UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HULLEY ENTERPRISES LTD., YUKOS UNIVERSAL LTD., AND VETERAN PETROLEUM LTD.,	Case No. 1:14-cv-01996-BAH
Petitioners,	Chief Judge Beryl A. Howell
v.	
THE RUSSIAN FEDERATION,	
Respondent.	

DECLARATION OF PROFESSOR EKATERINA MISHINA, Ph.D.

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1. My name is Ekaterina Mishina. I am qualified to opine on issues of the law of the Russian Federation, including Russian constitutional law and Russian laws relating to the application of treaties. I have more than twenty-five years' experience researching, writing, teaching, and practicing Russian law. I hold a B.A. and M.A. in Jurisprudence from the Faculty of Law of Moscow State University, and a Ph.D. in Jurisprudence from the Institute of State and Law of the Russian Academy of Sciences. From 2005 through 2014, I held the position of Associate Professor in the Department of Constitutional and Municipal Law of the Faculty of Law of the National Research University—Higher School of Economics in Moscow, where I was also Deputy Director of the Institute for Legal Studies. I have since held Visiting Professorships at the University of Michigan. I have published widely on Russian constitutional law. My complete and current CV is attached hereto as **Annex 1.**

2. I am submitting this Declaration at the request of Petitioners and in support of their Supplemental Opposition to the Russian Federation's Motion to Dismiss Under the Foreign Sovereign Immunities Act. I have personal knowledge of the matters stated herein.

I. My Previous Expert Reports

3. I am the author of three expert reports, regarding Russian law, which were submitted to the Hague Court of Appeal (hereinafter referred to as "**Dutch Court of Appeal**") by Petitioners. I reaffirm, here, the opinions stated in those reports.

a. **Annex 2** to this Declaration is my first expert report, dated March 8, 2017. This report was submitted to the Dutch Court of Appeal as Exhibit HVY-D4.

b. **Annex 3** to this Declaration is my second expert report, dated February 19, 2019. This report was submitted to the Dutch Court of Appeal as Exhibit HVY-D10.

c. **Annex 4** to this Declaration is my third expert report, dated September 6, 2019. This report was submitted to the Dutch Court of Appeal as Exhibit HVY-D21.

4. **Annex 5** to this Declaration is the Consolidated List of Exhibits cited in my three expert reports. The prefix "M" corresponds to the first letter of my last name.

5. **Annex 24** to this Declaration contains all of the exhibits cited in my reports.

II. Summary of Opinions Relating to Ruling No. 2867 O-P of the Constitutional Court of the Russian Federation of December 24, 2020 (the "Christmas Decision")

6. The Russian Federation has submitted to the Court an unofficial English translation of Ruling No. 2867-O-P of the Constitutional Court of the Russian Federation, dated December 24, 2020 (the "**Christmas Decision**"), as Annex 6 of the Declaration of Prof. Alexei Avtonomov. The Christmas Decision was not considered by the Dutch Court of Appeal, or by any expert reports submitted to that Court, since it was issued 10 months after the Court of Appeal's judgment of February 18, 2020. Prof. Avtonomov's Declaration contains just one sentence giving his opinions about the Christmas Decision: "This judicial decision is binding within the Russian legal system and fully confirms my reasoning on the proper interpretation of Russian law in light of Article 26 and Article 45(1) of the Energy Charter Treaty." Avtonomov Decl., ECF 234, ¶ 5.

7. I have been asked by Petitioners to describe the circumstances leading up to the issuance of the Christmas Decision. In brief: The Christmas Decision describes itself as the Constitutional Court's response to a "request," submitted by the Russian Government, to "clarify" the Court's prior Resolution No. 8-P of March 27, 2012. (Resolution No. 8-P was discussed at length in my prior expert reports and was relied upon by the Dutch Court of Appeal.) The circumstances of the Christmas Decision are highly unusual in many respects, including: (1) the request for clarification was made *eight years* after Resolution No. 8-P was decided, which is an extraordinary delay; (2) the request was made (according to the Russian Federation's later filing

with the Dutch Supreme Court) in order to attempt to undo the Dutch Court of Appeal's decision in this case, which is a highly unusual basis for requesting clarification; (3) the request was submitted soon after constitutional and statutory amendments had come into effect, which made it much easier for the President to remove Justices from the Constitutional Court, and which imposed strict secrecy over requests for clarification and the procedure of consideration of such requests; and (4) the operative part of the Decision does not purport to clarify anything about Resolution No. 8-P, but rather presents an entirely new legal position. I further explain each of these circumstances below.

8. I have also been asked by Petitioners whether the Christmas Decision's legal positions are, in Professor Avtonomov's words, "a proper interpretation of Russian law," as that law existed *prior to* the Christmas Decision. In brief: No. The Christmas Decision, and the reasoning contained therein, represents a dramatic change from prior legal positions of the Constitutional Court. The Christmas Decision (without expressly saying so) effectively overrules the Constitutional Court's prior legal positions regarding the Russian Constitution, which were stated in previous cases including Resolution No. 8-P. In addition to departing from the prior legal positions of the Constitutional Court, the Christmas Decision also differs greatly from the Russian Federation's long-standing practice of provisionally applying international treaties.

III. The Legal Positions of the Constitutional Court's Previous Resolution No. 8-P of March 27, 2012

9. The Constitutional Court's prior Resolution No. 8-P, dated March 27, 2012, extensively considered the legal effect of provisionally applied international treaties of the Russian Federation. The Resolution made clear that provisionally applied international treaties create binding obligations and rules that override inconsistent rules of Russian law. Resolution No. 8-P is included as **Annex 7** to this Declaration, and was submitted to the Dutch Court of Appeal as

Exhibit M-79. I discussed this Resolution at length in my first report (**Annex 2**), at paragraphs 194 through 205. The Dutch Court of Appeal also discussed and relied upon Resolution No. 8-P in its decision. Court of Appeal Judgment, ¶¶ 4.7.22-4.7.24.

10. Resolution No. 8-P resulted from a case that was brought to the Court by Mr. Ushakov, a Russian citizen, who had been assessed a large amount of customs duties under an Agreement between the Governments of the Russian Federation, Belarus, and Kazakhstan, which Agreement provided for much higher duties than were due under the Russian Customs Code. **Annex 2**, ¶¶ 195-97. This Agreement had not been ratified at the time; it was applied provisionally. *Id.* ¶ 197.

11. The Constitutional Court held that provisional application of treaties complied with the Russian Constitution. In its reasoning, the Court confirmed the Russian Federation's long-standing practice of provisionally applying international treaties. Furthermore, Resolution No. 8-P (because it was a Constitutional Court judgment) further strengthened this approach. The Constitutional Court is the only court of the Russian Federation whose judgments are made binding on executive and judicial bodies of state power. *See* **Annex 2** (my first report), ¶¶ 94-122 (describing the role and authority of the Constitutional Court). The Constitutional Court's judgments (including of course Resolution No. 8-P) have precedential force, meaning that the Constitutional Court's interpretations of the Constitution and federal laws cannot be questioned by any other Russian courts or by any other state organ. *Id.* ¶¶ 118-121 (quoting numerous decisions of the Constitutional Court that establish this point).

12. At the time that Resolution No. 8-P was decided, the provisional application of international treaties was expressly authorized by Article 23 of the Federal Law on International Treaties (FLIT), which provides:

> **Article 23: Provisional application of international treaties by the Russian Federation**
>
> 1. An international treaty or a part thereof may, prior to its entry into force, be applied by the Russian Federation provisionally if the treaty itself so provides or if an agreement to such effect has been reached with the parties that have signed the treaty.
>
> 2. Decisions on the provisional application of a treaty or a part of a treaty by the Russian Federation shall be made by the body that has taken the decision to sign the international treaty . . . .

Annex 19 (FLIT) (previously submitted to the Dutch Court of Appeal as Exhibit S-18 to Professor Stephan's first report), art. 23.

13. In Resolution No. 8-P, the Constitutional Court construed Article 15(4) of the Russian Constitution. **Annex 6** to this Declaration is an English translation of the Russian Constitution of 1993, with amendments as of September 6, 2001. This document was previously submitted to the Dutch Court of Appeal as Exhibit S-12 to Professor Stephan's first expert report. Article 15(4) reads in full:

> The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Annex 6 (Russian Constitution), art. 15(4).

14. The Constitutional Court held that it follows from Article 15(4) of the Constitution that provisionally applicable treaties are, as to their legal consequences, "essentially equivalent" to ratified treaties that have entered into force—a point that I discussed in my first expert report. *See* **Annex 2** (my first report), ¶ 204 (quoting Resolution No. 8-P). Thus, if a provisionally applicable treaty contains rules that are different from Russian federal law, then the provisionally applicable treaty prevails over the federal law. *Id.* ¶ 205. The Constitutional Court held:

> [T]he public authorities and officials in the Russian Federation consistently pursue a juridical policy whereby the rules of a provisionally applied international treaty become a part of the Russian Federation legal system and, just like the international treaties of the Russian Federation that have entered into force, *have priority over Russian laws* . . . .

Annex 7 (Resolution No. 8-P), ¶ 4.1, p.10 (emphasis added).

> Consent to provisional application of an international treaty means that it becomes a *part of the Russian Federation's legal system and shall be applied on an equal basis* with those international treaties that have entered into force (unless specifically stipulated otherwise by the Russian Federation), *because provisional application would otherwise become meaningless.*

Id. ¶ 4, p.10 (emphases added).

> [P]rovisionally applied international treaties of the Russian Federation, in terms of their legal consequences and their effect on individual and civil rights, liberties, and duties in the Russian Federation, *are essentially equivalent* to those international treaties that have entered into force and have been ratified and duly published officially in the manner provided for by federal laws.

Id. ¶ 4.1, p.11 (emphasis added). Notably, the Constitutional Court did not provide for any exceptions or reservations to this rule.

15. Based on the foregoing legal positions, which established that provisionally applied treaties have the force of law and indeed "have priority over" federal law, the Constitutional Court determined that "official publication" of provisionally applied international treaties was required in order to give the Russian people notice of the laws that governed them. **Annex 7** (Resolution 8-P), ¶ 4.1, p.12. Official publication was required by "the principles of a law-governed State, juridical equality, and legal certainty." *Id.*

IV. There Was No "Confusion" Regarding Resolution No. 8-P's Legal Positions

16. In the later Christmas Decision, the Constitutional Court stated that the Russian Government had requested "clarification" of Resolution No. 8-P because the Government "believe[d]" that there was a "confusion" about Resolution No. 8-P's legal positions.[1] However,

[1] The unofficial English translation of the Christmas Decision, contained in Annex 6 to Professor Avtonomov's Declaration, states in paragraph 1 on page 1: "The Government of the Russian Federation has requested clarification of the above Resolution [No. 8-P], believing there has been a lack of clarity during its interpretation in legal practices . . . ." In my opinion, the English term "confusion" is a better translation of the original Russian than "lack of clarity."

the Christmas Decision provides no cited authority to support this claim of "confusion." To the best of my knowledge, the Russian Government had never before suggested that there was any "confusion" regarding Resolution No. 8-P. Nor had the Government previously submitted a request for official clarification of Resolution No. 8-P.

17. The claim of "confusion" is wrong. I am not aware of a single source—neither a court decision, nor any commentary by a Russian legal expert—that indicated any "confusion" regarding the legal positions established by the Constitutional Court in Resolution No 8-P.

18. On the contrary, as I noted in my earlier reports, Resolution No. 8-P was understood (perfectly clearly) to confirm that provisionally applicable international treaties "prevail over" the domestic laws of the Russian Federation. *See* **Annex 2** (my first report), ¶ 205 & n.172. When I wrote my earlier reports, no one questioned the clarity of Resolution No. 8-P on this point—not the Russian Federation and not its expert, Professor Avtonomov. *See* **Annex 4** (my third report), ¶ 18 (noting that Professor Avtonomov did not offer any contrary reading of the holding of Resolution No. 8-P, and that he implicitly conceded that Resolution No. 8-P was a leading case, from the Constitutional Court, regarding provisional application of international treaties). Here are five examples—three from the academic literature, and two from the Russian Parliament and Russian President—demonstrating their clear understanding of the meaning of Resolution No. 8-P:

a. *Boris Osminin.* Professor. Osminin is a leading Russian international practitioner who participated in the drafting and development of the Russian Federation's Federal Law on International Treaties (FLIT). He has written numerous works on Russian and international law. *See* **Annex 2** (my first report), ¶ 171, n.142. In my earlier expert reports, I relied on Mr. Osminin's 2013 article, *Provisional Application of International Treaties: State Practice*, 12

Russian Law Journal, pp. 110-121. A partial translation of this article was submitted to the Dutch Court of Appeal as Exhibit M-69. Attached hereto as **Annex 8** is a complete translation of this article in its entirety. In it, Professor Osminin confirms that Resolution No. 8-P was understood to hold that provisionally applicable treaties prevail over domestic laws and that the principle *pacta sunt servanda* ("agreements must be kept") applies to provisionally applied international treaties:

> The extension of the *pacta sunt servanda* rule to provisionally applied international treaties is confirmed in the above-mentioned Ruling of the Constitutional Court of the Russian Federation No. 8-P of March 27, 2012. . . . In justifying the need for official domestic publication of international treaties which have been provisionally applied, the Constitutional Court has stated that they have the same legal effect as ratified and entered into force treaties and, in the same way as international treaties which have entered into force, take precedence over Russian laws (Clause 4.1).

Annex 8 (Osminin article), at 4 (citing Resolution No. 8-P, ¶ 4.1).

> The Constitutional Court of the Russian Federation does not question the duty to comply in good faith with the generally recognized *pacta sunt servanda* rule of the international law (Articles 26, 27 of the Vienna Convention on the Law of Treaties) in inter-state relations, including with regard to international treaties provisionally applied by the Russian Federation (Clause 4.3).

Id. at 4 (citing Resolution No. 8-P, ¶ 4.3). Osminin did not detect any "confusion" in Resolution No. 8-P's legal positions.

b. *Natalya Ageshkina.* Natalya Ageshkina is a well-known Russian legal practitioner and expert with experience in commercial and non-commercial organizations and in concluding international trade agreements. **Annex 9** is a translation of portions of her 2013 treatise, which was submitted to the Dutch Court of Appeal as Exhibit M-70: N.A. Ageshkina, *Commentary to the Federal Law on International Treaties of 1995* (ConsultantPlus, 2013), p. 75. In this treatise, Ageshkina discusses Resolution No. 8-P at length. She writes, with specific reference to Resolution No. 8-P:

> As the RF Constitutional Court noted [in Resolution No. 8-P], public authorities and officials of the Russian Federation consistently pursue a juridical policy whereby the rules

> of provisionally applied international treaties become part of the Russian Federations legal system and prevail, just as in-force treaties of the Russian Federation, over domestic laws, even in the absence of an officially published [text], and including cases where they impact on the human and civil rights, freedoms, and obligations.
>
> In terms of the requirements of part 4 Article 15 of the RF Constitution, taken together with Articles 2, 17.1 and 19.1, provisionally applied international treaties of the Russian Federation, in terms of their legal consequences and their effect on individual and civil rights, liberties, and duties in the Russian Federation, are essentially equivalent to those international treaties that have entered into force and have been ratified and duly published officially in the manner provided for by federal laws. Consequently, provisionally applied international treaties must be published (promulgated) in an official manner, just as in-force international treaties.

Annex 9 (Ageshkina treatise), pp. 75-77. Like Osminin, Ageshkina did not detect any "confusion" in Resolution No. 8-P's legal positions.

c. *Gennadiy Kurdyukov.* Professor Kurdyukov is a professor of constitutional law and international law at the Kazan State University. **Annex 10** is a translation of portions of his 2014 article, which was submitted to the Dutch Court of Appeal as Exhibit M-80: G. Kurdyukov, *Agreement on Provisional Application of International Treaties,* Bulletin of Kazan University, Vol. 156, No. 4 (2014), pp.35-42. In this article, Professor Kurdyukov addresses the most important legal positions from Resolution No. 8-P and concludes that in this Resolution, the Constitutional Court "confirmed that an international treaty becomes part of the legal system of the RF by provisional adoption, and art. 15, para. 4 of the RF Constitution extends this to these treaties. In the absence of an officially promulgated text, such treaties have priority over Russian laws." *Id.* at 40-41. Like Osminin and Ageshkina, Kurdyukov did not detect any "confusion" in Resolution 8-P's legal positions.

d. *The Russian Parliament.* Resolution No. 8-P required "federal lawmakers to create a procedure for official publication of provisionally applied treaties of the Russian Federation." **Annex 9** (Ageshkina treatise), at 75-77; *see also* **Annex 7** (Resolution No. 8-P), ¶ 4.3,

pp.14-15. In response, the Russian Parliament enacted, in 2012, a new Federal Law No. 254-FZ, which required official publication of provisionally applied treaties. **Annex 9** (Ageshkina treatise), at 75-77; *see also* **Annex 10** (Kurdyukov article), pp. 40-41 (discussing the same law). If Resolution No. 8-P really did cause "confusion," as the Russian Government claimed in its request leading to the Christmas Decision, then I would have expected the Parliament to request "clarification" from the Constitutional Court in 2012, rather than waiting until December 2020 to do so.

e. *The Russian President*. Even before the Parliament passed Federal Law No. 254-FZ, President Putin took action in July 2012. Specifically, he issued Decree 970, entitled "Regarding Official Promulgation of Provisionally Applied International Treaties of the Russian Federation." This decree ordered various government agencies to officially publish provisionally applied international treaties. **Annex 9** (Ageshkina treatise), at 75-77; *see also* **Annex 10** (Kurdyukov article), pp. 40-41 (discussing the same decree). Here again, if Resolution No. 8-P really did cause "confusion," then I would have expected President Putin to seek "clarification" in 2012.

V. The "Request for Clarification" that Led to the Christmas Decision Was Unprecedented and Unusual for Many Reasons

A. The "Request for Clarification" Was Made Immediately After Significant Amendments to the Russian Constitution and the 1994 Federal Constitutional Law on the Constitutional Court

19. The year 2020, immediately prior to the Christmas Decision, saw fundamental changes to the 1993 Constitution of the Russian Federation. More than 100 amendments to the Constitution came into effect on July 4, 2020. Several of these amendments significantly modified the jurisdiction and status of the Russian Constitutional Court. Under the amended article 83 of the Constitution, the President has greatly increased power to cause the removal of Justices from

the Constitutional Court (and judges of any other federal courts), simply by making a request to the Federation Council (the upper house of Parliament). This constitutional amendment has been especially disruptive for the Russian judiciary as it destroyed all that remained of judicial independence in Russia. The President may request removal for essentially any reason at all, since the standard set out in the 2020 amendments is so vague: removal is authorized whenever "a judge commits an act besmirching the honor and dignity of the judge and also in any other case provided by a Federal Constitutional Law that evidences the impossibility of the exercise by the judge of his powers."[2]

20. Another constitutional amendment, which took effect in 2020, was directed specifically against the Dutch Court of Appeal Judgment in this case. Article 125(5.1)(b) was amended to state: "The Constitutional Court of the Russian Federation . . . shall decide . . . on the possibility of enforcing a decision of a foreign or an international (interstate) court, a foreign or an international arbitration court or tribunal imposing obligations on the Russian Federation if such a decision runs contrary to the foundations of the public order in the Russian Federation." **Annex 11.** A public meeting with members of the working group on drafting proposals for amendments to the Russian Constitution was held on February 26, 2020. **Annex 12** contains minutes of that meeting, compiled from two different sources.[3] The working group meeting minutes show that one of the amendment's drafters, Senator Konstantin Kosachev, Chairman of the Foreign Affairs Committee of the upper house of the Russian Parliament, stated:

> What do we mean by [this amendment]? Recently, we have seen a large number of such unlawful decisions taken by foreign courts. We get to see them and hear about them. Let me quote just one most recent highly publicized example—the recent order of the Hague

[2] The Amended Art. 83 (p. f-3) of the 1993 Constitution of Russia.
[3] The English translation in Annex 12 is comprised mostly of the Russian Federation's own English translation, but also includes an additional English translation insertion that is present in the original Russian but was omitted from the Russian Federation's published English version.

> Court of Appeal, mandating Russia to pay 50 billion dollars to the former shareholders of Yukos. . . . In our view, we need comprehensive constitutional instruments to protect Russian national interests from such shameless political infringements.

President Putin, who was present at the meeting, stated in response: "I fully agree with what was said about the authority of the Constitutional Court to decide whether to enforce or not to enforce international court rulings in Russia. You are right—this is directly related to upholding our sovereignty and suppressing any attempts to interfere in our domestic affairs."

21. Other amendments, in 2020, changed the federal constitutional law governing the procedure of the Constitutional Court, namely, the 1994 Federal Constitutional Law on the Constitutional Court of the Russian Federation. These amendments took effect on November 9, 2020—just four days before the request for "clarification" of Resolution No. 8-P was submitted to the Constitutional Court. These amendments introduced a number of significant changes to the procedure for requesting clarifications from the Constitutional Court of the court's judgments. Previously, requests for clarification were handled in a transparent manner—the requests themselves were made public, and the hearings were open to the public and their video recordings were made public. The 2020 amendments eliminated all public disclosure and transparency. The amendments require that hearings on requests for clarification be conducted *in camera*. Only the Justices of the Constitutional Court who consider the case are allowed to participate. Not even the parties to the case are able to attend. The minutes of the hearings on requests for clarification cannot be disclosed to the public. Justices and other persons who attend the in-chambers discussion cannot divulge any details of it or the results of the Justices' voting on the request for clarification. Justices are forbidden from openly disagreeing in any way with the decision of the Court on a request for clarification.

B. The "Request for Clarification" Was Highly Unusual

22. The only publicly available information I am aware of,[4] regarding the Russian Government's reasons for requesting clarification of Resolution No. 8-P, was provided by the Russian Federation itself in a submission to the Dutch Supreme Court on February 5, 2021. **Annex 22** is an English translation of the relevant excerpt. At paragraph 39 of that submission, the Russian Federation asserted that the Russian Ministry of Justice was "forced" to submit questions to the Constitutional Court for the following reasons: "Numerous articles and blogs have already been published about [the Dutch Court of Appeal Judgment]" and "Many specialists in international law closely monitor [the Dutch set-aside proceedings]." "The Russian Ministry of Justice [sic[5]] was therefore forced to submit questions to the Constitutional Court."

23. It is highly unusual for the Ministry of Justice or the Russian Government to request clarification of a Constitutional Court decision in response to foreign judgments such as the Dutch Court of Appeal's judgment in the set-aside proceedings. It is even more unusual to request clarification from the Constitutional Court in response to publications of articles and blogs about foreign legal proceedings. I am unaware of any other such cases in which clarification was sought, from the Constitutional Court, for similar reasons.

24. It is also extremely uncommon for the Constitutional Court to grant requests for clarification where (as in the case of Resolution No. 8-P) there was no confusion in the legal

[4] I have not seen a copy of the request for clarification and, to the best of my knowledge, it is not publicly available. The Christmas Decision states that the Constitutional Court also examined "responses" that the Court received from the "parties to the case," but those responses are also not publicly available. There are no publicly available transcripts or other accounts of the Justice's hearings or deliberations. All of this secrecy is new; it is the effect of the 2020 amendments to the federal constitutional law governing Constitutional Court procedure, which eliminated transparency, as I discussed above.

[5] The Christmas Decision does not state that the Ministry of Justice submitted a request for clarification. Instead, the request was submitted by the Russian Government , which is different from the Ministry of Justice.

positions that were expressed in the original decision. For example, in Decision No. 498 O-R of 10 March 2022, the Constitutional Court denied clarification of the Resolution No. 14-P of 19 April 2021, because its legal positions "contained no uncertainties."[6] This is a common reason for the Court to deny requests for clarification.

25. It is also very rare for the Constitutional Court to accept a request for "clarification" that asks the Court to formulate *new* legal positions—which is what the Court did in the Christmas Decision, as I explain below. The rule is that requests for clarification will *not* be granted if "the questions posed in it imply the need to formulate new legal positions that are not reflected in the [earlier] decision." Decision No. 180 O-R of 11 February 2021 (denying request for clarification, and citing the relevant law, Article 83 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation").[7] That is because "clarification is given only within the framework of the subject matter of [the earlier] judgment and only on those issues … [that] were the subject of consideration in the session of the Constitutional Court of the Russian Federation and were reflected in the [earlier] judgment adopted by it." On the (rare) occasions when the Court does accept a request for clarification, it typically explains in detail which portions of the legal positions, contained in the original judgment , were unclear. For example, in Decision No. 556 O-R of 11 November 2008, on pages 1-3, the Court explained in detail how law-enforcement

[6] This Decision is available at https://rulaws.ru/acts/Opredelenie-Konstitutsionnogo-Suda-RF-ot-10.03.2022-N-498-O-R/.
[7] This Decision is available at https://legalacts.ru/sud/opredelenie-konstitutsionnogo-suda-rf-ot-11022021-n-180-o-r/.

officials had misunderstood specific requirements and procedures laid out on specific pages of its earlier judgment.[8] There are many other such examples.[9]

26. The request for clarification that led to the Christmas Decision was submitted more than eight years after Resolution No. 8-P was rendered. It is out of the ordinary for the Constitutional Court to accept a request for clarification that is made so many years after the original judgment. Even when the request for clarification is made promptly, the Constitutional Court usually declines to issue a clarification.[10] Before the Christmas Decision, the last time the Constitutional Court had granted a request for clarification was more than four years earlier, in 2016—even though many requests had been submitted. In the 18 months since the Christmas Decision, the Constitutional Court has not granted any other requests for clarification.[11]

VI. The Christmas Decision Represents a Dramatic Change in Interpretation of Russian Law

27. As mentioned above, the Christmas Decision was highly unusual since its operational part (page 19) does not refer to, interpret, or clarify any legal positions stated in Resolution No. 8-P. The Christmas Decision instead interprets, not Resolution No. 8-P, but rather the constitutionality of Article 23(1) of the Federal Law on International Treaties (FLIT). The

[8] This Decision is available at https://legalacts.ru/doc/opredelenie-konstitutsionnogo-suda-rf-ot-11112008-n/.

[9] The following Decisions also contain detailed explanations of how specific parts, of the original decision's legal reasoning, had been shown to be unclear: Decision No. 449 O-R of 16 March 2016 (available at http://www.consultant.ru/document/cons_doc_LAW_188828/); Decision No. 1344 O-R of 09 November 2009 (available at http://www.consultant.ru/document/cons_doc_LAW_94045/6f5388c23284a43e29dde30c48025ccef23c721e/).

[10] For example, the requests for clarification were declined in the following: Decision No. 786 O-R of 31 March 2022; Decision No. 498 O-R of 10 March 2022; Decision No. 413 O-R of 24 February 2022; Decision No. 250 O-R of 24 February 2022; Decision No. 1371 O-R of 9 July 2021; Decision No. 586 O-R of 13 March 2018; Decision No. 252 O-R of 27 February 2018; Decision No. 484 O-R of 10 March 2016; and Decision No 1435 O-R of 07 July 2016.

[11] I based the last two sentences on my review of the following website, where most officially published judgments of the RF Constitutional Court are made available: http://publication.pravo.gov.ru/SignatoryAuthority/court.

Christmas Decision is effectively a brand-new decision placing constitutional limits on that law, rather than a clarification of anything stated in Resolution No. 8-P.

28. The Christmas Decision's new legal positions contradict the most important legal positions of the Constitutional Court that were stated in Resolution No. 8-P. Specifically, the Christmas Decision attempts to:

a. limit the scope of provisional application of international treaties of the Russian Federation by prohibiting the provisional application of parts of international treaties that provide for arbitration of disputes between the Russian Federation and foreign investors; and

b. deprive the Russian Government of its power to agree to provisional application of parts of international treaties that provide for arbitration of disputes between the Russian Federation and foreign investors.

29. These new legal positions depart dramatically from the legal positions stated in Resolution No. 8-P. They also significantly differ from the holdings of the Constitutional Court in a number of previous judgments, and from the routine practice of the Russian Federation in agreeing to provisional application of international treaties.

A. The Christmas Decision Attempts to Depart from the Constitutional Court's Other Cases That Applied Resolution No. 8-P

30. The Christmas Decision represents a dramatic break from the legal positions stated by the Constitutional Court in other decisions that were rendered after Resolution No. 8-P. In these later resolutions and decisions, the Constitutional Court relied upon Resolution No. 8-P as the basis for its conclusions or otherwise referred to this important case. I describe two examples in detail below. (Two additional examples are described in my first report. **Annex 2**, ¶¶ 206-209 (discussing Decisions 476-O and 477-O of 3 April 2012).) In these resolutions and decisions, the

Constitutional Court did not suggest that there was any uncertainty or lack of clarity around Resolution No. 8-P.

1. The Free Economic Zones Decision

31. In Decision No. 1820-O of 18 September 2014 (the "**Free Economic Zones Decision**"), the Constitutional Court examined the issue of provisional application of an international treaty referred to as the Free Economic Zones Agreement (full name: "Agreement Concerning Free/ Special/ Exclusive Economic Zones in the Customs Territory of the Customs Union and the Free-Customs-Zone Customs Procedure"). The decision is **Annex 13** to this declaration, and was submitted to the Dutch Court of Appeal as Exhibit M-82. I discussed the decision at length in all three of my previous expert reports. **Annex 2** (my first report), ¶¶ 210-219 (background and holding of the decision); **Annex 3** (my second report), ¶¶ 85-86 (refuting Professor Avtonomov's incorrect claim that the treaty in question had in fact been ratified, rather than provisionally applied); **Annex 4** (my third report), ¶¶ 51-53 (refuting yet more incorrect claims, made by Professor Avtonomov, about this decision). The Free Economic Zones Decision is also discussed by Professor Paul Stephan in his first report at paragraphs 105 and 106.

32. The Free Economic Zones Agreement is an international treaty created on the basis of, *inter alia*, the Customs Union Treaty concluded between the Russian Federation, Belarus and Kazakhstan on 06 October 2007.[12] **Annex 2**, ¶ 213. The Free Economic Zones Agreement was signed on 18 June 2010 and was applied provisionally from 06 July 2010—the day when the Treaty on the Customs Code of the Customs Union[13] of 27 November 2009 came into effect.[14] The Free

[12] http://www.consultant.ru/document/cons_doc_LAW_93361/

[13] http://www.consultant.ru/document/cons_doc_LAW_95238/017578b50738fbcd8d911fde3eb23bb1fe3471a7/#dst100017

[14] This procedure is envisaged in Article 27 of the Free Economic Zones Agreement, which his available at:

Economic Zones Agreement still had not been ratified by the Russian Parliament (and therefore was still being applied provisionally) as of September 2019. **Annex 4** (my third report), ¶ 51. The Agreement states: "This Agreement shall be subject to ratification and shall be applied provisionally . . . ." *Id.* (quoting Agreement). The Free Economic Zones Agreement required the complainant in the case to pay a customs duty when using haulage trucks to transport goods from Kaliningrad to Belarus; the complainant failed to do so; the customs authorities then commenced collection actions. Those actions eventually reached the Constitutional Court after conflicting lower court decisions. *See* **Annex 2** (my first report), ¶ 215.

33. In the Constitutional Court, the complainant made two arguments. *First*, he argued that the Free Economic Zones Agreement was in direct conflict with a prior Russian federal law known as the "SEZ Law,"[15] which allowed customs-free transport from Kaliningrad. *Id.* ¶ 215 & n.179 (quoting the SEZ Law, Article 15(1)); *id.* ¶¶ 216-17 (describing the complainant's argument). The Constitutional Court dispensed with this argument by holding that the Free Economic Zones Agreement (again, a provisionally applied treaty) *prevailed over the prior federal law even though it was being provisionally applied*. *Id.* ¶ 217 (quoting the Court's Decision). This was a primary legal position stated in Resolution No. 8-P—that provisionally applied treaties prevail over conflicting federal laws. *See supra* ¶ 12. In the *Free Economic Zones* decision, the Constitutional Court re-affirmed that holding even though Article 15(1) of the FLIT requires the treaty in question to be ratified. *See* **Annex 19** (FLIT), art. 15(1)(a) (ratification required for "international treaties … that set out rules different from those provided for by a law"); *id.* (e)

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http://www.consultant.ru/document/cons_doc_LAW_102087/4d1f365eb2931c1187479bbea1a30e83117ad3cc/

[15] Federal Law " On Special Economic Zone in the Kaliningrad oblast" No. 16-FZ of 10 January 2006.

(ratification required for "international treaties concerning the participation of the Russian Federation in inter-state unions").

34. *Second*, the complainant argued that the Free Economic Zones Agreement should not apply to him because it had not been officially published at the time that the complainant was hauling goods from Kaliningrad to Belarus. *Id.* ¶ 216 (summarizing argument). In response to this argument, the Constitutional Court did not call into question any legal position stated in Resolution No. 8-P. Instead, the Constitutional Court relied on the *enforcement* provision of that Resolution, which had required official publication. Because the Government had complied with that enforcement provision (i.e., had officially published the treaty in July 2012), the complainant's argument failed. *Id.* ¶ 217.

2. The Crimea Judgment

35. Another confirmation of Resolution No. 8-P's legal positions is found in the Constitutional Court's Resolution No. 6-P of 19 March 2014 (the "**Crimea Judgment**"). The Crimea Judgment is **Annex 14** to this declaration, and was submitted as Exhibit M-85 to the Dutch Court of Appeal. I discussed this decision at length in my earlier expert reports. *See* **Annex 2** (my first report), ¶¶ 220-26 (background and holding of the Crimea Judgment); **Annex 3** (my second report), ¶¶ 79-84 (same); **Annex 4** (my third report), ¶¶ 39-46 (refuting Professor Avtonomov's unpersuasive attempts to reconcile the Crimea Judgment with his position).

36. The Crimea Treaty was an international treaty between the Russian Federation and the Republic of Crimea, which was signed on March 18, 2014. **Annex 14**, ¶ 1, p.1. It formalized the Russian Federation's annexation of Crimea by making a number of "immediately apparent far-reaching changes to Russian law," including Russian federal statutes. **Annex 4**, ¶ 39 (describing the changes). It incorporated the Republic of Crimea into the Russian Federation and designated Sevastopol as a City of Federal Significance. **Annex 2**, ¶ 220. It made the inhabitants of Crimea

into Russian citizens. **Annex 4**, ¶ 39(c). And it superseded Ukrainian laws and regulations, and replaced them with Russian laws and regulations, within those territories. *Id.* ¶ 39(e). The Crimea Treaty also applied *provisionally*, prior to its required ratification by the Russian Parliament. *Id.* ¶ 40. Article 15(1) of the FLIT requires such treaties to be ratified. *See* **Annex 19** (FLIT), art. 15(1)(c) (ratification required for "international treaties concerning the territorial demarcation of the Russian Federation").

37. The Crimea Judgment was issued precisely one day after the treaty was signed, as the result of an application to the Constitutional Court by the Russian President, asking the Court to issue an opinion on the treaty's constitutionality. The Crimea Judgment cited and relied upon Resolution No. 8-P for the proposition that an international treaty may be applied provisionally, prior to ratification, even though the treaty effectively *amends the Russian Constitution*,[16] and even though the treaty alters other Russian federal laws of significant importance (e.g., the borders of the state, the citizenship of millions of Crimean inhabitants), all of which requires ratification under Article 15(1) of the FLIT.

38. Provisional application of the Crimea Treaty prior to its ratification, the Court explained, had already been "validated by the Constitutional Court of the Russian Federation in its Resolution No. 8-P." **Annex 14**, ¶ 3, p.7 ("The admissibility of this statutory concept [provisional application of a treaty] has been confirmed by the Constitutional Court of the Russian Federation in its Resolution No. 8-P of 27 March 2012 . . . ."). Because of the principle of provisional

[16] The Crimea Treaty effectively amended the Constitution because Article 65 of the Constitution lists all territorial "subjects of the Russian Federation," and further requires that "admission to the Russian Federation and the creation in it of a new subject shall be carried out according to the rules established by the federal constitutional law." **Annex 6**, art. 65(1) & (2). Article 67 states that "[T]he territory of the Russian Federation shall include the territories of its subjects . . . ." By adding the Republic of Crimea as a new "subject," the Crimea Treaty effectively altered the "territory of the Russian Federation" as well.

application, the Republic of Crimea and the City of Sevastopol were "within the Russian Federation as its subjects" "as of the time of the signing of the Treaty," and before its later ratification. *Id.* ¶ 3, p.8. This "cannot be regarded as violating the Constitution." *Id.* Nor was there any separation-of-powers violation. *Id.* ¶ 2, p.6 (holding that the immediate provisional application of the Crimea Treaty was "*not inconsistent with* the Constitution of the Russian Federation in terms of *the separation of powers* into legislative, executive, and judicial branches as established by the Constitution or in terms of the delimitation of competence among the federal state bodies" (emphases added)).

39. The Crimea Judgment was analyzed by Professor Alexey Karzov, who was a chair of the faculty of history and theory of State and law (RANEPA) and, as of 2019, was an advisor to the Constitutional Court. **Annex 23** is his 2015 article, which was submitted to the Dutch Court of Appeal as Exhibit M-73: A.S. Karzov, *On the Question of Realization of Constitutional Control in Respect of International Treaty on Including a New Subject into the Russian Federation*, 4(46) Journal of Constitutional Justice (2015) (retrieved from ConsultantPlus), pp. 1-8. In this article, Professor Karzov stated that the provisional application of the Crimea Treaty was authorized by the Russian Constitution (citing Resolution No. 8-P) and by the Federal Law on International Treaties (FLIT). He wrote: "[T]he possibility of provisional (i.e., pre-ratification) application of an international treaty is expressly codified by Article 25 of the Vienna Convention on the Law of Treaties of 1969, which also constitutes an international obligation of the Russian Federation." *Id.* at 7. The FLIT "includes no reservations or restrictions concerning provisional application of international treaties similar to" the Crimea Treaty." *Id.* In the Russian Federation, "the relevant authorized bodies of state power"—i.e., the Russian Government and President—"are not limited

in their right to make independent decisions with respect to provisional application of international treaties, including those that require adoption of a law in order to be entered into." *Id.*

3. Other Practitioners Agree that the Christmas Decision Represents a Dramatic Departure from Prior Decisions of the Constitutional Court

40. I am not alone in concluding that the Christmas Decision represents a dramatic departure from prior decisions of the Constitutional Court. The following is a selection of online publications by other Russian practitioners:

a. Igor Yershov, head of the arbitration practice of the Khalimon and Partners law firm, asserts that Petitioners' arbitrations were the reason why the Russian Government requested clarification, and that the Christmas Decision went far beyond merely clarifying the legal positions previously stated in Resolution No. 8-P.[17] Instead, he writes, the Court provided entirely new legal positions on new subjects not addressed in Resolution No. 8-P. The Court did not clarify its own judgment – it rather considered and adjudicated a new question, namely, the constitutionality of Article 23(1) of the FLIT.

b. Anton Imennov, a managing partner at the Moscow office of Pen & Paper, asserts that the Christmas Decision is exactly the opposite of the legal positions stated in Resolution No. 8-P.[18] Imennov points out that the Christmas Decision is also contrary to the Vienna Convention on the Law on Treaties, which establishes that a state that agrees to be bound by an international agreement cannot use provisions of its domestic law in order to justify its failure to fulfill such agreement. Imennov also believes (as I do, see below) that the new legal positions stated in the Christmas Decision are not retroactive.[19]

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[17] https://www.advgazeta.ru/novosti/ks-vystupil-protiv-peredachi-sporov-mezhdu-rf-i-inostrannymi-investorami-v-mezhdunarodnyy-arbitrazh/

[18] https://www.vedomosti.ru/politics/articles/2020/12/27/852673-aktsioneram-yukosa

[19] https://www.bbc.com/russian/features-55449091

c. Dmitriy Litvinskiy is an attorney at Litvinski Avocats (Paris). He states that the Christmas Decision is not the result of any lack of clarity in Resolution No. 8-P, but rather the desire of the Russian Government to attempt to defeat Petitioners' attempts to enforce the Arbitral Awards at issue in this case.[20]

B. The Christmas Decision Is Inconsistent With the Russian Federation's Long-Standing Practice of Provisionally Applying Treaties

41. In addition to departing dramatically from the Constitutional Court's prior decisions, the new legal positions stated in the Christmas Decision is also inconsistent with the Russian Federation's long-standing practice of provisionally applying all kinds of international treaties that concerned vitally important matters such as territorial boundaries, taxation, criminal laws, and various immunities. I am not aware of any authority, prior to the Christmas Decision, placing any limits on the kind of treaties that the Russian Government could sign and agree to apply provisionally pending ratification.

42. I have reviewed the expert report of Vladimir Gladyshev dated June 29, 2006, which was submitted to the Arbitral Tribunal by Petitioners. This report is attached as **Annex 15**. I know Gladyshev by reputation as highly qualified and respected lawyer in private practice in the Russian Federation, with expertise in international law and treaties. In paragraphs 34 through 56 of his report, he reviews the work of a number of prominent Russian legal scholars, who attest to the Russian Federation's long historical practice of provisionally applying treaties. In paragraphs 57 through 94, he describes in detail a large number of international treaties that the Russian Federation has provisionally applied. Attachment 3 of his report lists 390 treaties that the Russian Federation (and its precursor, the USSR) signed, which provide for provisional application and

20 https://zakon.ru/blog/2020/12/28/ob_opredelenii_konstitucionnogo_suda_ot_24_dekabrya_2020_g_ili_izvinite_no_my_zabyli_vam_skazat_chto

which the Russian Federation applied on a provisional basis prior to their ratification. Gladyshev's opinions and conclusions on this point are consistent with my own: The Russian Federation has had a long-standing practice of provisionally applying a wide variety of international treaties prior to their ratification, without any limits on the kinds of treaties that qualify for provisional application. The leading commentary on the Federal Law of International Treaties (FLIT) confirms this: "The provisional application of treaties has been widely used in Russian treaty practice. Before the [FLIT] entered into force [in 1995], such practice was based on Article 25 of the Vienna Convention. Article 23 [of the FLIT] was called upon to harmonize this practice . . . ." **Annex 16**, ¶ 1, p.73 (submitted to the Dutch Court of Appeal as Exhibit HVY-S-33).

43. In Professor Paul Stephan's expert reports, submitted to the Dutch Court of Appeal, he discusses additional examples of provisionally applied treaties. The following examples illustrate both how widespread this practice has been, and the extraordinary range of legal commitments that have been applied provisionally pending ratification.

44. *OECD Agreement.* The Agreement between the Government of the Russian Federation and the Organization for Economic Co-operation and Development on Privileges and Immunities Granted to the Organization in the Russian Federation was signed on June 8, 1994, and ratified more than a year later on July 15, 1995. The agreement was applied provisionally from the date of signature and provided for various tax exemptions and jurisdictional immunities, *as well as for international arbitration*. **Annex 17** (Exhibit S-52), arts. 6, 8, 16, 17.

45. *Maritime Boundary Agreement.* The June 1, 1990, Maritime Boundary Agreement between the Soviet Union and the United States is discussed in detail in Professor Stephan's first report, paragraphs 83 through 86. The Agreement itself is **Annex 18** (Exhibit S-36). This agreement delimits the boundary between the United States and the Soviet Union in the area of the

Bering Strait. The precise location of the boundary has significant effects on the fishing rights of both nations. The two governments agreed, by an exchange of notes, to apply the treaty provisionally. Stephan First Report, ¶ 84. Russian federal law nevertheless required that the treaty be ratified because it concerned the demarcation of the borders of the state. Ratification was required both under the law as it existed in 1990, and under the FLIT enacted in 1995. *Id.* ¶ 47; **Annex 19** (FLIT), art. 15(1)(c) (ratification required for "international treaties concerning the territorial demarcation of the Russian Federation"). This Agreement continues to apply provisionally today; it has never been ratified by the Russian Federation.

46. *The U.S. Transit Agreement.* The July 6, 2009, Agreement between the Governments of the Russian Federation and the United States on the Transit of Arms, Military Equipment, Military Property and Personnel Through the Territory of the Russian Federation in Connection with the Participation of the United States in the Reinforcement of the Ensuring of the Security, Stability and Restoration of the Islamic Republic of Afghanistan ("**U.S. Transit Agreement**") is discussed in detail in Professor Stephan's first report, paragraphs 91 through 93. The Agreement is **Annex 20** (S-110). It authorized the U.S. military to carry out supply and other operations on Russian territory, and waived Russian jurisdiction over any crimes committed by U.S. military personnel. **Annex 20**, art 5(2). It was applied provisionally, *id.* art. 14(2), even though ratification was required under the FLIT. **Annex 19** (FLIT), art. 15(1)(a) (ratification required because the treaty imposed rules different from the Russian criminal laws); *id.* (d) (ratification required because the treaty involves foreign and military relations).

47. *EDB Agreement.* The October 7, 2008, Agreement between the Government of the Russian Federation and the Eurasian Development Bank on the Conditions for the Presence of the Eurasian Development Bank on the Territory of the Russian Federation ("**EDB Agreement**") is

discussed in paragraphs 94 through 96 of Professor Stephan's first report. The Agreement is **Annex 21** (Exhibit S-44). The agreement permits this international banking organization to operate in Russian territory, and provides it with immunity from Russian taxes. *Id.* arts. 9, 13. *It also provides for arbitration of disputes. Id.* art. 17. It was applied provisionally from the date of signature, *id.* art. 18(1), even though ratification was required—for the tax exemption, at least—by the FLIT. **Annex 19** (FLIT), art. 15(1)(a) (ratification required for "international treaties … that set out rules different from those provided for by a law").

48. In short: The Christmas Decision represents a dramatic departure from the long-standing prior practice of the Russian Federation, of provisionally applying all kinds of international treaties, including treaties that deviated from existing Russian laws, that concerned highly significant maters, and that Article 15(1) of the FLIT required be ratified by the Parliament.

VII. The Christmas Decision Is Not Retroactive

49. I am familiar with the American legal concept of *nunc pro tunc*, according to which a later-in-time document has the effect of retroactively amending an earlier-in-time document, as though the earlier-in-time document had always contained the amendment.

50. I have been asked by the Petitioners whether the Christmas decision has a *nunc pro tunc* retroactive effect on the legal positions stated in Resolution No. 8-P. My answer is no. The Christmas Decision states in paragraph 2 of the operative part that the Decision takes effect on the date of its official publication (December 28, 2020). As of that date, the Christmas Decision became an integral part of Resolution No. 8-P. However, the new legal positions stated in the Christmas Decision are *not* considered to have been issued on 27 March 2012 (the date of Resolution No. 8-P). Rather, those new legal positions are considered to have been issued on December 28, 2020.

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

Executed on: 07 June, 2022 (date)

Signature: E. Mishina

Printed Name: Ekaterina Mishina