UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF CHRISTOPHER BOOG

I, Dr. Christopher Boog, FCIArb, FSIArb, hereby testify and declare as follows:

1. I am a Swiss attorney-at-law and partner at the law firm Schellenberg Wittmer Ltd, Löwenstrasse 19, PO Box 2201, 8021 Zürich, Switzerland, where I am a Vice-Chair of the International Arbitration Practice Group.

2. I am counsel for the Republic of India ("India") in proceedings currently pending in the Federal Supreme Court of Switzerland. In those proceedings, India seeks to annul the arbitration awards between Deutsche Telekom and India that underlies the enforcement action before this District Court. As described further below, these proceedings are referred to in Switzerland as "revision proceedings."

3. I submit this Declaration in support of India's motion to stay the instant case pending the outcome of the Swiss revision proceeding to annul the awards at issue here.

4. In this Declaration, I explain the key aspects of the revision proceeding currently pending in the Swiss Federal Supreme Court, registered as case 4A_184/2022, as

well as the anticipated next steps in that proceeding.

5. On May 2, 2022, Schellenberg Wittmer submitted on behalf of India an application for revision of the Interim Award (ECF 1-7) and Final Award (ECF 1-4) (collectively, the "Awards") issued in the arbitration between Deutsche Telekom and India, before the Federal Supreme Court of Switzerland. The Final Award is the subject of Deutsche Telekom's enforcement Petition before this Court (ECF 1). A copy of the revision application dated May 2, 2022 is attached to this Declaration as Exhibit 1 (the "Revision App.").

6. Switzerland was the seat of the arbitration in the proceedings between Deutsche Telekom and India that resulted in the Awards. *See* Final Award ¶ 65 (ECF 1-4). The Awards therefore are subject to Swiss arbitration law, specifically to the provisions of Chapter 12 of the Swiss Federal Act on Private International Law Act dated December 18, 1987 (the "PILA"). Specifically, Articles 176 to 194 of the PILA apply to all arbitrations where the seat of the arbitral tribunal is in Switzerland if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile, its habitual residence, nor its seat in Switzerland. *See* PILA, art. 176(1). The PILA is attached to this Declaration as Exhibit 2.

7. Under Article 190a(1) of the PILA, a party may request the revision of an arbitral award seated in Switzerland in the event of discovery of significant facts or conclusive evidence which could not have been submitted in the arbitral proceedings. *See* PILA, art. 190a(1)(a). The request for revision must be filed with the Federal Supreme Court of Switzerland within 90 days of the date the ground for revision was discovered. *Id.*, arts. 190a(2), 191.

8. The procedure before the Federal Supreme Court of Switzerland is governed by the Swiss Federal Supreme Court Act (the "SCA"). According to the SCA, any statutory or

judicial deadlines are extended for specific court holidays, namely from the seventh day before Easter until the seventh day after Easter (included), from July 15 to August 15 (included), and from December 18 to January 2 (included). *See* SCA, art. 46(1). In cases where the last day of a deadline ends on a Saturday, Sunday, or a bank holiday as per Swiss federal or cantonal law, the deadline is extended until the first following working day. *See id.*, art. 45(1). An application for revision of an arbitral award may be filed in French, German, Italian or English. *See id.*, arts. 77(2bis), 119(2). A translation of the relevant excerpt of the SCA is attached to this Declaration as Exhibit 3.[1]

9. If the Federal Supreme Court of Switzerland grants India's request for revision, the underlying arbitral awards will be annulled and remanded to the original arbitral tribunal, or if that is not possible, to a new arbitral tribunal, for a new decision. *See id.*, art. 119a(3). Accordingly, under Swiss law, the legal effect of a revision proceeding is equivalent to setting aside or annulling the award.

10. In the present case, upon the issuance of the Indian Supreme Court Judgment on January 17, 2022, in the case of *Devas Multimedia Private Ltd. v. Antrix Corporation Ltd. & Anr.* (Civil Appeal No. 5766 & No. 5906), India became aware of material facts and evidence conclusively establishing that Devas Multimedia Private Limited ("Devas"), in which Deutsche Telekom had an indirect shareholding interest, had been incorporated for a fraudulent and unlawful purpose and had obtained the Agreement for the Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft of January 28, 2005 (the "Devas-Antrix Agreement") in a fraudulent manner and, as I understand, in violation of Indian law. *See* Judgment, *Devas Multimedia Private Ltd. v. Antrix Corporation Ltd. & Anr.*, [2022] Civil

[1] Also included with this Declaration is an unofficial translation of each exhibit not originally produced in English.

Appeal No. 5766 & No. 5906 (India) ("Indian Sup. Ct. Judgment") ¶ 12.8. The Indian Supreme Court Judgment further concluded that Devas's shareholders, including Deutsche Telekom Asia Plc. Ltd., which is wholly owned and controlled by Deutsche Telekom, bore responsibility for Devas's fraudulent scheme. *See id.* ¶¶ 12.8(vii), (viii), (x), (xiv), (xv). A copy of the Indian Supreme Court Judgment is attached to this Declaration as Exhibit 4.

11. Under Swiss law, India therefore had 90 days (plus the Swiss courts' 15-day recess over the Easter period) after receiving notice of the Supreme Court Judgment—until May 2, 2022 (accounting for the court recess period)—to submit a revision application before the Swiss Federal Supreme Court.

12. Below, I briefly describe the grounds for revision presented in India's application, the applicable standard of review under Swiss law, and the legal effect of revision under Swiss law. I also describe the anticipated procedure for the revision proceeding and its expected duration.

I. India's Application for Revision

13. India's revision application is based upon the new material facts and evidence of fraud affirmed by the Indian Supreme Court's final Judgment dated January 17, 2022. The Indian Supreme Court—after hearing arguments from both parties and examining evidence related to Devas and its shareholders' fraud that had been recently uncovered during the winding-up proceedings and ongoing criminal investigations against Devas— considered that the winding-up of Devas was justified as per the relevant provisions of Indian law. Indian Sup. Ct. Judgment ¶¶ 12.8-12.10, 14.

14. I understand that, in its final Judgment, the Indian Supreme Court, the first judicial body to hear the issues regarding Devas's fraud, concluded that: (i) the Devas-Antrix

Agreement was procured in a fraudulent manner and concealed from the Government and the public of India; (ii) Devas fraudulently sought approval from the Indian Foreign Investigation Promotion Board (the "FIPB") to avoid scrutiny by the Department of Space of India; (iii) Devas conducted its affairs contrary to its representation under the FIPB approvals; (iv) Devas failed to obtain the necessary licenses and violated the regulatory framework in India; and (v) Devas could not provide the services it contracted to provide under the Devas-Antrix Agreement. *See id.* ¶ 12.8. The Indian Supreme Court decision further emphasized the responsibility of Devas's shareholders in this fraudulent scheme, highlighting that the shareholders of Devas could not feign ignorance and benefit from the fraudulent scheme put in place in collusion with government officials. *Id.* ¶¶ 12.8(xiv)-(xv).

15. As noted, the Indian Supreme Court Judgment concluded that Deutsche Telekom's purported investment in Devas was tainted by the illegality and fraud. *See id.* ¶¶ 12.8(x)-(xi). Thus, as I understand, with the issuance of the Indian Supreme Court Judgment, it was conclusively established that Devas had in fact been created for a fraudulent and unlawful purpose, and the investment purportedly made by Deutsche Telekom (namely its indirect acquisition of shares in Devas) had not been made "in accordance with the national laws" of the Republic of India, as required under Article 1(b) of the 1995 Agreement Between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments (the "Germany-India BIT") (ECF 1-5).

16. I understand that the Indian Supreme Court was the first judicial body to have rendered a determination on the fraudulent scheme carried out by Devas and its shareholders. Indeed, as I understand, the Indian Supreme Court Judgment was preceded by two orders issued by quasi-judicial bodies, namely the order of National Company Law Tribunal of India

(the "NCLT"), dated May 25, 2021, and the order of the National Company Law Appellate Tribunal (the "NCLAT"), dated September 8, 2021. *See* NCLT Order (ECF 12-11); NCLAT Order (ECF 12-15).

II. Legal Effect of Revision Under Swiss Law

17. Under Swiss law, revision of an arbitral award is equivalent in effect to set-aside or annulment proceedings of the same award. Set-aside applications must be brought within 30 days after the arbitral award was notified to the parties, while revision applications may be brought later under the specific conditions noted above. In either case, a successful application results in the arbitral award being declared void and unenforceable as a matter of Swiss law. As described in Article 119a(3) of the SCA, "[i]f the Federal Supreme Court admits the application for revision, it annuls the award and remands the case back to the arbitral tribunal for a new decision, or makes the necessary inquiries." SCA, art. 119a(3) (emphasis added).

18. The Federal Supreme Court of Switzerland has confirmed that revision is a so-called cassatory remedy, and that it will not itself decide the case anew. *See* Swiss Federal Supreme Court, Decision 118 II 199, dated Mar. 11, 1992 ¶ 3 (attached to this Declaration as Exhibit 5); Swiss Federal Supreme Court, Decision 4P.117/2003 dated Oct. 16, 2003 ¶ 2.2 (attached to this declaration as Exhibit 6). If a request for revision is granted, the Federal Supreme Court's only option is to annul the award and remand the case to the arbitral tribunal. *See* B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* ¶ 1979 (4th ed. 2021) (excerpt attached to this Declaration as Exhibit 7). The one exception to that rule is that the Federal Supreme Court may remove an arbitrator if it grants the revision application on the basis that the arbitrator lacked independence or impartiality. *See* Swiss

Federal Supreme Court, Decision 4A_318/202, dated Dec. 22, 2020 (attached to this Declaration as Exhibit 8). That exception is not at issue in the present case.

III. Grounds for Revision and Standard of Review Under Swiss Law

19. As noted above, under Swiss law, a party may request the revision of an arbitral award if it has subsequently become aware of significant facts or uncovered conclusive evidence which it could not have submitted in the earlier arbitral proceedings despite exercising due diligence. PILA, art. 190a(1)(a). Article 190a(1)(a) of PILA makes a distinction between a revision request based on "significant facts" or "conclusive evidence."

20. Pursuant to the Swiss Federal Supreme Court's case law, an application for revision based on the discovery of significant facts will be granted if the Swiss court finds that: (1) the facts are "relevant," meaning that they may influence the factual findings underlying the arbitral award and lead to a different outcome based on a correct legal assessment; (2) these facts already existed when the arbitral award was rendered; (3) the facts were only discovered after the award was issued; and (4) despite exercising due diligence, the applicant was unable to invoke these facts in the previous arbitration proceedings. *See* Swiss Federal Supreme Court, Decision 4A_464/2021, dated Jan. 31 2022 ¶ 6.2.1 (attached to this Declaration as Exhibit 9); Swiss Federal Supreme Court, Decision 4A_422/2021, dated Oct. 14, 2021 ¶ 4.4.1 (attached to this Declaration as Exhibit 10).

21. For an application based on new conclusive evidence, the requirements are broadly the same, but case law and literature support the proposition that evidence postdating the decision whose revision is sought, but shedding light on facts predating it, may also be admissible. In particular, the Swiss Federal Supreme Court has previously allowed such genuinely new evidence to serve as grounds for revision. *See, e.g.*, Swiss Federal Supreme

Court, Decision 8F_8/2009, dated Dec. 3, 2009 (attached to this Declaration as Exhibit 11) (declaring admissible a revision application based on a medical report that was issued after the judgment at issue was rendered and which described the medical state of the applicant prior to the judgment).

22. In another case, the Swiss Supreme Court observed that a "strict limitation" of revision to facts or evidence existing prior to the decision may lead to "unsatisfactory results," particularly where new evidence serves to prove facts predating the decision. Federal Supreme Court, Decision 5A_313/2013, dated Oct. 11, 2013, cons. 4.1 (attached to this Declaration as Exhibit 12). Commentators have similarly advocated for the admissibility of genuinely new evidence for purposes of award revision, because "evidence ultimately only serves to prove a particular factual allegation." Berger & Kellerhals, *supra*, ¶ 1955 (Exhibit 7); *see also* CPra Matrimonial-Sorosen, art. 328 CPC ¶ 26 (attached to this Declaration as Exhibit 13) (explaining that there is no justification to exclude new evidence in revision proceedings if it pertains to facts predating the judgment).

23. India's application for revision meets these Swiss-law requirements. Although the Indian Supreme Court Judgment was issued after the Awards were rendered, it serves to prove facts that occurred before the Awards were rendered. *See* Interim Award (ECF 1-7) (dated Dec. 13, 2017); Final Award (ECF 1-4) (dated May 27, 2020); Indian Sup. Ct. Judgment (dated Jan. 17, 2022). The Indian Supreme Court Judgment constitutes, in and of itself, new conclusive evidence, or in the alternative, allowed India to acquire sufficiently certain knowledge of the relevant new facts that Devas was incorporated for fraudulent purposes and conducted its business in a fraudulent manner, because, as I understand, it definitively established Devas's fraud as a matter of Indian law. The complex factual

circumstances that emerged during the winding-up proceedings that culminated in the Indian Supreme Court Judgment show the magnitude of the fraudulent scheme behind Devas. On the basis of those facts, the Indian Supreme Court concluded that Devas had engaged in fraud and that the winding up of Devas was justified. Indian Sup. Ct. Judgment ¶¶ 12.8(ix)-(x).

24. The arbitral tribunal that issued the Awards did not have an opportunity to examine the facts exposed in the Indian Supreme Court Judgment, and thus was never presented with a full picture of the fraudulent scheme behind Devas. In fact, the full extent of the fraud exposed in the Indian Supreme Court Judgment was unknown to India during the arbitral proceedings, and was not presented to the arbitral tribunal. During the arbitration, India exercised due diligence by notifying the tribunal of suspicions of fraud and irregularities that arose during the initial criminal investigations of Devas, including by informing the tribunal about the Charge Sheet filed by India's Central Bureau of Investigation ("CBI"). Interim Award ¶ 115 (ECF 1-7). The tribunal stated at the time that "the CBI Charge Sheet . . . was issued in the context of an investigation commenced by the CBI in March 2015 and contains mere allegations that have not yet been tried, let alone upheld, in court." *Id.* at ¶ 119. The arbitral tribunal thus did not fully consider the merits of whether Deutsche Telekom's indirect investment in Devas had been made "in accordance with the national laws" of India, as required under the Germany-India BIT (ECF 1-5).

25. Notably, as described in the Swiss revision application, these recently emerged facts have significant relevance with regard to the arbitral tribunal's jurisdiction (or lack thereof) over Deutsche Telekom's claims, India's purported liability under the Germany-India BIT, and the quantum of damages to be awarded to Deutsche Telekom (if any at all). *See* Revision App. ¶¶ 19, 164-82. In this regard, before the Swiss Federal Supreme Court, the

applicant must merely show that the newly asserted facts or evidence could have led to a different outcome, had they been known to the arbitrators before the awards were rendered. *See* Swiss Federal Supreme Court, Decision 4P.265/1996, dated July 2, 1997, ¶ 2(a) (attached to this Declaration as Exhibit 14). The Swiss Federal Supreme Court thus limits its analysis to a hypothetical examination of whether the newly discovered facts or evidence "*might actually have been relevant to the outcome of the case*." Berger & Kellerhals, *supra*, ¶ 1958 (Exhibit 7) (emphasis added). The application need not prove that the arbitral tribunal *would* actually have decided the case differently.

26. First, with respect to jurisdiction, under Article 1(b) of the Germany-India BIT, a protected investment means "every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made." Germany-India BIT, art. 1(b) (ECF 1-5) (emphasis added). As noted above, the arbitral tribunal never ruled on the issues of illegality of Deutsche Telekom's purported investment in India under the Germany-India BIT. *See* Revision App. ¶ 171. In light of the new evidence that Deutsche Telekom's purported investment was tainted by severe illegality and fraud, and, as I understand it, therefore not made in accordance with the national laws of India, the new evidence could have led the arbitral tribunal to find that Deutsche Telekom could not avail itself of the arbitration mechanism set out in the Germany-India BIT, and that it therefore lacked jurisdiction. *See id.* ¶¶ 167-73.

27. Second, had the new evidence of fraud been available for the arbitration, it could have impacted the tribunal's decision on liability. *See* Revision App. ¶¶ 174-78. The arbitral tribunal considered that the termination of the Devas-Antrix Agreement constituted a breach of the Fair and Equitable Treatment ("FET") standard set out in the Germany-India

BIT, because the decision to terminate resulted from a "flawed process," whereby India "misled" Devas and Deutsche Telekom. Interim Award ¶¶ 336, 362-63, 376 (ECF 1-7); *see* Revision App. ¶¶ 174-76. With the benefit of the Indian Supreme Court's Judgment, the tribunal would have been aware of Devas's and Deutsche Telekom's fraudulent scheme and would have realized that, to the contrary, it was India who was misled by Devas and its shareholders. *See* Revision App. ¶ 176. Indeed, I understand that, as a result of Devas's fraudulent scheme, the Devas-Antrix Agreement was null and void under Indian law from the start, and its termination could not have breached the FET standard. Moreover, as a party complicit in the fraud, Deutsche Telekom was not entitled to avail itself of this treaty standard, as it never made a legitimate investment in India. *See id.* ¶ 178.

28. Finally, the new material facts and conclusive evidence uncovered by India also could have led to a different outcome on the quantum calculation of Deutsche Telekom's claims. *See id.* ¶¶ 179-81. On Deutsche Telekom's own case, Devas's entire value (and, by implication, the value of Deutsche Telekom's alleged investment) rested on the Devas-Antrix Agreement. Final Award ¶ 11 (ECF 1-4); *see also* Revision App. ¶ 179. However, as the Indian Supreme Court Judgment conclusively established, contrary to what Devas represented to Antrix and to what Deutsche Telekom alleged in the arbitration (*see* Final Award ¶ 94 (ECF 1-4)), Devas had never been able to perform the services it was supposed to under the Devas-Antrix Agreement, as it did not have access to the necessary technology or the necessary intellectual property rights to design critical receivers. Indian Sup. Ct. Judgment ¶¶ 12.8(iv), (vii)-(viii); *see also* Revision App. ¶ 180. The outcome of the arbitration therefore could have been different based on these new facts and evidence, given that the arbitral tribunal could have come to the conclusion, as India has argued, that the project envisaged under the Devas-

Antrix Agreement could not have been carried out, and that Devas was therefore worthless as a company whose entire value was dependent on the project envisioned under the Devas-Antrix Agreement. *See* Revision App. ¶ 180. Deutsche Telekom would therefore have been entitled to a lower compensation than what the tribunal awarded, if any at all. *Id.* ¶ 181.

IV. Anticipated Procedure and Duration of the Revision Proceeding

29. In a revision proceeding, the Swiss Federal Supreme Court takes approximately 8 to 12 months, on average, from the filing of the revision application to issue a final decision. Since India filed its revision application on May 2, 2022, the revision proceeding is expected to conclude by the second quarter of 2023. The decision rendered by the Swiss Federal Supreme Court is final, and there is no opportunity for either side to appeal.

30. After an application for revision is filed and the applicant has paid the advance on costs, the Swiss Federal Supreme Court will notify the respondent party and the arbitral tribunal, and set a deadline, which will usually be 20 to 30 days, but can be extended to about 40 to 60 days, for the respondent to respond (and for the arbitral tribunal to comment, if it so wishes). *See* SCA, art. 102(1). In complex matters of international arbitration, such as the present, once the respondent has filed its response to the revision application, the court usually allows a limited second round of written submissions to be filed within very short timelines (10 to 20 days each, non-extendable). As a rule, no hearings are held for revision proceedings and thus there will be no oral pleadings and no evidentiary hearing before the Swiss Federal Supreme Court. After the conclusion of the written submissions, the Federal Supreme Court normally renders its decision within 4 to 8 months. *See* Berger & Kellerhals, *supra*, ¶¶ 1809-1812 (Exhibit 7).

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed May 18, 2022 in Zürich, Switzerland.

Christopher Boog