UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CEF ENERGIA, B.V., *et al.*,
Petitioners

v.

THE ITALIAN REPUBLIC,
Respondent.

Civil Action No. 19-3443 (CKK)

MEMORANDUM OPINION & ORDER
(February 10, 2025)

I. BACKGROUND

A. Procedural History

Respondent is the Italian Republic ("Italy"). Petitioners are Dutch, Danish, and Luxembourgish firms that invested in photovoltaic solar plants in Italy. Petitioners made their investments in reliance on Italy's renewable-energy subsidies. But Italy rolled those subsidies back, and Petitioners have spent the last ten years trying to recoup the ensuing losses.

In 2015, Petitioners commenced two arbitrations against Italy in the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) in Sweden. They did so because Italy (like the Kingdom of Netherlands, the Kingdom of Denmark, and the Grand Duchy of Luxembourg) is a signatory to the Energy Charter Treaty (ECT), a multilateral investment treaty that includes an arbitration clause.[1] Under that clause, Article 26, "[d]isputes between a [signatory state] and an Investor of another [signatory state] relating to an Investment in the Area of the former" may be submitted for arbitration in the SCC. In 2019, applying Swedish law, the SCC found that Italy had breached its obligations under the ECT and granted awards to Petitioners.

[1] Although Italy withdrew from the ECT in 2016, the ECT's grandfather clause makes it applicable to investments made prior to withdrawal for twenty years.

In the months that followed, all parties took action in response to the awards. Italy appealed the SCC's rulings to the Svea Court of Appeal in Sweden and argued for vacatur of the arbitral awards. Petitioners initiated this action and sought to confirm the arbitral awards under the Federal Arbitration Act, 9 U.S.C. §§ 201 *et seq*. (FAA).[2] An American court is not the obvious venue for this dispute between European firms and a European sovereign about a European arbitration panel's decision regarding European investments. But the United States (like Italy) is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). And the New York Convention, together with the FAA, empowers—indeed, requires—this Court to confirm international arbitral awards unless some other provision of law demands a different result. *See* 9 U.S.C. §§ 203, 207.

This litigation and Italy's appeal in the Svea Court then proceeded in parallel for a time. In December 2019, Italy moved to dismiss this action or, in the alternative, to stay it pending a ruling by the Svea Court. *See* Mot. to Dismiss, ECF No. 26. In broad strokes, Italy raised four arguments. First, Italy argued that both petitions should be dismissed for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* (FSIA), because no exception to Italy's presumptive sovereign immunity applies. Second, Italy argued that CEF Energia's petition should be dismissed for lack of personal jurisdiction because Italy was never properly served under 28 U.S.C. § 1608(a). Third, Italy argued on the merits that the SCC's award cannot be enforced under various provisions of the New York Convention. And finally, Italy argued that this litigation should be stayed pending resolution of its appeal in the Svea Court.

[2] This action began as two separate petitions for confirmation (one by Petitioner CEF Energia, B.V. and the other by Petitioners Greentech Energy Systems A/S and Novenergia General Partners S.A.) in New York state court. Those petitions were then removed to the U.S. District Court for the Southern District of New York, *see* Notice of Removal, ECF No. 1, transferred to this District, *see* Order, ECF No. 13, consolidated by then-Judge Ketanji Brown Jackson, Min. Order (Dec. 13, 2019), reassigned to then-District Judge Florence Y. Pan, Min. Entry (Oct. 1, 2021), reassigned to Judge Ana C. Reyes, Min. Entry (Feb. 24, 2023), and reassigned again to this Court, Min. Entry (Mar. 6, 2023).

In July 2020, then-Judge Ketanji Brown Jackson ordered that this matter be stayed pending resolution of the Svea Court appeal and otherwise denied Italy's Motion to Dismiss without prejudice. Order, ECF No. 46; Min. Order (July 23, 2020). This matter remained stayed on that basis for four years. Then, in August 2024, this Court continued the stay pending the resolution of a consolidated appeal before the U.S. Court of Appeals for the D.C. Circuit on issues relevant to this litigation. Min. Order (Aug. 8, 2024).

B. Intervening Developments

In the years since Italy filed its motion to stay this matter, there have been three legal developments worthy of discussion. *First*, the D.C. Circuit issued its opinion in *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria*, 962 F.3d 576 (D.C. Cir. 2020) ("*P&ID*"). That case concerned an attempt to confirm a foreign arbitral award against Nigeria. *Id.* at 580. When Nigeria asserted sovereign immunity under the FSIA, the district court construed the FAA to require Nigeria to file a consolidated motion "containing its 'merits arguments' in addition to its immunity and other jurisdictional defenses." *Id.* The D.C. Circuit reversed and held that district courts "must resolve colorable assertions of [sovereign] immunity before the foreign sovereign may be required to address the merits at all." *Id.* at 586.

Second, the Svea Court resolved Italy's appeals and annulled both of the SCC's arbitral awards. *See* Status Reports, ECF Nos. 89, 90. Naturally, the Svea Court's rulings are in Swedish. But Italy has submitted a certified translation of the Svea Court's Judgment with respect to CEF Energia.[3] Therein, the Svea Court discusses two landmark decisions of the European Union's court of last resort, the Court of Justice of the European Union.

[3] Although the Court appreciates Italy's efforts in procuring this translation, the Court raises two concerns. First, the Court notes that the resulting English-language document is, at times, stilted and difficult to parse. This may present problems in future litigation in this Court relying on the Svea Court Judgments. Second, neither party has provided the Court a copy of the Svea Court's Judgment in the Greentech and Novenergia appeal.

In *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2018), the Court of Justice invalidated a Dutch company's arbitral award against the Slovak Republic issued under a bilateral investment treaty. That treaty allowed disputes between members of the E.U. to be arbitrated in tribunals that lacked authority to refer questions of E.U. law to the Court of Justice. *Id.* ¶¶ 42, 49. But the Treaty on the Functioning of the European Union (TFEU)—one of the E.U.'s founding documents—requires that any tribunal called upon to interpret E.U. law under a Member State's treaties must have authority to refer questions to the Court of Justice, thus ensuring the uniformity of E.U. law. *Id.* ¶¶ 32–49. Because the relevant bilateral treaty ran afoul of this requirement, the Court of Justice prohibited enforcement of the arbitral award. *Id.* ¶ 60.

In *Republic of Moldova v. Komstroy, LLC*, ECLI:EU:C:2021:655 (Sept. 2, 2021), the Court of Justice extended *Achmea*'s logic to the ECT—the treaty at issue in this litigation. Like the bilateral treaty in *Achmea*, the ECT contemplates arbitration of intra-E.U. disputes in tribunals that cannot refer questions to the Court of Justice. *Id.* ¶ 50. To avoid a conflict with the dictates of the TFEU, the Court of Justice concluded that Article 26 of the ECT "must be interpreted as not being applicable to disputes between" E.U. Member States and investors from other E.U. Member States. *Id.* ¶ 66. In short, the Court of Justice held the ECT is inapplicable to intra-E.U. disputes.

Against this backdrop, the Svea Court concluded that the SCC's arbitral award to CEF Energia "is incompatible with the fundamental rules and principles governing the legal system of the E.U. and thus also of Sweden." ECF No. 90-1 at 16. "Upholding the arbitral award would thus be manifestly incompatible with the public policy of the Swedish legal system." *Id.* Without reaching Italy's "other grounds for invalidity and set aside," the Svea Court accordingly "declare[d] the arbitral award invalid." *Id.* And the parties represent that the Svea Court held similarly with respect to Greentech and Novenergia's appeal. *See* Joint Status Report, ECF No. 93.

Third, the D.C. Circuit resolved three consolidated appeals regarding intra-E.U. arbitral awards issued under the ECT in *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024) ("*NextEra*"). There, the Kingdom of Spain moved to dismiss petitions to confirm arbitral awards against it for lack of subject-matter jurisdiction under the FSIA. *Id.* at 1098. But the FSIA's arbitration exception withdraws sovereign immunity against actions "to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration . . . or to confirm an award made pursuant to such an agreement to arbitrate." 28 U.S.C. § 1605(a)(6). And the D.C. Circuit held that the ECT itself is an agreement to submit to arbitration for the benefit of private parties within the meaning of the FSIA's arbitration exception. *NextEra*, 112 F.4th at 1102.

Attempting to retain its sovereign immunity, Spain had argued that it did not enter into a qualifying arbitration agreement because the Court of Justice's holding in *Komstroy* that the ECT does not permit intra-E.U. arbitration foreclosed the formation of such an agreement as a matter of E.U. law. *See NextEra*, 112 F.4th at 1102. The D.C. Circuit disagreed:

> That . . . is an argument regarding the *scope* of the Energy Charter Treaty, not its *existence*. It goes to whether the ECT's arbitration provision applies to these disputes. And our binding precedent holds that the question "[w]hether the ECT applies to [a] dispute" is not "a jurisdictional question under the FSIA."

Id. at 1103 (quoting *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878–79 (D.C. Cir. 2021). Put differently, "[i]t does not matter *why* the ECT may not apply to [a] dispute. For jurisdictional purposes, the FSIA's arbitration exception requires that the arbitral tribunal 'purported to make an award, not that it in fact did so.'" *Id.* at 1104 (quoting *Stileks*, 985 F.3d at 878). Because Spain had entered the ECT and because an arbitral panel had purported to issue an award thereunder, the D.C. Circuit held that the district court had jurisdiction to confirm the award under the FSIA's arbitration exception notwithstanding *Komstroy*'s holding. *Id.* at 1104.

C. The Present Dispute

In December 2024, this Court lifted the stay in this matter and ordered the parties to file a joint status report informing the Court how they intend to proceed. Min. Order (Dec. 20, 2024). For a time, the parties conferred and attempted to negotiate a path forward. *See* Min. Order (Feb. 4, 2025). Those efforts bore some fruit: "The parties agree that Italy's motions to dismiss the Petitions in this action should be fully re-briefed in light of" the D.C. Circuit's decision in *NextEra*. Joint Status Report, ECF No. 95 at 4.

But the parties have reached an impasse. Italy contends that any such briefing must be bifurcated—first sovereign immunity, then everything else—under *P&ID*. *Id.* at 5. Petitioners respond that Italy cannot avail itself of *P&ID*'s procedural safeguard because bifurcation is only required when a foreign sovereign raises "*colorable* assertions of immunity," 962 F.3d at 586 (emphasis added), and "Italy's assertion of immunity is not even colorable" after *NextEra*, Joint Status Report, at 2. For that reason, Petitioners propose a consolidated briefing schedule that would conclude in June 2025. Joint Status Report, at 3–4. Italy's proposed briefing schedule also extends into June, but it would have the parties brief only jurisdictional issues. *See id.* at 6–7.

II. ANALYSIS

Unable to chart a mutually agreeable course for this litigation on their own, the parties have called upon the Court to set a briefing schedule. This task "falls squarely within the district courts' 'inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.'" *Risenhoover v. U.S. Dep't of State*, No. 19-cv-715, 2019 WL 13522497, at *1 (D.D.C. Nov. 1, 2019) (BAH) (quoting *Dietz v. Bouldin*, 579 U.S. 40, 47 (2016)). But "the exercise of an inherent power cannot be contrary to any express grant or limitation on the district court's power contained in a rule or statute." *Dietz*, 570 U.S. at 45.

Here, the Foreign Sovereign Immunities Act, as construed by the D.C. Circuit in *P&ID*, supplies the relevant limitation: The Court "must resolve colorable assertions of immunity before the foreign sovereign may be required to address the merits at all." 962 F.3d at 586. Two questions follow from this dictate. First, what makes an assertion of immunity "colorable?" Second, does Italy's argument for immunity clear that hurdle? The Court addresses each in turn.

A. Adding Some Color to "Colorability"

The FSIA does not define—or even include—the term "colorable." Nor did the D.C. Circuit offer a definition in *P&ID*. But *P&ID* teaches that an "obviously meritless" argument is not colorable. 962 F.3d at 583. And, at least in 2020, Nigeria's "argument that a confirmable 'award' under the arbitration exception cannot include an award set aside by a court with supervisory jurisdiction over the arbitration" was colorable. *Id.*

Dictionaries offer some guidance. A claim or action is colorable when it "appear[s] to be true, valid, or right." *Colorable*, *Black's Law Dictionary* (12th ed. 2024). In other words, a colorable argument is "seemingly valid or genuine." *Colorable*, Merriam-Webster Dictionary Online, https://perma.cc/Q65A-YPFH; *accord Colorable*, American Heritage Dictionary (5th ed. 2022) ("Seemingly genuine or legally valid.") These definitions would seem to suggest that, to determine whether an assertion of immunity is "colorable," the Court should review a foreign sovereign's argument and make a predictive judgment about the likelihood that the sovereign will succeed in defeating subject-matter jurisdiction without conclusively resolving the issue.

But that is exactly what *P&ID* forbids. The D.C. Circuit made clear that orders "styled as denying immunity pending further factual development" or "as merely deferring a ruling on immunity" were error because they "forc[ed] a foreign sovereign to defend litigation on the merits despite an unresolved assertion of immunity." *P&ID*, 962 F.3d at 581–82. And it repeatedly

stressed that trial courts must *conclusively* resolve issues of sovereign immunity before taking any other action. *See id.* at 584. Against this backdrop, the Court cannot interpret *P&ID*'s adoption of a "colorability requirement" as an invitation to prognosticate on the likelihood that a foreign sovereign's immunity defense will ultimately prevail. *Id.* at 583.

The subsequent history of the *P&ID* litigation illustrates the wisdom of forgoing such an approach. The *P&ID* court concluded that Nigeria's argument for sovereign immunity was colorable. But when Nigeria returned to the D.C. Circuit a few years later, the court dispatched that argument in a paragraph while noting that it was "foreclosed by . . . precedent" predating the original appeal. *Process & Indus. Devs. Ltd. v. Federal Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022) ("*P&ID II*") (citing *Diag Human, S.E. v. Czech Republic Ministry of Health*, 824 F.3d 131 (D.C. Cir. 2016)). "Colorable," then, must mean something less than "probably right."

The better view is that an assertion of sovereign immunity is colorable so long as it is not "obviously meritless." *P&ID*, 962 F.3d at 583. That approach comports with the "presumption of immunity" created by the FSIA. *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). And it follows from the *P&ID* court's reference to *Bell v. Hood*, 327 U.S. 678, 682–83 (1946), in which the Supreme Court held that courts lack subject-matter jurisdiction over "wholly insubstantial and frivolous" claims. In short, this Court will presume an assertion of immunity is colorable unless it can be rejected out of hand.

B. Italy's Argument Is Colorable

Italy's argument for sovereign immunity clears this low hurdle. Italy reports that it will argue the FSIA's arbitration exception does not apply in this case. Joint Status Report, ECF No. 98 at 5. That is so, Italy contends, because the Svea Court's rulings applying *Komstroy* undermined "the existence or validity of the arbitration agreement" underlying this action—the ECT—and

because that issue is "jurisdictional" under the FSIA. *Id.* at 6 (quoting *NextEra*, 112 F.4th at 1101).

Petitioners contend that this argument was "squarely foreclosed" by *NextEra*. *Id.* at 3. But Italy argues that *NextEra* is distinguishable. There, Spain's appeals of the disputed arbitration awards "were unsuccessful." *NextEra*, 112 F.4th at 1097. Here, Italy will argue that "the Swedish courts . . . with primary jurisdiction over the awards *in this action* have held—in judgments that are binding on the parties to this action—that no agreement to arbitrate exists." Joint Status Report at 5–6.[4] And Italy observes that a similar argument, though ultimately unsuccessful, was deemed colorable enough to require bifurcation in *P&ID*. *Id.* at 6 ("Nigeria was afforded precisely the opportunity that Italy seeks here . . . .").

In short, Italy argues that an essential element of the jurisdictional analysis is not satisfied. And it proffers a reason to distinguish the lead case to the contrary. The Court will not pass on Italy's assertion of sovereign immunity until the issue has been fully briefed. But the Court cannot conclude today that Italy's argument is so obviously meritless or patently frivolous that it is not "colorable" within the meaning of *P&ID*. Because Italy's argument for sovereign immunity is colorable, this Court must resolve it before requiring Italy to address the merits of this dispute. *P&ID*, 962 F.3d at 586. The Court will accordingly adopt a bifurcated briefing schedule.[5]

[4] In support of this contention, Italy quotes from the translated Svea Court Judgment in the CEF Energia appeal. The quoted portion reads: "No valid arbitration agreement has been concluded between CEF Energia and Italy based on Article 26 of the Energy Charter Treaty." ECF No. 90-1 at 7. Without expressing a view on the ultimate merits of Italy's argument for immunity, the Court notes that this language is quoted from the Svea Court's summary of *Italy's position*, *see id.* at 6 ("The Parties Respective Case . . . Italy")—not from the Svea Court's holding, *id.* at 16 ("The arbitral award must thus be declared invalid."). The Court reiterates its warning, at Note 3, *supra*, that relying on the current translation of the Svea Court Judgment may present problems moving forward.

[5] Neither party addresses the import of Italy's decision to brief its merits arguments along with its sovereign-immunity arguments in 2019. A foreign sovereign has the discretion to "forgo its entitlement to a threshold determination of immunity . . . by opting to brief all of its defenses together." *P&ID*, 962 F.3d at 585–86; *accord EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 104 F.4th 287, 298 (D.C. Cir. 2024) ("Petrobras voluntarily briefed the merits and thus invited the district court to rule upon them even if the immunity question were not yet conclusively resolved."). But Italy's consolidated motion was denied without prejudice when this matter was stayed. Min. Order (July 23, 2020). And Italy has now chosen to assert its right to a threshold immunity determination. The Court discerns no reason to hold Italy's years-old strategic choice against it now.

C. The Briefing Schedule

The only remaining issue for the Court is setting a briefing schedule. Italy proposes a schedule that it contends "reasonably accounts for the complexity of the foreign law issues involved in this action." Joint Status Report, ECF No. 98 at 5. Although that schedule is longer than the usual timetable this Court would adopt at the Rule 12 stage, the Court agrees that an extended briefing schedule is warranted.

When Italy filed its first Motion to Dismiss in 2019, Petitioner CEF Energia moved for a substantial extension of its deadline to respond because Italy's submission was "quite voluminous" and because it would "take a significant amount of time to fully review Respondent's submission and to prepare responsive expert reports and declarations." Mot. for Extension, ECF No. 29 at 3. To be sure, the bifurcated approach to briefing this time around should reduce the volume of the parties' submissions. But the parties filed more than 5,000 pages of argument and attachments when they last briefed the Court. And the parties will need to address the intervening changes in law this Court surveyed above from a blank slate.

III. CONCLUSION & ORDER

Accordingly, the Court **ORDERS** that the parties shall abide by the following schedule:

- Italy shall file a motion to dismiss limited to jurisdictional issues on or before **March 28, 2025**;
- Petitioners shall file their response to the motion on or before **May 12, 2025**; and
- Italy shall file its reply in support of the motion on or before **June 11, 2025**.

SO ORDERED.

DATED: February 10, 2025.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge