Expert Report of Professor Alexei S. Avtonomov:

The Position of Provisionally Applicable, Unratified Treaties Under the 1993 Constitution of the Russian Federation and the Hierarchy of Legal Norms

6 November 2017

The Court of Appeal of The Hague

TABLE OF CONTENTS

I. INTRODUCTION

1. My name is Alexei Stanislavovich Avtonomov. I live in Moscow, the Russian Federation. I have worked for more than thirty years as a Lecturer and Professor of Law at the Institute of State and Law at the Russian Academy of Sciences, the Moscow State Institute for International Relations, the Independent Institute of International Law, the Institute of Legislation and Comparative Law Studies, and the State University of Humanitarian Sciences, where I teach and have taught constitutional law, comparative constitutional law and international law.

2. I am the author of more than three hundred academic books and articles, published in the Russian Federation, Canada, the United Kingdom, Germany, Kazakhstan, Bulgaria, and other countries, and am the Editor-in-Chief of the oldest Russian law journal, entitled *State and Law*. I have more than one hundred published works in constitutional law, including three editions of the textbook, *Constitutional (State) Law of Foreign Countries*. I have degrees from the Moscow State Institute for International Relations, the Institute of State and Law at the Russian Academy of Science (where my thesis was entitled "Systemic Nature of Constitutional Law Categories"), the State University of Humanitarian Sciences in Moscow, and the D. Kunaev University in Kazakhstan.

3. Since 2003, I have served as a member of the United Nations Committee on the Elimination of Racial Discrimination in Geneva, Switzerland, serving as Chairperson (2012-2014), as Vice Chairperson (2008-2010, 2014-2016), and as Rapporteur (2016-2018). From 2002 to 2006, I was a member of the Commission on drafting the Constitutional Act of the Union State of Russia and Byelorussia, as head of the Russian constitutional experts group. Since 2000, I have been invited from time to time to

provide expert opinions to the Constitutional Court of the Russian Federation. In 2000 and 2001, I represented the Federation Council (the upper house of the Russian Federal Assembly) as counsel before the Constitutional Court. From 1997 to 2015, I was a member of the Expert Council on Constitutional Law, consulting for the Speaker of the Russian State Duma (the lower house of the Federal Assembly). From 2000 to 2006, I taught constitutional law as Professor of the State University for Humanitarian Studies. From 1994 to 1997, I worked as a senior research fellow of the Constitutional Law Department of the Institute of State and Law at the Russian Academy of Science. From 1984 to 1994, I worked as an academic teacher, lecturer and senior lecturer as the State Law Chair, subsequently renamed the Constitutional Law Chair, of the Legal Department of the Moscow State Institute for International Relations.

4. My qualifications as a constitutional scholar and a comparative law scholar are further detailed in my curriculum vitae, which is attached as Annex A.

5. I have been asked to provide an Expert Report addressing the following question: "Within the legal system of the Russian Federation, do the legal rules contained in an unratified, provisionally applicable treaty have priority over conflicting legal rules contained in a federal statute?"

6. From a different perspective, I have also been asked to consider, in light of the doctrine of separation of powers within the Russian Federation's constitutional structure: "Are the Government of the Russian Federation or any of its component organs (Ministries, Services, and Agencies) empowered under the 1993 Constitution to provisionally apply

legal rules contained within treaties which contradict legal rules set forth in federal statutes, which have been enacted by the Federal Assembly and signed by the President?"

7. I have been asked to consider these questions not only as a scholar of the constitutional system within the Russian Federation, but also from the perspective of a specialist in comparative constitutional law with knowledge regarding similar European constitutional systems.

8. In providing answers to the questions posed to me, I have been asked to respond to the specific arguments advanced by Professor Ekaterina Mishina in her Expert Report,[1] and by Professor Paul B. Stephan in Parts 1, 2.1, and 2.2 of his Expert Report.[2] I have also been asked to consider the reasoning of the District Court of The Hague with respect to the "principle of separation of powers," as reflected in paragraphs 5.74 to 5.93 of its judgment dated 20 April 2016.[3]

9. In summary, my conclusions are as follows. Contrary to the contentions of Professor Stephan and Professor Mishina, an international treaty can only supersede the normative acts issued by the same State organ that signed or otherwise approved the treaty, as well as any lower-ranking normative acts issued by lower-ranking State organs. As the District Court of The Hague correctly decided, therefore, an unratified treaty signed only by the Government can never supersede a federal statute, because federal statutes are ranked above the Government's normative acts within the hierarchy of legal norms. This

[1] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084).

[2] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085).

[3] The Hague District Court Judgment dated 20 Apr. 2016 (ASA-081) ¶¶ 5.74-5.93.

rule applies with equal force in the case of an unratified, provisionally applicable treaty, such as the Energy Charter Treaty ("ECT").

10. In preparing this Expert Report, I have consulted a number of legal sources, including the 1993 Constitution, federal statutes, judicial practice, legislative history, academic texts and journals, many of which I have cited as exhibits. I have reviewed the judgment of District Court of The Hague, the interim and final awards rendered by the arbitral tribunal, as well as the Expert Reports of Professor Stephan and Professor Mishina, and the exhibits cited in them.

II. OVERVIEW AND BACKGROUND

11. In this case, an international arbitral tribunal concluded that it possessed jurisdiction to consider claims against the Russian Federation under the ECT, even though the Russian Federation had not ratified the ECT but applied it provisionally only. Under the ECT's Article 26, "[d]isputes between a Contracting Party and an Investor of another Contracting Party" may be submitted to arbitration before an international arbitral tribunal.[4] The Russian Federation, however, was never a "Contracting Party" as defined under the ECT's Article 1(2), because the Russian Federation never ratified the ECT, as required under the ECT's Article 39.[5]

12. The Russian Federation did become a "signatory" to the ECT on 17 December 1994. On this date, the ECT was signed by Mr. Oleg D. Davydov,[6] who was then Deputy Chairman of the Government of the Russian Federation (often informally called "Deputy Prime

[4] Energy Charter Treaty (Lisbon) dated 17 Dec. 1994 (ASA-023), Art. 26.

[5] Energy Charter Treaty (Lisbon) dated 17 Dec. 1994 (ASA-023), Arts. 1(2), 39.

[6] Energy Charter Treaty (Lisbon) dated 17 Dec. 1994 (ASA-023), at 92.

Minister"). In signing the ECT, Mr. Davydov was acting pursuant to instructions from the Government of the Russian Federation, which were set forth in Resolution No. 1390 dated 16 December 1994.[7]

13. Resolution No. 1390 had been signed by Mr. Viktor S. Chernomyrdin, who was then the Chairman of the Government (often informally called the "Prime Minister").[8] On behalf of the Government, Mr. Chernomyrdin then submitted the ECT to the Russian Federation's principal legislative body, the Federal Assembly (often informally called the "Parliament"), accompanied by a Draft Law on Ratification on 26 August 1996.[9] The President of the Russian Federation, Mr. Boris N. Yeltsin, evidently never signed the ECT nor expressed the Russian Federation's consent to be bound by the ECT in any respect.

14. Over the next thirteen years, the Federal Assembly never held a plenary hearing regarding the ECT and never cast a vote to enact or reject the Government's Draft Law on Ratification of the ECT. Two committees of the Federal Assembly's lower chamber, the State Duma, did hold hearings to consider the legal and economic policy aspects of the ECT on 17 June 1997 and 26 January 2001.[10] At the request of the State Duma's

[7] Government of the Russian Federation Resolution No. 1390 "on the Execution of the Energy Charter Treaty and Related Documents" dated 16 Dec. 1994 (ASA-021); Ministry of Foreign Affairs Certificate Authorizing Davydov to sign the ECT dated 16 Dec. 1994 (ASA-022).

[8] Government of the Russian Federation Resolution No. 1390 "on the Execution of the Energy Charter Treaty and Related Documents" dated 16 Dec. 1994 (ASA-021).

[9] Government of the Russian Federation Decree No. 1016 "on the approval and submission of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects for ratification before the State Duma of the Federal Assembly of the Russian Federation" dated 26 Aug. 1996 (ASA-029); Draft Federal Statute "on Ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects" dated 26 Aug. 1994 (ASA-030).

[10] State Duma Economic Policy Committee Transcript of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17

Chairman, Mr. G.N. Seleznev, the Audit Chamber of the Russian Federation also issued an assessment of the ECT on 24 June 1997.[11]

15. Finally, on 20 August 2009, the Embassy of the Russian Federation to the Republic of Portugal informed the Ministry of Foreign Affairs of Portugal as the Depository of the Energy Charter Treaty that the Russian Federation did not intend to become a Contracting Party to the ECT.[12] On 24 August 2009, the Ministry of Foreign Affairs of Portugal informed the Energy Charter Secretariat of the notification by the Russian Federation of its intent not to become a Contracting Party to the ECT.[13] On 25 August 2009, the ECT Secretariat issued a Communication on this subject. [14]

16. Although the Federal Assembly never ratified the ECT, the Government of the Russian Federation applied the ECT provisionally (and partially) from the date of Mr. Davydov's signature in December 1994 until the exchange of correspondence in August 2009 between the Russian Federation, the Energy Charter Secretariat, and the Government of Portugal. The provisional application of the ECT, however, is conditioned upon a so-called "Limitation Clause" set forth under the ECT's Article 45(1). As Article 45(1) provides, "[e]ach signatory agrees to apply this Treaty provisionally pending its entry

June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034); State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)" dated 26 Jan. 2001 (ASA-044).

[11] Audit Chamber Report No. 01-539/04 dated 24 June 1997 (ASA-036).

[12] Letter No. 102 from the Embassy of the Russian Federation to the Republic of Portugal to the Ministry of Foreign Affairs of Portugal dated 20 Aug. 2009 (ASA-056).

[13] Ministry of Foreign Affairs of Portugal Telefax to the Energy Charter Secretariat dated 24 Aug. 2009 (ASA-057).

[14] Message of the ECT Secretariat No. 826/09 dated 25 Aug. 2009 (ASA-055).

into force for such signatory . . . to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."[15]

17. In the context of the present case, therefore, the question has arisen whether the Russian Federation was actually subject to the international arbitral tribunal's jurisdiction under the ECT's Article 26 based on its status as a "signatory" during the period between 1994 and 2009. A key part of this dispute relates to the proper application of the Limitation Clause under the ECT's Article 45(1) in the context of the Russian Federation's domestic legal regime.

18. The Russian Federation has argued consistently that it had no obligation to arbitrate under Article 26 by operation of Article 45(1). In particular, the Russian Federation has argued that arbitration of the present dispute under Article 26 would conflict with the Russian Federation's domestic statutes governing dispute resolution in several different respects (the specifics of which are not relevant to this Expert Report, which focuses solely on the issues of constitutional law).

19. Although certain international arbitrators have rejected the Russian Federation's arguments regarding the proper interpretation of its domestic statutes in relation to the Limitation Clause contained in Article 45(1), the District Court of The Hague agreed with the Russian Federation's position in a judgment dated 20 April 2016.[16] In that judgment, the District Court of The Hague set aside the international arbitrators' decision to accept

[15] Energy Charter Treaty (Lisbon) dated 17 Dec. 1994 (ASA-023), Art. 45(1).

[16] The Hague District Court Judgment dated 20 Apr. 2016 (ASA-081).

jurisdiction over the Russian Federation.[17] As of the date of this Expert Report, no other national court has yet ruled upon the relationship between the ECT's Article 45(1) and the Russian Federation's domestic statutes governing dispute resolution.

20. In their Expert Reports, Professor Mishina and Professor Stephan have argued that the District Court of The Hague was incorrect. In their view, the Russian Federation was *constitutionally* incapable of invoking any inconsistencies between the ECT and the Russian Federation's federal statutes. According to Professor Mishina and Professor Stephan, an unratified, provisionally applicable treaty will automatically "override" *all* federal statutes within the Russian Federation's hierarchy of legal norms, thereby rendering the Limitation Clause contained in the ECT's Article 45(1) inapplicable to the Russian Federation *regardless* of what the federal statutes may actually provide.[18]

21. In this Expert Report, I will evaluate only the arguments advanced by Professor Mishina and Professor Stephan with respect to the position of an unratified, provisionally applicable treaty within the Russian Federation's constitutional hierarchy of legal norms, as informed by constitutional doctrines such as the separation of powers, the supremacy of federal laws, and the rule of law. I note that Professor Stephan, in particular, has raised other issues pertaining to the proper interpretation of the ECT's Article 45(1) and the Russian Federation's domestic statutes in Parts 2.3 and 3 of his Expert Report, which I have not been asked to analyze.

[17] The Hague District Court Judgment dated 20 Apr. 2016 (ASA-081), at 65.

[18] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 182, 193; Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 15, 50.

III. ANALYSIS

22. In her Expert Report, Professor Mishina argues that "[p]rovisionally applied treaties create immediately binding rules and obligations that override inconsistent laws" by operation of Article 15(4) of the 1993 Constitution.[19] Analyzing essentially the same collection of legal authorities, Professor Stephan comes to the same conclusion: "[A]s a matter of Russian law, a court must apply rules contained in a provisionally applicable treaty in instances where those rules differ from or contradict rules found in Russian legislation . . . . Where a rule found in a provisionally applicable treaty conflicts with a preexisting rule adopted by the Legislator, Russian law requires that the rule in the treaty prevails."[20] The ultimate consequence of this theory, according to Professor Mishina and Professor Stephan, is that Article 15(4) of the 1993 Constitution renders the Russian Federation *constitutionally unable* to avail itself of the Limitation Clause contained in the ECT's Article 45(1) based on *any* conflicts between the ECT's provisions and the provisions of federal statutes.

23. Before beginning a detailed analysis of the legal principles relating to this question, it is worth briefly quoting Resolution No. 8-P of the Russian Federation's Constitutional Court, which was rendered on 27 March 2012 ("Resolution No. 8-P").[21] Professor Stephan and Professor Mishina both cite Resolution No. 8-P several times in their Expert

[19] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 182-183, 193.

[20] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 17-18.

[21] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen Ushakov I.D." dated 27 Mar. 2012 (ASA-074).

Reports, but avoid analyzing or even acknowledging one key paragraph, which is essential for the present case. As the Constitutional Court explained in that decision:

> "***The Russian Federation may*** agree to provisional application of an international treaty in whole or in part; stipulate the maximum provisional application period; and ***precondition provisional application of an international treaty (or any part thereof), before its entry into force, on its consistency with*** the Constitution of the Russian Federation or ***the statutes or other regulatory legal acts of the Russian Federation***."[22]

In this passage, the Constitutional Court thus succinctly refuted the same theory proposed by Professor Mishina and Professor Stephan.

24. This excerpt from Resolution No. 8-P expressly pronounces that the Russian Federation "may" avail itself of precisely the type of Limitation Clause set forth in Article 45(1) of the ECT—which Professor Mishina and Professor Stephan believe to be constitutionally impossible. It is undisputed, of course, that the Constitutional Court is the authoritative interpreter of the 1993 Constitution within the Russian Federation's judicial system.[23] Based on this passage, therefore, the theory espoused by Professor Stephan and Professor Mishina is unsustainable.

25. Accordingly, this Expert Report will walk through each of the legal principles and underlying constitutional logic which lead inevitably to the Constitutional Court's pronouncement in Resolution No. 8-P. As demonstrated below, the reasoning espoused

[22] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074) ¶ 4 (emphasis added).

[23] Federal Constitutional Statute No. 1-FKZ "on the Constitutional Court of the Russian Federation" dated 21 July 1994 (ASA-020), Art. 3(4). Professor Mishina and Professor Stephan certainly do not dispute this. *See* Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶ 122; Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 110.

by Professor Mishina and Professor Stephan is fundamentally wrong and contrary to core tenets of the Russian Federation's democratic legal order.

26. In Part III-A of this Expert Report, I will explain that a federal statute enacted by the Federal Assembly may be superseded only by a treaty that has been ratified by the Federal Assembly. This principle forms part of the Russian Federation's hierarchy of legal norms, which is reflected throughout the text of the 1993 Constitution, specifically in Articles 15(2), 90(3), and 115(1). This hierarchy is premised upon the doctrine of separation of powers (reflected in Article 10), the supremacy of federal laws (reflected in Article 4(2)), and the principle of the democratic, rule-of-law State (reflected in Article 1(1).

27. If this were not so, then numerous *unelected* officials (including Prime Minister Chernomyrdin and Deputy Prime Minister Davydov, as well as over seventy "federal executive organs" within the Government) could contravene the will of the *elected* officeholders (the elected members of the Federal Assembly and the elected President). Such a result would run counter to basic democratic norms, given that federal statutes are enacted by the Federal Assembly, signed by the President, and thus qualify as "the highest form of expression of the People's sovereign will" other than the 1993 Constitution itself.[24]

28. Moreover, as I address in Part III-B of this Expert Report, there is no exception to this hierarchy of legal norms for unratified, provisionally applicable treaties. This was demonstrated repeatedly during the public discourse surrounding the ECT itself.

[24] KUTAFIN O.YE., SOURCES OF THE CONSTITUTIONAL LAW OF THE RUSSIAN FEDERATION (2002) (ASA-046), at 67.

Specifically, throughout the period of the ECT's provisional application, key representatives of the Federal Assembly and the Government identified numerous conflicts between the ECT and various federal statutes. But during these years of debate, no person ever suggested that the ECT had *already* superseded any of the inconsistent provisions set forth in federal statutes by virtue of the ECT's provisional application. Indeed, based on Prime Minister Chernomyrdin's statements during a 2001 committee hearing regarding the ECT,[25] it is evident that even he did not actually believe that signing the ECT (which took place at his instruction in Resolution No. 1390)[26] had produced such a result.

29. Finally, in Part III-C of this Expert Report, I will individually address each of the judicial decisions, academic commentaries, and other authorities cited by Professor Mishina and Professor Stephan, and explain why none of them can lead to a different conclusion.

A. The Position of International Treaties within the Russian Federation's Hierarchy of Legal Norms

1. Separation of Powers and the Hierarchy of Legal Norms

30. I first explain the constitutional principles of separation of powers and the hierarchy of legal norms, before turning to the position of international treaties of the Russian Federation within the hierarchy of legal norms.

31. Article 10 of the Russian Federation's 1993 Constitution provides that "state power in the Russian Federation shall be exercised on the basis of its division into legislative,

[25] State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)" dated 26 Jan. 2001 (ASA-044), at 72-74.

[26] Government of the Russian Federation Resolution No. 1390 "on the Execution of the Energy Charter Treaty and Related Documents" dated 16 Dec. 1994 (ASA-021).

executive and judicial."[27] This tripartite division reflects the doctrine of separation of powers, the modern version of which was formulated in the Seventeenth and Eighteenth Centuries by political philosophers such as the Baron de Montesquieu (Charles-Louis de Secondat), John Locke, and James Madison. As explained by these philosophers, the fundamental purpose of the doctrine of separation of powers is to protect human liberty and prevent despotic rule through the undue concentration of power in any single State organ.[28]

32. The separation of powers formed a core aspect of the intellectual dialogue surrounding the drafting of the Russian Federation's 1993 Constitution. For example, this concept was reflected in the 1989 Draft Constitution authored by the renowned dissident and nuclear physicist, Andrey Sakharov,[29] which was recognized by President Yeltsin's legal advisors to be a critical inspiration for the 1993 Constitution.[30]

33. For decades, Professor Sakharov had severely criticized the unlimited power that certain State organs within the Soviet Union had exercised for years. Thus, as explained in his 1989 lecture on the topic of "Science and Liberty" in Lyon, France:

> "This is an unlimited [Soviet] power of party-state monopolies embodied in two parallel structures – the structure of agencies and a manifold structure of party leadership. This is the system that is to blame for the

[27] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 10.

[28] MONTESQUIEU, THE SPIRIT OF LAWS (BOOK 11, CHAPTER 6) (1873) (ASA-001), at 174.

[29] Draft Constitution of the Union of Soviet Republics of Europe and Asia by Sakharov A.D. (1989) (ASA-005), Arts. 28, 30.

[30] Meeting of the Leaders of the Republics of the Russian Federation, Heads of Regional Administrations of Krays, Oblasts, Autonomous Units, the cities of Moscow and St. Petersburg Transcript dated 29 Apr. 1993 (ASA-012), at 412; ALEKSEEV S.S., COLLECTED WRITINGS, IN 10 VOLUMES, VOL. 4, M. (2010) (ASA-064), at 82-83.

> meaningless zigzags of economic development, accompanied by the destruction of tremendous material wealth".[31]

34. Indeed, in addition to Professor Sakharov, many of the key participants in the drafting of the 1993 Constitution, including Professor S.S. Alekseyev,[32] Professor Sergey Shakhrai,[33] and Professor Yu. A. Tikhomirov,[34] wrote extensively about the significance of the concept of separation of powers, as well as the philosophy of Montesquieu, Locke, and Madison, for the fundamental structure of the 1993 Constitution.

35. In addition to forming part of the drafters' intellectual discourse, the separation of powers was also endorsed in a series of politically significant official documents during the period immediately before and after the dissolution of the Soviet Union. These included the 1990 Declaration on the State Sovereignty of the Russian Soviet Federative Socialist Republic ("RSFSR"), the 1992 Amendments to the 1978 Constitution, and President Yeltsin's Decree No. 1400, which announced the process by which the 1993 Constitution would be approved in a national referendum by the Russian people.[35] Each of these

---

[31] Sakharov A.D., *The Lyon Lecture* dated 27 Sept. 1989 (ASA-090) at 4.

[32] ALEKSEEV S.S., COLLECTED WRITINGS IN 10 VOLUMES, VOL. 8, M. (2010) (ASA-065), at 44.

[33] SHAKHRAI S.M., CONSTITUTIONAL LAW OF THE RUSSIAN FEDERATION. TEXTBOOK FOR UNDERGRADUATE AND POSTGRADUATE STUDENTS. M. (2017) (ASA-083), at 2.

[34] Letter from Tikhomirov Yu.A. to the Executive Secretary of the Constitution Committee Rumyantsev O.G. No. 01-15SB dated 13 Mar. 1992, (*reprinted in* FROM THE HISTORY OF CREATION OF THE RUSSIAN FEDERATION CONSTITUTION, IN 6 VOLUMES. Rumyantsev O. ed. Moscow: Wolters Kluwer, 2008) (ASA-008), at 1016-1017 (observing contemporaneously that separation of powers is "…an essential principle, without observing which it would be impossible to overcome the arbitrariness of state power, concentrated in a single body or official. This principle of democratic rule was already advanced by the lead thinkers of late 17th-18th centuries, John Locke (1632–1704) and Charles-Louis de Montesquieu (1689–1755), and then supported by the fathers of the American Constitution, T. Paine and T. Jefferson").

[35] Declaration on the State Sovereignty of the Russian Soviet Federative Socialist Republic dated 12 June 1990 (ASA-006) ¶ 13; Statute of the Russian Federation No. 2708-I "on Changes and Amendments to the Constitution (Main Law) of the Russian Soviet Federative Socialist Republic" dated 21 Apr. 1992 (ASA-009), Art. 3; Presidential Decree No. 1400 "on Phased Constitutional Reform in the Russian Federation" dated 21 Sept. 1993 (ASA-013), at 1-2.

documents recognized the significance of the separation of powers, demonstrating the importance of this principle at the outset of the newly democratic Russian Federation.

36. The Constitutional Court subsequently recognized this principle's importance in Resolution No. 2-P of 18 January 1996:

> "The separation of the integral state power into the legislative, executive and judicial powers implies the establishment of a system of legal guarantees, checks and balances that would exclude the possibility of concentration of all power with one of them, ensuring independent functioning of all branches of power and, at the same time, their interaction."[36]

37. A similar observation was made by the Constitutional Court in its Resolution No. 16-P of 29 May 1998:

> "The principle of separation of powers implies not only the distribution of power between the organs of different branches of state power, but also the mutual balancing of the branches of power, the inability for one of them to subordinate others to themselves. In the form in which it is enshrined in the Constitution of the Russian Federation, this principle does not allow the concentration of functions of various branches of government in one body."[37]

38. One of the clearest manifestations of the separation of powers within the Russian Federation's legal system is the hierarchy of legal norms reflected throughout the text of the 1993 Constitution. This hierarchy ensures that the legislative power of the Russian Federation is vested primarily in the Federal Assembly, a legislature comprised of two chambers (the Federation Council and the State Duma). Although the President and the Government also may unilaterally promulgate decrees, resolutions, and decisions with normative legal force, these norms are always subordinate to the federal statutes, which

[36] Constitutional Court Resolution No. 2-P in the Case on the Constitutionality of the Provisions of the Charter (Fundamental Law) of Altay Kray dated 18 Jan. 1996 (ASA-028), at 2.

[37] Constitutional Court Resolution No. 16-P "on the Inspection of the Constitutionality of paragraph 4 Article 28 of the Statute of the Komi Republic 'on State Service of the Komi Republic'" dated 29 May 1998 (ASA-038), at 2.

need to go through the process of enactment by the Federal Assembly and signature by the President.

39. As the 1993 Constitution expressly provides, the hierarchy of legislative and other legal acts is as follows:

(a) ***First***, at the summit of the pyramid of federal legal acts, the Constitution itself "shall have the supreme juridical force," such that "statutes and other legal acts . . . shall not contradict the Constitution. . . ."[38]

(b) ***Second***, immediately subordinate to the Constitution are federal statutes enacted by the Federal Assembly, which themselves have three different ranks:[39]

i. The highest-ranking statutes are those intended to introduce constitutional amendments under Article 136 of the Constitution, which must be enacted by at least three fourths of the total number of members of the Federation Council and at least two thirds of the total number of deputies of the State Duma, and then approved by two thirds of the federal subjects of the Russian Federation (*i.e.*, the constituent Republics, Territories, Regions, and Autonomous Areas).[40]

ii. Other high-ranking statutes dealing with specific topics, known as "federal constitutional statutes," must also be enacted by at least three fourths of

[38] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 15(1).

[39] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Arts. 76(1), 108, 136.

[40] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Arts. 65, 108(2), 136.

the total number of members of the Federation Council and at least two thirds of the total number of deputies of the State Duma.[41]

iii. Ordinary federal statutes may be enacted by a simple majority of the total number of deputies of the State Duma upon approval by a majority of the total number of members of the Federal Council (or upon the expiration of 14 days from submission of the law to the Federal Council for consideration), and must be signed by the President (if they are not vetoed prior to enactment, and in the absence of any parliamentary override of the President's veto).[42] Pursuant to Article 76(3), "[f]ederal statutes may not contradict federal constitutional statutes."[43]

After their enactment, all statutes—including both federal statutes and federal constitutional statutes—must be obeyed by "[t]he bodies of State authority," including the President and the Government.[44]

(c) ***Third***, the President may "issue decrees and orders" with normative force, but such "decrees and orders . . . shall not run counter to the Constitution of the Russian Federation and the federal statutes."[45]

(d) ***Fourth***, the Government may also "issue decisions and orders" with normative force, but only "[o]n the basis and for the sake of implementation of the

[41] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 108(2).

[42] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Arts. 105, 107.

[43] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 76(3).

[44] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 15(2).

[45] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 90.

> Constitution of the Russian Federation, the federal laws, or normative decrees of the President."[46]

40. To summarize, therefore, the highest priority is given to federal statutes enacted by the Federal Assembly, with lower priority given to the President's decrees and orders, and the lowest priority given to the Government's decisions and orders.

41. This placement reflects the Federal Assembly's democratic role in expressing the sovereign will of the Russian people, as numerous authorities explain. For example, A.Ya. Sliva, who was one of the key participants in the 1993 Constitutional Convention and a retired Judge of the Constitutional Court, observes that the Federal Assembly "is designed to express the will of the multi-national people of the Russian Federation that is the holder of sovereignty and the sole source of power in Russia."[47]

42. Confirming this view, Professor O.Ye. Kutafin characterises the role of federal statutes as follows:

> "Supremacy of the federal law primarily means that the principal, key, fundamental social relations in all spheres of the country's social life that are not governed by the Constitution, are governed not by simple legal acts, but precisely by federal laws. It is through the supremacy of federal law that the highest legal principles, the spirit of law, take shape in the social life in all of its spheres and all political institutes. This ensures the actuality and inviolability of the people's rights and freedoms, their legal status, legal protection in a true democracy … [T]he supremacy of federal law means the affirmation of its rule, that is, of such a position where all principles and foundations of the society envisaged in it would remain unswerving, and all actors of the social life without exception would abide by its rules."[48]

---

[46] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 115(1).

[47] Sliva A.Ya., *Commentary to Art. 94 of the Constitution of the Russian Federation*, *in* COMMENTARY TO THE CONSTITUTION OF THE RUSSIAN FEDERATION (Zorkin V.D. ed, 2011) (ASA-070), at 27.

[48] KUTAFIN O.YE., SOURCES OF THE CONSTITUTIONAL LAW OF THE RUSSIAN FEDERATION (2002) (ASA-046), at 67.

43. A similar observation is made by Professor Zh.I. Ovsepyan:

> "[A]s the acts of the highest (at the post-constitutional level) legal force, issued by the public authority (a collective representative authority based on a democratic law-making procedure), statutes ensure the supremacy of public authority within the state and independence in international relations."[49]

44. Notably, the Federal Assembly can also abrogate or amend previously enacted federal statutes. By contrast, the President can only issue normative decrees or orders to fill in gaps, as to questions upon which the Federal Assembly has not yet enacted relevant legislation. In Resolution No. 9-P, for example, the Constitutional Court confirmed that "decrees of normative character can be issued by the President . . . , which must not contradict the Constitution of the Russian Federation and federal statutes."[50]

45. Finally, at the bottom of this structure, the Government is empowered to issue the lowest-ranking forms of normative acts. This is constitutionally linked to the fact that, unlike the President and the State Duma, all officers of the Government are appointed rather than democratically elected. In this regard, Professor T.Ya. Khabriyeva explains that the Government's normative acts are designed specifically to implement federal laws, rather than to replace or amend them:

> "For the purposes of efficient implementation of the provisions of laws, inconsistency and contradictions between the norms of the law and the subordinate normative legal acts aimed at making them more concrete, are unacceptable. A subordinate legal act cannot set forth rules that would contradict the provisions of the law in whose pursuance it was issued. The legal acts of the Russian Government, in occupying their own place in the

[49] Ovsepyan Zh.I., *Theory of Federal Law (Common, or Simple, Ordinary Federal Laws) as a Source of Law in Russia during Globalization*, CONSTITUTIONAL AND MUNICIPAL LAW REVIEW (N. 11) (2015) (ASA-080), at 2.

[50] Constitutional Court Resolution No. 9-P in the case on the verification of consistency with the Constitution of Decree of the President of the Russian Federation No. 1709 dated 27 September 2000 "on Measures to Improve Governance of the State Pension Provision in the Russian Federation" in view of a request filed by a group of State Duma deputies dated 25 June 2001 (ASA-045) ¶ 5.

> system of legal rules of the Russian Federation, must be consistent with the [Russian] Constitution, the federal laws and the normative decrees of the President."[51]

46. As an example, in Resolution No. 4-P dated 2 February 1998, the Constitutional Court annulled one of the Government's regulations pertaining to the time limits for the registration of citizens and the grounds for refusing the registration of citizens.[52] As the Constitutional Court explained, this regulation was unconstitutional because it had trespassed the scope of the Federal Assembly's underlying federal statute, Law No. 5242-1 dated 25 June 1993, which ensured the freedom of movement within the Russian Federation and created a framework for the registration of citizens.[53]

47. As a final matter, it should be emphasized that this hierarchy of legal norms is fixed as a matter of constitutional law. As observed by the Constitutional Court of the Russian Federation in Resolution No. 15-P dated 11 November 1999, the State organs established under the Constitution—*i.e.*, the two chambers of the Federal Assembly, the President, the Government, or the judiciary—have no power to "usurp" the constitutional powers of other State organs:

> "By virtue of Articles 10 and 11 of the Constitution of the Russian Federation and based on the system of checks and balances established by it, no state authorities may exercise, let alone usurp the constitutional powers that do not belong to them . . . .[T]he constitutional powers

[51] Khabriyeva T. Ya., *Commentary to Art. 115 of the Constitution of the Russian Federation*, *in* COMMENTARY TO THE CONSTITUTION OF THE RUSSIAN FEDERATION (Zorkin V.D. ed. (2011) (ASA-071), at 37.

[52] Constitutional Court Resolution No. 4-P in the case on the verification of consistency with the Constitution of the Russian Federation of paragraphs 10, 12 and 21 of the Rules of Registration and De-Registration of the Nationals of the Russian Federation at Their Place of Stay and Residence within the Russian Federation, approved by Resolution of the Government of the Russian Federation No. 713 dated 2 Feb. 1998 (ASA-037), at 4.

[53] Constitutional Court Resolution No. 4-P in the case on the verification of consistency with the Constitution of the Russian Federation of paragraphs 10, 12 and 21 of the Rules of Registration and De-Registration of the Nationals of the Russian Federation at Their Place of Stay and Residence within the Russian Federation, approved by Resolution of the Government of the Russian Federation No. 713 dated 2 Feb. 1998 (ASA-037), at 2.

> belonging to the State Duma, may not be exercised by the President of the Russian Federation, or by another house of the Federal Assembly – the Federation Council."[54]

48. These background principles must be kept in mind as one considers the placement of international treaties within the hierarchy of legal norms, including unratified, provisionally applicable treaties such as the ECT.

2. Article 15(4) of the 1993 Constitution and the Place of International Treaties within the Hierarchy of Legal Norms

49. As was also the case in the Soviet Union, the Russian Federation's legal system empowers many different State organs at different levels of the federal hierarchy to negotiate and conclude international treaties.

50. In this regard, both the 1995 Federal Law on International Treaties (the "FLIT") and its 1978 Soviet predecessor (the "1978 USSR Law") have consistently recognized the existence of "inter-State, intergovernmental, and interagency treaties."[55] Such treaties can be concluded "on behalf of the Russian Federation (inter-State treaties), on behalf of the Government . . . (intergovernmental treaties), or on behalf of federal executive organs (interagency treaties)."[56] Although this taxonomy is not mentioned expressly in the text of the 1993 Constitution, the drafting history reflects that the key participants in the

[54] Constitutional Court Resolution No. 15-P in the case on the interpretation of Art. 84(b), 99(1), (2), and (4), and 109(1) of the Constitution of the Russian Federation dated 11 Nov. 1999 (ASA-043), at 3.

[55] Federal Statute No. 101-FZ "on International Treaties of the Russian Federation" dated 15 July 1995 (ASA-025), Arts. 1, 3; USSR Statute "on the Procedure for Concluding, Executing and Denouncing International Treaties of the USSR" (ASA-003), Art. 1.

[56] Federal Statute No. 101-FZ "on International Treaties of the Russian Federation" dated 15 July 1995 (ASA-025), Arts. 3; USSR Statute "on the Procedure for Concluding, Executing and Denouncing International Treaties of the USSR" (ASA-003), Art. 2.

framing of the 1993 Constitution were aware of the Soviet Union's practice in this regard and expected that it would be preserved.[57]

51. Significantly, there are more than seventy "federal executive organs" comprising the Government,[58] all of which are empowered to conclude "interagency treaties" with

[57] *See, e.g.*, Council of Nationalities of Russian Federation Supreme Council Hearing Transcript regarding Article 3 of the Russian Federation Constitution dated 2 Nov. 1992 (ASA-011), at 330 ("That is, legally concluded intergovernmental agreements that are not subject to ratification become part of the law. Their supremacy is only if they are ratified.... Part of the domestic law is ratified international treaties and non-ratified simple intergovernmental agreements, if they do not conflict with the law. If the international treaty is ratified, then its norms are in effect, it is as if higher. There is already an obligation of both the Russian Federation and the opposite side, there are already more participants in it, and not just one Russian Federation.").

[58] *See* Constitutional Court Resolution No. 2-P on Interpretation of Articles 71 (paragraph "d"), 76 (part 1) and 112 (part 1) of the Constitution of the Russian Federation" dated 27 Jan. 1999 (ASA-042); Presidential Decree No. 636 "on the Structure of the Federal Executive Authorities" dated 21 May 2012 (ASA-048), at 7-9 (listing Ministry of the Interior of the Russian Federation; Ministry of Civil Defence, Emergencies and Disaster Relief of the Russian Federation; Ministry of Foreign Affairs of the Russian Federation; Federal Agency for the Commonwealth of Independent States, Compatriots Living Abroad, and International Cultural Cooperation; Ministry of Defence of the Russian Federation; Federal Service for Military-Technical Cooperation; Federal Service for Technical and Export Control; Ministry of Justice of the Russian Federation; Federal Penitentiary Service; Federal Bailiff Service; State Courier Service of the Russian Federation; Foreign Intelligence Service of the Russian Federation; Federal Security Service of the Russian Federation; Federal National Guard Service of the Russian Federation; Federal Guard Service of the Russian Federation; Federal Service for Financial Monitoring; Federal Archival Agency; Chief Directorate for Special Programmes of the Russian President; Administrative Directorate of the President of the Russian Federation; Ministry of Healthcare of the Russian Federation; Federal Service for Supervision of Healthcare; Federal Medical-Biological Agency; Ministry of Culture of the Russian Federation; Federal Agency for Tourism; Ministry of Education and Science of the Russian Federation; Federal Service for Supervision in Education and Science; Federal Agency for Youth Affairs; Ministry of Natural Resources and Environment of the Russian Federation; Federal Service for Hydrometeorology and Environmental Monitoring; Federal Service for Supervision of Natural Resources; Federal Agency for Water Resources; Federal Agency for Forestry; Federal Agency for Mineral Resources; Ministry of Industry and Trade of the Russian Federation; Federal Agency for Technical Regulation and Metrology; Ministry for the Development of the Russian Far East; Ministry of Communications and Mass Media of the Russian Federation; Federal Service for Supervision of Communications, Information Technology and Mass Media; Federal Agency for Press and Mass Media; Federal Communications Agency; Ministry of North Caucasus Affairs; Ministry of Agriculture of the Russian Federation; Federal Service for Veterinary and Phytosanitary Supervision; Federal Agency for Fishery; Ministry of Sport of the Russian Federation; Ministry of Construction, Housing and Utilities of the Russian Federation; Ministry of Transport of the Russian Federation; Federal Service for Supervision of Transport; Federal Agency for Air Transport; Federal Road Agency; Federal Agency for Rail Transport; Federal Agency for Sea and Inland Water Transport; Ministry of Labour and Social Protection of the Russian Federation; Federal Service for Labour and Employment; Ministry of Finance of the Russian Federation; Federal Taxation Service; Federal Service for Alcohol Market Regulation; Federal Customs Service; Federal Treasury (federal service);

foreign State entities under the terms of Articles 3 and 11 of the FLIT. These have included entities as varied as the Ministry of Defence, the Ministry of Sport, the Federal Taxation Service, the Federal Penitentiary Service, the Federal Agency for Tourism, and the Federal Agency for Youth Affairs.[59]

52. These Ministries, Services, and Agencies regularly conclude interagency agreements with foreign State entities on virtually every conceivable topic. Most of these agreements are never ratified.[60]

53. The question thus naturally arises—where do treaties fall within the hierarchy of legal norms if they have been concluded by one of the seventy federal executive agencies, or by the Government without the participation of the President, or by the President without the participation of the Federal Assembly (*i.e.*, without ratification)? It would run counter to the hierarchy of norms to allow the Ministry of Sport, the Federal Penitentiary Service, or the Federal Agency for Tourism to conclude an interagency treaty that would contravene a federal statute enacted by the Federal Assembly and signed by the President,

---

Ministry of Economic Development of the Russian Federation; Federal Accreditation Service; Federal Service for State Registration, Cadastre, and Cartography; Federal Service for State Statistics; Federal Service for Intellectual Property; Federal Agency for State Property Management; Ministry of Energy of the Russian Federation; Federal Anti-Monopoly Service; Federal Service for the Oversight of Consumer Protection and Welfare; Federal Service for Environmental, Technological, and Nuclear Supervision; Federal Agency for State Reserves; Federal Agency for Scientific Organizations; Federal Agency for Ethnic Affairs).

[59] Presidential Decree No. 636 "on the Structure of the Federal Executive Authorities" dated 21 May 2012 (ASA-048), at 7-9.

[60] *See* Cooperation Agreement between the Ministry of the Interior of the Russian Federation and the Ministry of the Interior of the Kingdom of Cambodia dated 17 May 2016 (ASA-082); Agreement between the Federal Service for Environmental, Technological, and Nuclear Supervision of the Russian Federation and the Department of Technical Supervision of the Republic of Poland on the Cooperation in the Sphere of Supervision of Industrial Safety dated 10 Nov. 2011 (ASA-073).

which constitutes "the highest form of expression of the People's sovereign will" other than the Constitution itself.[61]

54. Indeed, permitting the President, the Government, or the federal executive agencies to contravene a federal statute by means of concluding an international agreement would directly violate Article 15(2) of the 1993 Constitution. This provision broadly states that "[t]he bodies of state authority . . . shall be obliged to observe the Constitution of the Russian Federation *and laws*."[62] The President, the Government and its component entities are also prohibited, when acting unilaterally, from contravening a federal statute under Article 90(3) ("[d]ecrees and orders of the President of the Russian Federation shall not run counter to the Constitution of the Russian Federation and federal laws") and Article 115(1) (the Government may "issue decisions and orders" with normative force, but only "[o]n the basis and for the sake of implementation of the Constitution of the Russian Federation, the federal laws, or normative decrees of the President."). Allowing these same entities to contravene a statute by concluding a treaty would likewise violate the doctrine of separation of powers (reflected in Article 10), the supremacy of federal laws (reflected in Article 4(2)), and the principle of the democratic, rule-of-law State (reflected in Article 1(1).

55. At the same time, a logical conundrum is apparently created by the second sentence of the 1993 Constitution's Article 15(4). In its entirety, Article 15(4) reads as follows:

> "The universally-recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system. *If an international treaty of the Russian Federation*

[61] KUTAFIN O.YE., SOURCES OF THE CONSTITUTIONAL LAW OF THE RUSSIAN FEDERATION (2002) (ASA-046), at 67.

[62] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 15(2).

> *provides for other rules than those envisaged by a statute, the rules of the international treaty shall be applied*."[63]

56. The first sentence of Article 15(4) thus acknowledges that international treaties can have direct effect within the legal system of the Russian Federation, without addressing the hierarchy of legal norms in any respect. By contrast, the second sentence of Article 15(4) does address the hierarchy of legal norms, creating a rule whereby "an international treaty" containing "rules other than those envisaged by a statute" is given priority over domestic statutes in instances of conflict. At first glance, therefore, there appears to be a logical conflict between Article 15(2) and Article 15(4), at least with respect to the position of unratified treaties concluded by the President, the Government, or the federal executive agencies.

57. In fact, the appropriate resolution to this apparent problem has been evident since even before the 1993 Constitution's enactment. As detailed below, this issue has been repeatedly addressed in judicial decisions, academic commentary, and legislative history:

(a) ***First***, under Articles 15(2), 90(3), and 115(1), a State organ cannot use an international treaty to contravene a federal statute or usurp the power of a superior State organ. Accordingly, an interagency treaty cannot contravene the Government's normative acts, an intergovernmental treaty cannot contravene the President's normative acts, and an unratified treaty concluded by the President or the Government cannot contravene the federal statutes enacted by the Federal Assembly.

[63] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 15(4) (emphasis added).

(b) ***Second***, under Article 15(4) of the 1993 Constitution, the treaties concluded by any State organ will supersede the normative acts issued by *that same State organ unilaterally* (as well as any lower-ranked normative acts).

58. As the starting point for this analysis, it should be recalled that Russian statutes have continuously required ratification of all treaties which "set out rules different from those provided for by a law" for four decades. This rule was already set forth in Article 12 of the 1978 USSR Statute ("ratification is required for […] treaties that set forth rules different from those contained in the legislative acts of the USSR"),[64] and preserved in Article 15(a)(1) of the 1995 FLIT ("the following international treaties of the Russian Federation shall be subject to ratification […] international treaties whose implementation requires modification of existing legislation or the enactment of new federal laws, or that set out rules different from those provided for by a law").[65] "Ratification" means the formal legislative approval of an international treaty by the Federal Assembly.[66]

59. It is also well established that this statutory requirement reflects an underlying principle of "constitutional significance."[67] This principle was acknowledged during the drafting of the 1993 Constitution by the Executive Secretary of the Constitutional Commission,

[64] USSR Statute "on the Procedure for Concluding, Executing and Denouncing International Treaties of the USSR" (ASA-003), Art. 12.

[65] Federal Statute No. 101-FZ "on International Treaties of the Russian Federation" dated 15 July 1995 (ASA-025), Art. 15(1)(a).

[66] Federal Statute No. 101-FZ "on International Treaties of the Russian Federation" dated 15 July 1995 (ASA-025), Art. 14; or, formerly, by the Presidium of the Supreme Council of the USSR: USSR Statute "on the Procedure for Concluding, Executing and Denouncing International Treaties of the USSR" (ASA-025), Art. 12.

[67] State Duma Hearing Transcript "on Draft Federal Statute 'on International Treaties of the Russian Federation'" dated 27 May 1994 (ASA-019), at 3.

Mr. Oleg G. Rumyantsev. During a 1992 hearing, Mr. Rumyantsev confirmed that *all* international treaties form a part of the Russian legal system, but *only* a ratified treaty has priority over a federal statute:

> "[L]egally concluded intergovernmental agreements that are not subject to ratification become part of the law. ***Their supremacy is only if they are ratified***. . . . Part of the domestic law is ratified international treaties and non-ratified simple intergovernmental agreements, if they do not conflict with the law. ***If the international treaty is ratified, then its norms are in effect, it is as if higher***."[68]

60. As reflected in the transcript, none of the hearing participants disagreed with this uncontroversial statement of principle by Mr. Rumyantsev, including Mr. Sergey Shakhrai, one of President Yeltsin's principal legal advisors.[69] Mr. Rumyantsev's understanding was subsequently confirmed many times during the period after the final text of the 1993 Constitution was adopted by referendum, including in statements made by official representatives of President Yeltsin and the Government, in judicial decisions, and in the writings of numerous influential academicians.

61. In May 1994, for example, the Deputy Minister of Foreign Affairs, Mr. S.B. Krylov, acting as special representative of the President of the Russian Federation, presented a draft version of the 1995 FLIT for consideration by the State Duma. At the outset of his presentation to the legislators, Deputy Minister Krylov made a speech explicitly acknowledging the relationship between the rule of priority under Article 15(4) of the

[68] Council of Nationalities of Russian Federation Supreme Council Hearing Transcript regarding Article 3 of the Russian Federation Constitution dated 2 Nov. 1992 (ASA-011), at 330 (emphasis added).

[69] *See* Council of Nationalities of Russian Federation Supreme Council Hearing Transcript regarding Article 3 of the Russian Federation Constitution dated 2 Nov. 1992 (ASA-011).

Constitution and the requirement that any treaty conflicting with a statute must be ratified by the Federal Assembly.

62. In the plenary hearing, Deputy Minister Krylov stated as follows:

> "***The most important issue of constitutional significance is the question of which international treaties are subject to ratification.*** Their list is contained in Article 15 of the bill, the text of which has been distributed to you, and it is much broader than what was in the previous law.
>
> I would like to draw your attention to the fact that ***only those treaties that are ratified in Parliament and therefore are approved in the form of a law will have priority in legislation in the event of a conflict of laws.*** Unlike the 1978 law, the document presented to you contains new rules—on the provisional application of a treaty prior to its entry into force. This is standard international practice, provided for by the Vienna Convention, however, our draft law establishes firmly that the State Duma will monitor such application especially strictly, and should, six months following its commencement, adopt either a law on the ratification of a treaty, or a decision on the extension of the ratification period, or (we might also allow for such cases) a decision refusing to ratify a treaty."[70]

63. Later in 1994, the same understanding was acknowledged by one of the Russian Federation's most influential international legal scholars, Professor A.N. Talalaev of Moscow State University, who had been one of the Soviet Union's delegates during the negotiations for the 1969 Vienna Convention on the Law of Treaties ("VCLT") and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.

64. As Professor Talalaev explained, Article 15(4) must be understood in conjunction with the broader structure of the 1993 Constitution and the democratic principles reflected therein:

[70] State Duma Hearing Transcript "on Draft Federal Statute 'on International Treaties of the Russian Federation'" dated 27 May 1994 (ASA-019), at 3 (emphasis added).

> *"[I]t would be a violation of the hierarchy of state authorities established in our legal system, to allow, for instance, the authorities executing interagency or even intergovernmental treaties to use them to appropriate the exclusive competence of the supreme legislative body, for such treaties to be made in violation of the statutes,* let alone the Constitution of the Russian Federation. Where a treaty contains rules that require amending a Russian law or annulling it, such a treaty must be submitted for ratification to the State Duma, irrespective of whether the treaty itself provides for its ratification. ***By being ratified in the form of a statute, such a treaty (even an interagency one) will prevail over a statute****."*[71]

65. The Plenum of the Supreme Court addressed the relationship between Article 15(4) of the 1993 Constitution and the hierarchy of legal norms for the first time in 1995, confirming the approach described by Deputy Minister Krylov and Professor Talalaev. In Resolution No. 8 dated 31 October 1995, the Supreme Court explained as follows:

> "[W]hen considering a case, the court may not apply the rules of any law governing legal relations if an international treaty, that has entered into force for the Russian Federation ***and the decision of the Russian Federation to be bound by which was taken in the form of a federal law***, establishes rules different from those provided for by such law. In these situations the rules of the international treaty of the Russian Federation shall be applied."[72]

66. Further details were provided by the Plenum of the Supreme Court in Resolution No. 5 dated 10 October 2003, with explicit reference to the provisions of the 1993 Constitution reflecting the broader hierarchy of legal norms:

> "The rules of an international treaty of the Russian Federation that has entered into force and ***consent to be bound by which was given in the form of a federal law*** shall be applied with priority over the laws of the Russian Federation.

---

[71] Talalaev A.N., *Correlation of International and National Law and the Constitution of the Russian Federation*, in MOSCOW JOURNAL OF INTERNATIONAL LAW No. 4 (1994) (ASA-015), at 13 (emphasis added).

[72] Plenum of the Supreme Court Resolution No. 8 "on Certain Matters of Application of the Constitution of the Russian Federation by Courts in the Administration of Justice" dated 31 Oct. 1995 (ASA-026) ¶ 5 (emphasis added).

> The rules of an international treaty of the Russian Federation that has entered into force and ***consent to be bound by which was given other than in the form of a federal law*** shall be applied with priority ***over sub-legislative legal acts issued by a State authority or an authorized agency that has entered into that particular treaty*** (Article 15(4), Article 90, 113 of the Constitution of the Russian Federation)."[73]

67. Applying this approach in a decision rendered on 29 December 2009, the Supreme Court resolved a conflict between an unratified treaty and two federal statutes (specifically the Criminal Code and the Criminal Procedure Code) by applying the same interpretation of Article 15(4). In this case, the Supreme Court once again acknowledged the placement of international treaties within the hierarchy of normative acts:

> "By virtue of the hierarchy of legal acts, ***priority over the laws of the Russian Federation is accorded to international treaties*** of the Russian Federation concluded on behalf of the Russian Federation (interstate treaties), ***consent to be bound by which was given in the form of a federal law*** . . . .
>
> ***Since the Government of the Russian Federation is not entitled to adopt, amend or abrogate the provisions of criminal laws or laws on criminal procedure, the provisions of the non-ratified Treaty*** between the Government of the Russian Federation and the Government of the Chinese People's Republic on the Russian-Chinese Border Regime dated November 9, 2006, to the extent it provides for rules different from those provided for by the Russian Criminal Code and the Russian Criminal Procedure Code, ***shall not apply in the Russian Federation***."[74]

68. Professor M.N. Marchenko has provided a detailed description of the approach in his 2008 treatise, which accurately summarizes the relationship between Articles 15(2) and 15(4):

[73] Plenum of the Supreme Court Resolution No. 5 "on Application by Courts of General Jurisdiction of Generally Recognized Principles and Norms of International Law and International Treaties of the Russian Federation" dated 10 Oct. 2003 (ASA-047) ¶ 8 (emphasis added).

[74] Supreme Court of the Russian Federation Cassation Ruling No. 59-O09-35 dated 29 Dec. 2009 (ASA-063), at 4 (emphasis added).

> "In this connection, the opinion expressed in academic legal literature that the legal force of an international treaty of the Russian Federation approved by a presidential decree is equivalent to the legal force of the decree itself appears to be reasonable and logical. Consequently, the ***legal force of an international treaty approved by a resolution of the Government of the Russian Federation is equivalent to the legal force of that resolution.***
>
> ***It is natural that neither the first, nor the second group of international treaties of the Russian Federation, nor the legal acts that approved them, have any supremacy over federal laws, but are placed below them,*** and shall be concluded and implemented in compliance therewith.
>
> International treaties approved in accordance with the Federal Law 'On International Treaties,' either by the President of the Russian Federation or the Government of the Russian Federation, ***prevail only over presidential, governmental or other legal acts issued by subordinate bodies***.
>
> … Speaking of the supremacy of the international treaties of the Russian Federation over domestic laws, *only those treaties that have been ratified and published in the manner stipulated by the law* have such supremacy.
>
> … ***Supremacy over domestic laws*** (which are traditionally understood in the Russian and foreign literature not only in the narrow meaning, but also *in the broader meaning – as the corpus of all legal acts* based on law) ***is accorded to all types of treaties of the Russian Federation without exception, but each type of treaty has such supremacy at its own level****:* at the level of presidential decrees, government resolutions, at the level of the agencies or at the inter-agency level, respectively. As regards ***ratified treaties of the Russian Federation,*** *they* ***prevail over domestic laws of the Russian Federation and have supremacy at all other regulatory levels***."[75]

69. Numerous scholars have repeatedly confirmed this understanding, including Professor D.A. Shlyantsev,[76] Professor B.R. Tuzmukhamedov,[77] Professor V.S. Ivanenko,[78]

[75] MARCHENKO M.N., SOURCES OF LAW (2008) (ASA-052), at 327-329 (emphasis added).

[76] SHLYANTSEV D.A., COMMENTARY TO THE FEDERAL LAW "ON INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION" (ARTICLE-BY-ARTICLE) (2006), Commentary on Art. 5 (ASA-049).

[77] TUZMUKHAMEDOV B.R., INTERNATIONAL LAW IN THE CONSTITUTIONAL JURISDICTION (2006) (ASA-050), at 135.

[78] Ivanenko V.S., *International Treaties and the Constitution in Russian Legal System: "The War of Supremacies" or a Peaceful Interaction, in* JURISPRUDENCE No. 3(2010) (ASA-067), at 143.

Professor B.L. Zimnenko,[79] Professor M.N. Marochkin,[80] and Professor G.V. Ignatenko.[81]

3. The Hierarchy of Legal Norms in Comparative Perspective

70. I will also note, briefly, that the Russian Federation's approach to these constitutional issues is fully in accordance with the approach applied in most (if not all) European legal systems.

71. The reason for taking into account constitutional law and current legislation of European countries lies in the vast usage of foreign (*i.e.* non-Russian) experience during the drafting of the 1993 Constitution. Dr. Rumyantsev, the Executive Secretary of the Constitutional Commission, has written: "Creative development of the Commission's international relationships allowed the use of both the historical experience of countries with a rich constitutional history, and a search for colleagues and like-minded persons . . . the Russian Constitutional process was included in the broader legal environment and lacked any indications of isolationism."[82]

72. It is not rare to read in Russian legal scientific publications that the greatest impact in the field of President-Parliament interaction regulation upon the present Russian Constitution was exerted by the 1958 French Constitution. For example, Alexander Kovalev argues

[79] ZIMNENKO B.L., INTERNATIONAL LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION, GENERAL PART: COURSE OF LECTURES (2010) (ASA-066).

[80] MAROCHKIN S.Y., OPERATION AND IMPLEMENTATION OF THE NORMS OF INTERNATIONAL LAW WITHIN THE LEGAL SYSTEM OF THE RUSSIAN FEDERATION (2011) (ASA-069), at 124-125.

[81] IGNATENKO G.V., INTERNATIONAL AND NATIONAL LAW: ISSUES OF INTERFERENCE AND INTERRELATION (A COLLECTION OF PUBLICATIONS OF 1972-2011) (2012) (ASA-079), at 162-175.

[82] FROM THE HISTORY OF CREATION OF THE RUSSIAN FEDERATION CONSTITUTION, IN 6 VOLUMES, Vol. 1 (Rumyantsev O. ed. Moscow: Wolters Kluwer, 2008) (ASA-053), at 28.

that "the 1958 French Constitution influenced seriously over the Russian Constitution."[83] According to an eminent French scholar, Maurice Duverger, there are also other republics in Europe with politically strong Presidents possessing vast powers along with France (though France has the most powerful President in Western Europe).[84] I will therefore briefly examine the French Constitution and several other European countries, whose constitutional experience was born in mind in the process of drafting the Constitution in the Russian Federation.

73. Within most European jurisdictions a President has no individual power to legislate. However, in certain European countries the President does have certain powers within the executive law-making process. Thus, the President of the French Republic, in accordance with Article 13 of the 1958 Constitution,[85] signs ordinances (*ordonnances* in French) and decrees (*décrets* in French), deliberated in the Council of Ministers (*Conseil des ministres* in French). The Council of Ministers is the French Government session chaired by the President of the Republic, while normally the French Government meetings are chaired by the Prime-Minister.

74. With respect to treaty making, the French President is also responsible for ratifying international treaties under Article 52 of the French Constitution, unless a treaty falls into one of the categories identified in Article 53.[86] Specifically, Article 53 requires that any

[83] CONSTITUTION OF THE RUSSIAN FEDERATION: A PROBLEMATIC COMMENTARY (1997) (Chetvernin V. ed., Moscow) (ASA-032), at 352.

[84] DUVERGER M., INSTITUTIONS POLITIQUES ET DROIT CONSTITUTIONNEL, Vol. 1, 1975 (ASA-002), at 294-296.

[85] Constitution of France dated 4 October 1958, as amended (ASA-088), Art. 13.

[86] Constitution of France dated 4 October 1958, as amended (ASA-088), Arts. 52-53.

treaty "modifying provisions which are the preserve of statute law" must necessarily "be ratified or approved *only by an Act of Parliament.*"[87]

75. An essentially similar arrangement with respect to treaty-making is found under the Italian Republic's 1947 Constitution. In Italy, the President also issues decrees and promulgates laws, which (generally speaking) must be counter-signed by the Prime Minister. The Italian President may also enter into international treaties without submitting them to Parliament for ratification, unless such treaties "have a political nature, require arbitration or a legal settlement, entail change of borders, spending *or new legislation*" under the terms of Article 80 of Italy's 1947 Constitution.[88] Accordingly, as in France, the Italian President may conclude treaties, but must submit any treaties that entail "new legislation" to the Italian Parliament for ratification.

76. In Spain, finally, one finds a similar arrangement under the 1978 Constitution. Specifically, Section 63 of Spain's 1978 Constitution vests primary authority for treaty making in the King: "It is incumbent upon the King to express the State's assent to international commitments through treaties, in conformity with the Constitution and the laws."[89] However, Section 94(1)(e) ensures that the King must first obtain a prospective authorization from the Parliament (*las Cortes Generales*) prior to concluding any treaty "which involve[s] *amendment or repeal of some law* or *require[s] legislative measures for their execution*."[90]

---

[87] Constitution of France dated 4 October 1958, as amended (ASA-088), Art. 53 (emphasis added).

[88] Constitution of the Italian Republic dated 27 December 1947, as amended (ASA-087), Art. 80 (emphasis added).

[89] Constitution of the Kingdom of Spain dated 27 December 1978, as amended (ASA-089), Sec. 63.

[90] Constitution of the Kingdom of Spain dated 27 December 1978, as amended (ASA-089), Sec. 94 (emphasis added).

77. The common thread, therefore, throughout each of these European legal systems, is that the head of State or head of Government may be active in both issuing legally normative decrees and orders, as well as in negotiating and signing international treaties. But these legal systems, like the Russian Federation's system under the 1993 Constitution, require legislative approval (whether through ratification or through prospective authorization) before any international treaty can alter preexisting domestic statutes. Heads of State or heads of Government thus do not play an unlimited role even with respect to foreign affairs, maintaining these legal systems' respective systems of checks and balances and preventing the concentration of all power in one body in the process of giving legal effect to international treaties, the priority in which is preserved for legislative bodies.

B. The Position of Unratified, Provisionally Applicable Treaties within the Russian Federation's Hierarchy of Legal Norms

78. In this section, I will consider whether the position of an unratified international treaty within the Russian Federation's hierarchy of legal norms is changed somehow by the fact that it has not yet entered into force, but rather is provisionally applied only.

79. The Russian Federation does recognize the concept of provisionally applicable treaties in accordance with the 1969 VCLT, which has been a part of Russian law since the Soviet Union became a party to the VCLT in 1986.[91] By definition, a provisionally applicable treaty is applied on a temporary basis even before this treaty formally enters into force "definitively" (for all States parties, based on the specific terms of the treaty) or enters into force for an individual State party (based on the specific requirements of that State party's domestic legal system).

[91] Presidium of the USSR Supreme Soviet Decree No. 4407-XI "on the Accession of the Union of Soviet Socialist Republics to the Vienna Convention on the Law of Treaties" dated 4 Apr. 1986 (ASA-004).

80. For the purposes of the Russian Federation's legal system, the details relating to the provisional application of treaties are set forth in Articles 23 and 30(2.1) of the 1995 FLIT, which permit the provisional application of treaties prior to their entry into force. There are no specific references to provisional application in the 1993 Constitution, in the 1978 USSR Law, or in any provision of the 1995 FLIT other than Articles 23 and 30(2.1).

81. A treaty is no longer "provisionally applicable" after it has entered into force in accordance with Article 24 and Article 30 of the 1995 FLIT. The common reasons why a treaty may not have yet entered into force include (1) that the treaty has not yet been ratified by the Russian Federation, where the terms of the treaty require ratification, (2) that the treaty has not been officially published in the Russian Federation, or (3) some other term in the treaty has not yet been fulfilled, such as obtaining a stipulated number of consents from participating States or the passage of a certain specified period of time since the opening of the treaty for signature.[92]

1. There Is No Exception to the Hierarchy of Legal Norms for Unratified, Provisionally Applicable Treaties

82. As Part III-C of this Expert Report addresses in further detail, Professor Stephan and Professor Mishina have argued that unratified, provisionally applicable treaties fall within a unique, implicit exception to the hierarchy of norms established under Articles 15(2), 90(3), and 115(1) of the 1993 Constitution. In their view, unratified, provisionally applicable treaties apparently represent the single instance where the Government or

[92] *See* Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 54.

indeed any federal executive organ (a Ministry, a Service, or an Agency) can contravene a statute enacted by the Federal Assembly and signed by the President.

83. But there is no evidence for any such exception in either the text of the 1993 Constitution or in the 1995 FLIT. As observed above, the 1993 Constitution does not reference provisional application at all. The 1995 FLIT mentions provisional application only in Articles 23 and 30(2.1), and none of these two articles' provisions make any explicit reference to either the hierarchy of legal norms or a special, exceptional rule to be applied in case of conflicts with federal statutes.

84. In fact, the only subsection of Article 23 or Article 30(2.1) with even potential relevance to the hierarchy of legal norms is the first sentence of Article 23(2.1).[93] As explained below, this subsection, when read together with Article 6 of the FLIT, actually acknowledges and affirms the underlying constitutional principles described above in Part III-A. That is, the "exclusive competence of the supreme legislative body"[94] cannot be encroached upon through the use of any treaty by the President or the Government, whether or not such treaty is provisionally applicable.

85. In accordance with its terms, Article 23(2) provides that the State organ which "has taken the decision to sign the international treaty" is likewise the State organ which renders the

[93] Most of Article 23 is concerned only with questions of timing - specifically, the beginning of provisional application (Art. 23(1)), the termination of provisional application (Art. 23(3)), and the requirement that any provisionally applicable treaty subject to ratification must be submitted to the Federal Assembly within six months from the commencement of provisional application (Art. 23(2), in the second sentence). Article 30(2.1) of the 2012 version of the FLIT addresses the procedure for temporary publication of provisionally applicable treaties, prior to their entry into force. Article 30(2.1) was not part of the original 1995 FLIT, but was added by a statutory amendment in 2012. *See* Federal Statute No. 101-FZ "on International Treaties of the Russian Federation", amended as of 25 Dec. 2012 (ASA-097), Art. 30(2.1).

[94] Talalaev A.N., *Correlation of International and National Law and the Constitution of the Russian Federation*, *in* MOSCOW JOURNAL OF INTERNATIONAL LAW No. 4 (1994) (ASA-015), at 13.

"decisions on the provisional application of [the] treaty."[95] Under this provision, therefore, it is understood that a treaty's provisional application is initiated by a "decision" [*решение*] of the President, the Government, or a federal executive organ. This term is further elaborated in both Article 11 and Article 6, which explain that any State organ's "decision" regarding an international treaty can be made only "***in accordance with [its] competence*** as defined by the Constitution of the Russian Federation, this Federal Law and other legislative acts of the Russian Federation."[96]

86. In other words, the text of the FLIT acknowledges and affirms that the "competence"[97] of any State organ is necessarily limited by the position of that State's normative acts within the 1993 Constitution's hierarchy of legal norms. As reflected in Articles 15(2), 90(3), and 115(1) of the 1993 Constitution, neither the President nor the Government possesses the "competence" to contravene a federal statute that has been enacted by the Federal Assembly and signed by the President.

87. To confirm this interpretation of the FLIT's Article 23, it is worth revisiting the speech by Deputy Minister Krylov in May 1994, as he was presenting the draft text of the 1995 FLIT to the Federal Assembly on behalf of President Yeltsin. In that speech, Deputy Minister Krylov made the following notable statement, where he touched briefly on *both* the concept of provisional application *and* the hierarchy of norms:

[95] Federal Statute No. 101-FZ "on International Treaties of the Russian Federation" dated 15 July 1995 (ASA-025), Art. 23(2).

[96] Federal Statute No. 101-FZ "on International Treaties of the Russian Federation" dated 15 July 1995 (ASA-025), Art. 6(2) (emphasis added).

[97] Federal Statute No. 101-FZ "on International Treaties of the Russian Federation" dated 15 July 1995 (ASA-025), Arts. 6(2), 23(2).

> "The most important issue of constitutional significance is the question of which international treaties are subject to ratification. Their list is contained in Article 15 of the bill, the text of which has been distributed to you, and it is much broader than what was in the previous law.
>
> I would like to draw your attention to the fact that only those treaties that are ratified in Parliament and therefore are approved in the form of a law will have priority in legislation in the event of a conflict of laws. ***Unlike the 1978 law, the document presented to you contains new rules—on the provisional application of a treaty prior to its entry into force.*** This is standard international practice, provided for by the Vienna Convention, however, ***our draft law establishes firmly that the State Duma will monitor such application especially strictly, and should, six months following its commencement, adopt either a law on the ratification of a treaty, or a decision on the extension of the ratification period, or (we might also allow for such cases) a decision refusing to ratify a treaty.***"[98]

88. Significantly, Deputy Minister Krylov did not suggest that the provisional application of treaties creates an exception to the general hierarchy of legal norms (which he had only just described in the previous paragraph). Nor did he suggest that provisionally applied treaties create a mechanism whereby the President, the Government, or the federal executive organs could obtain enhanced powers or augmented authority in relation to the Federal Assembly.

89. To the contrary, Deputy Minister Krylov said the opposite – he emphasized that the provisions of the new Draft FLIT would ensure the State Duma's power to "monitor . . . especially strictly" [*строго следить за*] the executive authorities' use of provisional application.[99] Deputy Minister Krylov's statement thus significantly undermines the suggestion that provisional application falls within any purported exception to the hierarchy of legal norms.

---

[98] State Duma Hearing Transcript "on Draft Federal Law 'on International Treaties of the Russian Federation'" dated 27 May 1994 (ASA-019), at 3 (emphasis added).

[99] State Duma Hearing Transcript "on Draft Federal Statute 'on International Treaties of the Russian Federation'" dated 27 May 1994 (ASA-019), at 3.

90. This impression is reinforced by the unequivocal terms in which the placement of treaties within the hierarchy of legal norms is repeatedly described in the numerous authorities cited above in Part III-A-2. None of these authorities suggest that provisionally applicable treaties fall within an exception to the hierarchy of norms – or indeed that any exceptions exist.

91. To take several examples:

(a) According to Resolution No. 5 of the Plenum of the Supreme Court, the identity of "a State authority or an authorized agency" which expressed the Russian Federation's "consent to be bound" is directly relevant to the international treaty's "priority over sub-legislative legal acts."[100]

(b) According to Professor Talalaev, who had been the Soviet Union's delegate to the VCLT negotiations: "[I]t would be a violation of the hierarchy of state authorities . . . to allow, for instance, the authorities executing interagency or even intergovernmental treaties *to use them to appropriate the exclusive competence of the supreme legislative body, for such treaties to be made in violation of the statutes* . . . ."[101]

(c) According to Professor Marchenko, "the legal force of an international treaty of the Russian Federation approved by a presidential decree is equivalent to the legal force of the decree itself . . . . Consequently, the legal force of an international treaty approved by a resolution of the Government of the Russian Federation is equivalent

[100] Plenum of the Supreme Court Resolution No. 5 "on Application by Courts of General Jurisdiction of Generally Recognized Principles and Norms of International Law and International Treaties of the Russian Federation" dated 10 Oct. 2003 (ASA-047) ¶ 8.

[101] Talalaev A.N., *Correlation of International and National Law and the Constitution of the Russian Federation*, *in* MOSCOW JOURNAL OF INTERNATIONAL LAW NO. 4 (1994) (ASA-015), at 13 (emphasis added).

to the legal force of that resolution. It is natural that neither the first, nor the second group . . . . have any supremacy over federal laws, but are placed below them . . . ."[102]

92. Not one of these statements acknowledges even the possibility of any exception in the case of a provisionally applicable treaty. Indeed, as a matter of democratic principles, there is no reason why there would be any such exception.

93. It would be equally undemocratic, and equally contrary to the logic of the 1993 Constitution, to allow the unelected officials of the Ministry of Sport or the Federal Agency for Tourism to contravene a federal statute ("the highest form of expression of the People's sovereign will")[103] in an *unratified, provisionally applicable* treaty—just as it would be inappropriate to do so in an *unratified, interagency* treaty that has entered into force. Any encroachment upon "the exclusive competence of the supreme legislative body"[104] by the executive authorities must therefore be rejected as contrary to the text of the 1993 Constitution and basic democratic logic.

2. Public Discourse Regarding Specific Conflicts Between the Provisions of the ECT and Federal Statutes

94. It is also highly significant in the context of the present case that, between 1996 and 2001, representatives of the Government and members of the Federal Assembly of the Russian Federation made numerous statements acknowledging individual conflicts between the ECT and specific federal statutes. But not one of these statements ever suggested that, after the ECT had been signed at the instruction of Prime Minister

[102] MARCHENKO M.N., SOURCES OF LAW (2008) (ASA-052), at 327-328.

[103] KUTAFIN O.YE., SOURCES OF THE CONSTITUTIONAL LAW OF THE RUSSIAN FEDERATION (2002) (ASA-046), at 67.

[104] Talalaev A.N., *Correlation of International and National Law and the Constitution of the Russian Federation*, in MOSCOW JOURNAL OF INTERNATIONAL LAW NO. 4 (1994) (ASA-015), at 13.

Chernomyrdin and became provisionally applicable on 17 December 1994, the ECT's provisions had thereby *already* overridden the conflicting provisions of federal statutes.

95. Indeed, it is clear from his statements during a 2001 hearing that not even Prime Minister Chernomyrdin himself took this view. As noted below, Prime Minister Chernomyrdin agreed that a comprehensive study should be performed to determine *how many* conflicts there were, indicating that there was no simple way of identifying all the possible conflicts between the ECT and existing federal statutes.

96. The relevant statements (which are quite numerous) are set forth in this timeline:

(a) **26 August 1996** – After the ECT had been signed in December 1994, the Government submitted the Draft Federal Statute "on Ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects" for the Federal Assembly's consideration, together with an Explanatory Note. The Explanatory Note expressed the Government's understanding that "[t]he ECT contains a number of legally binding provisions . . . ***that have yet to be reflected (or fully reflected) in the Russian legislation***. This concerns the provisions relating to customs duties; protective and anti-dumping measures; duties with regard to the export and import of goods; subsidies; state enterprises; implementation of technical norms and standards; etc."[105] The Explanatory Note did not suggest that signing and provisionally applying the ECT had already eliminated these conflicts.

[105] Draft Federal Statute "on Ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects" dated 26 Aug. 1996 (ASA-030); Explanatory Note to the Draft Federal Statute "on Ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects" dated 26 Aug. 1996 (ASA-031), at 4 (emphasis added).

(b) **19 February 1997** – After holding a seminar on 17 February 1997 to discuss the ECT, Mr. A.G. Puzanovsky, the Deputy Chairman of the State Duma Committee on Economic Policy independently wrote a separate Explanatory Note for the consideration of the State Duma. This Explanatory Note acknowledged numerous economic and legal "hidden hazards" [*подводных камней*, which is literally translated as "underwater rocks"], and did not purport to catalogue all of them.

In particular, Mr. Puzanovsky noted that, "[i]n accordance with Article 46 of the Treaty, no reservations of the ratifying State are allowed. Therefore, if the provisions of the legislation of the Russian Federation are inconsistent with the provisions of the said Treaty, the provisions of the latter ***will apply***."[106] Mr. Puzanovsky then identified specific conflicts between the ECT's Article 12 and the Civil Code's Article 401, and conflicts between the ECT's Article 24 and the Government's draft statute regarding the restriction of foreign investment in particular industries, products, and activities.[107]

Mr. Puzanovsky did not suggest that it was *already* too late for the Federal Assembly to prevent these conflicts between the ECT and federal statutes. Nor did he suggest that the provisional application of the ECT had *already* overridden all pre-existing statutes or foreclosed the enactment of any additional conflicting statutes in the future.

---

[106] Explanatory Memorandum from State Duma Economic Policy Committee prepared to the Parliamentary Hearings on the ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects dated 19 Feb. 1997 (ASA-033), at 2 (emphasis added).

[107] Explanatory Memorandum from State Duma Economic Policy Committee prepared to the Parliamentary Hearings on the ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects dated 19 Feb. 1997 (ASA-033), at 2-3.

(c) **17 June 1997** – The State Duma Committee on Economic Policy held a hearing regarding the possibility of ratifying the ECT, at which four different participants acknowledged conflicts between the ECT and federal statutes:

i. Mr. A.G. Puzanovsky, the Deputy Head of the Economic Policy Committee, speaking on behalf of "[t]he deputies," noted general concerns regarding conflicts between the ECT and federal statutes: "The deputies are in particular worried. . . [that] the provisions of the Charter on national investment regime . . . ***will bind*** Russia . . . as dominant international obligations over national legal order. The deputies are also concerned as to the influence the Charter ***might have*** on privatization processes. . ." or "[w]hether the Charter ***will force*** Russia's Government to comply with its prescribed rules on property."[108]

ii. Mr. S.V. Burkov, representative of Audit Chamber, specifically identified several ECT provisions which contradicted Russian laws. For instance, he mentioned Article 18(4) of the ECT, which obliged the Contracting Parties to grant non-discriminatory access to foreign investors to search, explore, and exploit energy resources. Mr. S.V. Burkov stated that, should ECT Article 18(4) become applicable, then the Russian Federation "***will not be able*** to exercise its powers to the full extent, including administrative ones … [the powers] that are vested by a wide range of effective laws."[109]

[108] State Duma Economic Policy Committee Transcript of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034), at 2-3 (emphasis added).

[109] State Duma Economic Policy Committee Transcript of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034), at 40.

Mr. S.V. Burkov also mentioned conflicts between the ECT and the Statute on Subsoil, the Statute on Production Sharing Agreements, and the Statute on State Regulation of Foreign Trade Activities.[110] Further, Mr. S.V. Burkov warned that Article 10 of the ECT contradicted the provisions of a draft statute that was on the State Duma's agenda at that time: "Should Russia accept the aforementioned obligations, it ***will be quite difficult to restrict*** access to foreign investors to industrial areas of strategic importance. Russia ***will not be able to restrict*** access to foreign investors in particular industry sectors."[111]

iii. Mr. S.S. Tsyplakov, representative of the Federation Council of the Russian Federation, also pointed out conflicts, inter alia, with the Draft Statute "On the List of Industries, Where the Operation of Investors Is Restricted or Prohibited," and agreed with the list of issues raised by Mr. Burkov of the Audit Chamber.[112] On this basis, Mr. Tsyplakov warned: "***If we now take and ratify***, that means, we must now hastily ***conform all of our legislation to the Charter***."[113]

iv. Professor G.A. Bystrov, doctor and professor in law, also emphasized the non-conformity of the ECT with existing federal statutes: "***We would not want to look***

[110] State Duma Economic Policy Committee Transcript of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034), at 38-40.

[111] State Duma Economic Policy Committee Transcript of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034), at 41 (emphasis added).

[112] State Duma Economic Policy Committee Transcript of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034), at 54-55, 57.

[113] State Duma Economic Policy Committee Transcript of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034), at 57-58 (emphasis added).

> ***like violators*** of those rules of the energy market ***if that document is ratified by the Parliament*** . . . And if Parliament ratifies it, what should we do? Should we amend, for instance, Subsoil Law, which provides for state system of review of subsoil use?"[114]
>
> Further, Mr. G.A. Bystrov, "being particularly concerned by one ECT provision that essentially strips Russia of its judicial immunity," specified that ECT's dispute resolution mechanism contradicted Russian statutes: "Incidentally, the law on subsoil does not anticipate this possibility – the resolution of disputes, for example, in the International commercial arbitration court in Stockholm. And if we keep the administrative system of licensing for the use of subsoil, if we keep the related system of State control in this sphere, and the energy market ***will*** be crafted not only according to law on agreements of product sharing, then when ratifying this document the parliament must reserve a special right. And ***current laws allow us to do that*** – Russia reserves its special dispute resolution system, ***not the one provided unconditionally and imperatively by Article 26*** . . . ."[115]

Given that this hearing occurred in June 1997, these statements demonstrate plainly that none of these participants believed that the ECT had already preempted all conflicting federal statutes three years previously in December 1994.

[114] State Duma Economic Policy Committee Transcript of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034), at 88-89 (emphasis added).

[115] State Duma Economic Policy Committee Transcript of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034), at 90-91 (emphasis added).

As reflected in the published legislative record, approximately one hundred attendees were present at this hearing.[116] A summary of the meeting was later published in the State Duma's official "Information Notes," which expressly referenced the participants' concerns regarding the "inconsistency of the current legislation with the provisions of the said Treaty."[117]

(d) **17 June 1997** – After concluding the hearing, the State Duma Economic Policy Committee circulated a Draft Recommendation to the State Duma advising to postpone ratification. The Draft Recommendation explained that "under Article 15(4) of the Constitution of the Russian Federation, if an international treaty contains different rules than contemplated under national law, then the international treaty prevails – and in this connection there are many hidden hazards ['underwater rocks' or *подводные камни*]."[118] Naturally, if Article 15(4) already eliminated these hidden hazards by virtue of the ECT's provisional application, then this statement would make no logical sense.

Notably, the Draft Recommendation then identified the following nonexclusive list of conflicts:

(i) ECT Article 5 "contradicts to Article 1 para. 7 of the Federal Law 'On Production Sharing Contracts,' which provides that a production sharing agreement must

[116] State Duma Parliamentary Hearings Information Notes in *Analytics and Statistics: Spring Session of 1997* dated 17 June 1997 (ASA-098), Information Card No. 2.1.4.-PS-141..

[117] State Duma Parliamentary Hearings Information Notes in *Analytics and Statistics: Spring Session of 1997* dated 17 June 1997 (ASA-098), Information Card No. 2.1.4.-PS-141.

[118] State Duma Economic Policy Committee Draft Recommendations of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (ASA-035).

have an obligatory condition on the mandatory purchase of part of the technological equipment of Russian origin."[119]

(ii) ECT Article 5 "goes against Article 15 of the Federal Law 'On the State Regulation of Foreign Trade Activities,'" which provides that export restrictions "can be implemented to guarantee the national security of Russia, and to perform Russia's international obligations."[120]

(iii) ECT Article 12 obligated State parties "to compensate investor's losses in full in case of force majeure circumstances, *i.e.*, armed conflict, civil unrest and in other extraordinary circumstances," which was contrary to Article 401 of the Civil Code of the Russian Federation.[121]

A similar assessment was published in the State Duma's "Information Notes," which repeated Mr. Puzanovsky's concerns[122] regarding the conflict between Article 12 of

[119] State Duma Economic Policy Committee Draft Recommendations of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (ASA-035), at 3.

[120] State Duma Economic Policy Committee Draft Recommendations of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (ASA-035), at 3.

[121] State Duma Economic Policy Committee Draft Recommendations of the Parliamentary Hearing "on the Energy Charter Treaty and the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects" dated 17 June 1997 (ASA-035), at 4.

[122] Explanatory Memorandum from State Duma Economic Policy Committee prepared to the Parliamentary Hearings on the ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects dated 19 Feb. 1997 (ASA-033), at 2-3 ("For example, in the event of armed conflict, civil unrest and other extraordinary circumstances, it is not the provisions on force majeure circumstances that grant exemption from financial liability in accordance with Article 401 of the RF Civil Code that will apply, but the provisions of Article 12 of the Treaty, which obligate the receiving state to compensate the losses of foreign investors in connection with the onset of said circumstances.").

the ECT (addressing "armed conflicts and other emergency circumstances") and Article 401 of the Civil Code.[123]

(e) **24 June 1997** – The Audit Chamber of the Russian Federation, in response to the State Duma's Instructions No. 1173-II GD dated 21 February 1997, also prepared an analysis on financial aspects of the ECT's ratification, where the Audit Chamber recommended the postponement of ratification. In particular, the Audit Chamber noted that "ECT Art. 18 (4) obliges the Contracting States to promote access to the energy resources by indiscriminately granting licenses, contracts, concessions for exploration and exploitation of energy resources. Thus, the Russian state ***will not be able to perform its functions in this area***" in the event of ratification.[124]

(f) **26 January 2001** – The State Duma Committee on Energy, Transport, and Communications held a hearing regarding the ratification of the ECT, at which six different participants, including a former Chairman of the Government of the Russian Federation, Mr. Viktor S. Chernomyrdin, acknowledged conflicts between the ECT and federal statutes:

(a) Mr. I.D. Ivanov, Deputy Minister of Foreign Affairs of the Russian Federation, mentioned that since "an enormous amount of newly enacted economic legislation has entered into force," then "there is a need to conduct an expert study. What provisions of domestic law conflict with the Treaty?"[125]

[123] State Duma Parliamentary Hearings Information Notes in *Analytics and Statistics: Spring Session of 1997* dated 17 June 1997, Information Card No. 2.1.4.-PS-141 (ASA-098) ("And in the case of armed conflicts and other emergency circumstances, the host State must compensate losses to foreign investors.").

[124] Audit Chamber Report No. 0I-539/04 dated 24 June 1997 (ASA-036), at 2 (emphasis added).

[125] State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT)

(b) Mr. G.D. Avalishvili, First Deputy Minister of Energy of the Russian Federation, also acknowledged the existing conflicts between the ECT and Russia's domestic legislation by stating that "ratification of the Treaty ***will*** allow Russia to speak a common legal language with its partners" and that "an analysis of the legislation that will require amendment in connection with the entry of the Treaty into force" was also needed.[126]

(c) Mr. Y.A. Yershov, deputy director of the National Institute for the Studies of External Economic Relations, noted that the ECT compensation requirements "are not present in Russian legislation." Mr. Y.A. Yershov mentioned that the ECT's provisions addressing the free transfer of capital "also add a number of other types of transfers that are not listed in our laws." He added that "the Article that states that an investor must be protected from imposition of a local component or local products … conflicts with the provisions of our legislation, the PSA law, where it is clearly stated that, at all costs, 70% of required equipment and materials must be of Russian origin."[127]

(d) Mr. M.S. Pankin, Institute of External Economic Relations of the Ministry of Economic Development, noted regarding the inconsistency between ECT provisions and domestic legislation: "At the hearing, the chairman, deputy S. Glazyev, asked negotiators a direct question: 'what will happen if we accede to

(Editorial Version)" dated 26 Jan. 2001 (ASA-044), at 36.

[126] State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)" dated 26 Jan. 2001 (ASA-044), at 38, 39 (emphasis added).

[127] State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)" dated 26 Jan. 2001 (ASA-044), at 41, 42.

the WTO with such a problem as mandatory provisions for production sharing agreements which are inconsistent with the WTO rules?' Their response was unequivocal: 'this is something for legislators to deal with, the inconsistency will have to be eliminated.'"[128]

(e) Mr. K.V. Yankov, Deputy Chairman of the Russian Federal Energy Commission, stated that the ECT obliged the contracting states to accord national treatment, while its definition in Russian laws was unclear: "As a matter of fact, there are certain gaps in our legislation here. . . . Therefore, we need to address this issue through our domestic laws."[129]

(f) Mr. V.S. Chernomyrdin, the former Prime Minister, acknowledged that "gaps" existed between the ECT provisions and Russian laws: "So how many gaps do we have, that are preventing us from ratifying this Treaty today? We need to work on the 'gaps', to work on the laws, on these rules which would include us in this system. Not so that it benefits individual industries, but so that the Russian economy as a whole would fit into this system! We need to work. Do we know these 'gaps'? I do not think so."[130] Mr. Chernomyrdin thus concurred with other participants that a comprehensive study was needed to determine precisely how many such "gaps" might exist, and how they could be resolved.[131]

[128] State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)" dated 26 Jan. 2001 (ASA-044), at 45.

[129] State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)" dated 26 Jan. 2001 (ASA-044), at 68.

[130] State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)" dated 26 Jan. 2001 (ASA-044), at 73-74.

[131] State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT)

As reflected in the legislative record, approximately three hundred people were in attendance at this public hearing, and thus were aware of these statements regarding conflicts between the ECT and federal statutes.[132] A summary of the meeting was later published on the State Duma's website,[133] and a verbatim transcript was published in the *International Scientific Journal*.[134]

97. As reflected by these statements made from 1996 to 2001, the representatives of the Government and the members of the Federal Assembly had identified numerous different conflicts between the ECT and federal statutes. Apparently, not even one of these participants in this discourse, including former Prime Minister Chernomyrdin, believed that signing and provisionally applying the ECT had already overridden these conflicting federal statutes. Indeed, based on his recommendation that a comprehensive study should be performed, it appears that Mr. Chernomyrdin did not see any simple way of determining how many conflicts existed.

98. This extended public discourse, spanning at least five years, would make no logical sense if the theory espoused by Professor Mishina and Professor Stephan were correct. If the signature of the ECT on 17 December 1994 had actually eliminated all conflicting rules contained in federal statutes, then there would not have been anything to talk about or study.

(Editorial Version)" dated 26 Jan. 2001 (ASA-044), at 73-74.

[132] State Duma Parliamentary Hearings Informational and Analytical Materials dated 26 Jan. 2001 (ASA-099), at 4.

[133] State Duma Parliamentary Hearings Informational and Analytical Materials dated 26 Jan. 2001 (ASA-099).

[134] State Duma Transcript of the Parliamentary Hearings "on the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)" dated 26 Jan. 2001 (ASA-044).

C. Specific Arguments Advanced and Authorities Cited by Professor Mishina and Professor Stephan

99. Having set out above in Parts III-A and III-B the affirmative reasons why the theory proposed by Professor Mishina and Professor Stephan cannot be correct, I will now address each of the individual arguments advanced and authorities cited in their Expert Reports.

100. Specifically, Professor Mishina and Professor Stephan have advanced seven distinct lines of argument pertaining to *(1)* the constitutional distribution of power resulting from the 1993 political crisis, *(2)* a 1996 academic commentary authored by Professor B.I. Osminin and Professor A.G. Khodakov, *(3)* the deletion of the term, "ratified," from a previous draft of Article 15(4) of the 1993 Constitution, *(4)* the judicial practice of the Constitutional Court and the Supreme Arbitrazh Court, *(5)* the Federal Assembly's purported "endorsement" of the theory proposed by Professor Mishina and Professor Stephan in a statement by the State Duma's plenipotentiary representative, *(6)* a group of treaties which have been provisionally applied by the Russian Federation at various times, and *(7)* a set of letters exchanged among three executive federal organs regarding the provisional application of an international treaty relating to the Eurasian Development Bank ("EDB"). In each instance, these arguments must be rejected for the reasons detailed below.

1. The Political Crisis of October 1993 and the Allegedly "Hypertrophic" Presidency

101. In both of their Expert Reports, Professor Mishina and Professor Stephan have made their most extensive arguments based upon the history of the 1993 Constitution.

102. Specifically, Professor Mishina and Professor Stephan propose that unratified, provisionally applicable treaties should override contrary federal statutes based on an unwritten distribution of powers emerging, purportedly, from the Russian Federation's constitutional crisis in October 1993. This constitutional crisis culminated in a brief but violent conflict between President Yeltsin and the national legislature (which was then called the Congress of People's Deputies).

103. According to Professor Stephan and Professor Mishina, because of this conflict, "the Constitution thus adopted in 1993 created a system that heavily favours presidential and executive powers over parliamentary powers, which is perhaps to be expected from the process that led to its adoption."[135] Based on this version of history, Professor Stephan thus argues that the 1993 conflict produced an institutionally "hypertrophic presidency" within the Russian Federation:

> "After suppressing the uprising, focused on the Legislature housed in the Russian 'White House' and resulting in hundreds of deaths, the President asserted his dominance over the Legislature and suspended the Constitutional Court (which did not resume work until 1995). The Constitutional Conference resumed its work, operating under the supervision of presidential allies, and prepared a draft constitution that reflected the new political situation and presidential supremacy. This draft was published on November 10, 1993, and approved by a referendum on December 12 of that year."[136]

Professor Stephan and Professor Mishina then attempt to bolster their historical theory of the "hypertrophic presidency" and the "decidedly presidential regime" with dozens of pages analyzing the distribution of powers within the Russian Federation.[137]

[135] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶ 27.

[136] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 29.

[137] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 18-87; Expert Report of Professor Stephan

104. This aspect of the theory espoused by Professor Mishina and Professor Stephan is unsustainable, however, for a variety of reasons.

105. ***First***, even if the Russian Federation did have a "decidedly presidential regime," this fact would be utterly irrelevant in the present case, because President Yeltsin never signed or otherwise approved the ECT in any respect. As noted above in Part II of this Expert Report, the ECT was signed on 17 December 1994 only by an official of the Government, Deputy Prime Minister Oleg Davydov.[138] Mr. Davydov did so at the instructions of another official of the Government, Prime Minister Chernomyrdin, who subsequently submitted the ECT to the Federal Assembly on behalf of the Government.[139] The record thus contains no evidence that President Yeltsin or even any member of the Presidential Administration ever approved the ECT.

106. ***Second***, it is impossible to understand why a "decidedly presidential regime"[140] would allow federal statutes—which *have been signed by the President*—to be overridden by the Government or by federal executive agencies in a provisionally applicable treaty that was *never submitted to the President for approval*. The theory of the "hypertrophic presidency" proposed by Professor Mishina and Professor Stephan thus collapses on its own irrational terms. Any theory that would enable the Ministry of Sport or the Federal

---

dated 8 Mar. 2017 (ASA-085) ¶¶ 24-35.

[138] Energy Charter Treaty (Lisbon) dated 17 Dec. 1994 (ASA-023), at 93.

[139] *See* Government of the Russian Federation Resolution No. 1390 "on the Execution of the Energy Charter Treaty and Related Documents" dated 16 Dec. 1994 (ASA-021); Government of the Russian Federation Decree No. 1016 "on the approval and submission of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects for ratification before the State Duma of the Federal Assembly of the Russian Federation" dated 26 Aug. 1996 (ASA-029); Draft Federal Statute "on Ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects" dated 26 Aug. 1996 (ASA-030).

[140] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 34.

Agency for Youth Affairs to contravene the will of the President by provisionally applying a treaty cannot logically be considered "decidedly presidential."[141]

107. ***Third***, if the intention of the 1993 Constitution's drafters was to give the President or even the Government an advantage over the Federal Assembly with respect to the hierarchy of legal norms, then why would the 1993 Constitution deprive them of this same advantage when acting unilaterally? In other words, why wouldn't the 1993 Constitution's framers have deleted or re-written Articles 15(2), 90(3), and 115(1), which give priority expressly to federal statutes over all normative acts issued unilaterally by the President and the Government? A truly "hypertrophic presidency" would be considerably hampered if the President were prevented from implementing policy when acting unilaterally – thus requiring the assistance of foreign States or foreign State entities to override federal statutes.

108. ***Fourth***, if the enhanced powers proposed by Professor Mishina and Professor Stephan arise in some way out of "Presidential and Governmental competence in shaping Russia's foreign policy,"[142] then why would this special competence be limited to unratified, *provisionally applicable* treaties? Why would the 1993 Constitution withhold giving this same purportedly augmented normative authority to intergovernmental and interagency agreements *after their entry into force*? And yet, as the Supreme Court has concluded expressly, and as Deputy Minister Krylov announced to the Federal Assembly (on behalf

[141] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 34.

[142] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 52.

of President Yeltsin), intergovernmental and interagency agreements do not have the power to override federal statutes, unless they are ratified.[143]

109. ***Fifth***, with respect to the basic historical facts, Professor Mishina and Professor Stephan have provided a skewed, inaccurate account – particularly as regards the events that took place *after* the October 1993 political crisis. In their Expert Reports, Professor Mishina and Professor Stephan both refer to President Yeltsin's "dominance over the Legislature,"[144] suggesting that perhaps President Yeltsin was the winner of every single political conflict with the Federal Assembly. An accurate account of the 1990s, however, shows that the Federal Assembly was able to thwart the plans of President Yeltsin on many occasions:

(a) One of the first decisions made by the new Federal Assembly (in February 1994, just two months after the December 1993 referendum on the new Constitution) was to announce an immediate legislative amnesty for President Yeltsin's principal opponents during the 1993 political crisis, Vice President Alexander Rutskoy and Speaker Ruslan Khasbulatov, resulting in their release from Lefortovo Prison.[145] That legislative amnesty was strongly opposed by President Yeltsin, who tried unsuccessfully to block it. This resulted in the dismissal of the Prosecutor General,

[143] Supreme Court of the Russian Federation Cassation Ruling No. 59-O09-35 dated 29 Dec. 2009 (ASA-063), at 3-4; State Duma Hearing Transcript "on Draft Federal Statute 'on International Treaties of the Russian Federation'" dated 27 May 1994 (ASA-019), at 3.

[144] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 29; Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶ 77.

[145] State Duma Resolution No. 65-1 GD "on Announcing Political and Economic Amnesty" dated 23 Feb. 1994 (ASA-016); *Kremlin is Going Through the Amnesty*, Kommersant Newspaper No. 036 dated 1 Mar. 1994 (ASA-017).

Alexey Kazannik, who refused to fulfil President Yeltsin's unconstitutional directives.[146]

(b) During the State Duma's second convocation from 1995 until 1999, the State Duma successfully reached the qualified majority sufficient to override President Yeltsin's vetoes on 58 separate occasions.[147] In other words, after President Yeltsin attempted to veto legislation enacted by the Federal Assembly and presented for his signature, the Federal Assembly voted to override President Yeltsin's veto with a two-thirds majority under Article 107(3) of the 1993 Constitution. All of these statutes were therefore enacted into law despite President Yeltsin's objection.

(c) The Federal Assembly is also vested with the constitutional right to dismiss the candidacy of the Prime Minister under Article 111 of the Russian Constitution, and the State Duma resorted to this right several times under President Yeltsin. In particular, this occurred twice in late 1998, when President Yeltsin attempted to resubmit Mr. Chernomyrdin as a candidate for Prime Minister.[148] On 31 August 1998 and 7 September 1998, the State Duma voted with overwhelming majorities to reject Mr. Chernomyrdin's candidacy – thus leading to the appointment of Prime Minister Yevgeny Primakov.[149]

---

[146] *The Case of the Prosecutor General is Postponed Indefinitely*, Kommersant Newspaper No. 063 dated 8 Apr. 1994 (ASA-100); *Alexey Kazannik Cleared the Constitutional Field Up*, Kommersant Newspaper No. 064 dated 9 Apr. 1994 (ASA-101); *Yeltsin Gets Into the Role of Chambellan Delaureau*, Kommersant Newspaper No. 013 dated 12 Apr. 1994 (ASA-102).

[147] Isayev N.N., *On the Work with the Federal Laws Adopted by the State Duma and Dismissed by the President of the Russian Federation or the Federation Council*, Analytics and Statistics. Autumn Session (1999) (ASA-041).

[148] *See* State Duma Session No. 196 Transcript dated 31 Aug. 1998 (ASA-039), at 1; State Duma Additional Session No. 199 Transcript dated 7 Sept. 1998 (ASA-040), at 1.

[149] State Duma Session No. 196 Transcript dated 31 Aug. 1998 (ASA-039), at 1; State Duma Additional Session No. 199 Transcript dated 7 Sept. 1998 (ASA-040), at 1.

110. The "decidedly presidential regime" proposed by Professor Mishina and Professor Stephan thus had unmistakable limitations. Accordingly, the history of the 1993 Constitution provides no basis to accept their irrelevant, illogical, and distinctly skewed theory regarding the distribution of powers, or disregard the numerous and consistent authorities describing the hierarchy of legal norms.

2. The Academic Writings of Professor Osminin and Professor Khodakov

111. Both Professor Stephan and Professor Mishina rely extensively on the academic writings of Professor B.I. Osminin, "a leading Russian international lawyer [who] participated in the drafting and development of the FLIT."[150] In particular, Professor Osminin coauthored an academic commentary with Professor A.G. Khodakov in 1996, in which these two scholars tentatively noted that "[o]ne can imagine" that "exception(s) to the federal law on the basis of provisional application are possible." [151] The two coauthors did not cite any concrete examples where this has occurred.[152] In this regard, several points should be made about the 1996 commentary written by Professor Osminin and Professor Khodakov.

112. First, neither Professor Osminin nor Professor Khodakov actually agreed with the theory espoused by Professor Stephan and Professor Mishina regarding Article 15(4) of the Constitution or the "hypertrophic presidency." This is evident not only from the text of

[150] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶ 171 n. 142; *see also* Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 78-79.

[151] Osminin B.I. and Khodakov A.G., *Provisional Application*, *in* COMMENTARY ON THE FEDERAL LAW "ON INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION" (Zvekov V.P., Osminin B.I., eds., Spark 1996) (ASA-027), at 75.

[152] Osminin B.I. and Khodakov A.G., *Provisional Application*, *in* COMMENTARY ON THE FEDERAL LAW "ON INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION" (Zvekov V.P., Osminin B.I., eds., Spark 1996) (ASA-027), at 74-75.

the commentary (which does not rely on either of these purported grounds),[153] but also from the fact that Professor Osminin and Professor Stephan expressly rejected this theory during their participation in the drafting of the FLIT.

113. Specifically, both Professor Osminin and Professor Khodakov were participants in a Working Group on 17 May 1994, only a few months after the adoption of the 1993 Constitution.[154] The purpose of this Working Group was to consider a revised draft text of the FLIT, which had already been under negotiation for several years.[155] In this meeting, Professor Osminin participated as the representative of the Presidential Administration, and Professor Khodakov participated as the representative of the Ministry of Foreign Affairs.[156]

114. One of the participants in that meeting, Mr. V.N. Trofimov, briefly suggested the possibility of broadly interpreting Article 15(4) of the Constitution in the way proposed by Professor Mishina and Professor Stephan in the present case—to include even unratified treaties.[157] Mr. Trofimov then asked Professor Osminin and Professor

[153] Osminin B.I. and Khodakov A.G., *Provisional Application*, *in* COMMENTARY ON THE FEDERAL LAW "ON INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION" (Zvekov V.P., Osminin B.I., eds., Spark 1996) (ASA-027), at 74-75.

[154] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 2, 6.

[155] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 1.

[156] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 51.

[157] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 54-55 ("I have a question: what do you think, who in this country should write laws and adopt laws? Is this exclusively the competence of the legislative body, the law should naturally be signed by the President, or is a situation possible when, for example, some body, but not the legislative body, signs an international treaty, which, in accordance with paragraph 4 of Article 15 of the Constitution, turns into a part of our legal system, and a law emerges that has not gone through Parliament? Even the [Soviet] Union law, which is very flawed, that is currently being applied, it still contains one set of wording. Those treaties that change existing legislation are subject to ratification. That is an iron-clad rule.").

Khodakov to comment on this possible interpretation: "Do you still believe that it somehow follows from this wording [of Article 15(4)] that if a treaty has not been ratified, then it does not take precedence?" Both Professor Osminin and Professor Khodakov rejected Mr. Trofimov's proposed interpretation, repeatedly and emphatically.

115. As Professor Khodakov explained, Article 15(4) could not be interpreted in this way, because it would contradict other provisions throughout the 1993 Constitution:

> "***[Y]ou cannot take one article from the Constitution and interpret it in isolation from the context of the entire Constitution and the legislative acts that elaborate on the Constitution.*** It is this law that renders impossible the situation that you are talking about, Vladimir Nikolayevich. ***Because here, in this Law, in the draft that we are discussing, it is written in black and white that a treaty that makes provision for amendments as compared with the existing rules of the Law is subject to ratification. That says it all.*** And in the context of this article of the draft Law and the Constitution, this issue does not arise. ***An international treaty that has not been ratified cannot change the law.***"[158]

116. Professor Osminin also noted that this "black and white"[159] constitutional principle was actually affirmed in the text of Article 6(2) of the Draft FLIT (which was identical to the final version), because a State organ's power to conclude a treaty is limited by that same State organ's "competence":

> "It is said here that consent, whether by Parliament, or by the President, or by the Government, or by a department, to Russia being bound by an international treaty is granted ***only in accordance with their competence***. And no more than that. ***A departmental treaty does not have the right to change the law. Neither does the Government, if the Government takes a decision, nor the President.*** Only, if it is approved in the form of

[158] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 59-60 (emphasis added).

[159] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 60.

> ratification, signed by the President, only then can this treaty be above the law. Only in one instance."[160]

117. Professor Khodakov agreed that Article 15 of the FLIT also affirmed the preexisting understanding reflected in the Constitution, by requiring ratification for any treaty that purports to alter a federal statute:

> "[A]s treaties that amend federal law are concerned, then it is written in this draft [of the FLIT] that they are subject to ratification. ***That means that federal law can only be amended by a ratified treaty. As regards those treaties that are not ratified, they cannot by definition amend the law, and thus even being a part of our legal system, in accordance with what is written here and in the Constitution, they will not have force that prevails over the force of the law.*** And consequently no problems arise."[161]

118. Later in the same meeting, Professor Khodakov again reiterated the basic point that neither the 1993 Constitution nor the Draft FLIT authorize an unratified treaty to deviate from a federal statute:

> "In the Constitution, where the President signs international treaties, but ***he does not have the full, complete right to conclude any international treaty***. In order ***to restrict the powers of the President and the Government, we are introducing an article to the draft on those treaties that are subject to ratification. In other words, without Parliament's opinion, these matters will not and should not be resolved.*** And the list of matters subject to ratification is much broader in this draft than featured in the USSR 1978 law. ***We are not interfering with the competence of Parliament here. On the contrary, we are expanding it***."[162]

119. Finally, during a plenary session of the State Duma the following year, Professor Osminin again stated expressly that the scope of the 1993 Constitution's Article 15(4) is

[160] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 60 (emphasis added).

[161] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 56 (emphasis added).

[162] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 74 (emphasis added).

subject to a limitation: "[I]nternational treaties ***that have been ratified by Parliament***, in accordance with the Constitution, take precedence over our statute, insofar as if an international treaty provides for rules different to those provided for by our statute, the rules of the international treaty apply."[163]

120. Accordingly, as these numerous, unequivocal statements reflect, neither Professor Osminin nor Professor Khodakov actually supported the reasoning proposed by Professor Stephan and Professor Mishina with respect to Article 15(4) or the President's purportedly "hypertrophic" powers.

121. Finally, a few significant observations should also be made about the theory that was actually proposed by Professor Osminin and Professor Khodakov in their 1996 commentary. As explained below, this speculative hypothesis should also be rejected both because it is unsupported by any concrete examples or practice, and because it is incorrect as a matter of legal reasoning.

122. In this commentary, the co-authors did tentatively suggest as follows: "One can imagine . . . that exception(s) to the federal statute on the basis of provisional application are possible."[164] The basis for this suggestion, however, was neither the text of the Constitution's Article 15(4) itself nor any conception of presidential power. Rather, these co-authors' suggestion was that the 1969 VCLT entailed this consequence, because the VCLT's Article 25 recognizes the provisional application of treaties, and because the

[163] State Duma Plenary Session Transcript on Draft Federal Statute "on International Treaties of the Russian Federation" dated 22 Feb. 1995 (ASA-024), at 5 (emphasis added).

[164] Osminin B.I. and Khodakov A.G., *Provisional Application*, *in* COMMENTARY ON THE FEDERAL LAW "ON INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION" (Zvekov V.P., Osminin B.I., eds., Spark 1996) (ASA-027), at 75.

VCLT is itself incorporated into Russian law under Article 15(4) of the 1993 Constitution.[165]

123. This suggestion by the co-authors in their 1996 commentary, however, is untenable - which is no doubt why Professor Stephan and Professor Mishina themselves have not relied upon it to any significant degree in their Expert Reports. In fact, the VCLT does not address *any* issues pertaining to the hierarchy of legal norms within the domestic legal systems of the VCLT's States parties, which include nearly every State in the international community. To the contrary, the VCLT deals exclusively with issues of international legal obligations on the international level. Indeed, under Article 26 of the Vienna Convention, "*[e]very* treaty in force is binding upon the parties to it," as a matter of international law. As a matter of Russian domestic law, however, this obligation to apply "[e]very treaty in force" does not elevate the position of intergovernmental or inter-agency treaties within the hierarchy of legal norms, as noted by Professor Talalaev himself - who was one of the Soviet Union's delegates during the 1969 VCLT's negotiations.[166]

124. Even in their 1996 commentary, Professor Osminin and Professor Khodakov confirm the position which they had taken (two years previously) during the drafting of the FLIT: "[A]s a general rule, only a ratified treaty or some other law provides grounds for an

[165] Osminin B.I. and Khodakov A.G., *Provisional Application*, *in* COMMENTARY ON THE FEDERAL LAW "ON INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION" (Zvekov V.P., Osminin B.I., eds., Spark 1996) (ASA-027), at 74-75.

[166] Talalaev A.N., *Correlation of International and National Law and the Constitution of the Russian Federation*, *in* MOSCOW JOURNAL OF INTERNATIONAL LAW NO. 4 (1994) (ASA-015), at 13.

exception to the law."[167] This general rule thus demonstrates that the binding effect of a treaty on the international level (and under Article 26 of the VCLT, in particular) is irrelevant to the hierarchy of norms within the Russian system. This shows, with all due respect, that the coauthors' theory is internally irreconcilable. There is simply no reason why the international obligations imposed under Article 25 of the VCLT (with respect to provisionally applicable treaties) would have a different effect within the Russian Federation's domestic legal system than the international obligations imposed under Article 26 of the VCLT (with respect to all treaties).

125. Finally, even though Professor Osminin and Professor Khodakov tentatively proposed this speculative theory in their 1996 commentary (without any citation or concrete examples), there is no evidence that they ever discussed this exception with the Federal Assembly during the preparation of the FLIT in 1994 and 1995, or that the drafters of the 1993 Constitution had any such exception in mind. To the contrary, as reflected in the legislative record, Professor Khodakov described it as "written in black and white" that "[a]n international treaty that has not been ratified cannot change the law."[168]

126. Accordingly, any reliance upon the 1996 academic commentary of Professor Osminin and Professor Khodakov is misplaced, given that their hypothesis was unsupported by any concrete example, logically inconsistent, and contrary to the unequivocal statements made by the authors during the preparation of the FLIT.

---

[167] Osminin B.I. and Khodakov A.G., *Provisional Application*, *in* COMMENTARY ON THE FEDERAL LAW "ON INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION" (Zvekov V.P., Osminin B.I., eds., Spark 1996) (ASA-027), at 75.

[168] Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 60.

3. The Deletion of the Term, "Ratified," from Article 15(4)

127. In her Expert Report, Professor Mishina also makes a brief argument regarding the drafting history of Article 15(4) of the 1993 Constitution.[169] She observes that, in various drafts of the Constitution considered in 1992 and 1993, previous versions of Article 15(4) had provided as follows: "If the ***ratified*** treaty of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied."[170] Professor Mishina argues that the deletion of this word "ratified" from the final text was intended to expand the category of treaties which take priority over statutes in the hierarchy of norms.[171]

128. To recall, however, numerous statements by key figures during the early 1990s demonstrate that Professor Mishina's explanation for this deletion is extremely improbable:

(a) In November 1992, Mr. Oleg G. Rumyantsev, the Executive Secretary of the Constitutional Commission, stated in a drafting session that "supremacy" is given to international treaties "only if they are ratified. . . . If the international treaty is ratified, then its norms are in effect, it is as if higher."[172] Mr. Rumyantsev was not contradicted by the participants in the session, including by the legal advisor to the President, Mr. Sergei Shakrai.[173]

[169] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 187-189.

[170] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 187-189.

[171] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶ 190.

[172] *See* Council of Nationalities of Russian Federation Supreme Council Hearing Transcript regarding Article 3 of the Russian Federation Constitution dated 2 Nov. 1992 (ASA-011), at 330.

[173] *See* Council of Nationalities of Russian Federation Supreme Council Hearing Transcript regarding Article 3 of the Russian Federation Constitution dated 2 Nov. 1992 (ASA-011).

(b) In May 1994, three important representatives of the President and the Government (Deputy Minister Krylov, Professor Osminin, and Professor Khodakov) confirmed that "only those treaties that will be ratified in Parliament and therefore are approved in the form of a law will have a priority in legislation in the event of a conflict of laws."[174]

(c) By the following year, this understanding had been affirmed by the Supreme Court of the Russian Federation[175] and Professor Talalaev, one of the Russian Federation's most influential international lawyers during this period.[176]

129. Given the inherent improbability of Professor Mishina's explanation for the deletion of the term, "ratified," therefore, the question arises - what is the more likely explanation? The most convincing possibility is that the word, "ratified," was subject to criticism for being insufficiently precise, for the following two reasons.

130. First, as reflected in the 1969 VCLT, the 1978 USSR Statute, and Article 2(b) of the 1995 FLIT, the mechanism of "ratification" is not the exclusive means by which the Russian Federation's legislature (*i.e.*, the Supreme Soviet, the Congress of People's Deputies, and finally the Federal Assembly) has been permitted to voice its endorsement of an international treaty. In addition to ratification, the legislature also might "accede" to,

[174] State Duma Hearing Transcript "on Draft Federal Statute 'on International Treaties of the Russian Federation'" dated 27 May 1994 (ASA-019), at 3; Transcript of State Duma International Affairs Committee Working Group Session dated 17 May 1994 (State Archive Vol. No. 10100-2-1205, 17 May 1994) (ASA-018), at 74.

[175] Plenum of the Supreme Court Resolution No. 8 "on Certain Matters of Application of the Constitution of the Russian Federation by Courts in the Administration of Justice" dated 31 Oct. 1995 (ASA-026) ¶ 5.

[176] Talalaev A.N., *Correlation of International and National Law and the Constitution of the Russian Federation*, *in* MOSCOW JOURNAL OF INTERNATIONAL LAW NO. 4 (1994) (ASA-015).

"approve," or "accept" an international treaty. Russian treaty practice during this period reflects numerous examples of each method.[177]

131. Reflecting this concern, Mr. R.M. Tsivilev, the head of the legal department of the Supreme Council, observed in a memorandum late in 1992 that the reference to "ratified international treaties" was insufficiently specific.[178] "This is connected to the fact that *in addition to the ratification* . . . , there are also other means of expressing" the consent to be bound by an international treaty.[179] Including only one of these terms, "ratification," in the text of the 1993 Constitution thus might have introduced an imprecision and led to undesirable misunderstandings. For example, a treaty *ratified* by the Federal Assembly might have been given priority in some circumstances, whilst a treaty *accepted* or *approved* by the Federal Assembly might have conceivably been denied priority. Avoiding this potential anomaly thus provided a logical basis to delete the term.

132. Second, from a different perspective, the ratification of an international treaty may be *legally insufficient* in some circumstances for the Russian courts to give priority to the international treaty over a federal statute - particularly if the treaty has not yet come into force definitively (*i.e.*, for the other Contracting Parties). Indeed, this possibility was

[177] For example: Vienna Convention on Diplomatic Relation (ratification); Vienna Convention on Consular Relations (accession); International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Covenant on Civil and Political Rights (ratification); Optional Protocol to the International Covenant on Civil and Political Rights, Convention relating to the Status of Refugees; Protocol relating to the Status of Refugees (accession); Constitution of the World Health Organization (acceptance).

[178] *See* Legal Department of the Supreme Council Suggestions to amend and supplement the Constitution of the Russian Federation dated Oct. 1992 (State Archive Vol. No. 10026-4-1015, 1992-1993) (ASA-010) ¶ 27.

[179] *See* Legal Department of the Supreme Council Suggestions to amend and supplement the Constitution of the Russian Federation dated Oct. 1992 (State Archive Vol. No. 10026-4-1015, 1992-1993) (ASA-010) ¶ 27 (emphasis added).

noted expressly by the Deputy Minister of Ecology and Natural Resources, Mr. O.S. Kolbasov, during the negotiation of the 1993 Constitution. As Mr. Kolbasov observed: "The treaty can be ratified, but does not always come into force."[180] The inclusion of the word, "ratified," in Article 15(4) thus might have been misinterpreted to mean that a treaty should always be applied after its ratification, even if other stipulated conditions remained to be fulfilled before its entry into force.

133. Professor Mishina's explanation must therefore be rejected as overly simplistic. There are many reasons why deleting this term was appropriate, arising principally from the complexities of concluding and implementing international treaties. But this does not mean that the drafters of the 1993 Constitution actually intended to give priority over federal statutes to unratified, provisionally applicable treaties, or unratified intergovernmental agreements, as so many key figures acknowledged during the early 1990s.

4. Judicial Practice

134. Both Professor Stephan and Professor Mishina argue that the Constitutional Court and other courts of the Russian Federation have rejected the view set forth above in Parts III-A and III-B. In their view, "[t]he Constitutional Court has confirmed that provisionally applied treaties create immediately binding rules and obligations that override inconsistent laws adopted by Parliament."[181] This suggestion does not withstand basic scrutiny. To the contrary, the Constitutional Court has never been squarely presented with this question, and thus has never had occasion to decide it. Moreover, at least one

[180] *See Table of Amendments Submitted During and After the Sixth Congress of People's Deputies of the Russian Federation*, *in* CONSTITUTIONAL COMMISSION: TRANSCRIPTS, MATERIALS, DOCUMENTS (1990-1993), VOL. 3: 1992. SECOND BOOK (JULY – DECEMBER 1992) (2008) (Rumyantsev O.G. ed.) (ASA-007), at 941.

statement by the Constitutional Court demonstrates that this interpretation of its judicial decisions is untenable, as explained below.

135. In their Expert Reports, Professor Mishina[182] and Professor Stephan[183] both refer extensively to the Constitutional Court's Resolution No. 8-P dated 27 March 2012 (the *Ushakov* Case).[184] In their view, this 2012 decision demonstrates that "provisionally applied treaties create immediately binding rules and obligations that override inconsistent laws adopted by Parliament."[185]

136. It is this very same decision, however, which disproves their theory regarding the relationship between the ECT and the Russian Federation's domestic law. In Resolution No. 8-P, as noted above in Part I, the Constitutional Court explained as follows:

> "***The Russian Federation may agree to provisional application of an international treaty in whole or in part***; stipulate the maximum provisional application period; ***and precondition provisional application of an international treaty (or any part thereof) before its entry into force, on its consistency with the*** Constitution of the Russian Federation or the ***laws or other regulatory legal acts of the Russian Federation.***"[186]

137. Strikingly, neither Professor Mishina nor Professor Stephan ever addresses this passage in any respect. Indeed, this passage makes clear that the Russian Federation *may* constitutionally avail itself of provisions such as Article 45(1) of the ECT, which

---

[181] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶ 193; Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 101-108.

[182] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 194-205.

[183] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 103-105.

[184] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074).

[185] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶ 193.

[186] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074) ¶ 4 (emphasis added).

"precondition" provisional application based on "consistency with . . . the laws" of the Russian Federation "in whole or in part."[187] This is precisely the opposite of what has been argued by Professor Mishina and Professor Stephan, who do not identify any interpretation of this passage which can be reconciled with their reading of Article 15(4) of the 1993 Constitution. On this basis alone, their argument should be rejected.

138. Even those aspects of Resolution No. 8-P which Professor Stephan and Professor Mishina rely upon do not actually support their theory. Specifically, this decision dealt with a multilateral agreement creating a customs union amongst the Russian Federation, Kazakhstan, and Belarus, known as the *Agreement on the Procedure of Transfer by Individuals of Goods for Personal Use Through the Customs Border of the Customs Union, and Customs Operations Related to Their Release*.[188] The treaty was adopted on 18 June 2010 and provisionally applied from 1 July 2010.[189] As the Constitutional Court explained, this treaty continued to be provisionally applied even after it was ratified on 5 April 2011 by the Russian Federation, because the Republic of Belarus had not ratified the agreement and because the agreement had not been officially published.[190]

[187] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074) ¶ 4.

[188] Agreement between the Government of the Russian Federation, the Government of the Republic of Belarus, and the Government of the Republic of Kazakhstan "on the Procedure of Transfer by Individuals of Goods for Personal Use Through the Customs Border of the Customs Union, and Customs Operations Related to Their Release" dated 18 June 2010 (ASA-068).

[189] Agreement between the Government of the Russian Federation, the Government of the Republic of Belarus, and the Government of the Republic of Kazakhstan "on the Procedure of Transfer by Individuals of Goods for Personal Use Through the Customs Border of the Customs Union, and Customs Operations Related to Their Release" dated 18 June 2010 (ASA-068).

[190] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074) ¶¶ 4-4.1.

139. As the Constitutional Court explained, a Russian citizen named Mr. Ushakov had brought personal property into the Russian Federation on 10 July 2010, during the period when the treaty was being provisionally applied. Mr. Ushakov was ultimately required to pay the customs duty under the agreement with Kazakhstan and Belarus, which was higher than the amount calculated under the customs code. Refusing to pay the higher duty, Mr. Ushakov argued only that application of the treaty was unlawful because it "had not been officially published."[191] According to Mr. Ushakov, compelling payment of the higher duty in the absence of official publication contravened the due process principles reflected in Articles 2, 15(3), and 29(4) of the 1993 Constitution:

> "I.D. Ushakov is requesting that [provisions of the 1995 FLIT] . . . be declared inconsistent with Articles 2, 15 (part 3) and 29 (part 4) of the Constitution of the Russian Federation, since he believes that the interrelated provisions of said articles allow provisional application of those international treaties of the Russian Federation that involve both individual and civil rights, liberties, and duties before they enter into force without being published officially for public knowledge, which prevents the persons concerned from reviewing these provisions in a timely manner and from anticipating the effects of their application so as to make their conduct consistent with the rules set forth in such provisions."[192]

140. The Constitutional Court rejected this argument, but directed the Government to ensure that the issue of official publication was resolved:

> "This conclusion does not release the federal legislator from the necessity to establish, within the shortest time possible, a procedure for official publishing of provisionally applied international treaties of the Russian Federation in compliance with the requirements of the Constitution of the

[191] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074) ¶ 1.1.

[192] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074) ¶ 1.2.

> Russian Federation and subject to this Resolution, including through the use of any conventional and other capabilities offered by the contemporary information space for the purpose of officially publishing such international treaties. Prior to making appropriate modifications to the existing statutory regulation, the international treaties provisionally applied by the Russian Federation under paragraph 1 of Article 23 of the Federal Law 'On the International Treaties of the Russian Federation,' which involve individual and civil rights, liberties, and duties and establish, at that, rules other than the rules provided for by law, shall be published officially . . . ."[193]

141. As reflected in the text of Resolution 8-P, therefore, Mr. Ushakov's argument was essentially that compliance with the treaty was contrary to the Constitution, because the treaty had not been *officially published*. Mr. Ushakov made all of his arguments based on constitutional principles of civil rights (Article 2 of the Constitution), official publication of statutes (Article 15(3) of the Constitution), and freedom of information (Article 29 of the Constitution).

142. Mr. Ushakov did not make any arguments whatsoever with respect to the hierarchy of norms, the ratification of treaties, the separation of powers, or the supremacy of federal laws – and the Constitutional Court thus had no occasion to analyze any such arguments. Under Articles 74, 96 and 97 of Federal Constitutional Statute No. 1-FKZ dated 21 July 1994 "On the Constitutional Court of the Russian Federation," the Constitutional Court is limited to reviewing only the subject matter of the case presented to it, and the Constitutional Court's statements regarding matters outside the scope of the dispute are not binding on future courts. The Constitutional Court stated expressly that it would not address whether "the provisions of the Federal Law 'On the International Treaties of the

[193] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074), at 14.

Russian Federation' that allow provisional application, before the entry into force, of international treaties of the Russian Federation are consistent with the Constitution of the Russian Federation."[194]

143. In other words, the constitutionality of the treaty's provisional application pursuant to the hierarchy of norms was simply not at issue in this case. The Constitutional Court therefore expressly declined to address it. Under such circumstances, therefore, the Constitutional Court's Resolution No. 8-P does not provide any basis for the arguments now advanced by Professor Mishina and Professor Stephan.

144. The other cases cited by Professor Stephan and Professor Mishina are equally inapplicable, for a variety of reasons:

(a) **Decisions Nos. 476-O-O and 477-O-O of 3 April 2012**[195]

Both of these cases simply address the same issue as Resolution No. 8-P.[196] Both cases considered whether the treaty forming the Russian Federation's customs

[194] Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074) ¶ 1.2.

[195] Constitutional Court Ruling No. 477–O-O "on the Termination of Proceedings in the Case on the Verification of Conformity to the Constitution of the Russian Federation of Art. 5(3), 23(1) and 30 of the Federal Statute 'On International Treaties of the Russian Federation,' under the Complaint of Mr. A.A. Gorodenko and Yu.Yu. Smirnova" dated 3 April 2012 (ASA-076); Constitutional Court Ruling No. 476–O "on the Termination of Proceedings in the Case on the Verification of Conformity to the Constitution of the Russian Federation of Art. 5(3), 23(1) and 30 of the Federal Statute 'On International Treaties of the Russian Federation,' under the Complaint of Mr. N.S. Karpov" dated 3 Apr. 2012 (ASA-075) (cited in Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 206-208).

[196] Constitutional Court Ruling No. 477–O-O "on the Termination of Proceedings in the Case on the Verification of Conformity to the Constitution of the Russian Federation of Art. 5(3), 23(1) and 30 of the Federal Statute 'On International Treaties of the Russian Federation,' under the Complaint of Mr. A.A. Gorodenko and Yu.Yu. Smirnova" dated 3 April 2012 (ASA-076); Constitutional Court Ruling No. 476–O "on the Termination of Proceedings in the Case on the Verification of Conformity to the Constitution of the Russian Federation of Art. 5(3), 23(1) and 30 of the Federal Statute 'On International Treaties of the Russian Federation,' under the Complaint of Mr. N.S. Karpov" dated 3 Apr. 2012 (ASA-075); Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties

union with Kazakhstan and Belarus could be applied despite the Government's failure to officially publish the treaty.[197] But none of the litigants in these two cases made any arguments regarding the hierarchy of legal norms in any respect, or the need for treaties to be ratified before they can be given priority over federal statutes. Just as in Resolution No. 8-P, therefore, the Constitutional Court had no opportunity to address this issue.

(b) **Decision No. 1820-O dated 18 September 2014**[198]

This decision[199] involved the provisional application of a ***ratified*** treaty, not the provisional application of an ***unratified*** treaty. In this case, a company called Vichiunai–RUS LLC brought goods from the Russian Federation to Belarus between January and July 2012. During this period, the customs treaty with Kazakhstan and Belarus still had not been ratified by Belarus and still had not been officially published. The treaty thus had not come into force, and remained only provisionally applicable. The treaty ***was*** ratified by the Federal Assembly,

---

of the Russian Federation' in Connection with a Complaint Filed by Citizen I. D. Ushakov" dated 27 Mar. 2012 (ASA-074).

[197] Constitutional Court Ruling No. 477–O-O "on the Termination of Proceedings in the Case on the Verification of Conformity to the Constitution of the Russian Federation of Art. 5(3), 23(1) and 30 of the Federal Statute 'On International Treaties of the Russian Federation,' under the Complaint of Mr. A.A. Gorodenko and Yu.Yu. Smirnova" dated 3 Apr. 2012 (ASA-076) ¶ 1; Constitutional Court Ruling No. 476–O "on the Termination of Proceedings in the Case on the Verification of Conformity to the Constitution of the Russian Federation of Art. 5(3), 23(1) and 30 of the Federal Statute 'On International Treaties of the Russian Federation,' under the Complaint of Mr. N.S. Karpov" dated 3 April 2012 (ASA-075), at 3.

[198] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 106-107; Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 210-219.

[199] Constitutional Court Decision No. 1820-O "on the Inadmissibility of the Complaint of Viciunai-Rus' LLC Concerning the Violation of Its Constitutional Rights and Freedoms by the Provisions of Art. 12.2(1) of the Federal Statute 'On the Special Economic Zone in the Kaliningrad Region and Amendments to Certain Legislative Acts of the Russian Federation'" dated 18 Sept. 2014 (ASA-078).

however, on 5 April 2011 through the enactment of Federal Statute No. 60-FZ,[200] more than six months before the first shipment of goods into Belarus. Accordingly, even if the claimant, Vichiunai–RUS LLC, had raised any issues pertaining to the hierarchy of legal norms or separation of powers, there would have been no basis for the Constitutional Court to address such arguments.

(c) **Decision No. 1344-O-R dated 19 November 2009**[201]

In this case, the Constitutional Court considered an unratified treaty that had been signed by the Russian Federation, but which ***was not provisionally applicable***. The specific question presented to the Constitutional Court was whether the Russian Federation was obliged to refrain from imposing capital punishment under Protocol 6 of the European Convention on Human Rights and Fundamental Freedoms, in light of the Russian Federation's obligation under Article 18 of the 1969 VCLT to avoid defeating the object and purpose of a treaty which it has signed.[202] The Constitutional Court did conclude, ultimately, that Protocol No. 6 should be considered as part of the background context applicable to

[200] Federal Statute No. 60-FZ "on Ratification of the Agreement on the Procedure of Transfer by Individuals of Goods for Personal Use Through the Customs Border of the Customs Union, and Customs Operations Related to Their Release" dated 5 Apr. 2011 (ASA-072).

[201] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 117.

[202] Constitutional Court Ruling No. 1344-O-R "on explaining paragraph 5 of the operative part of Resolution of the Constitutional Court of the Russian Federation No. 3-P dated February 2, 1999 regarding the control of constitutionality of the provisions of Article 41 and of paragraph 3 of Article 42 of the RSFSR Criminal Procedure Code, and of paragraphs 1 and 2 of the Resolution of the Supreme Council of the Russian Federation dated July 16, 1993 concerning the entry into force of the Russian Federation Statute amending the RSFSR Statute "On the RSFSR Judicial System", the RSFSR Criminal Procedure Code, the RSFSR Criminal Code, as well as the RSFSR Code of Administrative Offenses" dated 19 Nov. 2009 (ASA-060). □

interpretation of Article 20(2) of the 1993 Constitution, which protects the fundamental right to life.[203]

But the Constitutional Court also stated expressly that an unratified treaty, by itself, could not prevail over contrary federal statutes under ordinary circumstances: "Since Protocol No. 6 has not been ratified [by the Russian Federation] so far, as such, ***it cannot be viewed as a normative legal act directly abolishing capital punishment*** in the Russian Federation…."[204]

This decision of the Constitutional Court, therefore, was distinctly limited to the unique situation before it, where the unratified treaty reflected the same fundamental human rights and freedoms underlying one of the provisions of the 1993 Constitution. Indeed, the Constitutional Court expressly rejected Professor Stephan's suggestion that an unratified treaty could prevail over contrary federal statutes in ordinary circumstances.

More recently, the Supreme Court has also rejected Professor Stephan's interpretation of Decision No. 1344-O-R in a judgment rendered in 2015.[205] That

[203] Constitutional Court Ruling No. 1344-O-R "on explaining paragraph 5 of the operative part of Resolution of the Constitutional Court of the Russian Federation No. 3-P dated February 2, 1999 regarding the control of constitutionality of the provisions of Article 41 and of paragraph 3 of Article 42 of the RSFSR Criminal Procedure Code, and of paragraphs 1 and 2 of the Resolution of the Supreme Council of the Russian Federation dated July 16, 1993 concerning the entry into force of the Russian Federation Statute amending the RSFSR Statute "On the RSFSR Judicial System", the RSFSR Criminal Procedure Code, the RSFSR Criminal Code, as well as the RSFSR Code of Administrative Offenses" dated 19 Nov. 2009 (ASA-060) ¶ 6.

[204] Constitutional Court Ruling No. 1344-O-R "on explaining paragraph 5 of the operative part of Resolution of the Constitutional Court of the Russian Federation No. 3-P dated February 2, 1999 regarding the control of constitutionality of the provisions of Article 41 and of paragraph 3 of Article 42 of the RSFSR Criminal Procedure Code, and of paragraphs 1 and 2 of the Resolution of the Supreme Council of the Russian Federation dated July 16, 1993 concerning the entry into force of the Russian Federation Statute amending the RSFSR Statute "On the RSFSR Judicial System", the RSFSR Criminal Procedure Code, the RSFSR Criminal Code, as well as the RSFSR Code of Administrative Offenses" dated 19 Nov. 2009 (ASA-060) ¶ 6 (emphasis added).

[205] Decision of the Supreme Court of the Russian Federation, Case No. 5-APU15-68 dated 8 Sept. 2015 (ASA-096).

is, one of the litigants in Case No. 5-APU15-68 argued (as Professor Stephan does now) that "the absence of a legislative act did not bar a signed treaty from having domestic legal effect," because the Russian Federation is obliged under Article 18 of the 1969 VCLT to avoid defeating the object and purpose of a treaty which it has signed.[206] The Supreme Court rejected this argument expressly:

> "[T]he duty of the state to refrain from actions that would deprive the treaty of its object and purpose, if it signed the treaty under the condition of ratification, in no way can substitute for itself the procedure for ratifying such a treaty, which is a form of expressing the consent of the state to the binding nature of the treaty. In the opinion of the Judicial Board, until the time of ratification and official publication, the Fourth Additional Protocol to the European Convention on Extradition is not subject to application and does not have priority over the provisions of the laws of the Russian Federation, including the Code of Criminal Procedure of the Russian Federation, in particular Cl. 4 p. 464 of the Code of Criminal Procedure."[207]

(d) **Resolution No. 6-P dated 19 March 2014**[208]

In this case, the Constitutional Court considered ***only*** whether the Treaty on the Accession of the Republic of Crimea to the Russian Federation was compatible specifically with the 1993 Constitution.[209] Under Article 125(2)(d) of the 1993 Constitution, the Constitutional Court exercises a unique grant of jurisdiction to consider whether treaties "which have not come into force" [210] "correspond[…] to

[206] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 118.

[207] Decision of the Supreme Court of the Russian Federation, Case No. 5-APU15-68 dated 8 Sept. 2015 (ASA-096).

[208] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 220-227; Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 90.

[209] Constitutional Court Resolution No. 6-P "on the Verification of Conformity to the Constitution of the Russian Federation of the Treaty between the Russian Federation and the Republic of Crimea on the Accession to the Russian Federation of the Republic of Crimea and Formation of New Constituent Entities within the Russian Federation That Has Not Entered into Force" dated 19 Mar. 2014 (ASA-077) ¶ 3.

[210] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 125(2)(d).

the Constitution of the Russian Federation."[211] As reflected in the text of Resolution No. 6-P, this was the only category of questions considered by the Constitutional Court in that case. Accordingly, the Constitutional Court's only mention of this international treaty's provisional application was its affirmation that this practice is constitutional: "the Treaty in question cannot be regarded as violating the Constitution of the Russian Federation . . . ." But the Constitutional Court did not consider ***any*** issues pertaining to conflicts between this treaty and ***any*** federal statutes, or make any determinations regarding the hierarchy of legal norms.

[211] The Russian Federation Constitution dated 12 Dec.1993 (ASA-014), Art. 125(2).

(e) **Decision No. VAS-13594/09 of 7 December 2009**[212]

In this decision, the Supreme Arbitrazh Court considered whether Deutsche Lufthansa Aktiengesellschaft should be exempted from paying value-added tax under Article 149(2) of the Tax Code and under a provisionally applicable treaty, the Agreement on Air Traffic between the Russian Federation and the Federal Republic of Germany.[213] In this case, the federal statute (Article 149(2) of the Tax Code) and the provisionally applicable treaty were completely in harmony – both provided for an exemption from value-added tax based on the type of services rendered. Accordingly, the Supreme Arbitrazh Court never had occasion to consider ***any*** conflicts between an unratified, provisionally applicable treaty and a contrary federal statute.[214] The parties thus never made any arguments regarding the hierarchy of legal norms or the separation of powers, and the Supreme Arbitrazh Court never analyzed any of these issues.[215]

145. Accordingly, none of the judicial decisions analyzed by Professor Stephan and Professor Mishina sustain their argument that an unratified, provisionally applicable treaty prevails over a contrary federal statute. Most of the decisions cited by Professor Stephan and Professor Mishina relate to entirely different situations - *i.e.*, where the treaty was actually ratified (Decision No. 1820-O), where the treaty was not provisionally applicable (Decision No. 1344-O-R), where the Constitutional Court was considering only the

[212] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 108 n. 98.

[213] Ruling of High Arbitrazh Court No. VAS-13594/09 dated 7 Dec. 2009 (ASA-061), at 1-2.

[214] Ruling of High Arbitrazh Court No. VAS-13594/09 dated 7 Dec. 2009 (ASA-061).

[215] Ruling of High Arbitrazh Court No. VAS-13594/09 dated 7 Dec. 2009 (ASA-061).

constitutionality of the treaty, rather than any conflicts with statutes (Resolution No. 6-P), or where the treaty and the federal statute were not actually in conflict (Decision No. VAS-13594/09). These decisions are all irrelevant to the present analysis.

146. As for the three remaining cases involving situations of conflict between an unratified, provisionally applicable treaty and federal statutes (Resolution No. 8-P, Decision No. 476-O-O, and Decision No. 477-O-O), it is evident from the text of the Constitutional Court's decisions that it had not considered any issues pertaining to the hierarchy of legal norms or the separation of powers in these cases. Rather, the sole question presented in these cases pertained to the official publication of provisionally applicable treaties. Under such circumstances, no conclusions may be drawn regarding the hierarchy of legal norms or the separation of powers within the Russian Federation's legal system.

5. The Statement by Mr. Vyatkin

147. Professor Mishina and Professor Stephan also cite a statement by Mr. Dmitry F. Vyatkin, the plenipotentiary representative of the State Duma. Mr. Vyatkin made this statement, specifically, during the Constitutional Court's hearings in the case involving Mr. Ushakov's obligation to pay customs duties, which resulted in Resolution No. 8-P:

> "In case of a discrepancy between a federal law and a provisionally applicable treaty, we nevertheless consider that the international treaty shall apply, as the meaning of provisional application is, precisely, to apply the treaty immediately."[216]

[216] Expert Report of Professor Mishina dated 8 Mar. 2017 (ASA-084) ¶¶ 192, 199; Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 130.

According to Professor Stephan and Professor Mishina, this statement confirms their theory that unratified, provisionally applicable treaties prevail over contrary federal statutes.

148. This interpretation must be rejected. Significantly, Professor Mishina and Professor Stephan are citing Mr. Vyatkin's words selectively and misrepresenting the main point of his statement. At the very beginning of his speech, Mr. Vyatkin briefly described the provisions of Article 15(4) of the 1993 Constitution and Article 5 of the 1995 FLIT, and then made the following remark: "Based on the provisions cited, we see that a ***ratified*** international agreement ranks higher than a national statute in the hierarchy of sources of law."[217]

149. Accordingly, all subsequent references to provisionally applicable treaties in Mr. Vyatkin's speech must be understood in this specific context, in light of this introductory remark. Mr. Vyatkin thus did not voice any opinions regarding the failure of the Federal Assembly to ratify a provisionally applicable treaty or the separation of powers—he was addressing the distinct question of the treaty's provisional application prior to its entry into force. Indeed, as noted above, none of the litigants had made any arguments about the absence of ratification at all.[218] Accordingly, none of Mr. Vyatkin's statements should be construed as taking a position on this distinct issue, as suggested by Professor Mishina and Professor Stephan.

[217] Statement of D.F. Vyatkin on behalf of the State Duma before the Constitutional Court dated 13 Mar. 2012 (ASA-086).

[218] *See* Constitutional Court Resolution No. 8-P "on the Matter of the Constitutionality Test of Paragraph 1 of Article 23 of the Federal Statute 'on International Treaties of the Russian Federation' in Connection with a Complaint Filed by Citizen I.D. Ushakov" dated 27 Mar. 2012 (ASA-074) ¶ 1.2.

6. Professor Stephan's List of Provisionally Applicable Treaties

150. In his Expert Report, Professor Stephan also identifies a list of provisionally applicable treaties, and proposes various ways in which some of these treaties arguably conflict with certain federal statutes:

(a) First, Professor Stephan notes that the maritime boundary agreement between the United States and the Soviet Union remains provisionally applicable today, even though it was originally opened for signature in 1990, and speculates about how this might affect issues within the Russian domestic legal system.[219]

(b) Second, Professor Stephan also notes that the 2014 treaty by which the Republic of Crimea acceded to the Russian Federation was provisionally applicable for three days, between its adoption on 18 March 2014 and its ratification on 21 March 2014.[220] He further observes that the Constitutional Court acknowledged the constitutionality of this treaty in its Decision No. 6-P.[221]

(c) Third, Professor Stephan identifies a handful of transit agreements, whereby the Russian Federation guaranteed judicial immunity to the armed forces of the United States, Germany, France, Spain, Italy, and Sweden, during the time of their presence within the territory of the Russian Federation.[222] As Professor Stephan notes, each of these transit agreements was provisionally applicable for periods between three and nine years, even though these agreements arguably

[219] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 84-87.

[220] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 88-91.

[221] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 88-91.

[222] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 92-94.

conflicted with the statutes subjecting these foreign military forces to the ordinary jurisdiction of the Russian courts.[223]

In fact, the mere existence of these treaties cannot logically support the argument which Professor Stephan is attempting to make.

151. Even where an unratified, provisionally applicable treaty does contain legal norms which conflict with a federal statute, the mere *existence* of this conflict says absolutely nothing about which legal norm (the treaty or the statute) should *prevail*. Obviously, conflicting legal rules exist in many legal systems. This is precisely why rules of priority are used—so that these conflicts can be resolved in favor of the norm entitled to priority. The question arising in the present case, however, is not whether conflicts *exist* within the Russian legal system, but rather what rule of priority should be applied, *i.e.*, which legal rules *prevail*.

152. Professor Stephan's list of treaties and purported conflicts does nothing to address this question. He simply has failed to identify *any* instance where *any* rule from this list of unratified, provisionally applicable treaties was ever given priority over even a single provision of a federal statute. Indeed, as Professor Stephan concedes, he is "not aware of any instance where Russian authorities had exercised criminal jurisdiction over the personnel covered by these agreements during the period of provisional application."[224] The absence of any such examples, naturally, deprives this part of Professor Stephan's argument of any force.

[223] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 92-94.

[224] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 94.

7. Correspondence About the Eurasian Development Bank

153. Finally, Professor Stephan also cites two letters exchanged in October 2009 between certain federal executive organs regarding a conflict between a federal statute and (supposedly) an unratified, provisionally applicable treaty.[225] In these letters, the Federal Tax Service and the Ministry of Foreign Affairs were discussing the relationship between the Federal Tax Code and an unratified, provisionally applicable "Headquarters Agreement" signed by the Russian Federation and the Eurasian Development Bank ("EDB") on 7 October 2008.[226]

154. Based on these two letters, Professor Stephan makes the following argument:

> "During this period before ratification, it appears that the Federal Tax Service raised a question whether the tax exemptions provided by that Agreement could apply in the absence of any legislative confirmation. The Ministry of Foreign Affairs replied that the rules of the provisionally applicable treaty governed, even though they altered general rules of taxation: 'The principle of performance of international obligations in good faith fully applies to provisionally applicable treaties.' The Ministry concluded that on the basis of this reasoning, 'we are of the view that the Agreement shall be applied in its entirety,' including those provisions that applied different rules of taxation than those found in Russian legislation. The Federal Tax Service in turn distributed the Ministry's response to its subordinate organs for practical application."[227]

In Professor Stephan's view, therefore, "this episode" reflects the conclusion of the Ministry of Foreign Affairs that an unratified, provisionally applicable treaty (such as the

[225] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶¶ 95-97, 154-155.

[226] Letter from the Ministry of Foreign Affairs No. 6068/1DSKG "on the Application of Articles 9 and 13 of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on the Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" (ASA-058); Letter from Federal Tax Service dated 21 Oct. 2009 (ASA-059); Agreement between the Government of the Russian Federation and the Eurasian Development Bank on the Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation dated 7 Oct. 2008 (ASA-092).

[227] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 96.

Headquarters Agreement) prevails over contradictory provisions in a federal statute (such as the Federal Tax Code).[228]

155. Professor Stephan's argument must be rejected, however, because he has failed to consider significant aspects of the context surrounding these 2009 letters. In particular, he has ignored one of the relevant legal instruments (a second, *ratified* treaty) and the conclusions of a third participant in this exchange (the Ministry of Finance). He also fails to acknowledge that these federal executive organs (the Ministry of Finance, the Ministry of Foreign Affairs, and the Federal Tax Service) never actually resolved the conflict under deliberation. Indeed, the whole issue was apparently rendered moot only two months later, when the EDB's 2008 Headquarters Agreement was ratified in December 2009.[229] As detailed below, therefore, these letters do not give rise to the consequences which Professor Stephan seeks to infer.

156. ***First***, the two letters identified by Professor Stephan are actually only part of *a series of six letters*, which together tell a different, more nuanced story.[230] As the full exchange of correspondence reveals, the conflict under discussion did not involve merely (1) a federal

[228] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 97.

[229] Federal Statute No. 355-FZ "on Ratification of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 27 Dec. 2009 (ASA-062).

[230] *See* Letter from Ministry of Finance to Federal Tax Service dated 3 July 2009 (ASA-093); Letter from Federal Tax Service to Ministry of Finance dated 30 July 2009 (ASA-094); Letter from Ministry of Finance No. N 04-02-02/11745 "on Implementation of the Agreement between the Government of the Russian Federation and the EDB on the Conditions of Stay of the EDB in the Territory of the Russian Federation" to Federal Tax Service dated 14 Aug. 2009 (ASA-054); Letter from Federal Tax Service to Ministry of Foreign Affairs dated 2 Sept. 2009 (ASA-095); Letter from Ministry of Foreign Affairs No. 6068/1DSKG "on the Application of Articles 9 and 13 of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on the Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" to Federal Tax Service dated 2 Oct.2009 (ASA-058); Letter from Federal Tax Service No. ShS-17-3/189@ "on the Implementation of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 21 Oct. 2009 (ASA-059).

statute and (2) an unratified treaty, as Professor Stephan suggests. Rather, the conflict involved (1) a federal statute, (2) an unratified treaty, and (3) *a second, ratified treaty*, which had arguably incorporated the unratified treaty by reference.

157. As reflected several times in the correspondence, the EDB's 2008 Headquarters Agreement did not exist in isolation.[231] Rather, it was negotiated "*pursuant to*" the EDB's Charter, which formed part of an earlier treaty, the Agreement on the EDB's Establishment dated 12 January 2006 (the "Establishment Agreement").[232] Significantly, the 2006 Establishment Agreement had already been ratified on 3 June 2006, as the Federal Tax Service noted in its letter to the Ministry of Foreign Affairs.[233] By virtue of this ratification, the 2006 Establishment Agreement would naturally be given priority over contrary federal statutes (including the Federal Tax Code) under Article 15(4) of the 1993 Constitution.

158. As the Federal Tax Service noted further,[234] Article 2 of the EDB's 2006 Establishment Agreement and Article 3(5) of the EDB's Charter provide expressly that the EDB's activities are governed by "applicable international treaties" and by international

[231] Letter from Ministry of Finance to Federal Tax Service dated 3 July 2009 (ASA-093); Letter from Federal Tax Service to Ministry of Foreign Affairs dated 2 Sept. 2009 (ASA-095); Letter of the Federal Tax Service No. ShS-17-3/189@ "on the Implementation of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 21 Oct. 2009 (ASA-059).

[232] Letter from Federal Tax Service dated 2 Sept. 2009 (ASA-095), at 2 ("Pursuant to the Agreement dated 12 January 2006 and the Charter making an integral part of the said Agreement, on 7 October 2008, in Moscow, the Government of the Russian Federation and the Eurasian Development Bank concluded an Agreement on the Terms of the EDB's Presence in the Territory of the Russian Federation (hereinafter, the Agreement dated 7 October 2008).").

[233] Letter of the Federal Tax Service No. ShS-17-3/189@ "on the Implementation of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 21 Oct. 2009 (ASA-059), at 1; *see* Federal Statute No. 69-FZ "on Ratification of the Agreement on the Eurasian Development Bank Establishment" dated 3 June 2006 (ASA-051).

[234] Letter from Federal Tax Service dated 2 Sept. 2009 (ASA-095), at 1.

agreements "on the terms of the Bank's presence in the territory" of the States parties.[235] Arguably, the EDB's 2008 Headquarters Agreement fell within either of these two categories (even before its ratification), such that the EDB's 2008 Headquarters Agreement was potentially incorporated into the EDB's 2006 Establishment Agreement by reference.

159. Professor Stephan is therefore wrong to suggest that the 2008 Headquarters Agreement had not received "any legislative confirmation,"[236] because such legislative confirmation was arguably provided *by the ratification of the 2006 Establishment Treaty*.

160. Accordingly, the answers provided by the Ministry of Foreign Affairs to the Federal Tax Service must be understood in this unique context. That is, the entire exchange of correspondence cited by Professor Stephan relates to a narrow legal question arising from the interaction of a federal statute with a *ratified* treaty, into which a provisionally applicable, unratified treaty was arguably *incorporated by reference*. None of the letters exchanged in 2009 ever suggested that an unratified, provisionally applicable treaty should automatically be given priority over a federal statute based on its own legal force.

161. ***Second***, Professor Stephan also misunderstands the letter sent by the Ministry of Foreign Affairs. Contrary to Professor Stephan's statement, the Ministry of Foreign Affairs did not reply "that the rules of the provisionally applicable treaty governed, even though they altered general rules of taxation."[237] To the contrary, the Ministry of Foreign Affairs did not discuss "general rules of taxation" at all. The Ministry of Foreign Affairs appears to

[235] Treaty on the Establishment of Eurasian Development Bank dated 12 Jan.2006 (ASA-091).

[236] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 96.

[237] Expert Report of Professor Stephan dated 8 Mar. 2017 (ASA-085) ¶ 96.

have been considering only the international legal aspect of the Headquarters Agreement's provisional application, rather than the relationship between the Headquarters Agreement and the Tax Code with respect to the Russian Federation's hierarchy of legal norms.

162. Notably, the analysis of the Ministry of Foreign Affairs was strictly limited to issues of international law and international legal obligations: "The principle of performance of international obligations in good faith fully applies to provisionally applicable treaties."[238] "A treaty is applied provisionally in its entirety unless it provides otherwise or unless the parties have reached a different agreement by other means."[239] "[A] failure to submit a provisionally applicable treaty to the State Duma . . . does not result in automatic termination of its provisional application."[240] But the Ministry of Foreign Affairs avoided any discussion of the *domestic* hierarchy of legal norms, and certainly never mentioned Article 15(4) of the 1993 Constitution. It is incorrect, therefore, for Professor Stephan to rely upon this letter in his analysis of the domestic hierarchy of legal norms. The Ministry of Foreign Affairs did not address that topic at all.

[238] Letter from the Ministry of Foreign Affairs No. 6068/10SKG "on the Application of Articles 9 and 13 of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on the Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 2 Oct. 2009 (ASA-058) ¶ 1.

[239] Letter from the Ministry of Foreign Affairs No. 6068/10SKG "on the Application of Articles 9 and 13 of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on the Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 2 Oct. 2009 (ASA-058) ¶ 3.

[240] Letter from the Ministry of Foreign Affairs No. 6068/10SKG "on the Application of Articles 9 and 13 of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on the Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 2 Oct. 2009 (ASA-058) ¶ 2.

163. ***Third***, Professor Stephan has also ignored the conclusions of the Ministry of Finance. Unlike the Ministry of Foreign Affairs, the Ministry of Finance was squarely focused on the domestic legal effect of the EDB's 2008 Headquarters Agreement.

164. As the Ministry of Finance explained in its letter dated 14 August 2009, although it had been "provisionally applied from the date of its signing," the EDB's Headquarters Agreement was nonetheless "subject to ratification" under "the provisions of Article 15 of the [FLIT]."[241] Having made this observation, the Ministry of Finance concluded is letter by stating that "[t]he issue of submission of the Agreement for ratification to the State Duma of the Federal Assembly of the Russian Federation is currently pending examination by the Government of the Russian Federation."[242] This letter can best be interpreted as an instruction to the Federal Tax Service not to apply the 2008 Headquarters Agreement until after the issue of ratification was finally decided.

165. ***Fourth*****,** the Federal Tax Service itself appears not to have taken any position as to the interaction between the ratified Establishment Agreement, the unratified Headquarters Agreement, and the Federal Tax Code. Rather, in its letter on 21 October 2009, the Federal Tax Service simply recounted the full sequence of correspondence in careful, neutral terms:

[241] Ministry of Finance Letter No. N 04-02-02/11745 "on Implementation of the Agreement between the Government of the Russian Federation and the EDB on the Conditions of Stay of the EDB in the Territory of the Russian Federation" dated 14 Aug. 2009 (ASA-054).

[242] Ministry of Finance Letter No. N 04-02-02/11745 "on Implementation of the Agreement between the Government of the Russian Federation and the EDB on the Conditions of Stay of the EDB in the Territory of the Russian Federation" dated 14 Aug. 2009 (ASA-054).

(a) The EDB had asked the Government to clarify "practical application of the provisions of the Bank's Charter, which is an integral part of the Foundation Agreement, as well as of the [Headquarters] Agreement of October 7, 2008";[243]

(b) The Ministry of Finance had confirmed that many tax exemptions were directly available under the EDB Charter itself;[244]

(c) The Ministry of Finance had also noted "[a]t the same time" that the Headquarters Agreement was "subject to ratification," but had not yet been ratified;[245] and

(d) The Ministry of Foreign Affairs had provided "clarifications . . . on the provisional application" of the Headquarters Agreement. [246]

166. After this recitation, the Federal Tax Service's letter then abruptly concluded. No clear answer was given, therefore, as to whether the EDB could or could not use the tax exemptions stipulated under the 2008 Headquarters Agreement. No clear answer was provided as to whether the 2008 Headquarters Agreement was indeed incorporated into the 2006 Establishment Agreement.[247] And, in any event, the entire issue was rendered

[243] Letter of the Federal Tax Service No. ShS-17-3/189@ "on the Implementation of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 21 Oct. 2009 (ASA-059).

[244] Letter of the Federal Tax Service No. ShS-17-3/189@ "on the Implementation of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 21 Oct. 2009 (ASA-059).

[245] Letter of the Federal Tax Service No. ShS-17-3/189@ "on the Implementation of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 21 Oct. 2009 (ASA-059).

[246] Letter of the Federal Tax Service No. ShS-17-3/189@ "on the Implementation of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 21 Oct. 2009 (ASA-059).

[247] Letter of the Federal Tax Service No. ShS-17-3/189@ "on the Implementation of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 21 Oct. 2009 (ASA-059).

moot only two months later, in December 2009, when the Federal Assembly ratified the 2008 Headquarters Agreement.[248]

167. The Federal Tax Service, apparently, was thus relieved of the obligation to decide how the EDB's tax treatment should be resolved, and how the interactions between the federal statute, the ratified treaty, and the unratified treaty should finally be understood. Accordingly, this incident cannot provide any basis for the broad legal conclusions which Professor Stephan seeks to draw.

IV. CONCLUSION

168. As the District Court of The Hague correctly held, therefore, "treaties that deviate from or supplement national Russian laws, cannot be applied based solely on their signature, but require prior ratification" by the Federal Assembly.[249] On the grounds set forth above, neither the Government nor any of its component organs (Ministries, Services, and Agencies) are permitted under the 1993 Constitution to provisionally apply legal rules contained within unratified treaties which contradict legal rules set forth in federal statutes.

Professor Alexei S. Avtonomov
Moscow, Russian Federation
6 November 2017

[248] Federal Statute No. 355-FZ "on Ratification of the Agreement between the Government of the Russian Federation and the Eurasian Development Bank on Conditions of Presence of the Eurasian Development Bank in the Territory of the Russian Federation" dated 27 Dec. 2009 (ASA-062).

[249] The Hague District Court Judgment dated 20 Apr. 2016 (ASA-081) ¶ 5.93.