IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CC/DEVAS (MAURITIUS) LTD, et al.,

Petitioners,

v.

REPUBLIC OF INDIA,

Respondent.

Civil Action No. 1:21-cv-00106-RCL

PETITIONERS' OPPOSING POINTS AND AUTHORITIES IN RESPONSE TO RESPONDENT'S MOTION TO DISMISS

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INTRODUCTION

Petitioners CC/Devas (Mauritius) Ltd. ("CC/Devas"), Devas Employees Mauritius Private Limited ("DEMPL"), and Telcom Devas Mauritius Limited ("Telcom Devas," collectively, the "Petitioners"), are the holders of an arbitral award of more than $111 million in damages, plus interest and various fees (the "Quantum Award") against the Republic of India ("India"). The award arises out of India's destruction of Petitioners' investment in an Indian company, Devas Multimedia Private Limited ("Devas"). Because India has steadfastly refused to pay the award—and instead has taken further steps to unlawfully divest Petitioners of their investment and right to relief—Petitioners brought this action under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "New York Convention"), seeking recognition and enforcement of the award in the United States. India has moved to dismiss for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1605(a). *See* ECF No. 15-1. But clear and controlling D.C. Circuit precedent unambiguously establishes this Court's jurisdiction to enforce arbitral awards against foreign states in these circumstances. This Court should deny India's motion to dismiss.

The facts of Petitioners' underlying dispute with India are largely irrelevant to this Court's subject-matter jurisdiction under the FSIA, but they highlight the importance of prompt U.S. enforcement of Petitioners' arbitral award. Devas contracted with Antrix Corporation Ltd. ("Antrix")—the commercial arm of India's space agency—for Antrix to build and launch satellites and to lease the use of transponders on those satellites to Devas. After years of investment by Petitioners to develop Devas's new business, however, India used its control over Antrix to repudiate the contract with Devas. At India's behest, Antrix thoroughly and completely repudiated its contractual responsibilities. It refused to build, launch, or operate the satellites it was contractually committed to provide for Devas. And in doing so, Antrix and India destroyed Devas's business,

and the value of Petitioners' investments in that business.

Antrix's and India's annulment led to multiple arbitrations between and among various parties, including India, Antrix, Devas, and Devas's shareholders. Those proceedings culminated in *three separate arbitral tribunals* each finding that Antrix and India's conduct was wrongful. Each tribunal awarded substantial damages totaling over $1.5 billion against India and Antrix and in favor of Devas and Petitioners.

Rather than honor its obligation to pay Petitioners' award, India has abused its sovereign powers, launching multiple bogus investigations into Devas, its principals and employees; seizing Devas's accounts and records; amending India's arbitration law under pretext; and even engineering the liquidation of Devas itself—all in an effort to "hind[er] and delay" enforcement of the awards against it or to abnegate those awards entirely. Order, *Devas Multimedia Private Ltd. v. Antrix. Corp. Ltd.*, No. 18-cv-1360, ECF No. 132 (W.D. Wash. Aug. 9, 2021).

This motion to dismiss is India's latest effort to avoid its obligations. This Court has subject-matter jurisdiction if any of the FSIA's immunity exceptions set forth in 28 U.S.C. § 1605(a) are applicable. Here, controlling D.C. Circuit precedent establishes the applicability of *two* exceptions.

First, as the D.C. Circuit held just two years ago, signatories to the New York Convention like India "waiv[e] [their] immunity from arbitration-enforcement actions in other signatory states," and courts therefore have jurisdiction over such actions under the FSIA's waiver exception to sovereign immunity. *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (per curiam). Under *Tatneft*, this Court has jurisdiction under 28 U.S.C. § 1605(a)(1).

Second, this Court has jurisdiction under Section 1605(a)(6), which grants jurisdiction over a case against a foreign state "to confirm an award made pursuant to . . . an agreement to arbitrate."

28 U.S.C. § 1605(a)(6). Here, India argues that it never agreed to arbitrate this dispute with Petitioners. But the bilateral investment treaty under which the arbitration was conducted provides that disputes over arbitrability—including whether a dispute is subject to arbitration under the treaty—are delegated to the arbitral tribunal. ECF No. 1-8, art. 8(2)(d) (adopting arbitral rules); Champion Decl. Ex. 2, art. 21 (assigning arbitrability to tribunal). And the D.C. Circuit quite recently confirmed that where an arbitration agreement delegates the question of "arbitrability itself . . . to the arbitrators," a court "'possesses no power to decide the arbitrability issue,' even if it thinks the argument for arbitrability is 'wholly groundless.'" *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021) (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019)). And the D.C. Circuit further confirmed that an arbitration tribunal's rulings on arbitrability are entitled to the same dispositive deference when assessing *jurisdiction* under the FSIA as applies to the *merits* of the enforcement action. *Stileks*, 985 F.3d at 878–79. This Court accordingly must defer to the arbitrators' conclusion that India did agree to arbitrate this dispute. Jurisdiction thus lies also under 28 U.S.C. § 1605(a)(6).

India's motion to dismiss is a non-starter. This Court should therefore reject India's latest attempt at "hindrance and delay," *Devas Multimedia*, No. 18-cv-1360, ECF No. 132, and deny India's motion to dismiss.

BACKGROUND

I. Petitioners Invested In And Became Shareholders Of Devas, An Indian Corporation.

Petitioners are Mauritian companies (owned largely by U.S. investors) that made significant investments in a hybrid satellite and terrestrial communications business owned by Devas, an Indian corporation. That business was in large part predicated on a contract Devas entered into on January 28, 2005 with Antrix (the "Agreement"). Antrix is the commercial arm of the Indian Space Research Organization and the Department of Space and is wholly owned by the

Indian government. ECF No. 1-6 ¶ 5. Each of these organizations ultimately is controlled by the Indian Prime Minister. *Id.* ¶ 67.

The Agreement committed Antrix to lease to Devas spectrum capacity, and to provide two satellites to broadcast at that spectrum, to be built, operated, and launched by the Indian Space Research Organization. *Id.* ¶¶ 76–80. These satellites were to form an integral part of a hybrid satellite/terrestrial system through which Devas would provide broadband wireless access and audio-video services cost-effectively both to rural areas within India as well as India's numerous large cities. *Id.* Under the Agreement, Devas was required to pay Antrix upfront capacity reservation fees of approximately $40 million to reserve transponder capacity on the two satellites, followed by annual lease fees after the satellites were launched. *Id.* ¶¶ 89–90.

The Agreement became fully binding and effective on February 2, 2006, when Antrix wrote to Devas confirming that it had "received the necessary approval for building, launching and leasing" the first satellite. ECF No. 1-6 ¶ 204 (quoting Antrix February 2, 2006 letter to Devas). On the basis of Antrix's notification, and other indications of support from Indian government officials, Petitioners injected multiple rounds of capital into Devas—capital that would permit Devas to provide the required upfront and annual payments due to Antrix. *Id.* ¶¶ 107–08, 111, 205. Petitioners also brought to bear the considerable expertise of a talented and impressive group of individual directors and officers—including but not limited to Lawrence T. Babbio, Jr., a former vice chairman, president, and member of the board of directors for Verizon Wireless. *See* Babbio Decl. ¶ 1.

Utilizing proceeds from the Petitioners' investments, Devas made the contractually-required capacity fee payments to Antrix to secure transponder space on both satellites; secured licenses to deliver internet services throughout India; and conducted successful experimental technology trials. ECF No. 1-6, ¶ 109.

II. Petitioners' Investments Were Protected By A Bilateral Investment Treaty.

In making these investments in Devas, Petitioners relied on a longstanding bilateral investment treaty, between India and Mauritius (the "Treaty"). The Treaty's express purpose was to "create favourable conditions for greater flow of investments made by investors of either" country in the territory of the other. ECF No. 1-8 at 1. The Treaty thus protects "all investments made by investors of either Contracting Party in the territory of the other Contracting Party." *Id.* art. 2. Article 1 of the Treaty defines "investments" as "every kind of asset established or acquired under the relevant laws and regulations of the Contracting Party in whose territory the investment is made" including "shares, debentures and any other form of participation in a company" as well as "claims to money, or to any performance under contract having an economic value." *Id.* art. 1(a)(ii)-(iii).

The Treaty accords substantive and procedural protections to investors who have made qualifying investments. Specifically, India and Mauritius committed to "promot[e]" and "protect[]" investors by, *inter alia*, "obtaining the required clearances and permissions" for investments. *Id.* art. 3 & (2). Additionally, Article 4(1) provides that qualifying "[i]nvestments" shall be accorded "fair and equitable treatment," and Article 6 provides that investments shall not be expropriated or nationalized "except for public purposes under due process of law, on a non-discriminatory basis and against fair and equitable compensation." *Id.* arts. 4(1), 6(1).

The Treaty enables investors to enforce these protections by authorizing them to submit a dispute "in relation to an investment" to arbitration, including, subject to certain conditions, arbitration before "an *ad hoc* tribunal set up in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976" ("UNCITRAL Rules"). *Id.* art. 8(2)(d).

The 1976 UNCITRAL Rules set out the applicable procedural rules governing the conduct of international arbitration proceedings. Champion Decl. Ex. 2. Parties can agree to adopt the rules in their arbitration agreement, as India and Mauritius did in the Treaty.

A critical feature of the UNCITRAL Rules is that they specifically authorize arbitral tribunals to resolve questions as to the scope of their jurisdiction, rather than leaving that question for later determination by a reviewing court after arbitration has completed. Specifically, Article 21 of the Rules provide 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.* art. 21(1). The Rules thus further protect investors by ensuring that questions about the parties' consent to arbitration are settled by neutral arbitrators well in advance of any litigation to enforce any resulting arbitral award.

III. India Violated Its Obligations And Petitioners Commenced A Successful Arbitration Against India.

Although Devas fully performed under the Agreement, Antrix did not. In July 2010, the Indian Government made a covert determination to "annul" the Agreement, which it announced in February of 2011. ECF No. 1-6 ¶ 146. A few days later, citing the Cabinet Committee's decision, Antrix informed Devas that the Agreement was "terminated." *Id*. As a consequence of Antrix's unilateral termination of the Agreement, Devas's business was completely destroyed, and so were Petitioners' investments in that business. *Id.* ¶ 422.

On July 3, 2012, Petitioners commenced an arbitration against India under Article 8(2)(d) of the Treaty by sending India a Notice of Arbitration in accordance with the UNCITRAL Rules. The arbitral tribunal (the "Tribunal") selected The Hague, the Netherlands, as the seat of the Tribunal and bifurcated the arbitration into two phases: jurisdiction/merits and quantum (*i.e.*, damages). *See id.* ¶¶ 17–20, 501(h). The Tribunal then received briefing and evidence from the parties

on jurisdiction and merits issues. *Id.* ¶¶ 31–34. From September 1 through 5, 2014, at the Peace Palace in The Hague, the Tribunal conducted an in-person hearing on jurisdiction and merits—including on India's challenge that Petitioners had made no cognizable "investment." *Id.* ¶¶ 44–45. After the hearing, the Tribunal received further evidence and submissions from the parties, including on "licensing" issues raised by India. *Id.* ¶¶ 46–54, 61–63.

One of India's principal arguments in the arbitration was to challenge the Tribunal's jurisdiction on the same ground that it challenges this Court's jurisdiction here: by claiming that Petitioners had not made a qualifying "investment" under the Treaty. *Id.* ¶ 171–74. According to India, Devas had only engaged in "pre-investment activities" because it had not applied for a license from the Wireless Planning and Coordination Wing ("WPC license") and thus Petitioner's investment in India also only constituted "pre-investment" activities. *Id.*[1]

On July 25, 2016, however, the Tribunal issued a 141-page Merits Award, unanimously upholding its jurisdiction and finding India liable for breaches of the Treaty in connection with the annulment of the Agreement.[2] *See id.* ¶ 501. Unanimously rejecting India's jurisdictional challenge, the Tribunal held that Petitioners' interests in the Devas business were "investments" protected by the Treaty. *Id.* ¶¶ 198–210, 501(a). The Tribunal found that Petitioners' "shares, debentures and any other form of participation" in Devas and their indirect partial ownership of Devas's

[1] India makes much of the WPC license in its motion to dismiss. As the Tribunal described, a WPC license is necessary for a company to "terrestrially re-use the spectrum allocated to it" for telecommunications services but is *not* required "for satellite-only services." ECF No. 1-4 ¶ 380. The Agreement did not require Devas to secure the WPC license and the Tribunal concluded that even though Devas did not obtain a WPC license, there was "little doubt" that Devas had fulfilled its obligations to secure regulatory approvals and that the WPC license "would have been issued in favor of Devas" had Antrix not annulled the Agreement. *Id.*

[2] One arbitrator issued an opinion concurring as to jurisdiction and liability, but dissenting in part as to the extent of India's liability. *See* ECF No. 1-7 ¶¶ 110–12 (dissenting opinion of Haigh and noting that Devas was entitled to a *higher* award).

business were assets "established or acquired under the relevant laws and regulations" of the Respondent. *Id.* ¶ 200. The Tribunal found that Petitioners "made significant investments in time and money in Devas and Devas honoured its obligations under the Agreement until its annulment by Antrix." *Id.* ¶ 208. Petitioners had thus made a protected investment under the express terms of the Treaty, and the Tribunal had jurisdiction under the Treaty to hear and determine Petitioners' claims.

The Tribunal likewise rejected India's arguments that Petitioners engaged in "only pre-investment activities." The Tribunal held that "[t]he Devas Agreement was a valid contract between Devas and Antrix" which leased to Devas capacity on Antrix's spacecraft, which could not be used by another party during the life of the satellite or as long as the Agreement was effective and under which Devas had to pay upfront reservation fees for that space. *Id.* ¶¶ 201–04. Moreover, the Tribunal found that the Agreement called for Antrix to obtain certain licenses and Devas to obtain others, with "best effort" support from Antrix, but "nothing in the Agreement ma[de] its validity dependent on Devas obtaining such permits, and at no time during the course of the Agreement or at the time of its annulment by Antrix was it argued by Antrix or any governmental authority that it was not in full effect." *Id.* ¶ 206. Accordingly, the Tribunal found that while the "non-issuance of a governmental license may pertain to the quantum of damages that may be claimed against [India] if there was breach of the Treaty . . . it [did] not pertain to the validity of the Agreement or whether an investment was made by the Claimants." *Id.* In other words, the non-issuance of the WPC license had no effect on the validity of the Agreement or whether Petitioners made "investments" in Devas. *Id.* ¶ 209.

On the merits, the Tribunal determined in the Merits Award that India had violated its obligations under the Treaty by unlawfully destroying Petitioners' investments in Devas. *Id.* ¶ 501(d). The Tribunal also concluded that, by leaving Petitioners "completely in the dark" about

its decision to terminate the Agreement, India had not acted in "good faith." *Id.* ¶ 468. That bad faith breached India's obligations under the Treaty to accord "fair and equitable treatment" to Petitioners' investments. *Id.* ¶¶ 468, 470; *see also id.* ¶ 501(d).

Finally, the parties proceeded to the damages or "quantum" phase. From 2017 to 2018, the parties submitted briefing and evidence on damages. ECF No. 1-4 ¶¶ 45–120. The Tribunal conducted another in-person hearing from July 16 to 21, 2018, at the Peace Palace in The Hague, with fact and expert witness evidence. *Id.* ¶¶ 124–27. Following the conclusion of the hearing, the parties submitted additional authorities, evidence and other submissions, including concerning the attorneys' fees and costs incurred by them in the arbitration. *Id.* ¶¶ 128–69.

On October 13, 2020, the Tribunal ordered India to pay, in addition to interest and reasonable costs:

> (a) $50,497,600 as compensation to Petitioner CC/Devas (owner of 17.06% of the issued share capital of Devas), *id.* ¶ 663(c);
>
> (b) $10,300,800 as compensation to Petitioner DEMPL (owner of 3.48% of the issued share capital of Devas), *id.*; and
>
> (c) $50,497,600 as compensation to Petitioner Telcom Devas (owner of 17.06% of the issued share capital of Devas), *id.*

IV. The Dutch Courts With Primary Jurisdiction To Review That Tribunal's Awards Have Rejected India's Efforts To Set Aside The Merits Award.

Soon after the Merits Award was rendered, India applied to set it aside before the Dutch Courts at The Hague, the seat of the arbitration. The Hague District Court denied India's challenge and affirmed the Merits Award in November 2018. ECF No. 1-9.

While India repeated its argument that Petitioners' activities do not qualify as investment under the Treaty because Devas had not obtained a WPC license at the time of Antrix's repudiation, the Court rejected this argument. *Id.* ¶¶ 4.23–28. Like the Tribunal before it, the Court found that the Petitioners had made a valid investment under the Treaty by purchasing shares in Devas

and that, while the absence of the WPC license possibly could affect the value of Petitioners' investment, it was immaterial to the question of whether Petitioners had made an investment. *Id.* ¶¶ 4.15–17. The Court further found that the Tribunal "furnished a reasoned argument" supporting its findings and addressing India's objections. *Id.* ¶¶ 4.21, 4.25.

India appealed to The Hague Court of Appeal, which yet again rejected India's challenges and reaffirmed the Merits Award in February 2021. Champion Decl. Ex. 3. The Court of Appeal "concur[red] with the District Court that the Tribunal assumed, on the right grounds, that there was an 'investment' within the meaning of the Treaty and therefore it had jurisdiction to assess [Petitioners'] claim" as the Petitioners "acquired shares in Devas" which thus "falls under the 'shares, debentures and any other form of participation in a company' as referred to at (ii) of the definition of 'investment' in Article 1 of the Treaty." *Id.* ¶ 5.8. The Court moreover found "no basis" for India's argument that a WPC license was necessary to effectuate an investment since "[a]ny uncertainty about granting of a WPC license . . . may at most mean that Petitioners' investment entailed certain risks" which may impact the value of the investment but "it does not mean that there was never an investment." *Id.* ¶ 5.10. The Court agreed that the Tribunal adequately addressed India's challenges on this basis. *Id.* ¶¶ 5.14–20. On May 17, 2021, India appealed certain issues to the Dutch Supreme Court, which has yet to rule. ECF No. 16-14.

India also has applied to set aside the Quantum Award before The Hague District Court, but India does not (and indeed could not) challenge in that proceeding the Tribunal's findings as to its jurisdiction. *See* ECF No. 16-13. Notwithstanding the pendency of India's application to set aside the Quantum Award, the Hague District Court entered an exequatur order allowing Petitioners to enforce the Quantum Award against India's property in the Netherlands. Champion Decl. Ex. 4.

V. Two Other Independent Tribunals Also Found That India And Antrix Acted Unlawfully In Annulling The Agreement, Resulting In Damages Awards Totaling More Than $1.5 Billion.

India's arguments have fared no better in related arbitral proceedings. *First*, in an investor-state arbitration brought by another of Devas's major shareholders, Deutsche Telekom AG, the arbitral tribunal again rejected the same jurisdictional argument India raises here. In that proceeding, Deutsche Telekom arbitrated against India under the India-Germany bilateral investment treaty before an UNCITRAL tribunal seated in Geneva. The tribunal considered and rejected India's jurisdictional challenge—that Deutsche Telekom's investment had not yet been "established" and was only a "pre-investment." Champion Decl. Ex. 13 ¶¶ 179–82. That tribunal also rejected India's contention that a WPC license was required to complete the investment and that while the "absence of the WPC License may have made DT's investment less valuable … [i]t does not … affect jurisdiction." *Id.* ¶ 180. That arbitral tribunal ultimately awarded Deutsche Telekom AG over $132 million plus interest because India had failed to "accord . . . fair and equitable treatment" by "arbitrar[ily] and unjustifi[ably]" cancelling the Agreement. *Id.* ¶ 363.

India applied to set aside this decision before the Swiss Federal Supreme Court, which upheld that tribunal's decision in its entirety, including its findings on jurisdiction. Champion Decl. Ex. 14. The Swiss court, like the Deutsch Telekom tribunal, found that Devas met all the requirements to constitute an investment under the bilateral investment treaty there invoked. *Id.* ¶ 3.2.2.2.2.

Second, after Antrix repudiated the Agreement in 2011, and in parallel with the Petitioners' Treaty arbitration, Devas commenced arbitration proceedings in the International Chamber of Commerce ("ICC") to enforce its rights under the Agreement. ECF No. 1-10 ¶¶ 13, 131. The ICC Tribunal issued a unanimous final award that concluded that Antrix had "wrongful[ly] repudiat[ed]" the contract and awarded Devas $562.5 million plus interest. *Id.* ¶¶ 362, 401. Devas

subsequently petitioned to confirm the award in the U.S. District Court for the Western District of Washington. That court entered judgment for Devas and against Antrix for nearly $1.3 billion, ECF No. 1-13.

India has refused to satisfy any of these awards. Instead, India has abused its sovereign powers, launching multiple bogus investigations into Devas, its principals and employees; seizing Devas's accounts and records; amending India's arbitration law under pretext; and most audaciously, engineering the liquidation of Devas itself—all in an effort to delay enforcement of the awards against it or to avoid those awards entirely. *See, e.g.*, *Devas Multimedia Private Ltd. v. Antix Corp. Ltd.*, 2021 WL 3616787, at *5 (W.D. Wash. Aug. 16, 2021) (recognizing India and Antrix's efforts to obstruct and delay enforcement proceedings through India's liquidation of Devas and the "unique circumstances . . . confronting the Court's fair administration of justice"); *accord* Order, *Devas Multimedia Private Ltd. v. Antrix. Corp. Ltd.*, No. 18-cv-1360 TSZ (W.D. Wash. Aug. 9, 2021), ECF No. 132 (denying motion for stay noting that "this matter has been subject to hindrance and delay, largely on the part of Respondent Antrix Corp." and because the stay is "intended to further delay these proceedings, as well as [Devas and Petitioners'] right to recover on the Award").

* * *

Petitioners commenced these proceedings on January 13, 2021, to recognize and confirm the Quantum Award under the New York Convention, and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201.[3] The New York Convention is a treaty among 165 countries—including India and

[3] Simultaneously, Petitioners are pursuing enforcement of the Quantum Award in proceedings in New York against India's alter ego, Air India, *see CC/Devas (Mauritius) Ltd. v. Air India*, No. 21-cv-5601 (S.D.N.Y. 2021), and around the world.

the United States[4]—which obliges signatories to recognize and enforce foreign and non-domestic arbitral awards in the same way as domestic awards. Champion Decl. Ex. 1, art. III ("N.Y. Convention"). Following a lengthy service process, India executed and returned its summons on May 28, 2021. On August 27, 2021, India moved to dismiss and concurrently moved for a stay.

ARGUMENT

India's motion to dismiss seeks to do what the New York Convention prohibits: to collaterally attack the Tribunal's determination that India consented to arbitration. The United States has a treaty obligation to "recognize arbitral awards" governed by the Convention "as binding and enforce them." N.Y. Convention, art. III. Congress has made clear that the New York Convention "shall be enforced in United States courts." 9 U.S.C. § 201. The FAA—which implements the Convention in the United States—thus directs courts to "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. And the Convention provides only limited grounds for refusing to confirm an arbitration award governed by the Convention, *see* N.Y. Convention, art. V—none of which India has invoked in this motion.

The FAA thus "affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012). Courts must "give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). That is equally true of an arbitral tribunal's decisions on issue of "arbitrability,"

[4] *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, United Nations (last visited September 14, 2021) https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (listing India and United States as parties to the Convention).

so long as the parties have agreed to "assign[] the arbitrability determinations to an arbitrator." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021). In those circumstances, a court "'possesses no power to decide the arbitrability issue,' even if it thinks the argument for arbitrability is 'wholly groundless.'" *Id*. (citation omitted).

India seeks to avoid these clear limitations by framing its challenge to the Quantum Award as an argument that this Court lacks subject-matter jurisdiction under the FSIA. India's theory is that the Petitioners conducted only "pre-investment" activity and therefore were not investors protected by the Treaty. ECF No. 15-1 at 18 ("Br."). But this argument is not properly before the Court—and the Court need not decide it—because the "arbitrability of a dispute is not a jurisdictional question under the FSIA." *Stileks*, 985 F.3d at 878. India thus has no more authority under the FSIA to collaterally attack an arbitration tribunal's determination of arbitrability than it has under the FAA and the New York Convention.

The FSIA grants district courts jurisdiction over any civil action against a foreign state for which the state is not entitled to immunity under the FSIA. 28 U.S.C. § 1330(a); *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1101 (D.C. Cir. 2019). Here, India is not entitled to immunity based on two, specifically enumerated FSIA exceptions. *Maalouf*, 923 F.3d at 1101. Petitioners need only prevail under either one to defeat India's motion to dismiss. And here, binding D.C. Circuit precedent makes clear that *two* exceptions apply.

First, under the FSIA's waiver exception, a foreign state is subject to federal court jurisdiction in any case in which it "has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Because the New York Convention expressly contemplates enforcement of arbitral awards against contracting states in the courts of other contracting states, including the United States, India's ratification of the Convention "waive[d] its immunity from arbitration-enforcement actions in other signatory states." *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir.

2019) (per curiam). To prevail in its motion, therefore, India must persuade this Court that *Tatneft* is both *non-binding* and *not correct*. But *Tatneft* is binding on this Court, its holding is well supported and directly on point, and it leaves no doubt that the waiver exception creates jurisdiction here.

Second, consistent with the New York Convention, under the FSIA's arbitration exception, a foreign state is expressly subject to federal court jurisdiction in an action "to confirm an award made pursuant to . . . an agreement to arbitrate" that is "made by the foreign state with or for the benefit of a private party." 28 U.S.C. § 1605(a)(6). The Petition to enforce the Quantum Award against India falls squarely within that exception because India agreed to arbitrate disputes arising under the Treaty with private investors like Petitioners. *See* ECF No. 1-8, arts. 8, 9. The Tribunal already recognized India's consent to arbitration, and the D.C. Circuit made clear in *Stileks* that this Court "possesses no power" to revisit that determination. 985 F.3d at 878. *Stileks* thus forecloses any dispute that this Court also has jurisdiction under the arbitration exception.

I. India Waived Its Immunity To Enforcement Of Arbitration Awards In Federal Courts By Signing The New York Convention.

Under the FSIA's waiver exception, a foreign state is subject to jurisdiction in any case in which it "has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Because the New York Convention expressly contemplates enforcement of arbitration enforcement actions in the courts of other signatories, settled precedent makes clear that India's signing of the Convention necessarily waived its immunity from such enforcement in U.S. court. And since that waiver is based on India's consent to *enforcement* in the *New York Convention*, jurisdiction in no way depends on whether India consented to *arbitration* in its *Treaty* with Mauritius.

India's waiver here is a waiver "by implication." 28 U.S.C. § 1605(a)(1). To waive immunity by implication, a foreign state need only "indicat[e] its amenability to suit" in U.S. court.

Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994). Waiver may be implied where the state: (a) demonstrates "a subjective intent to waive immunity"; (b) "take[s] an act that objectively can be interpreted as exhibiting an intent to waive immunity"; or (c) "take[s] acts that forfeit its right to immunity, irrespective of whether it has intended to do so." *Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 202 (2d Cir. 1999).

Based on these principles, it is well settled that "by signing the New York Convention" a foreign state "contemplate[s] arbitration-enforcement actions in other signatory countries" and therefore "waives its immunity from arbitration-enforcement actions in other signatory states." *Tatneft*, 771 F. App'x at 10. Indeed, *Tatneft* broke no new ground. The D.C. Circuit had already observed, in a case that did not involve a signatory state, that "when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states." *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999) (quoting *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir. 1993)). The Second Circuit had adopted the same position, *Seetransport Wiking*, 989 F.2d at 578–79 (state "implicitly waive[s] any sovereign immunity defense" when it "becomes a signatory to th[at] Convention"), and so had a district court in this district, *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 189 (D.D.C. 2016) (holding that Kazakhstan had impliedly waived immunity to enforcement actions by signing the New York Convention). These decisions demolish India's outdated assertion that the D.C. Circuit limits implied waiver to "three" situations not applicable here, see Br. at 30.[5]

[5] *Ivanenko v. Yanukovich*, 995 F.3d 232 (D.C. Cir. 2021), is not to the contrary. Br. at 30. The D.C. Circuit did not purport to overrule *Creighton*, which it cited favorably, *id*. at 240, or *Tatneft*, which it never mentioned. Nor did the panel have any occasion to consider whether signing an

Tatneft and *Creighton* should be the end of the story. India—like the Ukraine in *Tatneft*—is a party to the New York Convention. *See supra* 13 n.4. So under settled D.C. Circuit precedent it has waived immunity to enforcement proceedings under that Convention.

India's main response is to attempt to frame *Tatneft*'s central holding as "*dicta*." Br. at 32. But the Ukraine's signing of the New York Convention was the exclusive and dispositive basis for *Tatneft*'s ultimate conclusion that the Ukraine was subject to jurisdiction under the FSIA. India also quotes the D.C. Circuit's recent decision in *Process & Industrial Developments Limited v. Federal Republic of Nigeria*, 962 F.3d 576 (D.C. Cir. 2020), as holding that *Tatneft* "'does not bind' this Court" because it was "'unpublished.'" Br. at 32. But that is not what *Process & Industrial Developments* held. The full quote—which India misleadingly truncates—states only that *Tatneft*, like all unpublished decisions, "does not bind *future panels*" of the D.C. Circuit. 962 F.3d at 584 (emphasis added). *This Court*, by contrast, is duty-bound to follow the D.C. Circuit's command, including its unpublished decisions. The D.C. Circuit has provided by rule that unpublished decisions that postdate January 1, 2002 "may be cited as precedent" in this Circuit. D.C. Cir. R. 32.1(b)(1)(B). And the very case that India cites for the proposition that *Tatneft* is not binding—*In re Grant*, 635 F.3d 1227 (D.C. Cir. 2011)—confirms that such decisions have the same precedential value that "the Supreme Court grants to its own . . . summary affirmances," *id*. at 1232,

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arbitration enforcement convention like the New York Convention waives immunity from arbitration enforcement, because the case did not involve arbitration (let alone the New York Convention). Instead, the panel held only that the Ukraine's bilateral investment treaty with the United States did not waive its sovereign immunity from suit in U.S. courts because the treaty merely obligated each signatory to waive its sovereign immunity *in its own courts*, not to consent to suit in the courts of the other. *See id.* ("[A]n individual or company may resolve an investment dispute involving a signatory nation in 'the courts or administrative tribunals of *the Party that is a party to the dispute*.'" (emphasis added) (citation omitted)).

which are binding on "lower courts," *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975). Indeed, *Process & Industrial Developments* did not question or purport to overrule *Tatneft*—it merely remanded to this Court, 962 F.3d at 586, which ultimately followed *Tatneft*. *Process & Industrial Developments Limited v. Federal Republic of Nigeria*, 506 F. Supp. 3d 1, 6–11 (D.D.C. 2020). Whether or not *Tatneft* is controlling on appeal, *this Court* clearly is bound to follow it.

In any event, *Tatneft* has "persuasive value aside from any precedential value or lack thereof," *United States v. Bikundi*, 73 F. Supp. 3d 51, 55 n.1 (D.D.C. 2014), and none of India's stated grounds for challenging *Tatneft* provides any persuasive grounds for this Court to depart from the D.C. Circuit's reasoned judgment.

India's principal quarrel with *Tatneft* is that the Convention "does not . . . mention sovereign immunity." Br. at 30. But the FSIA is clear that a waiver of sovereign immunity need not be "explicit[]," and a waiver "by implication" will suffice. 28 U.S.C. § 1605(a)(1). Unsurprisingly, then, India does not identify a single case in which a court held that a sovereign that agreed to the New York Convention *did not* waive sovereign immunity by doing so. Instead, India detours through *FAA v. Cooper*, 566 U.S. 284 (2012), a case addressing the sovereign immunity of the *federal government*—not foreign states. But principles of federal sovereign immunity have no bearing on this case because it is "well established" that a waiver of the federal government's immunity—quite unlike FSIA immunity as stated clear in § 1605(a)(1)—"*cannot be implied*." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (citation omitted) (emphasis added).

India also claims that the New York Convention's "text," "context," and "purpose" do not evince any intent to waive sovereign immunity. Br. at 31. But that is plainly wrong. The Convention "specifically declares that it 'shall apply 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'" and "further provides that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them.'" *Process & Indus. Devs. Ltd.*, 506 F. Supp. 3d at 8 (quoting *Seetransport Wiking*, 989 F.2d at 578). "[N]o state could sign such a document without contemplating that it would be subject to actions for enforcement of arbitral awards in the courts of other Convention signatories, including the U.S." *Id.* Indeed, the very "goal of the Convention" is to "promote the enforcement of arbitral agreements . . . so as to facilitate international business transactions" and the related investments in foreign economies. *David L. Threkeld & Co. Inc. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 250 (2d Cir. 1991). The Convention would stand as a barrier rather than stimulant for international commerce if, as India suggests, "states could avail themselves of the Convention's benefits" in attracting foreign investment "then assert immunity from award-enforcement actions that the Convention expressly contemplates." *Process & Indus. Devs.*, 506 F. Supp. 3d at 9.[6]

Finally, India's waiver of immunity in no way depends, as India argues, on whether it "agree[d] to arbitrate" the underlying dispute. Br. at 32. India's waiver is not tethered to any specific, individual disputes. Rather, India, like all signatories, waived sovereign immunity when it "bec[ame] a signatory to the Convention," *Creighton*, 181 F.3d at 123—"by becoming a party," *Blue Ridge Investments, LLC v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013). Ukraine's waiver in *Tatneft*, for instance, was based on its consent to "enforcement" under the New York

[6] Neither of the authorities on the New York Convention that India cites provides any basis for a contrary conclusion. The treatise India cites merely states that the Convention does not *expressly* establish "specific rules . . . regarding immunity." 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). But again, the waiver here is by implication. And the law review article India cites offers no authority or analysis for its conclusory statement that the Convention "does nothing to lift a sovereign's immunity from suit." W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. Ill. L. Rev. 67, 77 & n.49 (2014).

Convention, 771 F. App'x at 10—not, as India suggests, its "agreement to arbitrate" the specific dispute, Br. at 32.

In fact, Ukraine expressly argued that it "did not agree to arbitrate th[e] dispute"—and that "[n]o agreement to arbitrate" the claims of two of the companies involved was ever "formed"—for precisely the same reason that India advances here: because the dispute purportedly did not involve "an investment" within the meaning of the applicable Treaty. Br. for Appellant at 43, 46, *Tatneft*, No. 18-7057, Doc. ID 1748825 (D.C. Cir. Sept. 4, 2018) (heading altered; bold omitted). But the D.C. Circuit found jurisdiction anyway without even addressing the Treaty's definition of an investment or the existence or validity of any arbitration agreement in doing so. If, as India claims, a court needed to find that the parties had entered an agreement to arbitrate for the waiver exception to apply, the D.C. Circuit could *not* have taken jurisdiction as it did without considering the parties' arbitration agreement at all—particularly where the existence of such an agreement was disputed in the parties' briefing.

Instead, as the D.C. Circuit has recognized, jurisdiction over a foreign state can be predicated in an enforcement proceeding solely on the respondent having signed the New York Convention. So, too, here. Because India signed the New York Convention, it "must have contemplated arbitration-enforcement actions in other signatory countries," and therefore implicitly waived its sovereign immunity. *Tatneft*, 771 F. App'x at 10.

Because India has ratified the New York Convention, it has waived its immunity in actions seeking to enforce awards under that Convention. On that basis alone, India's motion to dismiss should be denied.

II. This Court Also Has Jurisdiction Under The FSIA's Arbitration Exception.

A. The FSIA Expressly Allows Courts To Take Jurisdiction Over Foreign States In Proceedings To Confirm Arbitral Awards.

This Court also has jurisdiction under the FSIA's arbitration exception, which permits a proceeding against a foreign state to "confirm an award" made pursuant to an agreement "by the foreign state," "with or for the benefit of a private party," to "submit to arbitration," if the "award is . . . governed by a treaty," such as the New York Convention, that is "in force for the United States" and that "call[s] for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

Each of these elements is satisfied here. Article 8 of the Treaty provides that "[a]ny dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement" may be submitted "to an *ad hoc* tribunal set up in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976." ECF No. 1-8 art. 8 ("UNCITRAL Rules"). The D.C. Circuit construed a similar provision in a U.S.-Ecuador bilateral investment treaty to be a "standing offer to all potential U.S. investors to arbitrate investment disputes." *Chevron Corp. v. Ecuador*, 795 F.3d 200, 206 (D.C. Cir. 2015); *see also Stileks*, 985 F.3d at 877–79. Petitioners here accepted that offer "in the manner required by the treaty," *see id.*, when they sought to resolve the dispute with India amicably for over six months, and, when that failed, submitted the dispute to arbitration under the UNCITRAL Rules. ECF No. 1 ¶¶ 36–40; ECF No. 1-8, art. 8.

The Tribunal's Quantum Award was made pursuant to India and the Petitioners' agreement to arbitrate their dispute, *see* ECF No. 1-4 ¶ 22, and this proceeding is one to confirm that Quantum Award, *see* ECF No. 1 ¶ 1; *see also* 28 U.S.C. § 1605(a)(6). The Quantum Award is governed by

the New York Convention because it arises out of a commercial legal relationship—*i.e.*, Petitioners' investments in India—that is not entirely between citizens of the United States. *See* 9 U.S.C. § 202. And the New York Convention is a treaty in force in the United States that calls for the recognition and enforcement of arbitral awards. *See id.* § 201.

The FSIA's arbitration exception therefore applies, and India is not immune from this action. This Court should deny India's motion to dismiss for lack of jurisdiction.

B. This Court Lacks Jurisdiction Over India's Attempt To Relitigate Arbitrability.

India cannot evade the clear terms of the FSIA's arbitration exception by arguing that it did not agree to arbitrate its dispute with Petitioners and asking the Court to review and reverse the Tribunal's conclusion on arbitrability. Br. at 16–29. As an initial matter, the Tribunal was plainly correct. As the Tribunal and every court to have considered the issue has concluded, the Treaty plainly applied on its terms to require arbitration over India's expropriation of Petitioners' shares of tens of millions of dollars invested in Devas. *See supra* 7–8, 10–11; *see also* ECF No. 1-6 ¶¶ 171–82, 192–210, 411 (rejecting argument that Petitioners' engaged only in "pre-investment activities" in India and finding that Petitioners were indirect owners of an "investment with significant value" that India wrongfully expropriated);[7] *id.* ¶¶ 206, 209 (rejecting argument that there

[7] The pre-investment cases on which India relies are thus completely irrelevant, Br. at 19–20, as the Tribunal correctly found when it found India's reliance on them to be misplaced. This case does not involve a situation where a party hoped to contract with the government but was disappointed or sought permission to operate a business in the host country but was denied the opportunity. *Mihaly v. Sri Lanka* involved a claimant who signed a non-binding letter of intent with Sri Lanka to build a power plant in the future. No. ARB/00/02, Award ¶¶ 40–42, 45, 59 (ICSID 2002). Here, Devas formed a contract that was binding on both parties for years prior the expropriation and which Antrix acknowledged was fully operative in February 2006, when it confirmed it had coordinated the international orbital slots needed for the satellites. *See supra* 4. *Lemire v. Ukraine* supports Petitioners' arguments—there, the tribunal held that a shareholder in a Ukrainian radio company had qualifying investments that conferred jurisdiction on the tribunal even though Ukraine had illegally refused give the company broadcast frequencies and licenses.

was no investment because the Devas multimedia system was not completed and the correct licenses had not yet been obtained and noting that such arguments would go to the quantum of damages, not whether an investment was made); *id.* ¶¶ 205–06, 411–17, 425, 468–70, 501(f) (finding that India's unlawful actions rendered Petitioners' shares in Devas worthless).

In any event, India's request that this Court *re*-determine that issue is plainly improper. The parties delegated issues of arbitrability to the arbitrators, and the Tribunal considered and rejected India's "primary contention" that "this case 'only involves pre-investment activities that are outside the scope of protection afforded by the [Treaty].'" ECF No. 1-6 ¶ 171; *see also id.* ¶ 171 n.206 (collecting India's supporting authorities, including *Mihaly* and *Nagel*, which India now relies on in this motion). The Tribunal expressly rejected India's position, concluding that "not only were the [Petitioners] qualified investors under Article 1(1)(b) of the Treaty but that they also made qualifying investments under Article 1(1)(a) of the Treaty." *Id.* ¶ 210; *see also id.* ¶ 501(a) (holding "[u]nanimously" that the Petitioners' "claims relate to an 'investment' protected under the Treaty").

Because the parties delegated arbitrability to the Tribunal and because the Tribunal decided arbitrability, this Court therefore has no jurisdiction to re-decide it. It is well-settled that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,'" *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010), including "whether [the] parties have a valid arbitration agreement," *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013); *Henry Schein Inc. v. Archer &*

No. ARB/06/18, Decision on Jurisdiction and Liability ¶¶ 89–90 (ICSID 2010). Finally, the parties in *Nagel v. Czech Republic* entered a "Cooperation Agreement" in which the parties agreed only to work together in the hope of obtaining a license, which never occurred. No. 049/2002, Award ¶¶ 326, 328 (SCC 2003). This is far from "strikingly analogous" to this case, Br. at 21, in which Petitioners owned shares in a domestic corporation, invested millions of dollars into that corporation, and held an indirect ownership right in a contract that included valuable, non-preemptible leases of spectrum on Indian governmental satellites.

White Sales, Inc., 139 S. Ct. 524, 29 (2018). Where parties have so agreed, a court "must defer to [the] arbitrator's arbitrability decision." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1995). Indeed, when, as here, the "parties' contract" "delegates the arbitrability question" to the arbitrators, a court has "*no power* to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 528–29 (emphasis added). "That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id*. at 529.

And the D.C. Circuit has confirmed that the same rule applies in the foreign sovereign context. *Stileks*, 985 F.3d at 878–79 (applying *Henry Schein* in the context of a petition to confirm an arbitration award against Moldova under the New York Convention). As the Supreme Court has explained, "a treaty is a contract, though between nations" and "[i]ts interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014); *accord Stileks*, 985 F.3d at 878–79. "[I]n the absence of explicit language in a treaty demonstrating that the parties intended a different delegation of authority," a federal court's "ordinary interpretive framework applies." *BG Grp.*, 572 U.S. at 39.

Here, the parties unmistakably and expressly agreed to delegate the question of arbitrability to the Tribunal. India made a standing offer to submit investment disputes to a tribunal set up in accordance with the UNCITRAL Rules. ECF No. 1-8, art. 8(2)(d). Article 21 of the applicable 1976 version of the UNCITRAL Rules 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." UNCITRAL Rules, art. 21(1) (1976). Moreover, the Treaty makes clear that the parties were not to collaterally attack the validity of an arbitral award, stating that the award "shall be binding on the parties to the dispute." ECF No. 1-8, art. 8(2)(d)(iii).

The D.C. Circuit in *Stileks* confirmed that an agreement to arbitrate under the UNCITRAL Rules based on "an international treaty" is "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Stileks*, 985 F.3d at 878–79 (quoting *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1077 (9th Cir. 2013)). With that agreement, courts "*must* accept the arbitral tribunal's determination" that a dispute was arbitrable. *Id.* at 879 (emphasis added). Consequently, where parties arbitrate pursuant to the UNCITRAL Rules delegating arbitrability to the arbitrators, courts have "no authority to delve into the merits of [a foreign state's jurisdictional] argument." *Id.*

Similarly, in *Chevron*, the D.C. Circuit held that the district court "did not need to reach the question of whether Chevron's lawsuits fell within the terms of submission to arbitration because the Treaty allows the arbitration tribunal to make that determination." 795 F.3d at 207. The court came to its conclusion because the treaty in that case, like the one here, permitted arbitration under the UNCITRAL Rules which in turn delegated to the arbitral tribunal questions of arbitrability. Consequently, in that case, as in *Stileks*, the foreign state "therefore consented to allow the arbitral tribunal to decide issues of arbitrability," and the district court lacked authority to reconsider the tribunal's determination. *Id*.[8]

[8] The D.C. Circuit explicitly made clear that, for the arbitration-exception under the FSIA to apply, a court need not determine that a petitioner's claims fell within the scope of the Treaty's standing offer to arbitrate. *Chevron*, 795 F.3d at 205. Instead, the FSIA's jurisdictional requirement is satisfied when a petitioner makes a "prima facie showing that there was an arbitration agreement by producing the [Treaty] and the notice of arbitration." *Id*. When a treaty contains a standing offer to arbitrate and an investor accepts that offer "in the manner required by the treaty" (*e.g.*, by filing a notice of arbitration) as Petitioners did here, a district court has jurisdiction under the FSIA. *Id*. at 206.

India's attempts to distinguish *Stileks* and *Chevron* are unavailing. When the parties have agreed to arbitrate the jurisdiction of the arbitral tribunal—as India concedes, Br. at 23 (acknowledging that the UNCITRAL Rules delegate questions of arbitrability to the arbitrators)—they cannot raise (as India does) jurisdictional challenges to the arbitration in court by framing them as arguments that the claims in the arbitration were beyond the scope of an investment treaty. That is "unadorned question-begging" and the two arguments "are different ways of framing the same question." *Stileks*, 985 F.3d at 879. Because the parties agreed to have the Tribunal determine its own jurisdiction under the Treaty, "it is up to the tribunal to determine what the treaty means." *See id.* The Tribunal did so here, and this Court thus has "no authority to delve into" India's claims that Petitioners' claims were beyond the scope of the Treaty. *See id.*

India nonetheless argues that under authority from another circuit—*DDK Hotels LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308 (2d Cir. 2021)—courts must look beyond the arbitration agreement—to its "context"—to "understan[d] the parties' intent" with respect to who will decide arbitrability. Br. at 24. But *DDK* held nothing of the sort. The "context" that the Second Circuit found relevant was the language of *other portions of the contract*, *id.* at 319–20, and not, as India attempts to introduce here, evidence entirely outside the contract. In any event, the Supreme Court and D.C. Circuit both have squarely foreclosed the notion that a court must look *beyond* the contract to determine whether the incorporation of the UNCITRAL Rules submits arbitrability to the arbitrator. *Henry Schein*, 139 S. Ct. at 529 (incorporation of AAA Rules in contract assigns arbitrability to the arbitrator); *Chevron*, 795 F.3d at 207 (same as to UNCITRAL Rules); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 760 F. App'x 1, 3 (D.C. Cir. 2019) (same as to ICSID Rules).

Basic principles of contract and treaty interpretation further foreclose any recourse to extrinsic evidence to overcome the clear and unmistakable *textual* commitment to submit questions

of arbitrability to the Tribunal. "Where the language of a contract is wholly unambiguous," the court "will not consider extrinsic evidence of the parties' intent." *Vulcan Arbor Hill Corp. v. Reich*, 81 F.3d 1110, 1117 (D.C. Cir. 1996). Instead, the court "finds the intention of the parties in the language used to express their agreement." *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 204 (D.C. Cir. 1974). "Outside evidence may not be brought in to create an ambiguity where the language is clear." *HRE, Inc. v. United States*, 142 F.3d 1274, 1276 (Fed. Cir. 1998) (citation omitted). The same applies to treaty interpretation. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin v. Texas*, 552 U.S. 491, 506 (2008). "[T]reaties cannot be rewritten or expanded beyond their clear terms," even "to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943).

It is therefore irrelevant what Indian courts or Mauritian courts or any other foreign court has said about the deference due to an arbitrator's decision about arbitrability. The courts of *this* nation must and *do* defer to an arbitrator's decisions about arbitrability when that issue has been clearly delegated to the arbitrator by, for example, incorporating the UNCITRAL Rules. And that is why the D.C. Circuit rejected Ecuador's attempt to relitigate arbitrability in *Chevron*, 795 F.3d at 207, notwithstanding the decision of a Dutch court in a related proceeding that India invokes here. Br. at 26 (discussing *Republic of Ecuador/Chevron Corp.*, HR, Sept 26, 2014, First Chamber No. 12/04679 (EV/LZ) (Neth.) ¶ 4.2).

In any event, India's characterization of foreign law is simply incorrect. Indian courts have a "pro-enforcement bias" with respect to arbitral awards and do not allow freestanding re-examination of arbitral awards, instead allowing only challenges that "come[] clearly" under the limited exceptions laid out in the New York Convention. Dutt Decl. ¶ 21 (quoting *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Serv. Ltd. and Another*, SCC OnLine SC 572 (2021)). When a

party seeking to enforce an award "has gone through a challenge" to the "award in the country of its origin" that party "must then be able to get such award recognised and enforced in India as soon as possible." *Id.* Ex. 20 (quoting *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, 11 SCC 1 (2020), Dutt Decl. Ex. 20 ¶ 43).

In short, the Treaty pursuant to which the parties arbitrated delegated arbitrability to the Tribunal, and the Tribunal concluded it had jurisdiction over the case. Clearly established Supreme Court and D.C. Circuit case law prohibits this Court from reassessing that determination here. India's motion should be denied.

CONCLUSION

This Court should deny India's motion to dismiss and should enter judgment on the Quantum Award in Petitioners' favor in the amount and currency specified in the Quantum Award.

Dated: September 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 17, 2021, I caused the foregoing Petitioners' Opposition to Respondent's Motion to Dismiss to be filed with the Clerk for the U.S. District Court for the District of Columbia through the ECF system. Participants in the case who are registered ECF users will be served through the ECF system, as identified by the Notice of Electronic Filing.

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