swiss Court agreed with the Tribunal that it was sufficient that the Treaty's definition of "investments" did not explicitly exclude indirect investments from its scope. *Id.* ¶¶ 3.2.1.2.4-3.2.1.2.5. This conclusion flowed from an interpretation of the Treaty based on the customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties (*see* 1155 U.N.T.S. 331), and was consistent with the weight of international arbitral authority on the topic of indirect investments. *Id.*[16]

50. The Swiss Court then rejected India's argument that the Tribunal lacked jurisdiction because DT had made only a "pre-investment," rather than an investment specifically admitted by India. Like the Tribunal, the Swiss Court found that Article 3(1) of the Treaty did not reserve to India the right to unilaterally refuse admission of an investment and thus refuse protection of the Treaty to an investor. *Id.* ¶ 3.2.2.2.1. The Swiss Court also found that Devas met all the qualifications under the Treaty to constitute an investment, not just a preliminary investment. *Id.* ¶ 3.2.2.2.2.

51. The Swiss Court then rejected India's argument concerning "essential security interests" under Article 12 of the Treaty. Citing case-law of the International Court of Justice and the work of the U.N. International Law Commission, the Swiss Court found that Article 12

16. At the public oral deliberations, two of the justices (Justice Kathrin Klett and Justice Martha Niquille) expressed their opinion that the Treaty protected only direct investments. Their disagreement on this point with the other three justices (Justice, Fabienne Hohl, Justice Marie-Chantal May Canellas, and Justice Christina Kiss) does not form a part of the Swiss Court's ultimate reasoned decision, because Swiss law does not recognize dissenting opinions. *See* Boykin Decl., ¶ 13.

does not affect the jurisdiction of the Tribunal, but rather offers the host state a defense on the merits; and the Swiss Court has no authority to second-guess the Tribunal's decision on the merits regarding whether Article 12 was satisfied. *Id.* ¶ 3.2.3.3. It also observed that India did not present Article 12 as a jurisdictional objection before the Tribunal, and could not do so for the first time at the setting-aside stage. *Id.* ¶ 3.2.3.3.1.

52. Finally, the Swiss Court found nothing improper in the Tribunal's refusal to admit – seven months after the hearing – evidence from India of criminal proceedings concerning Devas. The Swiss Court found that under the Treaty, the legality of the investment is a jurisdictional question, and India had forfeited its right under Swiss law to raise new jurisdictional objections after its statement of defense of the arbitration. *Id.* ¶ 4.4.2. The Swiss Court in any event found that the evidence that India had sought to introduce would not have proven that DT had made its investment illegally. *Id.* ¶ 4.4.3.

53. The Swiss Court therefore refused to set-aside the Interim Award.

E. The Final Award: The Tribunal Unanimously Awards Petitioner Damages

54. While India's challenge to the Interim Award was pending before the Swiss Court, the Tribunal conducted the quantum phase of the arbitration. The parties each filed two written briefs. Exh. A, Final Award, ¶¶ 22, 27, 29, 31. The Tribunal also granted India's request to introduce evidence from the related arbitration brought by Devas' Mauritian shareholders (*see supra* n.4). *Id.* ¶ 28. The Tribunal held a hearing on quantum at the ICC Hearing Centre in Paris from April 29 to May 3, 2019. *Id.* ¶ 33. Each party then filed two post-hearing briefs and submissions on costs. *Id.* ¶¶ 38-39.

55. India essentially prevailed in the quantum phase of the arbitration. On May 27, 2020, the Tribunal issued its unanimous, 125-page, 357-paragraph Final Award. The Final Award adopted the legal standard of damages advocated by India and ordered it to pay USD 93.3

million in damages to Petitioner, with pre-award interest from February 17, 2011 (the valuation date),[17] as well as arbitration costs and legal fees, with post-award interest. *Id.*, ¶ 357.

56. The Tribunal first addressed India's argument that its breach of the Treaty did not cause Petitioner any loss, because Devas would not have obtained the relevant licenses to operate anyway (or would not have done so at an economically viable price). *See id.* ¶¶ 95-115. The Tribunal explained that India was conflating the question of causation (the *fact* of loss) with valuation (the *extent* of loss). "[T]here can be no doubt that the annulment of the [Devas-Antrix] Agreement caused the diminution in the value of DT's investment," because the annulment deprived the investment of its "key asset," namely the right to lease spectrum. *Id.* ¶¶ 122-23. Therefore, India's breach had caused a loss to DT. *Id.* ¶ 124. However, any uncertainty surrounding Devas' ability to obtain the requisite licenses but-for India's breach would bear on the *value* of DT's investment as of the date of the breach, and would thus be relevant of determining the *extent* (but not the *fact*) of DT's loss. *Id.* ¶¶ 123-24, 131.

57. The Tribunal then turned to the question of valuation. The parties had between them submitted three different methods to calculate the value of DT's damages:

57.1 Petitioner argued that the Tribunal should calculate the fair market value ("FMV") of Devas as of the valuation date using the discounted cash flow ("DCF") method. Under this method, the Tribunal would forecast the profits that Devas would have earned from its telecommunications operations over its lifetime, and discount these future amounts back to the valuation date to reflect the time value of money and risk of obtaining these profits. Petitioner's damages would be 19.62% of this

17. February 17, 2011 is the date on which the Indian Cabinet Committee on Security publicly issued its decision stating that the Devas-Antrix Agreement shall be annulled. *See supra* ¶ 24.

discounted value (corresponding to Petitioner's 19.62% shareholding in Devas). *Id.* ¶¶ 165-72. This method yielded a damages figure of USD 270 million. *Id.* ¶ 12.

57.2 Alternatively, Petitioner argued that the Tribunal should adopt an "investment plus" method. Under this method, the Tribunal would take as a starting point the USD 75 million that Petitioner paid for a 17.2% interest in Devas in March 2008 (which implies a FMV of Devas of USD 375 million). The Tribunal would then adjust this value upward to reflect DT's bargaining power and in-kind contributions, since these factors allegedly allowed DT to obtain a below-market cash price for its shares. Then, the Tribunal would further adjust the value upward to reflect the progress in developing the business made between March 2008 and the February 17, 2011 valuation date. *Id.* ¶ 212. This method yielded a damages figure of between USD 207 and 284 million. *Id.* ¶ 12

57.3 India, for its part, argued that DT's damages should be limited to its net sunk costs i.e. the amount it spent to acquire its interest in Devas, minus DT's pro rata share of Devas' net assets as of the valuation date. *Id.* ¶¶ 272-74. This method yielded a damages figure of USD 24.1 million. *Id.* ¶ 12.

58. The Tribunal found that the DCF method was inappropriate, because it was too uncertain that Devas would have actually received the cash flows that form the basis of the DCF methodology. *Id.* ¶¶ 203-04. The Tribunal reasoned that, as of the valuation date, Devas was not yet a going concern (i.e. had not yet begun operations), and was far from becoming one. Moreover, the Tribunal concluded that it was too uncertain as of the valuation date whether Devas would receive the necessary license to operate, let alone at an economically viable fee, so

as to justify an award of lost future profits. *Id.*[18] As the Tribunal observed, Petitioner's own financial statements did not value Devas using the DCF method. *Id.* ¶ 205. The Tribunal likewise rejected Petitioner's "investment plus" method, because it found no evidence indicating that the price Petitioner actually paid for its shareholding in Devas in March 2008 was below market value, and the project had not substantially advanced between March 2008 and the February 17, 2011 valuation date. *Id.* ¶¶ 233-69.

59. The Tribunal therefore agreed with India that it should apply the sunk cost method for calculating Petitioner's damages. *Id.* ¶¶ 288-89. Petitioner had paid USD 97.2 million for its shareholding in Devas. *Id.* ¶ 293. According to Devas' audited financial statements, its net assets after the valuation date were USD 19.9 million; Petitioner's pro rata 19.62% share of these assets was USD 3.9 million. *Id.* ¶¶ 295-96. Therefore, Petitioner's damages were the difference between these two amounts, or USD 93.3 million. *Id.* ¶ 298.[19]

60. The Tribunal awarded Petitioner pre-award interest on the damages amount. *Id.* ¶ 319. It also ordered India to reimburse Petitioner a portion of Petitioner's legal costs and its share of the costs of the arbitration. *Id.* ¶¶ 349, 353. It awarded post-award interest on these latter amounts. *Id.* ¶ 356.

61. Finally, the Tribunal accepted Petitioner's undertaking to avoid double recovery in relation to the ICC Arbitration. Namely, if Antrix in fact ever pays any of the damages it owes to Devas pursuant to the award in the ICC Arbitration, Petitioner "will take appropriate

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18. The Tribunal observed that India had never before issued such a license, and it was unclear the fee that it could or would lawfully charge for it.

19. India had argued that the Tribunal should subtract USD 73.1 million from USD 97.2 million, because USD 73.1 million is the amount that Petitioner allegedly could have gotten in a "hypothetical liquidation" on the valuation date. *Id.* ¶ 291. The Tribunal rejected this, because the sunk cost method requires considering only the current net assets of the investment, not reconstructing a hypothetical liquidation scenario. *Id.* ¶ 292.

steps to ensure that it is not compensated twice." *Id.* ¶¶ 329, 357(e). Since the issuance of the Final Award, Devas began the process of being wound up by the Indian government and there is no chance of any of its shareholders ever recovering any amount from the award in the ICC Arbitration. Petitioner's only avenue for recovering the losses it sustained from India's misconduct is through the enforcement of the Final Award.

62. India has never challenged the Final Award, and the deadline for it to do so under Swiss law has passed. *See* Boykin Decl., ¶ 9. On August 20, 2020, the Civil Court for the Republic and Canton of Geneva certified that the Final Award was enforceable (after the Swiss Federal Supreme Court had delivered to the Geneva tribunal a "certificate of non-appeal" on August 7, 2020). *See* Exh. F, Certificate of Enforceability.

LEGAL STANDARD AND ARGUMENT

A. The New York Convention applies to the Final Award

63. The New York Convention applies "to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." New York Convention, Art. I(1). The United States is a party to the New York Convention, subject to the reservation that it applies the Convention "on the basis of reciprocity, to the recognition and enforcement only of those awards made in the territory of another Contracting State." Declaration of the United States of America, Sept. 30, 1970, 21 U.S.T. 2566, 751 U.N.T.S. 398. The Final Award was made in Switzerland. *See supra* ¶ 33; Exh. A, Final Award, p. 125. Switzerland is also party to the New York Convention. Ratification Instrument of Switzerland, June 1, 1965, 536 U.N.T.S. 477.

64. The FAA, for its part, provides that the Convention applies to an arbitration award if the underlying commercial relationship involves at least one party that is not a United States citizen, or the relationship "involves property located abroad, envisages performance or

enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. The underlying commercial relationship here is between a German party and an Indian party, and concerns an investment in India.

65. Thus, the New York Convention applies to the Final Award.

B. The Grounds for Refusing to Confirm an Award under the Convention Are Extremely Narrow

66. While courts of the country in which (or under the arbitration law of which) an award was made have 'primary jurisdiction' over the award, under the Convention United States courts have secondary jurisdiction over a foreign award, and as a result lack subject matter jurisdiction to vacate, set aside, or modify foreign awards. *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) ("The Convention provides a carefully crafted framework for the enforcement of international arbitral awards. Under the Convention, '[o]nly a court in a country with primary jurisdiction over an arbitral award may annul that award.'" (citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir.2004))).

67. The FAA provides that, in proceedings to confirm a foreign award under the Convention, "the court shall confirm the award, unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207.[20] This Circuit has recognized that judicial review of an arbitral award under the

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20. These grounds are listed in Article V of the Convention:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties

Convention is extremely limited. *See Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) ("Consistent with the 'emphatic federal policy in favor of arbitral dispute resolution' recognized by the Supreme Court as 'appl[ying] with special force in the field of international commerce,' the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards" (quoting *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985))). "Federal courts in the United States have minimal discretion to refuse to confirm an award under the FAA[.]" *PAO Tatneft v. Ukraine*,

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have subjected it or, failing any indication thereon, under the law, of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

301 F. Supp. 3d 175, 184 (D.D.C. 2018). "Given that the New York Convention provides only several narrow circumstances when a court may deny confirmation of an arbitral award, confirmation proceedings are generally summary in nature." *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011); *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365, 369 (D.C. Cir. 2011) ("Confirmation proceedings under the Convention are summary in nature, and the court must grant the confirmation unless it finds that the arbitration suffers from one of the defects listed in the Convention."); *Mediso Med. Equip. Developing Servs., Ltd v. Bioscan, Inc.*, 75 F. Supp. 3d 359, 363-64 (D.D.C. 2014) (noting the FAA's "strict enforcement requirements" and that it has "little discretion" in refusing or deferring enforcement).

68. Furthermore, the burden of proof is on the party who seeks to oppose confirmation. Convention, Art. V; *Mediso Med. Equip. Developing Servs., Ltd*, 75 F. Supp. 3d at 363-64 ("[The] Convention permits courts to set aside the arbitral award only where the party opposing the award's enforcement submits 'proof' to the court that the award" falls under one of the categories for non-enforcement); *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) ("The party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses. . . applies"). "[T]he showing required to avoid summary confirmation is high." *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011) (citation omitted). Courts will not second-guess arbitrators' determinations of facts and law, even if incorrect. *See id*. ("[T]his Court 'do[es] not sit to hear claims of factual or legal error by an arbitrator' in the same manner that an appeals court would review the decision of a lower court." quoting *Teamsters Local Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 604 (D.C.Cir.2001))); *LaPrade v. Kidder, Peabody & Co.*, 94 F. Supp. 2d 2, 4 (D.D.C. 2000) ("[A]

court must confirm an arbitration award where some colorable support for the award can be gleaned from the record.").

C. There is No Reason Not to Confirm the Final Award

69. None of the grounds for refusing or deferring confirmation is present here. The Tribunal's jurisdiction under the Treaty was confirmed not only in the Interim Award, but also in the Swiss Federal Supreme Court's thorough decision refusing to set aside the Interim Award. India participated actively in the arbitral proceedings and was afforded full due process. The Tribunal was constituted in accordance with the parties' agreement in Article 9(2)(b)(i) of the Treaty, and the parties had the benefit of having their dispute adjudicated by three of the most eminent international arbitrators in the world.

70. The Final Award is final and binding on the Parties. India failed to challenge the Final Award before the Swiss Federal Supreme Court. It is not surprising that India elected not to do so; as described above, the Tribunal applied India's valuation methodology to determine the compensation due to Petitioner. In any event, the proper forum for India to challenge any aspect of the Final Award was the Swiss Federal Supreme Court. It chose not do so and this Court should not permit India to raise issues in these recognition proceedings that it deliberately chose not to present to the Swiss court, which was the court with primary jurisdiction over the arbitration and "competent authority" within the meaning of Article V(1)(e) of the New York Convention and thus the only court with authority to vacate, modify, or set aside the Final Award. On August 20, 2020, the Civil Court for the Republic and Canton of Geneva issued a certificate of enforceability of the Final Award.[21]

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21. In any event, courts in this district have confirmed arbitration awards even in the face of pending vacatur proceedings. *See Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, No. CV 14-2014 (JEB), 2015 WL 7428532, at *16-18 (D.D.C. Nov. 20, 2015) (confirming an

71. Finally, U.S. law readily recognizes the use of investor-state treaty arbitration to settle pecuniary claims arising out of a state's sovereign misconduct towards a foreign investment, and recognition of the Final Award would not be contrary to any applicable U.S. public policy. *Cf. see*, *e.g.*, *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 69 (D.D.C. 2013) ("The public-policy exception under the New York Convention is construed extremely narrowly and applied 'only where enforcement would violate the forum state's most basic notions of morality and justice.'"), *aff'd sub nom. Chevron Corp. v. Ecuador*, 795 F.3d 200 (D.C. Cir. 2015).

72. Accordingly, India cannot meet its heavy burden of demonstrating that it has any defense to confirmation of the Final Award.

CONCLUSION

73. For the foregoing reasons, Petitioner Deutsche Telekom AG respectfully requests that the Court confirm the Final Award in its entirety, together with such other and further relief as the Court deems just and proper and enter judgment against the Respondent accordingly.

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award against Venezuela notwithstanding a pending proceeding in France challenging the validity of the award, concluding that a balance of factors "supports immediate confirmation"); *see also Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d at 71-73 (reaching the same conclusion); *G.E. Transp. S.P.A. v. Republic of Albania*, 693 F. Supp. 2d 132, 137-39 (D.D.C 2010) (same).

WHEREFORE, Petitioner respectfully requests that, pursuant to Article III of the New York Convention and 9 U.S.C. § 207, this Court:

1. Enter an order recognizing and confirming in its entirety the Final Award issued on May 27, 2020 that is attached as Exhibit A to the accompanying Declaration of James H. Boykin;

2. Enter judgment for Petitioner in the amount of USD 93,300,000 in damages, plus interest on that amount as provided for by paragraph 357(a) of the Final Award "until payment in full." (*See supra*, ¶¶ 5.1, 6.1);

3. Enter judgment for Petitioner in the amount of USD 8,271,765 representing the value in U.S. dollars of the costs and attorneys' fees awarded to Petitioner in the Final Award (GBP 5,250,011.70, EUR 33,977.00, and USD 10,000.00 and attorneys' fees and related costs, and EUR 730,272.32 in arbitration costs, all converted to USD based on exchange rates as of the date of this petition), plus interest on that amount accruing as provided for by paragraph 357(c) of the Final Award "until payment in full." (*see supra* ¶¶ 5.2, 6.2);

4. Directing that post judgment interest shall accrue "until payment in full" of the above amounts as provided for in paragraph 357 of the Final Award;

5. Granting such other and further relief as the Court may deem just and proper.

Dated: April 19, 2021
Washington, D.C.

HUGHES HUBBARD & REED LLP

By: /s/ James H. Boykin

James H. Boykin (DC Bar No. 490298)
Alexander S. Bedrosyan (DC Bar No. 1044386)
Sean F. Mason (DC Bar No. 1671159)
1775 I Street, N.W.
Washington, D.C. 20006-2401
Telephone: +1 (202) 721-4600
Fax: +1 (202) 721-4646

Attorneys for Petitioner
Deutsche Telekom AG