No. 18-7154
Not yet scheduled for oral argument

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Process and Industrial Developments Limited,

Petitioner-Appellee,

– v –

Federal Republic of Nigeria and Ministry of Petroleum Resources of the Federal Republic of Nigeria,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 18-cv-0594 (HON. CHRISTOPHER R. COOPER)

BRIEF FOR PETITIONER-APPELLEE PROCESS AND INDUSTRIAL DEVELOPMENTS LIMITED

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

All parties, intervenors, and amici appearing in this court are listed in the Brief for Appellants.

Rulings under Review

References to the rulings at issue appear in the Brief for Appellants.

Related Cases

Apart from the District Court proceeding, this case has not been before this or any other court. Counsel for Appellee are unaware of any related cases under D.C. Circuit Rule 28(a)(1)(C). Simultaneous with the District Court case, appellee brought a proceeding in the High Court of England and Wales, Queen's Bench Division (Commercial Court), in London for permission to enforce the Final Award, which is listed for a hearing on May 21, 2019.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Process and Industrial Developments Limited ("P&ID") is an engineering and project management company organized and existing under the laws of the British Virgin Islands. P&ID has no publicly held corporate parents, affiliates, or subsidiaries.

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TABLE OF AUTHORITIES*

Cases

* Authorities on which we chiefly rely are marked with asterisks.

Statutes and Regulations

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GLOSSARY

Briefing Schedule	The District Court's October 1, 2018 Opinion and Order (JA226-30)
Brief (Br.)	Opening Brief for Respondents-Appellants (Document #17804789)
District Court	United States District Court for the District of Columbia
FAA	Federal Arbitration Act (*codified at* 9 U.S.C. § 1 *et seq.*)
FSIA	Foreign Sovereign Immunities Act (*codified in pertinent part at* 28 U.S.C. § 1605)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38
Nigeria	The Federal Republic of Nigeria and the Ministry of Petroleum Resources of the Federal Republic of Nigeria (Appellants-Respondents)
P&ID	Process and Industrial Developments Limited (Appellee-Petitioner)
TermoRio	*TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, No. 1:03-cv-02587, 421 F. Supp. 2d 87 (D.D.C. 2006), *aff'd sub nom. TermoRio SA E.S.P. v. Electranta S.P.*, No. 06-7058, 487 F.3d 928 (D.C. Cir. 2007).

JURISDICTIONAL STATEMENT

For the reasons discussed in Point I below, and as explained previously in P&ID's Motion to Dismiss, this Court lacks jurisdiction over Nigeria's appeal from the Briefing Schedule. (Document No. 1762525.) Nigeria's only stated basis for jurisdiction—28 U.S.C. § 1291, as construed by the collateral order doctrine—does not apply because the District Court did not conclusively deny a colorable claim of immunity. *See Will v. Hallock*, 546 U.S. 345, 349, 353 (2006).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

P&ID filed a Petition to confirm an arbitration award under the FAA. Supported by evidence and a legal brief, P&ID explained that the District Court had subject-matter jurisdiction because the FSIA's arbitration and waiver exceptions to sovereign immunity applied, and that the award should be confirmed. Although the FAA directs petitions to be made and heard like motions, Nigeria did not file an opposition. Instead, Nigeria filed a motion to dismiss, arguing immunity under the FSIA on the basis that a Nigerian court purportedly set aside the London-seated tribunal's liability award—thus ignoring binding authority that *confirms* application of the FSIA's arbitration exception regardless of any set-aside order. Nigeria also previewed but reserved its other arguments against confirmation. Rather than requiring further briefing on that motion, the District Court entered the Briefing Schedule setting a deadline for Nigeria to brief all its arguments in an opposition to the Petition. Nigeria appealed this procedural order. The appeal raises three issues:

1. Does the collateral order doctrine permit an appeal from an order setting a briefing schedule (i) that does not conclusively deny sovereign immunity and (ii) where the immunity assertion is not even colorable?

2. If this Court has appellate jurisdiction, did the District Court soundly exercise its discretion by requiring Nigeria to brief its jurisdictional and other arguments together in an opposition to the Petition, in the "manner provided by law for the making and hearing of motions"?

3. If this Court has appellate jurisdiction, should it decide and reject Nigeria's assertion of sovereign immunity, which is unsupported by the FSIA, foreclosed by this Court's precedent, and already fully briefed?

PERTINENT STATUTES

All applicable statutes, etc., are reproduced in the Addendum to this Brief, except for those contained in the Brief for Appellants.

PRELIMINARY STATEMENT

This appeal should be seen for what it is: an effort by Nigeria to delay a summary proceeding to confirm an arbitration award. The Briefing Schedule appealed here does not satisfy the collateral order doctrine because it does not conclusively deny Nigeria's substantive right to sovereign immunity. The Briefing Schedule is a purely procedural order that does just what its name describes: it sets a schedule to brief the Petition as a motion, consistent with the FAA, following which immunity will be decided. It does not conclusively, or even in effect, deny anything. Moreover, Nigeria's assertion of immunity is meritless, which precludes application of the collateral order doctrine. Two FSIA exceptions to immunity apply, giving the District Court subject-matter jurisdiction in this case.

Indeed, the Briefing Schedule is consistent with both the FSIA and the FAA. Despite Nigeria's claims of an "absolute right" to have its sovereign immunity determined "as a threshold matter" before it may be required to "defend this lawsuit on the merits" (Br. at 1), neither the FSIA nor the case law interpreting the statute requires a separate determination of sovereign immunity. This Court and the Supreme Court have stated, in the context of liability lawsuits, only that immunity

should be conclusively resolved early in the case to avoid unnecessarily exposing a foreign state to the burdens of discovery and trial. The Briefing Schedule is consistent with that mandate because it allows the District Court to conclusively resolve immunity—and all other issues—at the threshold of the case. P&ID already presented its arguments on jurisdictional immunity and all other issues in its brief supporting the Petition, and the District Court merely directed Nigeria to present its arguments in an opposition so that all issues can be resolved immediately rather than in the piecemeal manner on which Nigeria insists. The FSIA simply does not create an absolute right to a bifurcated proceeding.

The Briefing Schedule does not require Nigeria to respond to discovery requests, participate in a trial, or even answer factual allegations of wrongdoing before immunity is decided. As the District Court correctly found, the "limited process" of requiring Nigeria to submit a single opposition to the Petition does not implicate any of the burdens "from which immunity is designed to shield foreign sovereigns." This Court, in *TermoRio*, applied the FAA procedure to petitions involving foreign sovereigns, and the District Court properly followed this Court's guidance by adhering to that procedure.

Nor can the District Court's order plausibly be construed to offend Nigeria's dignity. Nigeria does not need to answer for its conduct here. Consistent with the arbitration clause in Nigeria's agreement with P&ID, Nigeria has already fully

litigated this case in the London-seated arbitration. There, an esteemed panel of arbitrators unanimously found Nigeria liable for repudiating its agreement with P&ID and awarded damages. Unlike lawsuits seeking to hold a foreign sovereign liable for allegedly wrongful conduct, such as in *Helmerich & Payne*, the merits litigation of this dispute is long over, and the Petition merely asks the District Court to recognize the Final Award that Nigeria refuses to pay. Nigeria need only address whether there is any reason why the award should not be confirmed under the New York Convention, a treaty to which Nigeria, the United States, and the United Kingdom have all acceded. Foreign sovereigns—including Nigeria itself—routinely brief issues relating to immunity and confirmation of an award together at the outset of a case. And here Nigeria already has previewed its arguments against confirmation in several legal briefs. Submitting an opposition to the Petition can hardly be deemed an affront to dignity.

Despite Nigeria's efforts to center this appeal on the scope of foreign sovereign immunity, its brief elides the key jurisdictional question on which this Court requested briefing: appellate jurisdiction. (*See* Document No. 1773659.) As an otherwise non-final order, the Briefing Schedule would have to conclusively determine a colorable claim of immunity to be appealable under the collateral order doctrine. Yet Nigeria concedes that the Briefing Schedule does not "conclusively determine" immunity. Although Nigeria suggests that *effective* denials of immunity

are also immediately appealable, it cites not one case where an appellate court found jurisdiction without there being a district court order denying immunity. The District Court's procedural order here, which did not deny immunity, is not among the class of orders that can be immediately appealed under the collateral order doctrine, which the Supreme Court has cautioned must remain narrow.

Moreover, Nigeria's assertion of immunity is not even colorable to begin with. This, too, precludes application of the collateral order doctrine, and it underscores that Nigeria's appeal is merely a delay tactic. While Nigeria acknowledges that the District Court has jurisdiction to confirm an arbitration award against a foreign sovereign under the New York Convention, it now contends that the District Court ceases to have jurisdiction because Nigeria obtained a court order in Nigeria purporting to set aside the arbitration tribunal's liability award. Nigeria's authority for that proposition is dictum from *TermoRio* taken entirely out of context. That case demonstrates unequivocally that the FSIA's arbitration exception applies regardless of any set-aside order. Nigeria's claim of immunity is especially spurious in light of the circumstances surrounding the Nigerian court order. Not only did the Nigerian court lack the power to set aside an award made by the London-seated tribunal—as the tribunal itself concluded—but Nigeria only sought relief from the Nigerian court after it had applied for a set-aside order in the English court and lost.

Finally, if this Court does find appellate jurisdiction, it should not only affirm the order below as a proper exercise of the District Court's case-management powers but it should also decide and reject Nigeria's claim of immunity. There are no jurisdictional facts in dispute and the parties have already set forth their arguments on immunity in multiple briefs, so the issue is fully developed for judicial decision. To remand for a separate determination of immunity—and thereby potentially spur another *two* rounds of appeals to this Court—would be wasteful and unnecessary. Nigeria's tactics have already caused enough delay in what is supposed to be a summary proceeding. If this Court finds appellate jurisdiction, it should decide and reject Nigeria's immunity claim so that the District Court can expeditiously determine whether to confirm the Final Award.[1]

[1] This is not the first case in which Nigeria has deployed delay tactics to stave off enforcement of an arbitration award it refuses to pay. *See, e.g.*, *Cont'l Transfert Technique Ltd. v. Federal Government of Nigeria*, 932 F. Supp. 2d 153, 163 (D.D.C. 2013) ("Nigeria has protracted these proceedings at every stage, first by failing to appear, and then by attempting to dismiss the case and forestall confirmation of the award through arguments that the Court has consistently found meritless, sometimes bordering on the frivolous." (internal citations, alterations, and quotation marks omitted)).

STATEMENT OF CASE

I. Factual Background: The London-seated arbitral tribunal decides the merits of the underlying dispute—Nigeria's repudiation of the agreement—and awards damages to P&ID.

The agreement giving rise to the underlying arbitration was executed in January 2010. (*See* JA29-51.) Under the agreement, P&ID would help Nigeria power its notoriously weak electric grid using the natural gas produced as a byproduct of oil exploration. Nigeria agreed to supply "wet" natural gas, and P&ID would convert it into "lean" gas suitable for electricity generation. As compensation, P&ID would retain and sell a portion of the hydrocarbons separated by this process. Nigeria also agreed to provide the infrastructure for third parties to supply the wet gas. (JA39-41.)

P&ID and Nigeria agreed to arbitrate any disputes about the agreement in London:

> [A] Party may serve on the other a notice of arbitration under the rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004) which, except as otherwise provided herein, shall apply to any dispute between such Parties under this Agreement . . . .
>
> The arbitration award shall be final and binding upon the Parties . . . .
>
> The venue of the arbitration shall be London, England or otherwise as agreed by the Parties.

(JA46-47.)

Nigeria ultimately failed to uphold its end of the bargain. No gas was ever delivered to P&ID, and Nigeria's electrical system remains a shambles.

In response to Nigeria's repudiation, P&ID referred the matter to arbitration in London. (JA52-56.) The arbitration panel was composed of (i) presiding arbitrator Leonard, Lord Hoffman, a former Lord of Appeal in Ordinary (which, during Lord Hoffmann's tenure, was the highest judicial position in the United Kingdom); (ii) Sir Anthony Evans Q.C., a former justice of the Court of Appeal of England and Wales and a former chief justice of the Dubai International Financial Centre Courts; and (iii) Chief Bayo Ojo, S.A.N., a former Attorney General of Nigeria. (JA12-13.) Nigeria raised no objection to the tribunal's composition, procedures, or location, and it participated in the proceedings at every stage.

Although Nigeria blames third parties for its failure to perform under the contract, the tribunal unanimously found Nigeria liable for repudiating the agreement. In a part final award on jurisdiction, the tribunal found that the parties had agreed that the tribunal had jurisdiction to rule upon its own jurisdiction, and it referred explicitly to "the seat of arbitration, England." (JA57-73.) Then, after written arguments, witness statements, expert reports, and a hearing, the tribunal issued the unanimous award finding Nigeria liable to P&ID. (JA74-100 ("Liability Award").)

Nigeria tried and failed to set aside the Liability Award in the London Commercial Court. In a witness statement, Nigeria explained why it was seeking relief in London, and why it did so late: "[t]he issue of jurisdiction of this Court and the seat of the Arbitration had first to be considered." (JA123.) Despite Nigeria's suggestion (Br. at 7) that "there was some confusion" about the seat of the arbitration, Nigeria's submission to the London Commercial Court stated its conclusion—consistent with the text of the agreement—that London was the seat of the arbitration. Nigeria thus acknowledged that any challenge to the award "would have had to be before the English courts under the English Arbitration Act 1996." (JA121.)

After the English court rejected Nigeria's set-aside efforts as untimely and in any event having "no merit," Nigeria changed its approach. (*See* JA132.) Suddenly, Nigeria asserted that *Nigeria* was the seat of the arbitration and asked its own courts to set aside the Liability Award. (JA133-42.) Nigeria even told the Federal High Court in Lagos that it had come up with this new position after a "series of brainstorming sessions . . . with respect to the seat of the arbitration." (JA141.)

Rather than participate in the sham Nigerian proceedings, P&ID asked the arbitral tribunal to confirm that the parties in their agreement had selected London as the seat of the arbitration, which it did in Procedural Order 12. (JA143-60.) On two independent bases—the text of the parties' agreement and the parties' conduct

over the course of the arbitration—the tribunal concluded that London was the seat and that therefore the English courts, and not the Nigerian courts, had supervisory jurisdiction over the arbitration. (JA147-48, 160.)

After the Nigerian court unsurprisingly granted Nigeria its requested relief—an order "setting aside and/or remitting for further consideration all or part of [the Liability Award]," and containing no reasoning or analysis whatsoever (JA162-64)—the arbitration continued to the damages phase in London. As the tribunal explained, "the seat of the arbitration is in England" and thus "the [Nigerian] Federal High Court had no jurisdiction to set aside" the Liability Award. (JA166). Though Nigeria again applied to the Nigerian court to set aside the tribunal's finding on the seat of arbitration, it eventually abandoned that challenge and the Nigerian court dismissed the suit "for lack of appearance of counsel for Nigeria." (JA27.)

As the arbitration thus proceeded to the damages phase, Nigeria claimed to "maintain[] its position on the award on liability," but it participated fully. (JA168.) The parties exchanged written submissions and economic expert reports, and the tribunal heard two days of testimony and argument.

The tribunal then issued the Final Award that P&ID is seeking to have confirmed in the proceeding below. (JA177-213 ("Final Award").) A majority of the tribunal ordered Nigeria to pay P&ID $6,597,000,000 plus interest at the rate of 7% calculated from March 30, 2013. (JA212-13.) Although Nigeria claims the

award was "irrational," "unconscionable," and "punitive" (Br. at 8), the tribunal applied well-established principles of contract law and calculated damages with a standard discounted cashflow analysis. (JA189-212.) The damages amount reflected P&ID's loss of revenue from the sale of the separated hydrocarbons over the 20-year term of the supply agreement. The tribunal applied Nigerian law and recognized that P&ID had completed the "necessary preparatory engineering work" for the project. (JA182, 192.) Even though the project was still at an early stage when Nigeria repudiated the agreement, the Final Award concluded "on a balance of probability that . . . P&ID would have performed its obligations under" the agreement. (JA190-94.)

Nigeria has made no effort to set aside the Final Award, and the time to do so has long since expired. Nigeria still refuses to pay the debt owed to P&ID.

II. Procedural Background: Nigeria fails to respond to P&ID's Petition to confirm the Final Award and then improperly notices this appeal from the Briefing Schedule set by the District Court.

More than a year ago, P&ID petitioned the District Court under Chapter 2 of the FAA to confirm the Final Award under the New York Convention. (JA7-21.) After Nigeria challenged service of process, P&ID renewed service. (JA3-4.) Nigeria does not dispute that it has been properly served or that the District Court is a proper venue under the FSIA. *See* 28 U.S.C. §§ 1391(f)(4) (venue), 1608(a)(3) (service of process).

Consistent with the FAA's streamlined procedure for proceedings to confirm arbitration awards, P&ID's Petition was akin to a summary judgment motion. *See* 9 U.S.C. §§ 6, 208. Along with the Petition, P&ID filed a memorandum of law and two declarations with supporting evidence (including the parties' agreement and the Final Award) that set forth the bases for the District Court's jurisdiction under the FSIA and for confirming the Final Award under the New York Convention. (JA2.)

With respect to subject-matter jurisdiction, P&ID explained that two of the FSIA's exceptions to immunity gave the District Court jurisdiction over the Petition against Nigeria. (JA9-10.)

Under the so-called "arbitration exception," foreign states have no jurisdictional immunity from a proceeding "to confirm an award made pursuant to" an arbitration agreement "made by the foreign state," where the "award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6). P&ID's Petition and supporting brief explained that this is precisely such a proceeding: P&ID seeks confirmation of the Final Award, issued pursuant to a valid agreement to arbitrate to which Nigeria was a party, and the Final Award is "governed by the New York Convention, an international agreement of the type contemplated" by the statute. (JA9; *see also* Dkt 2. at 27.)

Further, under the implied-waiver exception, a foreign state does not enjoy sovereign immunity "in any case . . . in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). As P&ID explained, "Nigeria's signing an agreement to arbitrate waived its sovereign immunity as to any action to confirm an award issued pursuant to that agreement." (JA10, *see also* Dkt. 2 at 27-28.) Thus, P&ID argued that under either exception to immunity, the District Court had subject-matter jurisdiction.

After Nigeria was properly served with process (Br. at 9), the date for Nigeria to respond to P&ID's Petition was set as August 27, 2018. On that date, however, Nigeria did not file an opposition to the Petition nor did it seek an extension for doing so. Instead, Nigeria filed only a "Motion to Dismiss for Lack of Jurisdiction under the FSIA." (JA224-25.) Recognizing that P&ID had already briefed the basis for jurisdiction in its Petition and supporting memorandum of law, Nigeria argued that the two grounds for jurisdiction relied upon by P&ID—the arbitration exception and the implied-waiver exception—did not apply. (Dkt. 28-1 at 20-37.) According to Nigeria, the arbitration exception did not apply because the Nigerian court had purportedly set aside the Liability Award.

In its motion to dismiss, Nigeria also argued that it did not have to present its other arguments against confirmation until after a decision on the motion and, if necessary, an interlocutory appeal. (Dkt. 28-1 at 37-39.) Nigeria nevertheless

previewed those other arguments, including its contention that the amount of the Final Award was punitive, although the tribunal had already considered and rejected that claim. (*Compare* Dkt. 28-1 at 39 n.4, *with* JA189-212.)

Before the deadline to respond to Nigeria's motion to dismiss, P&ID moved for an order setting a briefing schedule on the Petition, explaining that Nigeria had failed to respond properly to the Petition on the due date and requesting that the District Court set a new date for Nigeria to do so. (Dkt. 31.) P&ID argued that "[c]onsistent with the summary nature of this action and the fact that under the FAA the Petition is to be treated as a motion, not a pleading, the Court should require Nigeria to submit its already-overdue response to the Petition promptly and, once briefing is complete, decide all issues in a single decision." (Dkt. 31 at 10.) While considering P&ID's motion, the District Court "vacated" the deadline for P&ID to respond to Nigeria's motion to dismiss. (JA5.)

After briefing, the District Court granted P&ID's motion and issued the order now on appeal. The Briefing Schedule required Nigeria to file its opposition to the Petition "on or before October 31, 2018," and to include "all jurisdictional and merits arguments that [Nigeria] asks the Court to consider." (JA230.) As the District Court explained, this Court's decision in *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007), shows that award-confirmation proceedings should follow motion practice even where the defendant is a foreign sovereign. (JA228.)

Moreover, relying on guidance from this Court and the Supreme Court, the District Court found that submitting "a single opposition to the Petition" does not "rise to the level of discovery, trial, or other procedures from which immunity is designed to shield foreign sovereigns." (JA229.)[2]

Nigeria still refused to file an opposition to the Petition and instead noticed an appeal. (JA231-33.) Nigeria claimed a right to immediate appellate review of the Briefing Schedule under the collateral order doctrine, asserting that the District Court's order amounted to a "denial of [Nigeria's] jurisdictional immunity under the FSIA" because it required Nigeria to present its defenses to the Petition (which it erroneously referred to as a "lawsuit") before a "conclusive and authoritative decision on its sovereign immunity has been reached." (JA231-32.) Nigeria asserted that its Notice of Appeal divested the District Court of jurisdiction, (JA232), and the District Court stayed the case. (JA5.)

P&ID then moved the District Court to retain jurisdiction and lift the stay because Nigeria's Notice of Appeal was invalid or frivolous. (JA6.) Meanwhile,

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[2] Contrary to Nigeria's suggestion that the District Court "cited no authority" for this conclusion (Br. at 3), the District Court relied on *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017), *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004), and *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000).

this Court docketed Nigeria's appeal and set motion deadlines. (Document No. 1755779.)

The District Court ultimately denied P&ID's request that it retain jurisdiction. (JA234-38.) The District Court observed that "P&ID may well be correct that Nigeria's appeal is dilatory," noting that "the Court's order did not reject [Nigeria's] immunity defense, but merely required Nigeria to follow FAA procedures." (JA235-36.) The District Court pointed out that submitting a brief was "not particularly burdensome" on Nigeria. In fact, Nigeria's attempt to litigate jurisdictional immunity and confirmation of the award separately "would likely aggravate its litigation burdens relative to the FAA's summary procedures." (JA236-37.) Yet because the "question of whether this interlocutory appeal is appropriate goes to the D.C. Circuit's own jurisdiction and is best answered there," the District Court hesitated to find the Notice of Appeal "wholly invalid" without this Court having "squarely" addressed the issue. (JA235, 237.) The District Court in no way suggested that Nigeria's immunity argument had any merit or was even colorable.

P&ID then moved this Court to dismiss the appeal or, in the alternative, summarily affirm. (Document No. 1762525.) By *per curiam* order, this Court denied the motion for summary affirmance but referred the motion to dismiss "to the merits panel to which this appeal is assigned," directing the parties to address the issues raised by the motion in their briefs. (Document No. 1773659.)

SUMMARY OF ARGUMENT

This Court lacks appellate jurisdiction and Nigeria's appeal should be dismissed. *See* Point I. To be immediately appealable under the collateral order doctrine, the Briefing Schedule must have conclusively denied a colorable claim of immunity. *See Will v. Hallock*, 546 U.S. 345, 349, 353 (2006). Nigeria acknowledges that the Briefing Schedule does not "conclusively" deny its immunity claim (*see, e.g.*, Br. at 5), so the collateral order doctrine does not apply and this Court should dismiss the appeal for lack of jurisdiction. *See* Point I.A.i.

Even if, as Nigeria claims, an "effective" denial were appealable—and this Court's decision in *Papandreou* counsels otherwise—the Briefing Schedule does not effectively deny Nigeria's immunity because it imposes no meaningful burden on Nigeria. *See* Point I.A.ii; *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998). The proceeding below is not a lawsuit alleging unlawful conduct by Nigeria, but rather a petition to confirm an arbitration award. Nigeria need not endure the burdens of discovery or trial nor answer for its conduct: the arbitral tribunal already found Nigeria liable and awarded damages to P&ID. The District Court need only determine whether it has jurisdiction and, if so, whether any grounds exist to deny recognition under the New York Convention. The FAA's streamlined procedure enables the court to efficiently answer these questions while providing all the protections required by the FSIA. Nigeria is entitled only to an early—not a

separate—determination of its claim of immunity, which the Briefing Schedule provides by allowing all issues to be decided at the threshold of the proceeding. Nigeria's expansive interpretation of immunity lacks support in statute or case law.

Furthermore, Nigeria's meritless assertion of immunity cannot invoke the collateral order doctrine. *See* Point I.B. The FSIA's arbitration exception to immunity clearly applies because, as Nigeria acknowledges, Nigeria agreed to arbitrate its dispute with P&ID and the Final Award is governed by the New York Convention. 28 U.S.C. § 1605(a)(6). As the District Court noted, Nigeria's sole argument to the contrary relies on dictum from *TermoRio*, a case that actually found jurisdiction over a petition to confirm an award against a foreign sovereign regardless of even a *valid* a set-aside order. *See TermoRio S.A. E.S.P. v. Electranta S.P.*, 421 F. Supp. 2d 87 (D.D.C. 2006), *aff'd* 487 F.3d 928 (D.C. Cir. 2007). Nigeria cites no authority adopting its specious theory, and in fact the district court in *TermoRio* expressly rejected it.

Even if this Court had jurisdiction over Nigeria's appeal, the Briefing Schedule should be affirmed as a sound exercise of the District Court's discretion. *See* Point II. Consistent with both the FAA and the FSIA, as well as the interests of judicial efficiency, the District Court properly exercised its case-management powers by requiring Nigeria to present its immunity and other arguments in a response to the Petition so that all issues could be decided immediately.

If this Court does find appellate jurisdiction, it should determine here and now whether Nigeria is immune. *See* Point III. This Court has before it all that it needs to decide, and reject, Nigeria's immunity claim. Remanding this issue to the District Court would merely further delay this summary proceeding and potentially give rise to another round of appeals before a final judgment on the Petition. It is undisputed that a duly constituted tribunal issued the Final Award under a valid agreement to arbitrate governed by the New York Convention. Whether this satisfies an exception to immunity under the FSIA—which it clearly does—is a pure question of law that this Court can resolve, and the proceedings to decide the Petition need not be delayed any longer.

ARGUMENT

I. The Briefing Schedule is not appealable under the collateral order doctrine, and the appeal should thus be dismissed.

The Briefing Schedule is a procedural order, not a "final decision." *See* 28 U.S.C. § 1291. To be immediately appealable under the collateral order doctrine, a trial court's decision must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349. The Supreme Court has repeatedly cautioned that the "class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (quoting *Will*, 546 U.S. at 350)).

The collateral order doctrine is the only claimed source of appellate jurisdiction, yet Nigeria fails to address that doctrine's requirements or even analyze controlling decisions on the subject from this Court and the Supreme Court. Instead, Nigeria relies on rhetoric about immunity, dicta taken out of context, and inapposite citations. Not only is it wrong in claiming that the Briefing Schedule has the effect of abrogating its immunity, but Nigeria cannot avoid the fact that the Briefing Schedule fails to meet the collateral order doctrine's requirements. Without any other source for this Court's jurisdiction, the appeal should thus be dismissed.

A. This Court lacks jurisdiction because the Briefing Schedule does not "conclusively determine" immunity.

As a practical construction of Section 1291's "final decision" requirement, the collateral order doctrine requires "a complete, formal and, in the trial court, final rejection of a claimed right where denial of immediate review would render impossible any review whatsoever." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981) (citations and quotation marks omitted). This Court has thus applied the collateral order doctrine to find jurisdiction where a district court conclusively denies a colorable motion to "dismiss a complaint on the ground of sovereign immunity under the FSIA." *See Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1025 (D.C. Cir. 1997).

Here, however, the District Court did not deny Nigeria's motion to dismiss or otherwise reject its assertion of immunity. (JA236 (noting that Briefing Schedule

"did not reject the immunity defense").) As Nigeria recognizes, "the District Court did not conclusively decide" Nigeria's claim of immunity when it set a briefing schedule. (*See, e.g.*, Br. at 15.) But that is precisely what the Supreme Court requires for jurisdiction under the collateral order doctrine: an order that "conclusively determine[s] the disputed question." *Will*, 546 U.S. at 349; *accord Jungquist*, 115 F.3d at 1026 ("[t]he district court's denial of dismissal on grounds of sovereign immunity is conclusive and final as to that issue"). This alone requires dismissal of Nigeria's appeal for lack of appellate jurisdiction.

i. Orders that do not conclusively deny immunity are not appealable as of right.

Nigeria implies that other courts have found jurisdiction over appeals from effective, rather than conclusive, denials of sovereign immunity. (*See, e.g.*, Br. at 17.) But not one decision identified by Nigeria has adopted this significant expansion of the collateral order doctrine. Instead, each case it cites arose from a *denial* of a motion to dismiss for lack of subject-matter jurisdiction under the FSIA.[3]

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[3] *See, e.g.*, *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 808 (D.C. Cir. 2015) (reviewing denial in part of motion to dismiss), *rev'd* 137 S. Ct. 1312 (2017); *EM Ltd. v. Banco Central de la República Argentina*, 800 F.3d 78, 87-88 (2d Cir. 2015) (quoting district court that "[t]he motion to dismiss the action is denied")); *Blue Ridge Invs., LLC v. Republic of Argentina*, 735 F.3d 72, 81 (2d Cir. 2013) (affirming denial of motion to dismiss petition to confirm arbitral award); *In re Republic of the Philippines*, 309 F.3d 1143, 1148 (9th Cir. 2002) (reversing denial of motion to dismiss); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) (affirming dismissal of sovereign defendant on FSIA grounds); *Phoenix Consulting, Inc. v. Republic of*

This is also true for the two out-of-circuit decisions that Nigeria discusses at length, *United States v. Moats* and *Butler v. Sukhoi Co*. In *Moats*, the district court "denied the motion to dismiss" in which the defendant, Pemex, had argued jurisdictional immunity. 961 F.2d 1198, 1200 (5th Cir. 1992). The district court denied the motion without opinion, but the Fifth Circuit reviewed the district court's order "as holding that Pemex does not have sovereign immunity." *Id.* at 1201. While Nigeria points to the Fifth Circuit's statement that the effect of the order was to require Pemex to defend the lawsuit (Br. at 20), the fact remains that the appeal was from a denial of a motion to dismiss on immunity grounds.

So too in *Butler*. There, the defendants brought a motion to dismiss asserting immunity and the district court ordered that "Defendants' Motion is DENIED."[4] Nigeria glosses over this crucial point, instead stressing that the district court ordered the defendants to submit to jurisdictional discovery and answer the factual

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Angola, 216 F.3d 36, 39 (D.C. Cir. 2000) ("the district court denied Angola's motion to dismiss" holding "that the choice of law provision would constitute a waiver of sovereign immunity"); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 753-54 (2d Cir. 1998) (affirming denial of motions to dismiss); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346-37 (7th Cir. 1987) (finding appellate jurisdiction after denial of motion to dismiss).

[4] No. 07-61078, 2008 U.S. Dist. LEXIS 130770, at *2 (S.D. Fla. July 29, 2008), *rev'd* 579 F.3d 1307, 1311 (11th Cir. 2009) (finding jurisdiction under collateral order doctrine); *see also Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. A. No. 82-0220, 1989 WL 44086, at *8 (D.D.C. April 18, 1989) (denying motion to dismiss), *rev'd* 905 F.2d 438, 443 (D.C. Cir. 1990).

allegations in the complaint, which in any event the District Court here did not order. (*See* Br. at 18-19.) Regardless, the Eleventh Circuit found appellate jurisdiction over a district court's denial of a motion to dismiss asserting immunity. 579 F.3d at 1311.

Notably, each appellate decision that Nigeria relies upon analyzed whether or not the sovereign was in fact immune from suit, and it remanded only where the record required further factual development to determine immunity. This underscores that those decisions reviewed conclusive denials of immunity by the district court.

Unlike the cases cited by Nigeria, the Briefing Schedule does not conclusively deny immunity. Nigeria concedes as much. (*See, e.g.*, Br. at 15.) The District Court merely entered a procedural order setting a schedule for Nigeria to submit an opposition to the Petition. Nigeria could therein brief any arguments it wanted the Court to consider in response to P&ID's fully briefed Petition. The District Court could then decide immunity, and all other issues, after just one round of briefing. This would not only conserve judicial resources, but Nigeria's immunity would be decided at the earliest opportunity in the case.

This Court has twice addressed trial court orders that did not conclusively deny immunity but that imposed serious burdens on a foreign sovereign, and in neither case did it find appellate jurisdiction under the collateral order doctrine. In *Papandreou*, the district court had ordered depositions of Greek cabinet ministers

before making a conclusive determination of sovereign immunity, and this Court granted relief by mandamus, rather than finding jurisdiction and reversing. *See* 139 F.3d 247, 250–51 (D.C. Cir. 1998). The same was true in the unpublished decision involving Libya and cited by Nigeria. (*See* Br. at 19 n.9.) There, the district court ordered a foreign sovereign to file an answer to a complaint and produce documents before resolving Libya's assertion of immunity. *See Frey v. Socialist People's Libyan Arab Jamahiriya*, No. 97-0975 (RCL), 2004 U.S. Dist. LEXIS 33027 (D.D.C. Apr. 6, 2004). This Court then issued a writ of mandamus. *In re Socialist People's Libyan Arab Jamahiriya*, No. 04-7038, 2004 U.S. App. LEXIS 7244 (D.C. Cir. Apr. 13, 2004). As compared to the class of orders denying motions to dismiss on foreign sovereign immunity grounds, *Papandreou* and *Libya* suggest that the proper recourse for an order that supposedly subjects a foreign state to the burdens of litigation lies in mandamus, not an appeal under the collateral order doctrine.

Indeed, this is precisely the approach approved by the Supreme Court in *Mohawk*. Unlike the "blunt, categorical instrument" of the collateral order doctrine, exceptional cases can be resolved by mandamus or certification under 28 U.S.C. § 1292(b). *Mohawk*, 558 U.S. at 110-12 (discussing appropriate alternatives to collateral order doctrine).

Of course, Nigeria did not seek such relief here and would not have been entitled to it. The Briefing Schedule is hardly among the "really extraordinary

causes" requiring the "drastic and extraordinary remedy" of mandamus. *See Cheney v. U.S. District Court for D.C.*, 542 U.S. 367, 380–81 (2004) (requiring for mandamus relief that petitioner have "no other adequate means to attain the relief" and a "clear and indisputable" right to the writ, in which case the issuing court has discretion but not obligation to grant relief). Particularly given Nigeria's meritless assertion of immunity, the right to a writ of mandamus could not be "clear and indisputable." *Id.* For the same reasons, Nigeria would have struggled to obtain certification of an interlocutory appeal under Section 1292(b) and a stay because there is no "substantial ground for difference of opinion" on a question of law. But the inapplicability of those other forms of review does not mean the Briefing Schedule qualifies as a final decision that can be appealed under Section 1291.

Nigeria neither needs nor is entitled to this Court's review of this procedural order: the District Court has not denied Nigeria's assertion of immunity, nor does the Briefing Schedule subject Nigeria to any of the burdens from which immunity protects sovereigns. Merely asking a foreign sovereign to brief the New York Convention defenses that it already previewed—in a procedure consistent with the FAA and that Nigeria has followed before—hardly requires an extraordinary writ. Instead, Nigeria can seek this Court's review when there is a final judgment addressing immunity and, if appropriate, confirmation of the Final Award.

Because Nigeria cannot point to any authority for applying the collateral order doctrine here, Nigeria instead makes sweeping, conclusory statements about the breadth of appellate jurisdiction. (*See, e.g.*, Br. at 1, 4.) But those statements find no support in the case law, and the Supreme Court has specifically cautioned against expanding the collateral order doctrine. The "class of collaterally appealable orders must remain 'narrow and selective in its membership,'" particularly given the recent "legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining" the appealability of prejudgment orders.[5]

Neither the FSIA nor the Federal Rules grants a separate right to the interlocutory appeal Nigeria seeks. Only by satisfying the requirements of the collateral order doctrine set out in this Court's and the Supreme Court's precedent can this procedural order be immediately appealed. *See Helmerich & Payne*, 137 S. Ct. at 1323 (citing Supreme Court's non-FSIA collateral order decisions, such as *Will v. Hallock*, for appealability of denials of sovereign immunity). And because the Briefing Schedule does not conclusively decide an immunity claim, this appeal should be dismissed for lack of appellate jurisdiction.

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[5] *See Mohawk*, 558 U.S. at 113; *id.* at 115 (rejecting application of collateral order where the order "is not on all fours with orders we previously have held to be appealable") (Thomas, J., concurring).

ii. Even if this Court had jurisdiction over appeals from effective denials of immunity, the Briefing Schedule imposed no burden that in effect denies immunity.

As the District Court correctly recognized, the "limited process" of "submit[ting] a single opposition to the Petition, to which P&ID must then reply," "does not rise to the level of discovery, trial, or other procedures from which immunity is designed to shield foreign sovereigns." (JA229.) Given the minimal burden imposed by the Briefing Schedule—to say nothing of Nigeria's meritless assertion of immunity—it would not "so imperil[] the interest at stake as to justify the cost of allowing immediate appeal." (JA237 (quoting *Mohawk*, 558 U.S. at 108).) Nor does the Briefing Schedule require Nigeria to "answer for its conduct," (*see, e.g.*, Br. at 16), and thereby violate sovereign immunity. Still, Nigeria argues that effective denials of immunity are appealable (though they are not, as discussed above) and that the Briefing Schedule constitutes such an effective denial. Yet neither the FSIA nor case law supports Nigeria's contention that the Briefing Schedule effectively denies immunity.

As an initial matter, Nigeria offers no authority supporting its assertion that jurisdictional immunity must be decided *separately* and *before* a foreign state can be asked to brief any other issue in the case. In *Verlinden* and *Helmerich & Payne*, the Supreme Court merely observed that a district court should decide sovereign

immunity as early as possible in the case.[6] This Court made the same observation in *Phoenix Consulting*.[7] The Briefing Schedule complies with this requirement: the District Court can make an immediate determination of immunity; and, if it finds jurisdiction, the District Court can also decide whether to confirm the Final Award. The summary nature of an award-confirmation proceeding under the FAA thus accords with the principle—expressed by courts in damages actions, rather than in the FAA context—that sovereign immunity should be decided early in the case.

In fact, the decisions on which Nigeria relies belie the notion that that a foreign sovereign has an "absolute right" (Br. at 23-24) to have immunity decided separately before it briefs any other issues. Those decisions expressly state that sometimes immunity and merits questions must be resolved together to ensure an early

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[6] *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1983) ("At the threshold of every action in a District Court against a foreign state . . . the court must satisfy itself that one of the exceptions [to sovereign immunity] applies."); *Helmerich & Payne*, 137 S. Ct. at 1317 (observing that where jurisdictional questions turn upon further factual development, "the court should normally resolve those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible").

[7] 216 F.3d at 39 ("the district court must make the 'critical preliminary determination' of its own jurisdiction as early in the litigation as possible; to defer the question is to 'frustrate the significance and benefit of entitlement to immunity from suit'" (citation omitted)).

determination of immunity.[8] Thus, what matters is an early determination of immunity, not a separate one. This Court in *Papandreou* actually encouraged the resolution of other issues before immunity if it would more quickly release a foreign sovereign from litigation in U.S. courts.[9] Indeed, that is precisely why foreign sovereigns often brief a multitude of legal grounds for dismissal at the outset, including the defendants in *Butler* and *Blue Ridge* who moved to dismiss for failure to state a claim as well as for lack of subject-matter jurisdiction.[10] Nigeria itself has even done so in an arbitration award-confirmation proceeding, briefing immunity along with its other arguments against confirmation in *Enron Nigeria Power*

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[8] *See, e.g.*, *Helmerich & Payne*, 137 S. Ct. at 1319 ("We recognize that merits and jurisdiction will sometimes come intertwined. . . . If to [answer the jurisdictional question], it must inevitably decide some, or all, of the merits issues, so be it.").

[9] *See Papandreou*, 139 F.3d at 254 (recognizing that dismissal for other, non-merits reasons may be appropriate even before immunity can be determined); *see also De Csepel v. Republic of Hungary*, 714 F.3d 591, 596 (D.C. Cir. 2013) (noting that foreign sovereign moved to dismiss under FSIA as well as for failure to state a claim, statute of limitations, and the act of state and political question doctrines); *Phoenix Consulting*, 216 F.3d at 39 (discouraging jurisdictional discovery on immunity where defendants offer other grounds for dismissal).

[10] *Butler*, 579 F.3d at 1310 n.4 (noting that defendants briefed motion to dismiss for failure to state a claim); *Blue Ridge Invs., LLC v. Republic of Argentina*, 735 F.3d 72, 77 (2d Cir. 2013) (noting that Argentina moved to dismiss on sovereign immunity grounds, as well as failure to state a claim, res judicata, and statute of limitations); *See also Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492, 497 (D. Del. 1999) ("Having the parties submit briefing on the merits is a minor burden imposed on the [defendant] that permits the court to come to a sound result on the issue of sovereign immunity" under the Eleventh Amendment).

Holding, Ltd. v. Federal Republic of Nigeria. 234 F. Supp. 3d 251, 253 (D.D.C. 2015).

Further, the Briefing Schedule does not impose the type of burden that immunity is intended to protect. Immunity from suit protects foreign states from burdens imposed by the "coercive process of judicial tribunals" following motion practice, such as discovery and trial.[11] As this Court has observed, sovereign immunity serves to minimize the burden faced by foreign states haled to U.S. courts: "It would be bizarre if an assertion of immunity worked to increase litigation costs." *Papandreou*, 139 F.3d at 254.

The streamlined award-confirmation procedure imposes none of those burdens. The Briefing Schedule limits the entire litigation to just one round of motion practice, consistent with the FAA. *See* 9 U.S.C. § 6; Fed. R. Civ. Proc. 81(a)(6)(B) (limiting application of the Federal Rules where FAA provides for other procedures). This procedure provides the most efficient process available while giving Nigeria the benefits of sovereign immunity, such as the FSIA's service and

[11] *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993) (protecting immune sovereigns from the costs and burdens as litigation "proceeds past motion practice"); *see also Phoenix Consulting*, 216 F.3d at 41 (explaining that "to preserve the significance and benefit of a foreign sovereign's immunity from suit under the FSIA, the court could not 'postpon[e] the determination of subject matter jurisdiction until some point during or after trial'" (citation omitted)).

venue requirements. That was not the case in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, where a New York district court had enforced an ICSID arbitration award on an *ex parte* basis. 863 F.3d 96, 114-15 (2d Cir. 2017).[12] Through a single round of briefing, all issues presented by the Petition will be resolved "at the earliest possible stage in litigation." *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

Thus, contrary to what Nigeria suggests, there is no conflict between the requirements of the FSIA and of the FAA. Indeed, this Court already recognized in *TermoRio* that the FAA's streamlined procedures apply in petitions to confirm arbitration awards against foreign sovereigns, and it did not suggest that proceeding in that fashion might conflict with the FSIA. 487 F.3d at 940.

Equally unavailing is Nigeria's argument that the FSIA requires a separate determination of immunity before a foreign sovereign answers for its conduct. (*See* Br. at 25.) This abstract protection of "dignity," separate from burden, has no

[12] *Mobil Cerro Negro* concerned enforcement of an ICSID award under the ICSID Convention enabling statute, 22 U.S.C. § 1650a, and the Second Circuit observed that the Federal Rules of Civil Procedure about how to commence an action ("by filing a complaint with the court") apply. 863 F.3d at 120. As the Second Circuit also noted, however, Rule 81(a)(6)(B) exempts proceedings under the FAA (which does not apply to ICSID arbitration awards) from mandatory application of the Rules where the law provides other procedures. *Id.* at 120 n.19. Thus, the FAA provides that an application to confirm an award "shall be made and heard on the manner provided by law for the making and hearing of motions." 9 U.S.C. § 6.

grounding in precedent, but in any event it has no relevance here. Nigeria need not answer for its conduct, as the arbitral tribunal already resolved the dispute between P&ID and Nigeria by unanimously finding Nigeria liable for repudiating its agreement with P&ID. (JA74-100.) The only question before the District Court is whether any of the few grounds to deny recognition under the New York Convention might counsel against confirmation of the award. (JA236 (distinguishing plenary lawsuits).) Nigeria's purported concerns about answering for its conduct and suffering an affront to its dignity are therefore misplaced.

The District Court correctly held that immunity protects against the burdens of "discovery, trial, or other procedures from which immunity is designed to shield foreign sovereigns." (JA229.) The cases that Nigeria cites for the proposition that sovereign immunity protects against "the affront to their independence and dignity caused by having to defend against the merits of a claim over which a court lacks jurisdiction" (Br. at 1) actually confirm that immunity protects against "trial and the attendant burdens of litigation." *See Rein*, 162 F.3d at 756.[13]

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[13] *See also Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1135 (D.C. Cir. 2004) (allowing interlocutory appeal of immunity where foreign sovereign defendants "may be required to go through an entire trial"); *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1282 (3d Cir. 1993) (noting concern about deciding immunity after "a trial on the merits"); *Moats*, 961 F.2d at 1201 (noting collateral order doctrine protects foreign sovereigns from becoming "embroiled in litigation"); *Segni*, 816 F.2d at 347 ("A foreign government should not be put to the expense of defending what may be a protracted lawsuit without

Nor is *Blue Ridge* to the contrary. There, the Second Circuit did not suggest that the FSIA or FAA requires bifurcating an award-confirmation proceeding into separate jurisdictional and substantive stages, but instead merely applied the "general rule" that the collateral order doctrine confers appellate jurisdiction when a motion to dismiss on sovereign immunity grounds is briefed and then denied, which did not happen here. *See Blue Ridge Invs., LLC v. Republic of Argentina*, 735 F.3d 72, 81 (2d Cir. 2013). Indeed, the Second Circuit found that the district court had made a "threshold determination of FSIA immunity," unlike in other cases where the Court had declined to exercise appellate jurisdiction. *Id.* at 80-81. Here, the District Court has not yet had an opportunity to make a threshold determination of FSIA immunity because Nigeria refused to brief the Petition and then appealed.

Moreover, Nigeria's contention that the Briefing Schedule violates its immunity because it requires briefing the "merits" of the Petition relies on flawed analogies to lawsuits alleging unlawful conduct by foreign sovereigns. Unlike a lawsuit commenced in a U.S. court to hold a foreign sovereign accountable for some form of wrongdoing—which necessarily requires discovery, pre-trial wrangling, and

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an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity."); Brief for U.S. Gov't at 19, *Helmerich & Payne*, 137 S. Ct. 1312 (2016) (No. 15-423) 2016 U.S. S. Ct. Briefs LEXIS 3114 *35 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985), in brief about FSIA for proposition that immunity protects against "costs of trial" and "burdens of broad reaching discovery").

trial—the Briefing Schedule requires only one round of motion practice to determine whether the District Court should confirm an arbitration award. (*See* JA229.) The district court can then conclusively decide whether to confirm the arbitration award in a single opinion: first determining jurisdiction and then, if appropriate, evaluating whether any ground exists that would permit declining confirmation under the New York Convention.

The concern raised in cases like *Helmerich & Payne*, which is not present here, is that another court "sits in judgment of something that [a] foreign sovereign has done," determining both whether a foreign sovereign violated the law and the penalty for that conduct. Transcript of Oral Argument at 26, *Helmerich & Payne*, 137 S. Ct. 1312 (2017) (No. 15-423) (counsel for United States as *amicus curiae*). To resolve these allegations, a foreign sovereign must do more than explain its legal position: it must answer factual allegations, submit to discovery, and appear at trial. Sensitivities about allegations of wrongful conduct loom large in those cases, where a litigant alleges that a foreign sovereign's public acts (*jure imperii*) violate U.S. or international law. *Helmerich & Payne*, 137 S. Ct. at 1321. This is "particularly sensitive with respect to the expropriation exception" to sovereign immunity under the FSIA, 28 U.S.C. § 1605(a)(3), which was at issue in *Helmerich & Payne*. Transcript of Oral Argument at 27, *Helmerich & Payne*, 137 S. Ct. 1312 (2017) (No. 15-423) (counsel for United States as *amicus curiae*).

P&ID's Petition to confirm the Final Award raises none of the concerns posed by a lawsuit claiming liability based on a state's public acts, which are at the core of the concerns that Nigeria raises about a foreign sovereign defending its conduct "on the merits." (*See, e.g.*, Br. at 1.) Presenting legal arguments against confirmation of an award can hardly be compared to a foreign sovereign having to answer for or litigate factual allegations of unlawful conduct.[14] Moreover, Nigeria has already twice voluntarily previewed the arguments that it plans to raise against confirmation of the Final Award. (Dkt. 28-1 at 39 n.4; Document No. 1763641 at 4 n.1.) Nigeria does not explain how briefing those issues for the District Court to resolve would deny its immunity, while stating them in differently captioned memoranda of law does not.

Nor is there any basis for Nigeria's suggestion that the Briefing Schedule "deferred" a ruling on sovereign immunity. (*See, e.g.*, Br. at 18, 29.) When Nigeria failed to submit an opposition to the Petition on the due date, the District Court set deadlines to complete the briefing so that immunity and all other issues could be decided as soon as possible. The District Court would still determine immunity at

[14] While the District Court referred to arguments about whether the award should be confirmed as "merits" arguments (JA230), it did so to distinguish those arguments from jurisdictional immunity arguments. It did not suggest that in briefing New York Convention arguments Nigeria would be burdened with answering for its public acts.

the outset, and Nigeria would not be burdened by discovery or forced to answer for its conduct.

What the Briefing Schedule requires Nigeria to do—present any arguments Nigeria wishes to raise against confirmation in one opposition brief—is more similar to the many instances where district courts manage dockets involving potentially immune litigants without incident. Indeed, foreign sovereigns often appear in U.S. courts to explain their positions, avoid defaults, and preserve arguments, and in doing so comply with federal rules, scheduling orders, and standing orders. Sovereigns must comply with these directives even if it later turns out that the court lacks jurisdiction due to sovereign immunity.

Indeed, the frequency with which foreign sovereigns address immunity and arguments against confirmation in a single brief belies Nigeria's suggestion that doing so would effectively deny its immunity. Foreign states responding to New York Convention petitions often address all grounds for denying confirmation, including subject-matter jurisdiction and grounds for declining confirmation under the New York Convention.[15] District courts in these cases then resolve jurisdiction before addressing the other grounds for denying confirmation. In fact, Nigeria itself

[15] *See, e.g.*, *BCB Holdings Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 242 (D.D.C. 2015), *aff'd* 650 F. App'x 17 (D.C. Cir. 2016); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57 (D.D.C. 2013), *aff'd* 795 F.3d 200 (D.C. Cir. 2015).

briefed immunity along with its other arguments against confirmation in *Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria*, 234 F. Supp. 3d 251, 253 (D.D.C. 2015).

In sum, the Briefing Schedule presents none of the concerns identified by any of the decisions on which Nigeria relies to assert an "effective" denial of sovereign immunity, were that even a valid basis for jurisdiction under the collateral order doctrine. The Briefing Schedule does not force Nigeria to endure a trial (*Helmerich & Payne*, 137 S. Ct. at 1323), comply with discovery under penalty of contempt (*Papandreou*, 139 F.3d at 249-50), have its rights determined in an interpleader action despite a finding of sovereign immunity (*Republic of the Philippines v. Pimentel*, 553 U.S. 851, 864 (2008)), or even answer a complaint, which requires a foreign sovereign or state instrumentality to answer for allegedly unlawful conduct (*Butler*, 579 F.3d at 1311).

Nigeria need only explain its position as to why the District Court should not confirm an award governed by the New York Convention. This minimal inconvenience fails to meet the effective denial standard that Nigeria asks this Court to adopt for collateral order appeals (but which is not the existing law). The absence of any meaningful burden imposed by the Briefing Schedule also means that it does not "so imperils the interest [at stake] as to justify the cost of allowing immediate appeal[.]" (JA237 (quoting *Mohawk*, 558 U.S. at 108).)

B. Nigeria's assertion of immunity is not colorable, which precludes jurisdiction under the collateral order doctrine.

This Court and others have repeatedly explained that a claim must be "colorable," if not "substantial," to invoke appellate jurisdiction under the collateral order doctrine.[16] But Nigeria's meritless claim of immunity fails to clear that bar. *See Will v. Hallock*, 546 U.S. 345, 349, 353 (2006) (requiring that a collateral order "[2] resolve an important issue completely separate from the merits of the action").

Because the Award falls squarely within the FSIA's arbitration exception and implied-waiver exception, Nigeria's assertion of immunity is baseless and thus even a conclusive denial of immunity would not satisfy the collateral order doctrine.

i. The District Court has jurisdiction under the plain text of the FSIA's arbitration exception to immunity regardless of the Nigerian court's purported set-aside order.

The District Court has jurisdiction under the plain language of the FSIA's arbitration exception to sovereign immunity. 28 U.S.C. § 1605(a)(6). Nigeria's only argument to the contrary relies on dictum from *TermoRio S.A. E.S.P. v. Electranta*

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[16] *See, e.g.*, *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) ("colorable claim"); *Mitchell*, 472 U.S. at 525 ("substantial" claim of immunity); *accord Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Texas, Inc.*, 481 F.3d 265, 268-69 & n.11 (5th Cir. 2007) (concluding that a claim of immunity must be "substantial" rather than merely "colorable" to sustain an interlocutory appeal); *see also Richardson v. United States*, 468 U.S. 317, 322 (1984) (requiring colorability for collateral appeals on double jeopardy); *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) (holding that "[i]f the claim of immunity is a sham, however, the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district court in its tracks").

S.P. 421 F. Supp. 2d 87 (D.D.C. 2006), *aff'd* 487 F.3d 928, 936 (D.C. Cir. 2007) (suggesting an award that a court has set aside does "not exist to be enforced"). But—as the District Court recognized—the decisions in that case *confirm* that the arbitration exception applies even if an award has been set aside for purposes of the New York Convention. JA228 (noting that the *TermoRio* district court found jurisdiction under the FSIA). This Court should disregard Nigeria's brazen attempt to delay this proceeding by turning an argument against confirmation into a sham claim of immunity in order to seek an interlocutory appeal.

The Petition and supporting papers show that all the elements of the FSIA's arbitration exception under 28 U.S.C. § 1605(a)(6) are met. This is an action "brought to . . . confirm an award," namely the Final Award. (JA9-10, 177-213.) The Final Award was "made pursuant" to an agreement between Nigeria and P&ID (JA29-51), which is "an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship . . . concerning a subject matter capable of settlement by arbitration under the laws of the United States." And that award is governed by the New York Convention, which is "a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." *See Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 123-24 (D.C. Cir. 1999) ("Indeed, it has been said

with authority that the New York Convention 'is exactly the sort of treaty Congress intended to include in the arbitration exception.'"). Nigeria does not dispute any of this (Br. at 9), and this is all that the arbitration exception requires.

Rather than addressing the blackletter law of the arbitration exception, Nigeria suggests that the Nigerian court's order purporting to set aside the Liability Award can affect the District Court's jurisdiction to consider the recognition of an arbitral award under that exception. (Br. at 9-10.) On the contrary, Nigeria cites authority that *contradicts* this theory—*TermoRio*—as the District Court recognized. (JA228.)

To begin, Nigeria's argument relies on language from the New York Convention. (*See* Br. at 10.) But the New York Convention only spells out the limited circumstances in which a court may decline to confirm an arbitration award. One such circumstance arises when an award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention art. V(1)(e). This argument against confirmation has nothing to do with jurisdiction under the FSIA's arbitration exception to immunity.

Even a cursory comparison of the FSIA's arbitration exception and the New York Convention show that a set-aside order bears only on recognition and not on jurisdiction. The New York Convention provides several grounds on which "recognition of the award may be refused," including that there was not a valid

agreement to arbitrate (*supra* art. V(1)(a)), that the award was set aside by a court with supervisory jurisdiction (*supra* art. V(1)(e)), or that the award is contrary to public policy of the country where recognition is sought (*supra* art. V(2)(a)). By contrast, the FSIA's arbitration exception to immunity requires only that there be an agreement to arbitrate governed by an international agreement like the New York Convention, or an award arising from such an agreement. 28 U.S.C. § 1605(a)(6). While a valid agreement to arbitrate is a prerequisite to both jurisdiction under the FSIA and confirmation under the New York Convention, an order setting aside an award bears only on the latter. *See Chevron*, 795 F.3d at 205 n.3 (discussing agreements to arbitrate).

Were the statute not clear enough on its own, binding precedent from this Court—including the *TermoRio* decision on which Nigeria mainly relies—confirms that a set-aside order does not affect jurisdiction. In *TermoRio*, the district court declined to confirm an arbitration award that had been set aside by the court with supervisory jurisdiction over the arbitration (Colombia), as permitted by the New York Convention. *See* 421 F. Supp. 2d at 93. The *TermoRio* district court, however, expressly rejected the jurisdictional argument that Nigeria makes here, namely that the foreign court's set-aside order meant there was "no basis for jurisdiction by operation of a sovereign immunity exception." *See* 421 F. Supp. 2d at 93; JA228. Instead, the district court denied confirmation under the New York Convention, and

this Court affirmed on the same ground. *See* 487 F.3d at 940 (affirming district court). Neither the district court's nor this Court's decision in *TermoRio* found a lack of subject-matter jurisdiction under the arbitration exception.

Nevertheless, Nigeria quotes dicta from this Court's *TermoRio* decision out of context, saying the award "does not exist to be enforced." (Br. at 5, 10.) But this was a statement about confirming the award under the New York Convention. Both *TermoRio* decisions focus on the New York Convention. The suggestion that an international arbitration award ceases to exist for jurisdictional purposes following a foreign set-aside order is nothing less than a willful misreading of *TermoRio*. *See also* Alan Scott Rau, *Understanding (and Misunderstanding) "Primary Jurisdiction,"* 21 Am. R. Int'l Arb. 47, 84-85 (2010) (suggesting that this position lends itself to "ridicule").

This is underscored by the fact that U.S. courts have repeatedly found jurisdiction and even *confirmed* arbitration awards that were set aside by courts with supervisory jurisdiction, which the New York Convention gives courts discretion to enforce. *See Corporación Mexicana De Mantenimiento Integral v. Pemex-Exploracion y Produccion*, 832 F.3d 92 (2d Cir. 2016); *In re Chromalloy Aeroservices*, 939 F. Supp. 907 (D.D.C. 1996). Such decisions would have violated sovereign immunity if a set-aside order divested the U.S. courts of jurisdiction, but no court has so held. As the district court in *TermoRio* recognized, "a rule that a

U.S. court must dismiss a case because a foreign court nullified an arbitral award would violate the New York Convention provision." 421 F. Supp. 2d at 93.

In sum, Nigeria has not pointed to a single case, nor is P&ID aware of one, where a court held that the FSIA's arbitration exception to immunity from suit did not apply because the award at issue had been set aside. In fact, *TermoRio* rejected that argument.

Moreover, even if Nigeria's bizarre interpretation of *TermoRio* were correct, the Nigerian court's purported set-aside order has no effect on the Final Award because the parties agreed to have the tribunal decide its own jurisdiction and the tribunal determined that this was a London-seated arbitration. *Compare TermoRio*, 487 F.3d at 939 (Colombian court set aside award of Colombia-seated tribunal), *with* (JA143-60; 165-66 (finding that London was the seat of arbitration), *and* JA67-68 (finding by tribunal that had "jurisdiction to rule upon its own jurisdiction"), *and* JA130-32 (London Commercial Court declining to set aside Liability Award)). A U.S. court owes deference to a tribunal's decision on jurisdiction when the parties agree that it is empowered to determine its own jurisdiction and interpret the parties' agreement. *Cf. BG Group, Plc v. Republic of Argentina*, 572 U.S. 25, 34 (2014) (holding that "meaning and application" of a contract are presumptively for arbitrators to determine and parties can agree to have tribunal determine arbitrability). Even if a set-aside order from a court of competent jurisdiction could

affect jurisdiction in a proceeding to confirm the award—which it does not—the Nigerian court's order has no such effect.

ii. Separately, the District Court has jurisdiction under the FSIA's implied-waiver exception.

Under the relevant authorities, the District Court also clearly has jurisdiction under the FSIA's implied-waiver exception to sovereign immunity. 28 U.S.C. § 1605 (a)(1). Nigeria (as a contracting party to the New York Convention) agreed to arbitrate in England (also a contracting party to the Convention), so Nigeria may be presumed to understand the Convention's implications for enforcement of the resulting award. *See Creighton*, 181 F.3d at 123 (noting that "an implied waiver" could be found where a foreign government not only "agreed . . . to arbitrate in the territory of a state that had signed the New York Convention," but also was "a signatory to the Convention").[17] Nigeria not only agreed to arbitrate, it participated at every step in the proceedings. Yet Nigeria simply ignores the *Creighton* court's analysis that a signatory to the Convention will be deemed to have waived immunity in an enforcement action. (Br. at 11 n.5.) *See also Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 192 (D.D.C. 2018) (quoting *Creighton* that "'when a country becomes a

[17] *See also Ipitrade Int'l, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978) (holding Nigeria's entry into arbitration agreement waived sovereign immunity as to actions seeking enforcement of award issued thereunder); *M.B.L. Int'l Contractors, Inc. v. Republic of Trinidad & Tobago*, 725 F. Supp. 52, 55–56 (D.D.C. 1989) (applying same principle).

signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states'"), *appeal docketed* No. 18-7057 (D.C. Cir.).

The waiver exception thus serves a separate function from the arbitration exception, although they arise from the same principle. Agreements to arbitrate were always understood as implied waivers, and the arbitration exception merely reflected the "widespread recognition that this intent should be made explicit" to avoid perceived confusion among courts.[18] Indeed, this Court has recognized that the FSIA's "legislative history" includes agreements to arbitrate as one of "three examples of circumstances in which courts have found implied waivers." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990). The arbitration exception thus extends beyond the implied-waiver exception, covering foreign sovereigns like Yemen and Qatar that have not acceded to the New York Convention but may enter into agreements to arbitrate. Here, Nigeria has done both.

[18] "The legislative history of the FSIA [as originally enacted] indicates that the drafters understood that agreement to arbitrate implies a waiver of sovereign immunity, including immunity from execution of judgment upon the award." *Foreign Sovereign Immunities Act: Hearing Before the Subcomm. on Admin. Law and Governmental Relations*, 100th Cong. 74 (1987) (statement of Mark B. Feldman, Chairman, Comm. on Foreign Sovereign Immunity, American Bar Association, Section of Int'l Law and Practice, dated May 28, 1987).

Accordingly, because Nigeria does not have a colorable claim of jurisdictional immunity, Nigeria's appeal from the Briefing Schedule—even if it did conclusively deny that claim—cannot invoke the collateral order doctrine.

II. If this Court finds jurisdiction, the Briefing Schedule should be affirmed as a proper exercise of the District Court's discretion.

As a case management order, the Briefing Schedule is "reviewed for abuse of discretion," a deferential standard. *See Barhoumi v. Obama*, 609 F.3d 416, 422 (D.C. Cir. 2010) (citing *Potter v. District of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009)).[19] The District Court properly exercised this discretion by ordering the Briefing Schedule.[20]

Nigeria suggests that the Court should review the Briefing Schedule *de novo* as if it were a denial of sovereign immunity. However, Nigeria elsewhere acknowledges that the District Court has not yet decided Nigeria's sovereign immunity, and Nigeria is not asking this Court to review any such decision. *Compare* Br. at 1 (no conclusive determination of immunity); *with* Br. at 13 (citing

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[19] *See also Dietz v. Bouldin*, 136 S. Ct. 1885, 1893-95 (2016) (applying abuse of discretion standard); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) ("the district court is empowered to make a decision—of *its* choosing—that falls within a range of permissible decisions").

[20] *Konoike Constr. Co. Ltd. v. Ministry of Works, Tanzania*, No. 17-1986 (RJL), 2019 WL 1082337, at *3 (D.D.C. Mar. 7, 2019) (noting that award-confirmation proceedings are "summary . . . in nature" and should not be unnecessarily drawn out, which "unfairly prejudices [a] plaintiff to some degree" (modifications in original)).

De Csepel v. Republic of Hungary, 859 F.3d 1094, 1099 (D.C. Cir. 2017), for standard of review on appeals from denials of motions to dismiss).

Nigeria's sole argument for why the District Court erred is that the Briefing Schedule encroached its immunity. But as explained above, that is simply not the case. *See* Point I.A.ii. The Briefing Schedule will resolve Nigeria's immunity at the earliest possible stage, imposing no burdens of discovery or trial. As the District Court recognized, the Briefing Schedule satisfies both the text of the FAA and the FSIA's goal of minimizing a foreign sovereign's litigation burden. (*See* JA226-30.)

Indeed, award-confirmation practice in this and other circuits is replete with examples of foreign sovereigns briefing jurisdiction and arguments against confirmation together.[21] (*See also* JA227.) And this Court has endorsed the FAA's

[21] *See Hulley Enters. Ltd. v. Russian Federation*, 211 F. Supp. 3d 269 (D.D.C. 2016); *BCB Holdings Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 242 (D.D.C. 2015); *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57 (D.D.C. 2013); *Belize Bank Ltd. v. Gov't of Belize*, 191 F. Supp. 3d 26 (D.D.C. 2016); *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 183 (D.D.C. 2016); *see also Phoenix Consulting*, 216 F.3d at 40. Nigeria cites to *Tatneft v. Ukraine*, but that case does not counsel otherwise. There, the district court stayed award-confirmation proceedings after Ukraine appealed the denial of its motion to dismiss on sovereign immunity grounds. (Br. at 26 n.12.) The parties, including Ukraine, had briefed both their jurisdictional and New York Convention arguments by the time the district court decided immunity, which undercuts Nigeria's contention that the FSIA establishes a right to a decision on immunity before any other arguments are briefed. *See Tatneft*, 301 F. Supp. 3d at 181, 198-99. And the reason the district court did not in the same opinion decide whether to confirm the award is that it sought additional briefing on that issue. *Id.* at 199.

motion-style procedure for award-confirmation proceedings against foreign sovereigns. *See* 9 U.S.C. §§ 6, 208; *see, e.g.*, *TermoRio*, 487 F.3d at 940 ("Motions to enforce arbitral awards should proceed under motions practice, not notice pleading," in petition against Colombia); *see also Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007) ("a summary proceeding"); *Int'l Trading & DynCorp Aerospace Technology*, 763 F. Supp. 2d 12, 20 (D.D.C. 2011) ("generally summary in nature"). This procedure conserves judicial resources and accords with the "emphatic federal policy in favor of arbitral dispute resolution" that "applies with special force in the field of international commerce." *TermoRio*, 487 F.3d at 933 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

Nor is the District Court the first in this Circuit to reject these delay tactics by foreign sovereigns. Another court in this Circuit voiced its frustration at the "dubious[]" practice of submitting arguments and affidavits "in piecemeal fashion" that foreign sovereigns have adopted to delay proceedings. *Balkan Energy v. Republic of Ghana*, 302 F. Supp. 3d 144, 149 n.2 (D.D.C. 2018); *see also Konoike*, 2019 WL 1082337, at *3. Foreign sovereigns do not have a right to determine the procedure by which their arguments are decided by the court, particularly where they obstruct and delay the efficient administration of the court's docket.

This Court should affirm the District Court's exercise of its case-management powers. The Briefing Schedule allows resolution of Nigeria's claim of immunity—

and the Petition as a whole—as early as possible. Even if Nigeria had a colorable claim of immunity, this process would not deny its sovereignty. It is time that this summary proceeding—which has been going for over a year due to Nigeria's procedural delay tactics—be brought to a conclusion.

III. If this Court finds jurisdiction, it should reject Nigeria's assertion of foreign sovereign immunity rather than remand on this issue.

If there is appellate jurisdiction, this Court can and should give Nigeria the prompt, conclusive determination as to immunity that it seeks.

The Court has everything before it that it needs to resolve Nigeria's meritless assertion of immunity: P&ID submitted evidence satisfying the arbitration exception to the FSIA, along with a memorandum of law explaining those arguments, when it filed its Petition. *See Chevron*, 795 F.3d at 204 (noting petitioner's "burden of production" to show that an FSIA exception to immunity applies, but that the "burden of persuasion rests with the foreign sovereign claiming immunity"). Nigeria then briefed its arguments for immunity in its motion to dismiss. (JA4 (Dkt. 28-1).) It addressed them again in its opening brief on this appeal. (Br. at 9-11.) Nigeria never suggested that it needs to introduce evidence or seek discovery on the immunity question. As such, Nigeria's immunity can be resolved on the record before this Court.

As explained above, Nigeria's assertion of immunity has no grounding in statute and is based on a willful misreading of *TermoRio*, the primary authority on

which Nigeria relies. Nigeria has failed to meet its burden of proving that no statutory exception to immunity applies. *See Phoenix Consulting*, 216 F.3d at 40.

This Court can thus dispense with Nigeria's sovereign immunity argument and decide that the District Court has subject-matter jurisdiction because an exception to immunity from suit applies. *See, e.g.*, *Jones v. Parmley*, 465 F.3d 46, 62-63 (2d Cir. 2006) (denying qualified immunity rather than remanding); *see also Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1367 (D.C. Cir. 1999) (noting that a district court's failure to answer questions of law "does not bar [this Court] from doing so").

Nigeria cites not one appeal that resulted in a remand for an initial determination of sovereign immunity, nor does Nigeria have any valid reason to seek remand apart from causing more delay. Such an action would undermine the goals of immunity by protracting this proceeding and increasing the cost and burden to Nigeria (as well as to P&ID). It would waste judicial resources to remand for further proceedings on a meritless immunity claim that would only be appealed again to this Court.

This Court should avoid another inevitable appeal in this already long-delayed case by holding now that the District Court has subject-matter jurisdiction because the FSIA's arbitration and waiver exceptions apply.

CONCLUSION

The Briefing Schedule does not conclusively determine (or even effectively deny) Nigeria's sovereign immunity, nor does Nigeria present a colorable immunity argument. The Court therefore has no jurisdiction under the collateral order doctrine and Nigeria's appeal should be dismissed. But even if this Court asserts jurisdiction, it should affirm the Briefing Schedule and reject Nigeria's immunity claim. Nigeria has drawn out the proceeding long enough, and this Court should return this case to the District Court so it may determine whether the Final Award should be confirmed.

Dated: May 1, 2019
Washington, D.C.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with FRAP 32(a)(7)(b)(i) because it has 12,758 words. This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

/s/ Michael S. Kim
Michael S. Kim

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2019, I caused a copy of the above to be filed with the Clerk of the Court using the ECF system and thereby served on all counsel of record, including counsel for Appellants.

/s/ Michael S. Kim
Michael S. Kim

ADDENDUM

ADDENDUM OF PERTINENT STATUTES AND TREATIES

Except for the following, all applicable statutes, etc., are contained in Brief for Appellants:

New York Convention, Article V

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 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 decisions 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 of the country 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 and enforcement 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.

9 U.S.C. § 201

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.