

[ORAL ARGUMENT HELD MAY 15, 2026]

No. 25-7097

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

YUKOS CAPITAL LIMITED,
FORMERLY KNOWN AS YUKOS CAPITAL S.A.R.L.,

Appellee,

v.

RUSSIAN FEDERATION,

Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR UNITED STATES AS AMICUS CURIAE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Yukos Capital Limited, formerly known as Yukos Capital S.A.R.L., is the petitioner in district court and appellee in this Court. The Russian Federation is the respondent in district court and appellant in this Court.

Hulley Enterprises Limited has appeared as amicus curiae in support of Yukos Capital in this Court. The Court invited the United States to file a brief as amicus curiae.

B. Rulings Under Review

Russia is appealing the June 11, 2025, order and opinion entered by the Honorable Carl J. Nichols of the U.S. District Court for the District of Columbia in No. 22-cv-798, *see* Dkt. Nos. 103, 104. The district court's June 11, 2025, opinion is available at *Yukos Capital Ltd. v. Russian Federation*, No. 22-cv-798, 2025 WL 1650386 (D.D.C. June 11, 2025).

The district court subsequently amended its order and opinion, and its amended opinion is reported at *Yukos Capital Ltd. v. Russian Federation*, 792 F. Supp. 3d 83 (D.D.C. 2025).

C. Related Cases

Counsel for the government is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). The *Hulley* case, which is discussed in the briefing in this case and which implicates similar issues, is currently pending before the U.S. District Court for the District of Columbia, No. 14-cv-1996.

s/ Urja Mittal

URJA MITTAL

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GLOSSARY

FSIA

Foreign Sovereign Immunities Act

INTEREST OF AMICUS CURIAE

The United States submits this amicus brief at the invitation of the Court. The United States has an interest in ensuring that courts correctly interpret the Foreign Sovereign Immunities Act (FSIA), as U.S. courts' application of the FSIA can have implications for the treatment of the United States in foreign courts and for our relations with foreign states. The United States also has an interest in encouraging the reliable and efficient enforcement of international arbitral awards in aid of international commerce, while giving proper consideration to the judicial proceedings and judgments of other nations.

STATEMENT OF THE CASE

A. Statutory and Treaty Background

1. The Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95, is an investment treaty promoting international cooperation in the energy sector. Article 26 permits investors to submit disputes to arbitration. *See id.* art. 26, 2080 U.N.T.S. at 121-22. Article 45(1) requires each signatory to apply the treaty provisionally from signature, even before ratification, “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.” *Id.* art. 45(1), 2080 U.N.T.S. at 133. Russia signed the treaty in 1994 but never ratified the treaty, and then

withdrew from the treaty in 2009. The United States is not a signatory to the treaty.

2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, commonly referred to as the New York Convention, is a multilateral treaty that establishes a regime for the enforcement of international commercial arbitration agreements and awards. In relevant part, the treaty provides that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.” *Id.* art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40. The United States is a party to the New York Convention, which has been implemented as part of the Federal Arbitration Act, 9 U.S.C. §§ 201-208.

3. Under the FSIA, a “foreign state is presumptively immune” from civil liability in U.S. courts, and “unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.” *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see* 28 U.S.C. §§ 1330(a), 1604.

The FSIA's arbitration exception applies, in relevant part, in any case brought "to enforce an agreement made by the foreign state with or for the benefit of a private party" to arbitrate "all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship," or "to confirm an award made pursuant to such an agreement to arbitrate," if

(A) the arbitration takes place or is intended to take place in the United States,

(B) the agreement or 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,

(C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or

(D) paragraph (1) of this subsection is otherwise applicable.

28 U.S.C. § 1605(a)(6) (line breaks added). Subparagraph (D) of the arbitration exception refers to the FSIA's waiver exception, *id.* § 1605(a)(1), which applies in any case "in which the foreign state has waived its immunity either explicitly or by implication." *Id.*

B. Factual Background and Prior Proceedings

1. This case concerns an arbitration initiated by Yukos Capital Limited against the Russian Federation under the Energy Charter

Treaty for the expropriation of Yukos Oil. Yukos Capital was a wholly owned subsidiary of Yukos Oil that had extended multiple loans to Yukos Oil, on which Yukos Oil defaulted during this time. The underlying district court decision details the circumstances surrounding the expropriation of Yukos Oil's assets. *See Yukos Cap. Ltd. v. Russian Fed'n*, 792 F. Supp. 3d 83, 85-86 (D.D.C. 2025).

Yukos Capital initiated arbitration proceedings pursuant to the Energy Charter Treaty to recover its amounts due on its loans. *See Yukos Cap.*, 792 F. Supp. 3d at 86. Russia challenged the arbitral tribunal's jurisdiction, including on the ground that the Energy Charter Treaty's arbitration clause did not apply because provisional application of the treaty was inconsistent with Russian law. *See id.* at 86-87. The tribunal rejected this argument, holding that Russia's "provisional" application of the treaty "constituted consent to arbitrate disputes" under the treaty. *Id.* at 87 (quotation marks omitted). The tribunal also rejected Russia's other jurisdictional objections. *See id.* The tribunal awarded Yukos Capital "a total (including interest) of almost \$5 billion." *Id.*

Russia sought to set aside the award in Swiss courts, since the arbitration was seated in Switzerland. *See Yukos Capital*, 792 F. Supp.

3d at 86-87. The Swiss Supreme Court held that provisional application of the Energy Charter Treaty's arbitration clause was consistent with Russian domestic law and denied Russia's request to set aside the award. *See* Russia Br. 13.

2. a. Yukos Capital filed an action in federal district court seeking to enforce the award. *See Yukos Cap.*, 792 F. Supp. 3d at 87. Russia moved to dismiss for lack of subject-matter jurisdiction under the FSIA, *see id.*, arguing that the Energy Charter Treaty's arbitration clause only applies "provisionally pending [the Energy Charter Treaty's] entry into force ... to the extent that such provisional application is not inconsistent with [Russia's] constitution, laws or regulations," *id.* at 89 (alterations in original) (quotation marks omitted), and because provisional application of the treaty is inconsistent with Russian law, as explained further below, Russia never entered into an agreement to arbitrate, *see id.*

The district court denied Russia's motion to dismiss and determined that it had jurisdiction under the FSIA's arbitration exception. *See Yukos Cap.*, 792 F. Supp. 3d at 88-91. The court held that Russia's objection went to the arbitrability of the dispute, rather than the

jurisdictional question of whether an arbitration agreement exists. *See id.* at 89.

b. Shortly after the district court issued its decision denying Russia's motion to dismiss for lack of subject-matter jurisdiction, this Court issued its decision in *Hulley Enterprises Ltd. v. Russian Federation*, 149 F.4th 682 (D.C. Cir. 2025). That case arose out of the same general underlying circumstances but was brought by shareholders of Yukos Oil, who had challenged the expropriation of Yukos Oil and obtained a \$50 billion award in arbitration, which they sought to enforce in federal court. *See id.* at 685. Russia again argued that the FSIA's arbitration exception did not apply, and this Court held that "[w]hether an arbitration agreement exists is a jurisdictional fact under the FSIA that must be independently evaluated by the district court." *Id.* "Because the district court" had erred in giving "binding effect to the arbitral tribunal's determination of this jurisdictional fact," the Court vacated the judgment and directed the district court to "independently consider whether the FSIA's arbitration exception to sovereign immunity applies." *Id.*

Hulley left open the question of “whether issue preclusion applies to jurisdictional questions under the FSIA,” as well as “whether preclusion extends to *foreign* judgments.” 149 F.4th at 691. The Court observed that “[i]f issue preclusion applies to jurisdictional facts under the FSIA, the district court must apply” the factors from *Hilton v. Guyot*, 159 U.S. 113, 163-67 (1895), which “explained that recognition of foreign judgments is a matter of international comity” and “set forth a series of factors for determining whether such recognition is appropriate in a particular case.” *Hulley*, 149 F.4th at 692. On remand, the United States filed a statement of interest in *Hulley* addressing these issues.

3. On appeal in this case, Russia renews its arguments that the district court lacked subject-matter jurisdiction under the FSIA. Among other things, Russia contends that it “did not agree to arbitrate with *anyone*” under the Energy Charter Treaty, because “Russia’s Constitution and other law do not permit its executive branch to waive sovereign immunity by agreeing to arbitration under investment treaties ... if they are not ratified by its Legislature,” as declared by the Russian Constitutional Court in December 2020. Russia Br. 3-4.

Yukos Capital contends that the December 2020 decision of the Russian Constitutional Court was the result of a “procedurally irregular ... attempt[] to rewrite Russian law retroactively to advantage Russia in ongoing litigation.” Yukos Br. 39. Specifically, Yukos Capital argues that the December 2020 decision was rendered after “Russia’s legislature enacted a new procedural mechanism for Russia’s Constitutional Court to ‘expla[in]’” an earlier decision “through one-sided, *in camera* proceedings with no participation by the public or affected investors.” *Id.* (alteration in original). Yukos Capital further contends that because Russia “fully litigated” its provisional-application objection before the Swiss Supreme Court, and the Swiss Supreme Court rejected the objection, determining that an agreement to arbitrate existed, issue preclusion bars Russia from relitigating the matter in this case. Yukos Br. 22-23.

A panel of this Court heard oral argument on May 15, 2026. Following argument, the panel invited the United States to file an amicus brief “addressing the views of the United States on whether, under Article 45(1) of the Energy Charter Treaty, provisional application of the Treaty is inconsistent with Russia’s constitution, laws, or regulations,

particularly in light of the Russian Constitutional Court’s 2020 Clarification.” Order (May 21, 2026). The Court’s order stated that the government’s brief “may also address any other issue on appeal in which the United States determines it has an interest.” *Id.*

ARGUMENT

The United States does not have a position on the specific question posed by the Court in its order, *i.e.*, “whether, under Article 45(1) of the Energy Charter Treaty, provisional application of the Treaty is inconsistent with Russia’s constitution, laws, or regulations, particularly in light of the Russian Constitutional Court’s 2020 Clarification.” Order (May 21, 2026). The United States is not a signatory to the Energy Charter Treaty, and it does not have any particular expertise on matters of Russian law.

Below, the United States addresses other issues on appeal in which the United States has determined it has an interest. First, under this Court’s precedent, a court must determine for itself whether a valid arbitration exists as part of determining whether the FSIA’s arbitration exception applies, and Russia’s provisional-application objection goes to the existence of a valid arbitration agreement. In the view of the United

States, the jurisdictional inquiry into whether there exists an arbitration agreement also depends on whether the arbitration agreement is “with or for the benefit of” the claimant, 28 U.S.C. § 1605(a)(6), although the government recognizes that this Court’s precedent holds otherwise. And in the context of a case like this one, the Court need not reach the waiver exception.

The government further notes that in assessing whether it has jurisdiction under the FSIA, a U.S. court is not required to give preclusive effect to a foreign court’s determination of a jurisdictional fact, such as whether a valid arbitration agreement exists. But there is no categorical bar to a U.S. court exercising its discretion and affording preclusive effect, where appropriate, to the foreign court’s determination. A U.S. court should first determine whether to recognize the foreign court’s judgment under *Hilton v. Guyot*, 159 U.S. 113 (1985), and then, if it finds the *Hilton* factors satisfied, it should apply the settled issue-preclusion standard in deciding whether to extend issue preclusion to the foreign court’s judgment.

Finally, a U.S. court should apply the factors set forth in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 585 U.S. 33

(2018), in assessing the weight to give to the views of a foreign government on questions of its own law.

I. A court must independently confirm that an arbitration agreement exists before determining that it has jurisdiction under the FSIA's arbitration exception.

A. The existence of a valid arbitration agreement is a jurisdictional question under the arbitration exception.

1. The FSIA's arbitration exception withdraws foreign sovereign immunity in any case brought "to enforce 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," or "to confirm an award made pursuant to such an agreement to arbitrate," with certain additional requirements not relevant here. 28 U.S.C. § 1605(a)(6).

Because "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," a court must satisfy itself of the facts necessary to establish its jurisdiction. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Before concluding that the arbitration exception applies, "a federal court must

independently confirm three jurisdictional facts: (1) the existence of an arbitration agreement; (2) an arbitration award; and (3) a treaty that may govern the award.” *Hulley Enters. Ltd. v. Russian Fed’n*, 149 F.4th 682, 687-88 (D.C. Cir. 2025). As relevant here, “the existence of an arbitration agreement is a jurisdictional question under the FSIA that must be independently determined by the court.” *Id.* at 690.

As this Court held in *Hulley*, Russia’s argument that it never entered into a valid arbitration agreement because the Energy Charter Treaty only applied provisionally is an argument that goes to the existence of the arbitration agreement. *See* 149 F.4th at 689-90. “[A]n arbitration agreement between Russia and [the claimants] would exist only if Russia had made a standing offer to arbitrate through provisional application of the [Energy Charter] Treaty. Russia denies it extended any such offer, because it was not required to apply the Treaty’s arbitration clause provisionally.” *Id.* (citation omitted). Whatever the merits of this claim, this argument “goes to the existence of an arbitration agreement and is jurisdictional.” *Id.* at 690.

Thus, the district court erred in concluding that Russia’s provisional-application objection goes to the scope of the arbitration

agreement, rather than its existence. *See Yukos Cap. Ltd. v. Russian Fed’n*, 792 F. Supp. 3d 83, 89 (D.D.C. 2025). And because Russia’s objection goes to the existence of an arbitration agreement, it implicates whether the arbitration exception applies and therefore bears on whether the district court has subject-matter jurisdiction over the action. That is a question the court must decide for itself. *See Hulley*, 149 F.4th at 690.

2. The jurisdictional inquiry into whether an arbitration agreement exists also turns on whether the arbitration agreement is “with or for the benefit of” the claimant. 28 U.S.C. § 1605(a)(6). The arbitration exception only applies if there exists an agreement between the sovereign “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.” *Id.* In context, the phrase “an agreement made by the foreign state with or for the benefit of a private party” is best read to mean an agreement with or for the benefit of the claimant—that is, the plaintiff to the action. *Id.*

The United States recognizes, however, that this Court’s precedent establishes that the question whether the arbitration agreement is “with or for the benefit” of the plaintiff to the action is not a jurisdictional

question and instead bears on the scope of the arbitration agreement. 28 U.S.C. § 1605(a)(6); *Hulley*, 149 F.4th at 690 (citing *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1103 (D.C. Cir. 2024)). The government therefore offers its views on this issue simply for the Court's consideration. See Brief for the United States as Amicus Curiae, *Kingdom of Spain v. Blasket Renewable Invs. LLC*, No. 24-1130, (U.S. May 26, 2026), 2026 WL 1507546.

B. There is no need to reach the FSIA's waiver exception.

The FSIA's waiver exception provides that a foreign sovereign may waive its sovereign immunity "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). "The FSIA does not specifically define what will constitute a waiver 'by implication,'" but this Court construes the term "narrowly." *Khochinsky v. Republic of Poland*, 1 F.4th 1, 8 (D.C. Cir. 2021) (quotation marks omitted). Specifically, this Court's cases require evidence "that the foreign state have intended to waive its sovereign immunity." *Broidy Cap. Mgmt. LLC v. Muzin*, 61 F.4th 984, 995 (D.C. Cir. 2023) (quotation marks omitted). Becoming a party to the New York Convention, without more, does not provide the necessary "strong evidence" that a foreign state intended to waive its sovereign immunity

in U.S. courts. *Khochinsky*, 1 F.4th at 8 (quotation marks omitted). The New York Convention establishes a framework for arbitrating disputes and enforcing arbitral awards that result; it does not alone commit a foreign state to engage in arbitration and therefore could not implicitly waive sovereign immunity for any enforcement action. Thus, a court must still find that a specific arbitration agreement exists for a party to invoke the waiver exception in this context.

That said, even though an arbitration agreement is necessary to find an implicit waiver in an action to enforce an arbitral award pursuant to the New York Convention, it is far from clear that the waiver exception could apply in such actions. Rather, in cases involving attempts to enforce arbitral awards against foreign states under the New York Convention, the proper course is for courts to rely on the FSIA's specific arbitration exception rather than the more general waiver exception. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“[I]t is a commonplace of statutory construction that the specific governs the general.” (alteration in original) (quotation marks omitted)).

The plain text of the arbitration exception indicates that it was intended to displace the waiver exception, at least for arbitration

agreements and arbitral awards involving disputes between private parties and sovereign states. Subparagraphs (A) through (C) of the arbitration exception identify specific scenarios in which jurisdiction exists over a petition to confirm an arbitral award—for example, where the arbitration takes place in the United States, or where the award is governed by a treaty providing for the enforcement of arbitral awards, like the New York Convention. *See* 28 U.S.C. § 1605(a)(6)(A)-(C). Subparagraph (D) then provides for jurisdiction over enforcement petitions if “paragraph (1) of this subsection”—meaning the waiver exception—“is *otherwise* applicable.” *Id.* § 1605(a)(6)(D) (emphasis added). The use of the word “otherwise” reflects Congress’s intent that, at a minimum, application of waiver principles in arbitration cases should not be based on conditions described in subparagraphs (A) through (C). *See Otherwise*, Black’s Law Dictionary (11th ed. 2019) (defining “otherwise” to mean “[i]n a different way; in another manner,” “[b]y other causes or means,” “[i]n other conditions or circumstances,” or “[e]xcept for what has just been mentioned”).

If the waiver exception were available to support jurisdiction in arbitration cases, subparagraph (D) would be superfluous. A party

seeking to enforce an arbitral award would seek to invoke the waiver exception (and not subparagraph (D) of the arbitration exception) only to avoid the threshold requirements of the arbitration exception (including, for example, that the arbitration agreement be made “with or for the benefit of a private party,” 28 U.S.C. § 1605(a)(6)). Statutory interpretation principles—including the canon against superfluity and the specific controls the general—counsel against this result. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957).

Finally, as this Court has recognized, applying the waiver exception to establish jurisdiction over a foreign state based solely on the foreign state being a party to the New York Convention “may have implications for the treatment of the United States in foreign courts and for our relations with foreign states.” *Process & Indus. Devs. Ltd. v. Federal Republic of Nigeria*, 27 F.4th 771, 775 n.3 (D.C. Cir. 2022) (quotation marks omitted). The United States is regularly sued in foreign courts and routinely asserts foreign sovereign immunity under customary international law, where appropriate, in defense of the United States. *See* U.S. Dep’t of Just., *Office of Foreign Litigation*,

<https://perma.cc/US56-XQ3K> (noting the Department of Justice’s Office of Foreign Litigation is currently “handl[ing] approximately 1,800 cases in over 160 countries”). Although U.S. courts have historically exercised restraint in construing implied waivers, other countries may not do so, especially if they perceive the United States as changing course.

In any event, it is unnecessary for this Court to “wade into [these] murky waters,” *Process & Indus. Devs.*, 27 F.4th at 775 n.3, at this juncture, because if the Court finds that there exists an agreement to arbitrate, that would suffice on the facts of this case to establish jurisdiction under the arbitration exception.

II. U.S. courts apply principles of comity in determining the weight to give the determinations of foreign courts and the views of foreign governments.

A. U.S. courts have the discretion to decide whether foreign court determinations of jurisdictional facts have preclusive effect.

As explained, a federal court has an independent obligation to confirm it has jurisdiction over a case. *See Henderson*, 562 U.S. at 434. And as explained, when a court is ascertaining whether it has jurisdiction under the FSIA’s arbitration exception to foreign sovereign immunity, the court must determine whether a valid arbitration agreement exists.

A U.S. court is not required to give preclusive effect to a foreign court's determination as to that question, because it is part of the court's obligation to confirm its own jurisdiction. But while a foreign court's determination is not binding on a U.S. court, there is no categorical bar to a U.S. court exercising its discretion and affording preclusive effect, where appropriate, to the determination of a foreign court to the extent it bears on a U.S. court's jurisdictional determination under the FSIA. In this case, this analysis bears on whether the court should afford preclusive effect to the Swiss Supreme Court's judgment rejecting Russia's provisional-application objections.

The first step of this analysis is to determine whether to recognize the foreign court's judgment. In *Hilton v. Guyot*, 159 U.S. 113 (1895), the Supreme Court articulated a series of factors that a U.S. court should consider in determining whether to recognize a foreign court's judgment.

Hilton provides that a foreign judgment should only be recognized if

there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was

sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.

Id. at 202-03.

As this Court recognized in *Hulley*, the *Hilton* factors reflect the comity principles that a U.S. court should take into account in determining whether to recognize a foreign court's judgment. *See Hulley*, 149 F.4th at 692 (“[I]n the seminal case *Hilton v. Guyot*, the Supreme Court explained that recognition of foreign judgments is a matter of international comity. ... Since *Hilton*, the federal courts have extended comity to foreign judgments that comport with the standard expounded by the Court.” (citations omitted)). In the view of the United States, U.S. courts should apply the *Hilton* factors searchingly to the specific facts of a case before deciding whether to recognize a foreign court's determination of fact or law as it pertains to the jurisdictional inquiry under the FSIA. This searching inquiry may involve assessing the evidentiary record that was before the foreign court to assess the persuasiveness of the foreign court's reasoning and judgment.

If a U.S. court determines that it is appropriate to recognize the foreign court's judgment under the *Hilton* factors, the second step is to

apply the settled standard for deciding whether to extend issue preclusion to the foreign court's judgment. The *Hilton* analysis, which is focused on whether principles of comity warrant giving weight to a foreign court's judgment, is distinct from and does not displace the test that courts employ to determine whether issue preclusion applies.

As this Court has explained, the court must find three conditions satisfied before determining that issue preclusion estops a party from relitigating an issue previously decided. See *Jack Faucett Assocs., Inc. v. American Tel. & Tel. Co.* 744 F.2d 118, 125 (D.C. Cir. 1984). First, the issue must have been “actually litigated,” namely, it must have been “contested by the parties and submitted for determination by the court.” *Id.* (quotation marks omitted). Second, it must have been “actually and necessarily determined by a court of competent jurisdiction” in the prior case. *Id.* (quotation marks omitted). Third, preclusion “must not work an unfairness” on the bound party. *Id.* (quotation marks omitted).

In short, if the court determines, after assessing the *Hilton* factors, to recognize the foreign judgment, then it can apply the usual test for issue preclusion to determine whether a foreign court's judgment has preclusive effect as to fact or issue in question. That fact or issue can

relate to a jurisdictional question under the FSIA—for instance, whether an agreement to arbitrate exists. *See Hulley*, 149 F.4th at 691 (“It is well established that, in general, ‘[i]ssue preclusion applies to threshold jurisdictional issues.’ And sovereign immunity is a jurisdictional issue.” (alteration in original) (citation omitted) (quoting *National Ass’n of Home Builders v. Environmental Prot. Agency*, 786 F.3d 34, 41 (D.C. Cir. 2015))); *see also Deutsche Telekom, A.G. v. Republic of India*, 155 F.4th 694, 703 (D.C. Cir. 2025) (noting that “United States courts often give preclusive effect to foreign judgments as a matter of international comity” and that “such preclusive effect might extend to foreign judgments confirming arbitral awards” but declining to decide the preclusion question).

While there is some overlap between the *Hilton* factors and the issue-preclusion analysis, assessing the sum total of these factors is appropriate in the circumstances presented here—where U.S. courts are obligated to confirm for themselves that they have jurisdiction under the FSIA but may draw on the expertise of foreign courts that have previously assessed identical issues—namely, circumstances where

principles of comity, fundamental notions of fairness, and reciprocity generally apply.

B. The views of a foreign government about its own law are entitled to “respectful consideration” but are not binding on U.S. courts.

This case also presents the distinct question of the weight that a U.S. court should give to the views of a foreign government on issues of foreign law, in light of the Russian government’s submission of its views on questions of Russian law.

The United States does not have a position on the specific question posed by the Court in its order, *i.e.*, “whether, under Article 45(1) of the Energy Charter Treaty, provisional application of the Treaty is inconsistent with Russia’s constitution, laws, or regulations, particularly in light of the Russian Constitutional Court’s 2020 Clarification.” Order (May 21, 2026). As noted, the United States is not a signatory to the Energy Charter Treaty, and it does not have any particular expertise on the requirements of Russian law.

The United States can, however, point the Court to the comity-based principles that should guide the weight that U.S. courts give to a foreign government’s views on foreign law.

In *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 585 U.S. 33 (2018), the Supreme Court explained that in cases like this one, where a U.S. court considering a question of foreign law is provided with the views of a foreign government, the court is not “bound to adopt the foreign government’s characterization” of its law, “nor required to ignore other relevant materials.” *Id.* at 43 (citation and quotation marks omitted). But the court must “accord respectful consideration to [the] foreign government’s submission.” *Id.* at 36. And “[i]n the spirit of international comity, a federal court should carefully consider a foreign state’s views about the meaning of its own laws.” *Id.* at 43. “[T]he appropriate weight ... will depend upon the circumstances,” including “the statement’s clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement’s consistency with the foreign government’s past positions.” *Id.*

In this case, applying the *Animal Science* factors would include taking into consideration the fact that the 2020 ruling of the Russian Constitutional Court, on which Russia relies, was adopted long after the

initiation of the Yukos arbitration and well after the tribunal issued its ruling rejecting Russia's jurisdictional objections. Moreover, the 2020 ruling was issued in December, pursuant to a law that the Russian legislature adopted the prior month, seemingly in response to a decision in a separate (but related) case (*Hulley*) that upheld a different arbitral award against Russia and rejected Russia's arguments about the provisional application of the Energy Charter Treaty. These are all factors that may be taken into consideration by a U.S. court assessing the weight to be given the views of the Russian government on the questions of Russian law presented in this case, since, at minimum, they are relevant to the "context and purpose" of the Russian government's statements of law, the "transparency of the foreign legal system," and the "consistency" of the Russian government's position with its "past positions." *Animal Sci.*, 585 U.S. at 43.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,914 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

s/ Urja Mittal

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