Court of Appeal of The Hague

Docket No. 200.179.079

SECOND EXPERT REPORT OF ASSOCIATE PROFESSOR EKATERINA MISHINA, Ph.D.

19 February 2019

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GLOSSARY

Term	Definition
Avtonomov Report	Expert Report of Professor Avtonomov dated 6 November 2017
Constitution	Constitution of the Russian Federation adopted in 1993
Crimea Treaty	Treaty between the Republic of Crimea and the Russian Federation on the Accession of the Republic of Crimea to the Russian Federation
ECT	Energy Charter Treaty
1994 FCL CC	1994 Federal Constitutional Law on the Constitutional Court of the Russian Federation
Resolutions	Judgments of the Constitutional Court of the Russian Federation on the merits of a constitutional issue listed in pp. 1, 2, 3, 3.1, 3.2, 4 and 5.1 of part 1 of Article 3 of the 1994 FCL CC, including judgments containing interpretation of provisions of the Constitution ("Postanovlenie", "Постановление")
Decisions	Judgments of the Constitutional Court of the Russian Federation dismissing petitions as not within the Court's jurisdiction or otherwise non-justiciable, judgments interpreting, replicating,

	confirming, concretizing and developing legal positions formulated in previously adopted Resolutions, and all other judgments of the Constitutional Court of the Russian Federation which are not Resolutions or conclusions on the merits of the adherence to the procedure of the President's impeachment ("Opredelenie", "Определение")
Plenum Resolutions	Resolutions No. 8 of 31 October 1995 and No. 5 of 10 October 2003 of the Plenum of Supreme Court of the Russian Federation
RSFSR	Russian Soviet Federative Socialist Republic
1997 FCL on the Government	1997 Federal Constitutional Law On the Government of the Russian Federation

PRELIMINARY MATTERS

I. INTRODUCTION

1 My qualifications are summarized in my First Report, and are reflected in my curriculum vitae and the list of publications attached as an Annex to this Report. I also annex a consolidated list of exhibits to this Report.

II. INSTRUCTIONS AND INDEPENDENCE

2 I have been asked by Hulley Enterprises Limited, Yukos Universal Limited and Veteran Petroleum Limited to provide a second expert report on specific questions of Russian law.

3 In particular, I have been asked to respond to certain aspects of the Avtonomov Report, namely Professor Avtonomov's analyses of, and his arguments in relation to:

(a) the allocation and separation of powers under the Constitution;

(b) Article 15(4) of the Constitution, and specifically the effect of a provisionally applicable international treaty of the Russian Federation vis-à-vis Russian federal law; and

(c) the so-called "*public discourse in the State Duma*" regarding the ECT.

4 I confirm that my statement of independence contained in the First Report remains complete, accurate and up-to-date. I will advise the parties and the Court if, between the date of this report and the conclusion of this matter, there is any change in circumstances which affects my statement of independence.

III. EXECUTIVE SUMMARY

5 This Report is divided in three parts, which correspond to the three issues on which I have been asked to opine.

6 In Part I, I revisit the constitutional position and powers of the various branches of state power in the Russian Federation, i.e., the President, the Government, the Parliament (the Federal Assembly) and the

Judiciary (with specific emphasis on the Constitutional Court) to illustrate that Professor Avtonomov's understanding of the separation of powers is fundamentally flawed. I explain that the principle of separation of powers in the Russian legal system cannot be understood from an isolated reading of Article 10 of the Constitution, but only on the basis of the comprehensive reading of the provisions of the Constitution, federal constitutional laws and federal laws. These rules provide the President and the Government with broad international treaty-making powers. Finally, I explain that the Constitutional Court confirmed that the provisional application of international treaties overriding inconsistent federal laws is constitutional and not inconsistent with the separation of powers.

7 Part II is devoted to the scope of Article 15(4) of the Constitution. I examine again the jurisprudence of the Constitutional Court, legal commentary and doctrine to demonstrate that Article 15(4) of the Constitution also applies to provisionally applied international treaties, which override inconsistent federal laws. I further show that Professor Avtonomov's contrary conclusions rest on a series of untenable suppositions.

8 Finally, in Part III, I deal with the statements upon which Professor Avtonomov relies on to support his general view that there were some inconsistencies between the ECT and certain federal laws that were not "eliminated" by the ECT's provisional application. I clarify that these statements were made during informal and inconclusive discussions in Parliament that carry no legal weight.

PART I — THE ALLOCATION AND SEPARATION OF POWERS

I. INTRODUCTION

A. Summary of my First Report

4 In my First Report, I analyzed the allocation of state power and the interaction between the President, the Parliament, the Government and the Judiciary in the Russian constitutional system.[1] I explained that the Constitution granted broad powers to the President and the Government in the area of foreign policy in general and treaty-making in particular, including the power to negotiate and sign international treaties.[2] By contrast, Parliament has a limited role in the treaty-making process,[3] but is equipped with specific powers: (i) to ratify a treaty, (ii) to denounce a treaty, and (iii) to refer a treaty that has not yet been ratified to the Constitutional Court for review.

5 I demonstrated that in accordance with the distinct constitutional position of the various branches of state power, Russian law did not, and still does not, preclude the President and the Government from agreeing to provisional application of international treaties that are subject to ratification, such as the ECT,[4] even where these treaties contradict federal statutes.[5]

6 I further showed that the provisional application of international treaties does not contravene the constitutional principle of the separation of powers.[6]

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1 First Report, paras. 28-122.

2 First Report, paras. 127-145.

3 First Report, paras. 146-153.

4 First Report, paras. 166-181.

5 First Report, paras. 183-227.

6 First Report, paras. 243-255.

B. Summary of Professor Avtonomov's arguments

7 Professor Avtonomov contends that any analysis of the treaty-making process in the Russian Federation and the effect of international treaties in the Russian legal system must begin with the principle of the separation of powers and the hierarchy of domestic legal norms.[7]

8 According to Professor Avtonomov, Article 10 of the Constitution reflects a classic *trias politica* division of powers,[8] within which the Russian Parliament expresses the Russian people's sovereign will when it enacts federal statutes.[9]

9 Against that background, Professor Avtonomov argues that any act of the President and the Government – whether on the domestic plane or in the international treaty-making process – must always rank lower than a federal law,[10] such that a provisionally applicable international treaty signed by the President or the Government can never supersede a federal law.[11]

C. Structure of this Part

10 Professor Avtonomov's analysis is flawed, and his conclusions are incorrect.

11 In **section II** of this Part, I will explain the clear and unambiguous division of state power between the branches of power in the Russian Federation with respect to international treaty-making under the Constitution. First, I will show in **section II.A** that Article 10 of the Constitution must be read in conjunction with other provisions of the Constitution, federal constitutional laws and federal laws. Second, I will demonstrate in **section II.B** that the procedure of agreeing to international treaties and the respective role of various state bodies

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7 Avtonomov Report, paras. 30-48.

8 Avtonomov Report, para. 31.

9 Avtonomov Report, paras. 27, 53 and 93.

10 Avtonomov Report, para. 77.

11 Avtonomov Report, paras. 9 and 26.

therein is defined in the Constitution. Finally, in **section II.C** I will show that the Constitutional Court has repeatedly confirmed that the provisional application of international treaties is constitutional, and specifically that it is not inconsistent with the separation of powers. Finally, in **section III**, I will explain that Professor Avtonomov's general analysis of the separation of powers under the Constitution is fundamentally flawed.

II. THE ALLOCATION AND SEPARATION OF STATE POWER WITH RESPECT TO THE NEGOTIATION AND CONCLUSION OF INTERNATIONAL TREATIES

A. Article 10 of the Constitution must be read in conjunction with other provisions of the Constitution, federal constitutional laws and federal laws

12 Being contained in Chapter 1 of the Constitution, Article 10 forms part of the "Fundamentals of the Constitutional System" and simply states:

> *"State power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial power. Bodies of legislative, executive and judicial power shall be independent."*[12]

13 However, Article 10 of the Constitution does not go beyond establishing the separation of powers in a general and abstract sense.[13] Consequently, Article 10 of the Constitution must be read in conjunction with other provisions of the Constitution, federal constitutional laws and federal laws, as well as the Constitutional Court's case law, to determine which powers and competencies have been allocated to the different branches of state power, and how the different branches of state power are to interact in any given area.

14 Specifically, Article 11(1) of the Constitution[14] explains how state power is generally distributed in the Russian Federation to four bodies—the

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12 Article 10 of the Constitution (**Exhibit M-94**).

13 First Report, paras. 249-250.

14 Article 11(1) of the Constitution (**Exhibit M-94**).

President, the Parliament, the Government and the courts of the Russian Federation. Chapters 4 to 7 of the Constitution then contain detailed rules on the powers and competencies of each of these bodies of state power, and on their interaction in the exercise of their constitutional powers.

15 That is precisely the approach that the Constitutional Court takes to the analysis of the separation of powers under the Constitution, having confirmed time and again that the separation of powers cannot properly be understood or applied based on an isolated reading of Article 10 of the Constitution.

16 For example, in Resolution No. 3-P of 1 February 1996, the Constitutional Court held that the principle of the separation of powers is "*entrenched in Article 10 of the Constitution of the Russian Federation and concretized in other articles of the Constitution of the Russian Federation*."[15] Similarly, the Constitutional Court held in Resolution No. 15-P of 11 November 1999 that Article 10 of the Constitution does not exhaustively deal with the separation of powers. In this case, the Constitutional Court was asked to interpret Articles 84(b), 99(1), (2) and (4) and 109(1) of the Constitution in order to determine when the authority of the State Duma terminates in case of its dissolution by the President. Having extensively examined the constitutional provisions relating to the allocation of state power and interaction of its branches (in particular, Articles 10, 11, 84(b), 92(3), 96(1), 99(1), (2) and (4), 109, 111 and 117(3), (4) and (5)), the Constitutional Court explained that:

> "[b]*y 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, state bodies are not allowed to perform or furthermore usurp constitutional powers that do not belong to them. In case of the dissolution of the State Duma and announcement of new elections, as provided in Articles 84(b), 109(1) and (2), 111(4) and 117 (3) and (4) of the Constitution of the Russian Federation, the constitutional powers that belong to the State Duma cannot be performed by the*

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15 Constitutional Court Resolution No. 3-P of 1 February 1996, para. 6 (**Exhibit M-95**). [emphasis added]

> *President of the Russian Federation or by the Council of the Federation, the other chamber of the Federal Assembly.*"[16]

17 In Resolution No. 8-P of 27 March 2012, the Constitutional Court addressed and analyzed a whole spectrum of constitutional provisions from Chapters 4 to 7 of the Constitution, in particular Articles 84(e), 86(b) and (c), 106(d), 107, 108, 125(2)(d) and (6).[17] Similarly, in Resolution No. 6-P of 19 March 2014, the Constitutional Court examined the constitutionality of the President's signature of the Crimea Treaty by reference to Articles 80(3) and (4), and 86(a) and (b) of the Constitution. The Constitutional Court concluded that this exercise of powers by the President was constitutional:

> "*For the Russian Federation, the Treaty in question was signed by the President of the Russian Federation who is authorised to determine, in accordance with the Constitution of the Russian Federation and federal laws, the main areas* [guidelines] *of the State's domestic and foreign policy; represents the Russian Federation, as the Head of State, both nationally and internationally; and exercises leadership with respect to the foreign policy of the Russian Federation, conducts negotiations, and signs international treaties of the Russian Federation (Article 80, parts 3 and 4; Articles 86, paragraphs (a) and (b) of the Constitution of the Russian Federation). For this reason, the signing of the Treaty in question by the President of the Russian Federation is consistent with the Constitution of the Russian Federation.*"[18]

18 Professor Avtonomov cannot point to a single example where the Constitutional Court reviewed the constitutionality of an act of a state body for consistency with the principle of the separation of powers exclusively by reference to Article 10 of the Constitution. None of the Constitutional Court resolutions that Professor Avtonomov refers to in his Report is based on an application of Article 10 of the Constitution in isolation.[19] For example, in Resolution No. 4-P of 2 February 1998, the Constitutional Court closely examined what the Government's

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16 Constitutional Court Resolution No. 15-P of 11 November 1999, para. 4 (**Exhibit M-96**).

17 Resolution No. 8-P of 27 March 2012 (**Exhibit M-79**).

18 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 2 (**Exhibit M-85**).

19 See Avtonomov Report, paras. 44, 46-47, referencing Constitutional Court Resolution No. 9-P of 25 June 2001 (ASA-045), Constitutional Court Resolution No. 4-P of 2 February 1998 (ASA-037) and Constitutional Court Resolution No. 15-P of 11 November 1999 (ASA-043).

competencies were in relation to the Parliament, concluding that one of the Government's resolutions had to be annulled as it contravened a federal law.[20] In order to understand the interrelation between the Government's and the Parliament's powers, the Constitutional Court looked at Chapter 6 of the Constitution and the 1997 FCL on the Government.[21]

19 In addition, Russian legal literature confirms that the principle of separation of powers in the Russian legal system cannot be understood based on an isolated reading of Article 10 of the Constitution.[22] In his commentary, Dr Lazarev defines the scope of separation of powers enshrined in the Constitution by reference to its Article 11 and various provisions of Chapters 4 to 7:

> "[T]*he Constitution determined its own spheres and independently performed powers (in accordance with the fundamentals of the constitutional system and general principles of organization of legislative and executive bodies of state power determined by federal laws) (Articles 6(4), 73, 76 and 77(1)) for each of branches of power which are divided horizontally (Article 11, Chapters 4 and 7) and vertically (Article 12, chapters 3 and 8), i.e. its own competence, taking into account necessary coordination of functioning and*

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20 Constitutional Court Resolution No. 4-P of 2 February 1998 (ASA-037). In this case the Constitutional Court verified the constitutionality 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 No. 713 of 17 July 1995 ("**Registration Rules**"). The Registration Rules provided for, inter alia, the possibility to refuse registration of a Russian citizen at a place of his or her stay and residence. The Constitutional Court pointed out that the federal legislator had already enacted the Law of the Russian Federation of 25 June 1993 "*On the Right of the Citizens of the Russian Federation to Freedom of Movement, Choice of the Place of Stay and Residence within the Russian Federation*" ("**Law of 25 June 1993**") which provided that the Government could only determine the "*procedure*" for the registration and not grounds for its refusal. For this reason and by reference to Article 115 of the Constitution, the Constitutional Court determined that the Resolution of the Government which approved the Registration Rules contravened the Law of 25 June 1993. The Constitutional Court concluded that provisions of the Registration Rules were inconsistent with Articles 27(1) and 55(3) of the Constitution which respectively establish that everyone has the right to choose the place of stay and reside freely and such right may be limited only by federal law.

21 Constitutional Court Resolution No. 4-P of 2 February 1998 (ASA-037), para. 5.

22 B. S. Krylov, 'Separation of powers and checks and balances', (1998) 6 *Russian Law Journal* (retrieved from ConsultantPlus), pp. 1-2 (**Exhibit M-97**); Yu. A. Dmitriev, *Constitution of the Russian Federation. Doctrinal commentary* (2nd edition, Statute, 2013) (retrieved from ConsultantPlus), pp. 26- 27 (**Exhibit M-98**), p. 27. See also V. D. Zorkin (ed.), *Commentary to the Constitution* (2nd edition, 2011) (retrieved from ConsultantPlus), pp. 126-130 (**Exhibit M-99**), p. 129.

interaction of its state bodies (Articles 78(2) and (3) and 80(1)) and entitling the President whose decrees and orders cannot contradict the Constitution (Article 90(3)) with their coordination."[23]

B. The Constitution clearly defines and delineates the respective roles of the bodies of state power in international treaty-making

20 As explained in my First Report,[24] the Constitution provides for a clear framework with respect to negotiating and entering into international treaties. This constitutionally defined procedure allocates prescribed powers to each branch of state power at different stages in the treaty-making process:

(a) The President's powers are particularly broad in relation to international treaty-making.[25] Article 80 of the Constitution endows the President with the authority to represent the Russian Federation "*within the country and in international relations*".[26] How far this authority goes in relation to the other branches of power is confirmed by the Constitutional Court in Resolution No. 9-P of 29 November 2006, in which the Constitutional Court decided that the guidelines of domestic and foreign policy, determined by the President, are binding for all bodies of state power, including the Government and the Parliament.[27] Article 86 of the Constitution further stipulates that the President "*shall govern the foreign policy of the Russian Federation*" and "*conduct negotiations and sign international treaties of the Russian*

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23 L.V. Lazarev (ed.), *Commentary to the Constitution of the RF* (Moscow, 2009), Article 10 (**Exhibit M-100**).

24 First Report, paras. 124-139, 146-164.

25 First Report, paras. 128-139.

26 Article 80(4) of the Constitution (**Exhibit M-94**): "*As the head of the state the President of the Russian Federation represents the Russian Federation within the country and in international relations.*"

27 Constitutional Court Resolution No. 9-P of 29 November 2006 (**Exhibit M-101**), para. 2: "*As follows from the requirement enshrined in the Constitution that the main guidelines of domestic and foreign policy of the state, determined in accordance with its Article 80 (part 3) are mandatory for all the state bodies, all subjects of the right of a legislative proposal, entitled with the power of authority, including legislative (representative) bodies of the subjects of the Russian Federation, must acts in such a way, when performing their powers, that does not endanger the stability of state and legal forms of functioning of the society established by the Constitution and the due balance of interests of the society.*" See also S. Avakyan, *Contemporary Problems of Organization of the State Power* (Moscow, Justizinform, 2014) (retrieved from ConsultantPlus), p. 61 (**Exhibit M-30**).

Federation".[28] In addition to determining the foreign policy, the President is charged, by Article 32(1) of the FCL on the Government, with the direction of the Ministry of Foreign Affairs allowing him to supervise the implementation of the foreign policy.[29] Resolutions and orders of the Government which are incompatible with Presidential decrees may be abolished by the President.[30] I further note that the President is in charge of the final stage of the treaty ratification process, the signing of the ratification law and the ratification instruments.[31] However, under Russian law the President is not obliged and cannot be forced to complete this final step. In essence, even if the Parliament has passed the law on ratification of an international treaty, the President can refuse to sign the ratification instruments.

(b) The Government implements foreign policy as determined by the President pursuant to Article 114(e) of the Constitution.[32] Article 21 of the 1997 FCL on the Government specifies that the Government of the Russian Federation "*shall ensure the representation of the Russian Federation in foreign states and international organizations, while acting within its respective powers conclude international treaties of the Russian*

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28 Article 86(a) and (b) of the Constitution (**Exhibit M-94**): "*The President of the Russian Federation shall: (a) govern the foreign policy of the Russian Federation; (b) conduct negotiations and sign international treaties of the Russian Federation*."

29 Article 32, para. 1 of the FCL on the Government (**Exhibit M-102**).

30 Article 33 of the FCL on the Government (**Exhibit M-102**); Article 115(3) of the Constitution (**Exhibit M-94**).

31 Constitutional Court Resolution No. 17-P of 9 July 2012, para. 2.3 (**Exhibit M-103**): "[i]*n this case, the ratification of an international treaty is performed in the form of the legislative process, including* […] *in case of adoption of a federal law – its consideration and approval (or disapproval) by the Council of the Federation and also its signing and publication (or refusal) by the President of the Russian Federation (Articles 84, 104(e) and 105, 106(d), 107 of the Constitution, Articles 16 and 17 of the Federal Law On International Treaties of the Russian Federation*". V. D. Zorkin (ed.), *Commentary to the Constitution* (2nd edition, 2011) (retrieved from ConsultantPlus), pp. 636-637 (**Exhibit M-104**), p. 637: "[A] *federal law adopted by the Parliament representing its approval of the ratification of a treaty does not bind the head of the state to sign the international treaty which went through the ratification process in the Parliament*."

32 Article 114(1)(e) of the Constitution (**Exhibit M-94**): "*The Government of the Russian Federation shall:* […]

(e) carry out measures to secure the defense of the country, the state security, and the implementation of the foreign policy of the Russian Federation;"

Federation, ensure fulfillment of the Russian Federation's commitments under international treaties [...]".[33] As noted above, the President can closely supervise this implementation and abolish Governmental resolutions and orders which are incompatible with Presidential decrees.

(c) The role of the Parliament in the area of treaty-making is strictly limited. The Constitution does not envisage any role for the Parliament in the process of negotiation and signing of international treaties of the Russian Federation. The Parliament cannot exercise control over actions of the President and the Government in this sphere.[34] According to Article 106(d) of the Constitution the Parliament can only ratify or denounce an international treaty.[35] Such ratification or denunciation of an international treaty must be considered and passed by both Houses of Parliament, the State Duma and the Council of the Federation. However, as noted above, even if the Parliament has passed a ratification law, the ultimate consent power remains with the President as there is no law obliging him to submit the ratification instruments.

(d) The Constitutional Court, pursuant to Article 125(2)(d) of the Constitution, reviews upon request by a state body, international treaties that have not yet permanently entered into force and are subject to ratification or approval.[36] When seized to review the

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33 Article 21 of the FCL on the Government (**Exhibit M-102**); First Report, paras. 134, 137, 141-142.

34 See First Report, para. 150. Article 5 of the Federal Law "On the Parliamentary Control" No 77-FZ of 07 May 2013 (**Exhibit M-37**) does not mention parliamentary control in the areas of foreign policy and treaty-making.

35 Article 106(d) of the Constitution (**Exhibit M-94**): "*Federal laws adopted by the State Duma on the following issues must be mandatorily considered by the Council of the Federation:* […]

(d) ratification and denunciation of international treaties of the Russian Federation."

36 Article 125(2)(d) of the Constitution (**Exhibit M-94**): "*2. The Constitutional Court of the Russian Federation upon requests of the President of the Russian Federation, the Council of the Federation, the State Duma, one-fifth of the members of the Council of the Federation or of the deputies of the State Duma, the Government of the Russian Federation, the Supreme Court of the Russian Federation, the bodies of legislative and executive power of the subjects of the Russian Federation shall consider cases on the correspondence to the Constitution of the Russian Federation of:* […] *(d) international treaties of the Russian Federation that have not entered into force.*" See Article 89 of the 1994 FCL CC (**Exhibit M-105**). See also First Report, paras. 154-164.

> constitutionality of an international treaty, the Constitutional Court must review the conformity of the treaty with the Constitution "*from the standpoint of the separation of state power into legislative, executive and judicial established by the Constitution of the Russian Federation*."[37]

21 Commentators confirm that the Constitution defines the procedure of agreeing to international treaties and that the President and the Government take the leading position in this process. Professor Lukashuk explains:

> *"The President holds the main role in determining the treaty-making policy of Russia. In accordance with the Constitution, the President represents the Russian Federation in international relations (Article 80(4)) and directs the foreign policy. With regards to treaties, the President carries out negotiations and signs treaties.* [...] *Special attention should be drawn to the right of the President to suspend the acts of bodies of executive power of the subjects of the Russian Federation in case they contradict "international obligations of the Russian Federation"(Article 85(2). The ratification is performed by the State Duma and the Council of the Federation jointly (Article 106(d)).* [...]
>
> *In accordance with the Constitution, the Government takes measures for "implementation of the foreign policy of the Russian Federation" (Article 114(1)(e)) and therefore it carries out measures for implementation of international treaties. The Government's competence in this area is outlined in more details in the Federal Constitutional Law dated 17 December 1997 "On the Government" (Art. 21)* [...]."[38]

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37 Article 86 of the 1994 FCL CC, which is applicable by virtue of Article 90 of the 1994 FCL CC (**Exhibit M-105**): "*The Constitutional Court of the Russian Federation shall establish the conformity to the Constitution of the Russian Federation of normative acts of bodies of state power and agreements between them: 1) based on the content of norms; 2) based on the form of a normative act or agreement; 3) based on the procedure for signature, conclusion, adoption, publication or putting into force; 4) from the standpoint of the separation of state power into legislative, executive and judicial established by the Constitution of the Russian Federation; 5) from the standpoint of delimitation of competence between federal bodies of state power established by the Constitution of the Russian Federation; 6) from the standpoint of the delimitation of competence and powers between bodies of state power of the Russian Federation and bodies of state power of the subjects of the Russian Federation, as established by the Constitution of the Russian Federation, the Federative Treaty and other agreements on the delimitation of competence and powers. Verification of the constitutionality of normative acts of bodies of state power and agreements between them adopted prior to the entry into force of the Constitution of the Russian Federation shall be carried out by the Constitutional Court of the Russian Federation solely on the basis of the contents of the norms.*"

38 I. I. Lukashuk, *The Contemporary Law of International Treaties* Vol. 1 (Moscow, 2004) (retrieved from ConsultantPlus), pp. 473-476 (**Exhibit M-106**), p. 475. See also Yu. A. Dmitriev, *Constitution of the Russian Federation. Doctrinal Commentary* (2nd edition, Statute,

22 Dr Okunkov confirms that it is the Government's task to implement in detail the general strategy on foreign policy as outlined by the President:

> "[I]*n the foreign policy domain* […], *the functions and powers of the Government possess a slightly different nature and purpose than those of the President. Though they overlap with the powers of the President, they are more detailed and subject-oriented. The Federal Government acts as one of the main constitutional institutions which the President uses for the realization of his international policy course.*"[39]

23 Professors Krasnov and Shablinskiy note that the presidential power to determine the foreign policy "*additionally ties the Government to the President fixing their relationships similar to the ones of the sovereign and its vassal*".[40]

C. The Constitutional Court confirmed that provisional application of an international treaty is constitutional and is not inconsistent with the separation of powers

24 Professor Avtonomov's attempt to find an inconsistency between the provisional application of an international treaty and the separation of powers is even more untenable in light of the clear case law of the Constitutional Court on this issue.

25 As I explained in my First Report,[41] the Constitutional Court specifically confirmed in Resolution No. 6-P of 19 March 2014 that the provisional application of an international treaty is in conformity with the separation of powers under the Constitution:

2013) (retrieved from ConsultantPlus), p. 304 (**Exhibit M-107**): "*The President of the Russian Federation as the head of the state represents the Russian Federation in the domestic arena and in international affairs determining the main guidelines of internal and foreign policy of the state.* […] *In accordance with clause "a" of this article* [86] *the President directs the foreign policy of the Russian Federation.* […] *He directly administers the fulfilment of the taken course, he instructs and controls the Ministry of Foreign Affairs and other executive bodies which have the fulfilment of one or another aspect of foreign policy as their competence.*"

39 L. A. Okunkov, 'The Government and the President: the Aspects of Interrelations', (1998) 9 *Journal of Russian Law* (retrieved from ConsultantPlus) (**Exhibit M-108**), p. 7.

40 M. A. Krasnov, I. G. Shablinskiy, *Russian System of Power: a Triangle with One Angle* (Moscow, 2008), pp. 32-41 (**Exhibit M-109**), p. 40.

41 First Report, para. 224.

> "*Also, the Treaty in question is not inconsistent with the Constitution of the Russian Federation in terms of the division of state power into legislative, executive, and judicial branches as established by the Constitution or in terms of the delimitation of competence among the federal bodies of state power, since, in accordance with Article 8 of the Federal Constitutional Law "On the Procedure for Admission to the Russian Federation and Creation of a New Subject within the Russian Federation," the question of its ratification will be resolved by the Federal Assembly.*"[42] [emphasis added]

26 In short, Resolution No. 6-P of 19 March 2014 expressly disproves Professor Avtonomov's contention that the provisional application of an international treaty signed by the President or the Government on behalf of the Russian Federation creates a conflict with the constitutional separation of powers.

27 The Constitutional Court came to this conclusion by analyzing constitutional provisions that set out the relevant powers of the state bodies.[43] The hierarchy of domestic legal norms expounded by Professor Avtonomov was neither mentioned nor considered by the Constitutional Court in upholding the constitutionality of the Crimea Treaty and confirming its conformity with the separation of powers.

28 Moreover, as I will explain in **section III** of **Part II**, the Constitutional Court did not see any issue with respect to the provisional application of international treaties overriding inconsistent federal laws,[44] confirming that, although federal statutes may be in one sense the "*highest form of expression of the People's sovereign will*" (as Professor Avtonomov puts it), this is of no consequence in this context.

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42 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 2 (**Exhibit M-85**).

43 With regard to the powers of the President, the Constitutional Court addressed Articles 80(3) and (4), and 86(a) and (b) of the Constitution discussed above in para. 20. See Constitutional Court Resolution No. 6-P of 19 March 2014, para. 2 (**Exhibit M-85**).

44 See, e.g., Article 5(1) of Law of the Russian Federation No. 4730-I of 1 April 1993 on the State Border of the Russian Federation (**Exhibit M-110**) and Article 2 of Federal Law No. 187-FZ of 30 November 1995 on the Continental Shelf of the Russian Federation (**Exhibit M-111**). See also Treaty of friendship, cooperation, and partnership between Ukraine and the Russian Federation of 31 May 1997 (**Exhibit M-112)** and Federal Law No. 62-FZ On the Citizenship of the Russian Federation of 31 May 2002 (**Exhibit M-113**).

29 In any case, the State Duma as the representative body constituting a part of the Parliament, has in fact expressed its official position on the constitutionality of the provisional application of international treaties. As I explained in my First Report,[45] the official representative of the State Duma in the Constitutional Court, Dr Vyatkin, appeared at the hearing in the proceedings that led to Resolution No. 8-P of 27 March 2012 and presented the State Duma's formal position on this question.[46] The State Duma confirmed that the legal effect of a provisionally applied international treaty is equal to a ratified treaty that has permanently entered into force, such that if there is a discrepancy between a federal law and a provisionally applied international treaty, the provisionally applied international treaty shall apply:

> "*The Vienna Convention on the Law of Treaties does not treat differently performance of a provisionally applicable treaty and a treaty which entered into force. In case of a discrepancy between a federal law and a provisionally applicable treaty, we nevertheless consider that the treaty shall apply, as the meaning of provisional application is, precisely, to apply the treaty immediately.*"[47] [emphasis added]

30 In fact, Professor Avtonomov agrees with me that Dr Vyatkin "*was addressing the distinct question of the treaty's provisional application prior to its entry into force*".[48] Therefore, there is no basis for Professor Avtonomov's assertion that Dr Vyatkin's presentation should be understood in light of his introductory remarks, in which he observed (entirely correctly and unsurprisingly) that, in accordance with Article

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45 First Report, para. 192.

46 See Constitutional Court Resolution No. 8-P of 27 March 2012 (**Exhibit M-79**) where Dr Vyatkin is referred to in the header as the "*representative of the State Duma*".

47 Statement of the State Duma of the Parliament of the Russian Federation, Hearing before the Constitutional Court of the Russian Federation of the Case upon Review of Constitutionality of Article 23(1) of the Federal Law "*On International Treaties of the Russian Federation*", 13 March 2012, minutes 14:10-21:16, available online at http://www.ksrf.ru/ru/Sessions/Pages/ViewItem.aspx?ParamId=74. A transcript is provided as (**Exhibit M-78**).

48 Avtonomov Report, para. 149.

15(4) of the Constitution, ratified treaties also supersede inconsistent federal laws.[49]

III. PROFESSOR AVTONOMOV'S ANALYSIS OF THE SEPARATION OF POWERS UNDER THE CONSTITUTION IS FUNDAMENTALLY FLAWED

31 Professor Avtonomov claims that the establishment of three branches of state power under Article 10 of the Constitution "*reflects the* [classic trias politica as] *formulated* […] *by* […] *Baron de Montesquieu (Charles-Louis de Secondat), John Locke, and James Madison* [with the purpose] *to protect human liberty and prevent despotic rule through the undue concentration of power in any single State organ*."[50] According to him, the principle of separation of powers was understood and conceptualized that way at the time of the drafting of the Constitution,[51] because it had already been included in a draft authored by the dissident and prominent nuclear physicist Andrey Sakharov in 1989[52] ("**1989 Sakharov Draft**") and endorsed in a series of official documents during the period immediately before and after the dissolution of the Soviet Union[53].

32 As explained in my First Report, this understanding of the separation of powers in Russia is fundamentally incorrect.[54] The system of separation of powers established by the Constitution requires a careful study of the text of the Constitution. Furthermore, Professor Avtonomov's approach finds no support in his own sources and is also at odds with the view of leading Russian constitutional scholars.

33 Professor Avtonomov suggests that the 1989 Sakharov Draft, which allegedly endorsed a separation of powers with no unlimited powers for certain state organs, influenced the notion of separation of powers in the

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49 Avtonomov Report, paras. 148-149.

50 Avtonomov Report, para. 31.

51 Avtonomov Report, para. 34.

52 Avtonomov Report, para. 32.

53 Avtonomov Report, para. 35.

54 First Report, para. 248.

Constitution adopted in 1993. However, the 1989 Sakharov Draft is inapposite for understanding the principle of separation of powers enshrined in the Constitution for several reasons. First, the provisions of the 1989 Sakharov Draft were not a precursor of the principle of separation of powers as enshrined in the Constitution. Secondly, Professor Avtonomov misunderstands and misinterprets the provisions of the 1989 Sakharov Draft.

34 First, the 1989 Sakharov Draft was not intended to be a constitution for the Russian Federation, simply because the Russian Federation, as an independent political entity, did not exist at that time, and the RSFSR was one of the constituent republics of the Soviet Union. Rather, the 1989 Sakharov Draft was a constitutional project for a "*Union of Soviet Republics of Europe and Asia* […] *a voluntary association of sovereign republics (states) of Europe and Asia*" ("**Union**").[55] Professor Avtonomov has not pointed to a single source to support his insinuation that the 1989 Sakharov Draft somehow served as a model (or as a conceptual starting point) for the drafting of the provisions of the Constitution (as adopted in 1993) that deal with the separation of powers.

35 Second, the 1989 Sakharov Draft did not contain a provision on the separation of powers. Rather, it featured a "[U]*nion central government*", which included a "*congress of* [U]*nion people's deputies*", "[U]*nion council of ministers*", a Union Supreme Court and was headed by the "*president*" of the Union.[56] The central government of the Union was to possess "*the plenitude of supreme power in the country, not sharing it with the executive* [governing] *bodies of any party*".[57] In contrast to the separation of powers

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55 Article 1 of Draft Constitution of the Union of Soviet Republic of Europe and Asia by Sakharov A.D. (1989) (ASA-005). This Union of Soviet Republics of Europe and Asia is not to be confused with the Union of Soviet Socialist Republics ("**USSR**"). Rather, the 1989 Sakharov Draft describes a voluntary union of sovereign republics based on free elections and respect for the liberty of all individuals.

56 Article 28 of Draft Constitution of the Union of Soviet Republic of Europe and Asia by Sakharov A.D. (1989) (ASA-005). The translation of Article 28 submitted by Professor Avtonomov is incorrect, as it speaks of "*a union supreme soviet*" instead of the "*Union Supreme Court*".

57 Article 28 of the Draft Constitution of the Union of Soviet Republic of Europe and Asia by Sakharov A.D. (1989) (ASA-005).

as traditionally understood, the 1989 Sakharov Draft appears to have envisaged for the unity of legislative, executive and judicial functions in one state body.

36 Finally, the 1989 Sakharov Draft provided that the President exclusively represents the Union in the international arena,[58] and that international treaties "*signed by the USSR and the* [U]*nion*" obtained the "*direct effect and take precedence over the laws*" of the Union and its components, without any involvement of the legislature. [59]

37 Similarly, Professor Avtonomov does not explain why Article 10 of the Constitution should be interpreted in light of the 1990 Declaration on the State Sovereignty of the RSFSR, the 1992 Amendments to the 1978 Constitution of the RSFSR and Presidential Decree No. 1400 dated 21 September 1993.[60] Taken at their highest, these documents merely state that the separation of powers is an important constitutional principle. However, they are completely silent on how this constitutional principle of the separation of powers is to be understood and applied. Contrary to what Professor Avtonomov claims, in particular, Decree No. 1400 cannot possibly be considered as an example embodying the separation of powers.[61] In fact, Decree No. 1400 was found unconstitutional by the Constitutional Court on the very same day it was issued.[62] Among other

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58 Article 36 of the Draft Constitution of the Union of Soviet Republic of Europe and Asia by Sakharov A.D. (1989) (ASA-005). The legislature on the other hand had no role in the treaty-making process. See Articles 30-31 of the Draft Constitution of the Union of Soviet Republic of Europe and Asia by Sakharov A.D. (1989) (ASA-005).

59 Article 5 of the Draft Constitution of the Union of Soviet Republic of Europe and Asia by Sakharov A.D. (1989) (ASA-005): "*International laws and agreements signed by the USSR and the* [U]*nion* […], *have direct effect on the territory of the union and take precedence over laws of the union and the republics*."

60 Avtonomov Report, para. 35.

61 In contrast with the principle of separation of powers, Article 1 of Decree No. 1400 of the President (**Exhibit M-3** and ASA-013) established its primacy over federal laws: "*I hereby decree as follows:* […] *The Constitution of the Russian Federation, and the legislation of the Russian Federation and of the constituent entities of the Russian Federation shall remain in force to the extent they do not contradict this Decree*."

62 The Constitutional Court decided that it was unconstitutional for the President to issue Decree No. 1400. See Opinion of the Constitutional Court No. Z-2 of 21 September 1993 (**Exhibit M-114**).

grounds for its unconstitutionality, the Constitutional Court decided that Decree No. 1400 contravened the principle of separation of powers.[63]

38 Professor Avtonomov further posits that certain key participants in the drafting of the Constitution wrote extensively about the significance of the concept of the separation of powers.[64] While they did indeed write about the separation of powers, their writings confirm that (contrary to what Professor Avtonomov claims) the Constitution does not provide for a classic separation of powers.

39 For his part, Professor Alekseyev explains that the presidential power is dominant because "*the idea of presidential power is stretched through the project* [of the Constitution]".[65] Describing the final draft of the Constitution, Professor Alekseyev admits that, particularly because of the President's broad powers, "*the initial idea of enshrining the balanced power and its functional limitation in the Constitution turned out to be unfulfilled*".[66] He further expressly acknowledges that the system of separation of powers "*is not done in a way which is described in textbooks, not in its classic forms*".[67]

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63 The Constitutional Court found Decree No. 1400 to be inconsistent with numerous constitutional provisions including Articles 2 and 3 of the 1978 Constitution of the RSFSR establishing the separation of powers and Article 121 defining the powers of the President.

64 Avtonomov Report, para. 34.

65 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, 29 April 1993 (ASA-012), p. 413. See translation not submitted with Professor Avtonomov's Report (**Exhibit M-115**).

66 S. S. Alekseyev, *Collected Writings, In 10 Volumes* (Moscow, 2010), Volume. 4 (ASA-064), p. 87. See translation not submitted with Professor Avtonomov's Report (**Exhibit M-116**): "*In the end, when at the verge of the constitutional referendum of December 1993 the final draft text of the Constitution was finalized, it turned out that there was a broad scope of administrative-executive powers in the President's hands which was broader than the scope of functions of the head of the state.* […] *Therefore the initial idea of enshrining the balanced power and its functional limitation in the Constitution turned out to be unfulfilled.*"

67 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, 29 April 1993 (ASA-012), p. 413. See translation not submitted with Professor Avtonomov's Report (**Exhibit M-115**).

40 Similarly, Professor Shakhrai underscores that the Constitution's conception of the separation of powers "*differs from the 'classical' version*":

> "[I]*n the opinion of foreign experts, the form of government established by Russia's constitutional law "is based on a new and interesting concept of presidential authority" and is determined to a greater degree by the events of the democratic transition period in the country and by the federal structure of the Russian state, than by any foreign model.* [...]
>
> *Thus, enshrined in the Constitution of the RF is a constitutional system of state power (Article 11(1)) fundamentally different than that seen previously, which additionally differs also from the "classical" version of the implementation of the separation of powers principle."*[68] [emphasis added]

41 That position is also taken by other notable Russian constitutional scholars. For example, Professor Dmitriyeva explains that the separation of powers in the Russian Federation is strongly affected by the specifics of the post-Soviet transition, the lack of democratic experience and the persistence of certain old Soviet approaches to presidential authority:

> "*Thus, the conducted analysis leads to the following conclusions: the principle of the separation of powers embodied in the 1993 Constitution does, indeed, have its own so-called "Russian" specificity. This is connected with a number of objective circumstances, among which the main ones, in our opinion, are: 1) the complexities of the so-called transitional period, which in both the political and economic environment required the significant concentration of power in the hands of one person; 2) the rudimentary nature of most democratic institutions, coupled with unbalanced and unsustainable political systems; 3) the significant influence of the old ideology on the political nature and circumstances of the formation of the Presidency; 4) the lack of real experience in organizing state power on the basis of the principle of the separation of powers and, consequently, the difficulties in determining the place of the President in a system of branches of power*."[69] [emphasis added]

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68 S. M. Shakhrai, *Constitutional Law of Russian Federation. Textbook for Undergraduate and Postgraduate Students* (Moscow, 2017) (ASA-083), p. 74. See translation not submitted with Professor Avtonomov's Report (**Exhibit M-117**).

69 L. I. Dmitrieva, 'The President of the Russian Federation in the system of separation of powers under the 1993 Constitution of the RF', (2003) 12 *Law: Theory and Practice*, available online at http://www.yurclub.ru/docs/pravo/1203/2.html (**Exhibit M-118**), p. 7. This is not uncommon. For example, Professor Ebzeyev acknowledges that the principle of separation of powers in its classic form is not an unchangeable dogma - its practical application is always affected by a variety of political, social, legal, cultural and other

42 Professor Nersesyanz notes that Article 10 and other provisions of the Constitution establish the presidential and executive primacy vis-à-vis the legislative and the judiciary in contrast with the classic *trias politica*:

> "*Although in accordance with the principle of separation of powers into the legislative, executive and judiciary established in art. 10 of the Constitution, it is clear that presidential power (the totality of constitutional authority of the President) is specifically executive power; within the meaning of a number of other articles of the Constitution it would appear that presidential power extends beyond the limits of the classic triad and is construed as a sort of separate (referential, base) power, hovering over the standard triad*."[70] [emphasis added]

43 In short, the separation of powers established by the Constitution departs from the classic *trias politica* notion. In particular, to quote Chief Justice Zorkin's commentary to the Constitution, the President "*is present both de facto and de jure in all branches of power*".[71]

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factors: "*Thus, the principle of the separation of powers must not be overemphasized. Nowhere in the world has this theory in the form in which it was formulated by Montesquieu been absolutely consistently enshrined in past or presently active constitutions. The abstract formula of the separation of powers immediately underwent a revision every time, as soon as it came into contact with the strategic interests of different social and political forces, the level of the legal culture of a people and its political mentality, a society's traditions and its readiness to resist authoritarianism, the measure of democratism by politicians, and other circumstances, i.e., with genuine reality, which is far from always in line with theoretical constructions, even if they adhere to the strictest logic*." See V. D. Zorkin (ed.), *Commentary to the Constitution* (2nd edition, 2011) (retrieved from ConsultantPlus), pp. 97-98 (**Exhibit M-119**).

70 V. S. Nersesyanz (ed.), *Problems of General Theory of Law and State* (Moscow, 1999), p. 689 (**Exhibit M-17**).

71 V. D. Zorkin (ed.), *Commentary to the Constitution* (2nd edition, 2011) (retrieved from ConsultantPlus), pp. 97-98 (**Exhibit M-119**).

PART II — INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION

I. INTRODUCTION

A. Summary of my First Report

44 In my First Report, I demonstrated that as a matter of Russian law, and specifically with respect to Article 15(4) of the Constitution, provisionally applied international treaties:

(a) form a component part of the Russian legal system, and

(b) create binding rules and obligations that override inconsistent federal laws adopted by the Parliament.[72]

45 This is unequivocally confirmed by the consistent case law of the Constitutional Court.[73]

B. Summary of Professor Avtonomov's arguments

46 I note that Professor Avtonomov accepts that provisionally applied international treaties form a component part of the Russian legal system, and that they are thus "*international treaties of the Russian Federation*" within the meaning of the first sentence of Article 15(4) of the Constitution.[74]

47 Nevertheless, Professor Avtonomov's argument appears to lead to the surprising result that, in essence, provisionally applied international treaties do not constitute "*international treaties of the Russian Federation*" for the purposes of the second sentence of Article 15(4) of the Constitution.[75] According to Professor Avtonomov's reading of Article 15(4) of the Constitution, only ratified international treaties can override

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72 First Report, paras. 182-192.

73 First Report, paras. 193-239.

74 Avtonomov Report, paras. 56, 78-81.

75 Avtonomov Report, paras. 56-69.

inconsistent federal laws and thus constitute "*international treaties of the Russian Federation*" in that sense. In Professor Avtonomov's view, permitting provisionally applied international treaties to supersede federal laws would be contrary to Articles 1(1), 4(2), 10 and 15(2) of the Constitution and the idea that the Parliament expresses the people's sovereign will.[76]

C. Structure of this Part

48 This is a puzzling and surprising position for Professor Avtonomov to take, and for the Russian Federation to advance, given that the Russian Federation itself officially explained to the Council of Europe some 23 years ago that:

> "[*t*]*he Constitution does not require precedence to be given solely to treaties ratified by Parliament (Federal Assembly). From a formal point of view, every treaty must be applied, even if it contradicts Russian legislation*."[77] [emphasis added]

49 As I will further explain, none of the authorities invoked by Professor Avtonomov can sustain his cramped and internally inconsistent interpretation of the constitutional concept of "*international treaties of the Russian Federation*", and of the position of provisionally applied international treaties in the Russian legal system.

50 In **section II** of this Part, I will demonstrate that the notion of "*international treaties of the Russian Federation*" in Article 15(4) of the Constitution does not exclude provisionally applied international treaties. In **section III** of this Part, I will examine again the jurisprudence of the Constitutional Court that has expressly and repeatedly ruled that provisionally applied international treaties override inconsistent federal laws. According to the Constitutional Court, provisionally applied international treaties fall within the ambit of both sentences of Article 15(4) of the Constitution. The Constitutional Court's judgments and interpretations in this regard are final and binding. **Section IV** of this

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76 Avtonomov Report, paras. 26, 54, 57, 86, and 107.

77 Council of Europe, 'The judge and international law, Multilateral meeting, Bucharest, 28-30 November 1995', 1999, pp. 55-58 (**Exhibit M-120**), p. 57.

Part summarizes the relevant legal commentary and doctrine, demonstrating that Article 15(4) of the Constitution encompasses provisionally applied international treaties which override inconsistent federal laws. Finally, in **section V** of this Part, I will show that Professor Avtonomov's conclusions rest on a series of untenable suppositions.

II. THE NOTION OF "*INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION*" IN ARTICLE 15(4) OF THE CONSTITUTION DOES NOT EXCLUDE PROVISIONALLY APPLIED INTERNATIONAL TREATIES

A. On a plain reading, the notion of "*international treaties of the Russian Federation*" in Article 15(4) of the Constitution does not exclude provisionally applied international treaties

51 To recapitulate, Article 15(4) of the Constitution contains two sentences, and each of them refers to "*international treaties of the Russian Federation*".[78] However, neither of them includes any reference to ratification, let alone a limitation, express or implied, which is aimed to exclude provisionally applied treaties from its ambit:

> "*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 establishes other rules than those envisaged by law, the rules of the international treaty shall be applied.*"[79] [emphasis added]

52 On a plain reading, Article 15(4) of the Constitution thus stipulates that provisionally applied international treaties of the Russian Federation have an immediate and overriding effect in the Russian legal system. Nothing in the wording of this provision suggests an exclusion of provisionally applied treaties from the scope of international treaties of the Russian Federation, much less that the same phrase "*international treaties of the Russian Federation*" means one thing in the first sentence

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78 Professor Avtonomov does not suggest that the notion of "*international treaties of the Russian Federation*" in these two sentences should be read or understood differently. See Avtonomov Report, para. 56.

79 Article 15(4) of the Constitution (**Exhibit M-94**).

(namely all international treaties) and a totally different thing in the second sentence (namely only ratified international treaties but not provisionally applied international treaties).

B. Similarly, references to "*international treaties of the Russian Federation*" in other provisions of the Constitution, federal constitutional laws and federal laws do not exclude provisionally applied international treaties

53 The notion of "*international treaties of the Russian Federation*" is used in other provisions of the Constitution apart from Article 15(4),[80] and in a variety of federal constitutional laws and federal laws.[81] None of these provisions contain an express or implied exclusion of provisionally applicable international treaties.

54 By way of example, Article 106(d) of the Constitution establishing the powers of the Council of the Federation, reads as follows:

> "*Federal laws adopted by the State Duma on the following issues must be mandatorily considered by the Council of the Federation* […]
>
> *(d) ratification and denunciation of international treaties of the Russian Federation.*"[82]

55 If "*international treaties of the Russian Federation*" in Article 106(d) of the Constitution referred exclusively to ratified international treaties and excluded provisionally applied international treaties, then ratification pursuant to Article 106(d) would be meaningless, as this would lead to the absurd situation that only international treaties that had already been ratified could be ratified by the Council of the Federation.

56 Another example is Article 125(2)(d) of the Constitution, which gives the Constitutional Court the power to examine whether international

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80 See, for example, Articles 46, 62, 63, 86, 106 and 125 of the Constitution (**Exhibit M-94**).

81 See Articles 88-91 of the 1994 FCL CC (**Exhibit M-105**), Article 2(7)(5) of the Federal Constitutional Law No. 3-FKZ of 05 February 2014 On the Supreme Court of the Russian Federation (**Exhibit M-121**), Articles 2(1), 4(2), 7, 8 and 9 of the Federal Constitutional Law No. 6-FKZ of 17 December 2001 on the Procedure for Admission to the Russian Federation and Creation of a New Subject within the Russian Federation (**Exhibit M-122**).

82 Article 106(d) of the Constitution (**Exhibit M-94**).

treaties that have not yet entered into force (such as international treaties that have not yet been ratified or otherwise have been approved[83]) comply with the Constitution:

> "*The Constitutional Court of the Russian Federation upon requests of the President of the Russian Federation, the Council of the Federation, the State Duma, one-fifth of the members of the Council of the Federation or of the deputies of the State Duma, the Government of the Russian Federation, the Supreme Court of the Russian Federation, the bodies of legislative and executive power of the subjects of the Russian Federation shall consider cases on the correspondence to the Constitution of the Russian Federation of:* […]
>
> *international treaties of the Russian Federation that have not entered into force.*"[84]

57 Again, if "*international treaties of the Russian Federation*" in Article 125(2)(d) of the Constitution was meant to refer to ratified treaties only, then the Constitutional Court's review of international treaties would be severely limited to those treaties which had already been ratified but have not come into force.[85] The Constitutional Court's case law provides no examples of such reading of Article 125(2)(d) of the Constitution. To the contrary, the Constitutional Court's leading cases in this area amply demonstrate that its constitutional review of "*international treaties of the*

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83 Article 89 of the 1994 FCL CC (**Exhibit M-105**).

84 Article 125(2)(d) of the Constitution (**Exhibit M-94**). In 2014, the wording of Article 125(2) of the Constitution was modified to exclude the reference to the Supreme Arbitrazh Court of the Russian Federation in accordance with the Law of the Russian Federation No. 2-FKZ of 5 February 2014 on the amendment to the Constitution of the Russian Federation "On the Supreme Court of the Russian Federation and the Procuracy of the Russian Federation".

85 This would also be contrary to the plain meaning of the 1994 FCL CC. For example, Article 89 of the 1994 FCL CC (**Exhibit M-105**) provides: "*The request for constitutional review of an international treaty of the Russian Federation that have not entered into force shall be admissible if: (i) the international treaty of the Russian Federation mentioned in the request is subject to ratification by the State Duma or approval by another federal body of state power.*" [emphasis added] Similarly, see Article 91 of the 1994 FCL CC (**Exhibit M-105**): "[…] *From the moment of pronouncement of the resolution of the Constitutional Court of the Russian Federation which rules that an international treaty of the Russian Federation or any part thereof does not comply with the Constitution, this international treaty cannot be put into force and applied, i.e. it cannot be ratified, approved or otherwise permanently enter into force in the Russian Federation.*" [emphasis added]

Russian Federation" covers treaties that have not been ratified, not excluding provisionally applied international treaties.[86]

C. The drafting history of the Constitution shows that Article 15(4) of the Constitution encompasses provisionally applicable international treaties

58 Earlier drafts of the provision that eventually became Article 15(4) of the Constitution show that the drafters of the Constitution considered (but ultimately rejected) limiting both the direct application of international treaties as well as the overriding legal effect of international treaties to ratified international treaties.

59 Professor Avtonomov acknowledges that the scope of the notion "*international treaties of the Russian Federation*" in Article 15(4) of the Constitution was discussed during the drafting of the Constitution, and that the word "*ratified*" was deliberately not included in the final text of this provision as adopted.[87]

60 Contrary to Professor Avtonomov's contention, it follows that the existing wording of Article 15(4) of the Constitution is the logical output of a thorough discussion on whether to limit the notion "*international treaties of the Russian Federation*" in Article 15(4) of the Constitution to ratified treaties, and the drafters' explicit decision against such limitation.

61 Between 1990 and 1993, several draft constitutions were prepared by various groups.[88] The approach to the role of international law, the scope of international treaties and their place within the Russian legal system

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86 See Constitutional Court's case law below in **section III**.

87 Avtonomov Report, paras. 127-133.

88 Besides the most high-profile draft constitutions such as the draft of the Constitutional Commission (see para. 62), the draft developed by the working group headed by Professor Shakhrai (see para. 67), and the draft proposed by President Yeltsin (see para. 68), there were other drafts prepared by various working groups. For example, there was a draft developed by the Communist Party of Russia (this draft heavily relied on the 1977 Constitution of the USSR and the 1978 Constitution of the RSFSR), the draft of the Reform Foundation prepared by Professors Mishin and Skouratov, and the draft developed by Saratov State Academy of Law.

differed from group to group and from draft to draft.[89] As I will explain in more detail below, the question of limiting "*international treaties of the Russian Federation*" to ratified treaties was discussed in detail during the drafting process of these draft constitutions.

62 The draft prepared by the Constitutional Commission established pursuant to the decree of the First Congress of the People's Deputies of RSFSR of 16 June 1990 ("**Constitutional Commission Draft**") initially limited "*international treaties of the Russian Federation*" to ratified international treaties:

> "*3(4). The universally-recognized norms of international law and ratified international treaties of the Russian Federation shall be a component part of its legal system. If a ratified international treaty of the Russian Federation fixes other rules than those envisaged by law, the rules of the international treaty shall be applied.*"[90] [emphasis added]

63 Notably, Article 3(4) of the Constitutional Commission Draft is virtually identical to the current version of Article 15(4) of the Constitution except for two qualifiers excluding international treaties that have not been ratified from the scope of the provision. In all the ensuing drafts, the basic structure remained the same, while only the ratification requirement was in dispute.

64 In contrast to the earlier draft, the draft of 24 October 1991 that was prepared for the Fifth (Extraordinary) Congress of People's Deputies of RSFSR did no longer contain a limitation to "*ratified*" international treaties:

> "*9(4). The general principles and norms of international law and the international treaties of the Russian Federation that do not*

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89 As Professor Danilenko notes, the drafting process with respect to international law and the role of international treaties reflected the intent to depart from the Soviet past with its limited role of international law in order to "*become an open and law-abiding member of the international community*". One of the most important elements of the constitutional reform was to open "*the Russian domestic legal system to international law*". See G.M. Danilenko, 'The New Russian Constitution and International Law', (1994) 88(3) *American Journal of International Law*, pp. 451-470, at pp. 452 and 461 (**Exhibit M-75**).

90 Constitutional Assembly. Transcripts, Materials, Documents. 29 April-10 November 1993. Volume 1 (29 April – 4 June 1993), pp. 495-498 (**Exhibit M-123**), p. 498.

> *contradict the Constitution of the Russian Federation are part of its legal system. If such an international treaty contains other rules than those contained in federal law, the rules contained in the international treaty must be applied if they do not contradict the Constitution of the Russian Federation.*"[91] [emphasis added]

65 By 10 September 1992, the Constitutional Commission Draft had been amended to reintroduce the distinction between "*international treaties*" and "*ratified international treaties*" in the two sentences of its Article 3(4):

> "*3(4). The general principles and norms of international law and the international treaties of the Russian Federation are part of its legal system. If a ratified international treaty contains other rules than those contained in federal law, the rules contained in the international treaty must be applied.*"[92] [emphasis added]

66 This version of the Constitutional Commission Draft was presented by Mr Oleg Rumyantsev in the Council of Nationalities[93] on 2 November 1992.[94] Professor Avtonomov refers to this presentation implying that Mr Rumyantsev's clarified that the term "*international treaties*" equals to "*ratified international treaties*". However, Professor Avtonomov fails to mention that there is no implicit reading. Instead, Mr Rumyantsev did nothing but confirm that the Constitutional Commission had consciously included the limitation in the second sentence of its draft:

> "*In the first sentence of part (4) we removed the wording that a ratified treaty makes part of our domestic law, so as not to exclude the intergovernmental agreements that are not subject to ratification. They, too, naturally make part of our domestic law. But when there is an inconsistency between the treaty and the internal laws, we are writing that the treaty norm applies. The norm of which treaty? Solely of the one that is ratified. This concerns the second sentence.*

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91 O.G. Rumyantsev (ed.), From the History of Creation of the Constitution of the Russian Federation. Constitutional Commission: Transcripts, Materials, Documents (1990-1993). Volume 2: 1991, pp. 564-567 (**Exhibit M-124**), p. 567.

92 Draft of the Constitution of 10 September 1992 available at https://rumiantsev.ru/a620/ (**Exhibit M-125**).

93 According to Art. 107 of the Constitution of the RSFSR of 1978, the Council of Nationalities was one of the houses of the Supreme Soviet (or as Professor Avtonomov refers to it - Supreme Council) of the Russian Federation.

94 Avtonomov Report, para. 128.

> *That is, there is no need for the word "ratified" in the first sentence, that is why we removed it.*"[95]

67 Professor Avtonomov further fails to mention that there were alternative drafts of the Constitution, including one developed in March 1992 by the working group headed by Professor Shakhrai, which did not contain a limitation of "*international treaties of the Russian Federation*" to ratified treaties:

> "*Article 56(4): "If an international treaty of the Russian Federation contains rules that differ from those contained in the laws, the rules of the international treaty will be applied.*"[96] [emphasis added]

68 Another draft which underwent several amendments in this regard was proposed by President Yeltsin in April 1993 and published in the newspaper "Moscovskaya Pravda" on 5 May 1993 ("**Presidential Draft**"). It was further developed by the Constitutional Assembly, a body established for the purposes of finalizing the Presidential Draft.[97] The Presidential Draft did not initially have a provision analogous to the current Article 15(4) of the Constitution. Its Article 8 provided that:

> "*In the Russian Federation recognition and guarantees shall be provided for the basic rights and freedoms according to the Universal Declaration of Human Rights and the universally recognized principles and norms of international law* […]."[98]

69 During the amendment process of 3-6 June 1993, the Constitutional Assembly fundamentally changed the wording of Article 8 of the Presidential Draft so as to include a rule pursuant to which only ratified

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95 See Council of Nationalities of Russian Federation Supreme Council Hearing Transcript regarding Article 3 of the Russian Federation Constitution dated 2 November 1992 (ASA-011), p. 331.

96 Draft prepared by the working group headed by Professor Shakhrai (published in the newspaper "Federatsiya" (1992) No. 16) available at http://constitution.garant.ru/history/active/101202/(**Exhibit M-126**).

97 G.M. Danilenko, 'The New Russian Constitution and International Law', (1994) 88(3) *American Journal of International Law*, pp. 451-470, at p. 452 (**Exhibit M-75**). The composition and function of the Constitutional Assembly was established by the President in his Decree No. 660 of 12 May 1993 (**Exhibit M-127**).

98 Constitutional Assembly. Transcripts, Materials, Documents. 29 April-10 November 1993. Volume 1 (29 April – 4 June 1993), pp. 12-15 (**Exhibit M-128**), p. 14.

international human rights treaties would have "*priority over the laws of the Russian Federation*":

> "*International norms which relate to human rights and freedoms and contained in documents ratified by the Russian Federation shall have priority over the laws of the Russian Federation when they extend rights and freedoms.*"[99] [emphasis added]

70 The above examples show that, throughout the drafting process, there were discussions and conceptual disagreements on whether or not to limit "*international treaties of the Russian Federation*" to ratified treaties. Where the drafters opted to include a limitation, they expressly stated it in the draft provision.

71 The referendum on the new Constitution with Article 15(4) in its current wording was held on 12 December 1993. To recapitulate, Article 15(4) of the Constitution contains two sentences and each of them refers to "*international treaties of the Russian Federation*". However, neither of them include any reference to ratification, let alone a limitation, express or implied, to ratified international treaties. Considering the drafting history of Article 15(4) of the Constitution, the constitutional drafters deliberately chose not to limit either prong of Article 15(4) of the Constitution (*i.e.*, direct applicability or supremacy) to ratified international treaties.[100]

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99 Constitutional Assembly. Transcripts, Materials, Documents. 29 April-10 November 1993. Volume 1 (29 April – 4 June 1993), pp. 349-350 (**Exhibit M-129**), p. 349.

100 See First Report, para. 190. G.M. Danilenko, 'The New Russian Constitution and International Law', (1994) 88(3) *American Journal of International Law*, pp. 451-470, at p. 464 (**Exhibit M-75**). In paras. 129-133 of his report, Professor Avtonomov claims that the deletion of the word "*ratified*" from Article 15(4) was more related to improving the clarity of the text and not to the legal force of treaties. The discussion above shows that Professor Avtonomov's arguments are implausible. The determination of the legal force of treaties in the newly established Russian constitutional system was central to the debates on the use the word "*ratified*" in what is today Article 15(4).

III. THE CONSTITUTIONAL COURT HAS EXPRESSLY AND REPEATEDLY HELD THAT PROVISIONALLY APPLIED INTERNATIONAL TREATIES OVERRIDE INCONSISTENT FEDERAL LAWS

72 Professor Avtonomov attacks the case law of the Constitutional Court addressed in my First Report on two grounds. First, he argues that the Constitutional Court has not ruled that provisionally applied international treaties override inconsistent federal laws, as "*the Constitutional Court has never been squarely presented with this question*".[101] Second, Professor Avtonomov contends that the judgments of some of these cases of the Constitutional Court on the status of provisionally applied international treaties are not determinative and binding.[102]

73 At the outset, I note that Professor Avtonomov and I agree on the content of the Constitutional Court judgments addressed in my First Report. There also seems to be no disagreement between us as to whether these are indeed all the relevant Constitutional Court cases that address the effect of provisionally applied international treaties in the Russian legal system. Therefore, the two points of disagreement with respect to the Constitutional Court's case law concern the position of the Constitutional Court on provisionally applied international treaties in the Russian legal system, and the nature and legal force of the Constitutional Court's holdings in this respect. As I will demonstrate in **section III.A** below, the cases that I referred to in my First Report – and which I discuss below again – unequivocally hold that provisionally applied international treaties fall within the ambit of both sentences of Article 15(4) of the Constitution and prevail over inconsistent federal laws. In **section III.B**, I will explain that the Constitutional Court's judgments (and the authoritative interpretations of the Constitution that they contain) are binding in their entirety, such that there is no room artificially to limit the reach of any of the Constitutional Court's relevant holdings.

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101 Avtonomov Report, paras. 134 and 145.

102 Avtonomov Report, paras. 142 and 146.

A. The Constitutional Court held that provisionally applied international treaties fall within the ambit of Article 15(4) of the Constitution and prevail over inconsistent statutes

74 As I explained in my First Report, the legal effect of provisionally applied international treaties has been considered by the Constitutional Court on several occasions. The Court has consistently held that provisionally applied international treaties, by virtue of Article 15(4) of the Constitution, have direct effect in the Russian legal system and will override inconsistent laws adopted by Parliament. Below I will shortly recapitulate the relevant Constitutional Court cases, for a more elaborate review including case content I refer to my First Report. [103]

75 In Resolution No. 8-P of 27 March 2012, the Constitutional Court held that it follows from Article 15(4) of the Constitution that provisionally applicable international treaties are, in terms of their legal consequences, "*essentially equivalent*" to ratified treaties that have entered into force. For this reason, the Constitutional Court found that, like ratified treaties that have entered into force, provisionally applicable international treaties must be published:

> "[T]*he public authorities and officials in the Russian Federation consistently pursue a juridical policy whereby the rules of a provisionally applied international treaty become a part of the Russian Federation legal system and, just like the international treaties of the Russian Federation that have entered into force, have priority over Russian laws*. [...]
>
> *From the point of view of the requirements of Article 15 (part 4) of the Constitution of the Russian Federation, which is interrelated with Articles 2, 17 (part 1), and 19 (part 1) of the Constitution, provisionally applied international treaties of the Russian Federation, in terms of their legal consequences and their effect on individual and civil rights, liberties, and duties in the Russian Federation, are essentially equivalent to those international treaties that have entered into force and have been ratified and duly published officially in the manner provided for by federal laws. Therefore, any provisionally applied international treaties should be officially*

103 First Report, paras. 193 et seq.

> *published (promulgated) just like those international treaties that have entered into force.*"[104] [emphasis added]

76 It is clear from the above that, contrary to what Professor Avtonomov argues,[105] the Constitutional Court addressed the legal force and effect of provisionally applicable international treaties under the Constitution and found that it was equal to that of ratified international treaties. The Constitutional Court also resolved the case on the basis of the legal force and effect of provisionally applicable international treaties. In particular, the Court concluded that the publication of provisionally applicable international treaties is mandatory on the basis of two principles, namely (i) ratified international treaties are published because they affect individual rights and duties, and (ii) provisionally applicable international treaties have equal legal effects as ratified treaties.

77 Professor Avtonomov criticizes me for not dealing with paragraph 4 of Resolution No. 8-P of 27 March 2012,[106] in which the Constitutional Court explains that the parties to an international treaty can precondition its provisional application:

> "*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.*"[107]

78 I do not dispute that the parties to an international treaty can precondition its provisional application. Neither could it be inferred from any of my arguments that that would be unconstitutional. However, the issue of preconditioning provisional application is simply not relevant to the present discussion. Pursuant to Resolution No. 8-P, it is not unconstitutional, based on Article 15(4) of the Constitution, for the

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104 Constitutional Court Resolution No. 8-P of 27 March 2012, para. 4.1 (**Exhibit M-79**).

105 Avtonomov Report, paras. 141-143.

106 Avtonomov Report, paras. 136-137.

107 Constitutional Court Resolution No. 8-P of 27 March 2012, para. 4 (**Exhibit M-79**).

President and the Government to agree to the provisional application of international treaties that override inconsistent federal laws.

79 The Constitutional Court has confirmed its position on provisional application in Resolution No. 6-P of 19 March 2014, in which it reviewed the constitutionality of all aspects of the Crimea Treaty, including the process of its conclusion, its substance and its compliance with the constitutional principle of the separation of powers.

80 Notably, the Constitutional Court considered the matter of the Crimea Treaty's provisional application before its ratification:

> "*As follows from Article 10 of the Treaty in question, the Treaty shall be applied provisionally from the date of signing and shall enter into force from the date of ratification. Thus, the admission of the Republic of Crimea to the Russian Federation is in effect provided for as an element of application of the Treaty in question prior to its ratification, with the latter serving as a condition for enactment of international treaties in accordance with the law of international treaties.*"[108]

81 The Constitutional Court stated that the possibility of provisional application was provided by Article 25(1) of the Vienna Convention on the Law of the Treaties and Article 23 of the Federal Law on International Treaties, and this permissibility had been "*confirmed by* [...] *Resolution No. 8–P*"[109]. Professor Avtonomov also regards this case as the affirmation of the Constitutional Court's practice that regards provisional application constitutional.[110]

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108 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 3 (**Exhibit M-85**).

109 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 3 (**Exhibit M-85**): "*At the same time, the possibility of application of an international treaty prior to its entry into force, if so provided for by the treaty or if the signatory parties have agreed to do so, arises from paragraph 1 of Article 25 of the Vienna Convention on the Law of Treaties of 23 May 1969, to which the Russian Federation is a party, with the said paragraph being essentially reproduced in Article 23 of Federal Law No. 101–FZ of 15 July 1995, "On the International Treaties of the Russian Federation." The admissibility of this statutory concept* [provisional application] *has been confirmed by the Constitutional Court of the Russian Federation in its Resolution No. 8–P of 27 March 2012* […]."

110 Avtonomov Report, para. 144(d).

82 As the Constitutional Court noted, the decision to apply an international treaty provisionally is an entirely legitimate and fully constitutional form of the expression of political will:

> "*The reference made in Article 1 of the Treaty in question to the fact that the Republic of Crimea is deemed to have been admitted to the Russian Federation as of the date of its signing is effectively of the nature of a fundamental expression of political will purporting to employ in future the execution procedure for admitting to the Russian Federation, and creating on the basis of the territory of the Russian Federation, new subjects of the Russian Federation, i.e., the Republic of Crimea and the Federal City of* [City of Federal Significance] *Sevastopol.*"[111]

83 Based on these holdings, the Constitutional Court came to the conclusion that the provisional application of an international treaty does not violate the Constitution:

> "*Consequently, the Treaty in question cannot be regarded as violating the Constitution of the Russian Federation insofar as it provides for the procedure for signing, conclusion, and enactment.*"[112]

84 As explained in my First Report,[113] the Crimea Treaty changed the territory of the Russian Federation by incorporating the Republic of Crimea and designating Sevastopol a City of Federal Significance within the Russian Federation. Therefore, the Constitutional Court, once again, held that provisional application of an international treaty that established rules other than those in existing laws (in the case of the Crimea Treaty, at least with respect to the territory and borders of the Russian Federation), was constitutional.

85 Similarly, in Decision No. 1820-O of 18 September 2014, the Constitutional Court, when faced with a provisionally applied international treaty that conflicted with existing federal laws, re-

111 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 3 (**Exhibit M-85**).

112 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 3 (**Exhibit M-85**).

113 First Report, paras. 220-227.

affirmed that provisionally applied international treaties override inconsistent laws enacted by Parliament:

> "*As a result, as from 6 July 2010, legal entities by virtue of Article 15 (part 4) of the Constitution of the Russian Federation, whereby if an international treaty of the Russian Federation establishes rules other than those provided for by law, then the rules of the international treaty shall apply, were denied the opportunity to use, for the purpose of international carriage of goods, passengers, and baggage between Kaliningrad Oblast and the Republics of Belarus and Kazakhstan as members of the Customs Union, the means of transportation placed under a free-customs-zone customs procedure in the Special Economic Zone in Kaliningrad Oblast without completing such customs procedure.*"[114]

86 Professor Avtonomov seeks to distinguish this case on the basis that the provisionally applied international treaty at issue in Decision No. 1820-O had, in fact, been ratified. This is simply untrue. Professor Avtonomov refers to Federal Law 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 April 2011.[115] However, the treaty at issue in Decision 1820-O was a completely different one, namely the "*Agreement on Issues Related to Free (Special) Economic Zones within the Customs Territory of the Customs Union and the Customs Procedure of Free Customs Zone*".[116] According to the publicly available information, this agreement is still being provisionally applied and has not been ratified.[117]

87 In Constitutional Court Decisions No. 476-O and 477-O of 3 April 2012, in which state authorities applied rules of a provisionally applied international treaty that was inconsistent with federal laws, the Constitutional Court confirmed Resolution No. 8-P, which has resolved the constitutionality of this issue.[118]

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114 Constitutional Court Decision No. 1820-O of 18 September 2014, para. 2.1 (**Exhibit M-82**).

115 Avtonomov Report, para. 144.

116 Free Economic Zones Agreement (**Exhibit M-84**).

117 See a print out from the website of the Ministry of Foreign Affairs (**Exhibit M-130**).

118 Constitutional Court Decision No. 476-O of 3 April 2012, para. 3 (**Exhibit M-92**); Constitutional Court Decision No. 477-O of 3 April 2012, para. 3 (**Exhibit M-93**).

B. Constitutional Court's judgments are final and binding in their entirety

88 As I explained in my First Report,[119] every judgment of the Constitutional Court, including both the motivational and the operative parts,[120] is binding on all state bodies. The Constitutional Court's authority to interpret the Constitution is exclusive and its interpretations are binding for all other state bodies. Professor Avtonomov does not dispute this analysis.[121]

89 However, Professor Avtonomov asserts that "*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*".[122] This leads Professor Avtonomov to posit that if the Constitutional Court had not been presented with the question of inconsistency of a provisionally applied international treaty with a federal law, but nevertheless considered it in the motivational part of its judgment, then its views on this question would not be binding.[123] This contention of Professor Avtonomov is unsubstantiated and disproven by the Constitutional Court's jurisprudence and Russian constitutional scholars.

90 Professor Avtonomov cites no authority in support of his propositions and simply points to Articles 74, 96, and 97 of the 1994 FCL CC. However, these provisions do not address the binding nature of judgments of the Constitutional Court.[124]

91 Instead, the binding force and immediate effect of the Constitutional Court's judgments follow from Articles 6, 79, and 106 of the 1994 FCL

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119 First Report, paras. 109-122.

120 Resolutions and Decisions taken together are referred to as "*judgments*".

121 Avtonomov Report, para. 24.

122 Avtonomov Report, para. 142.

123 Avtonomov Report, paras. 142 and 144.

124 Avtonomov Report, para. 142.

CC.[125] Article 6 of the 1994 FCL CC states that judgments of the Constitutional Court bind all bodies of state power:

> "*Judgments of the Constitutional Court of the Russian Federation shall be obligatory throughout the Russian Federation for all representative, executive and judicial bodies of state power, bodies of local self-government, enterprises, institutions, organizations, officials, citizens and their associations.*"[126]

92 Article 79 of the 1994 FCL CC states that all judgments of the Constitutional Court have immediate legal effect, without the need for confirmation or further acts of implementation:

> "*The judgment of the Constitutional Court of the Russian Federation shall be final and may not be appealed.* […] *The judgment of the Constitutional Court of the Russian Federation shall have direct effect and require no affirmation by other bodies and officials.*"[127]

93 Article 106 of the 1994 FCL CC makes clear that the Constitutional Court's interpretation is equally binding on all bodies of state power:

> "*The interpretation of the Constitution of the Russian Federation delivered by the Constitutional Court of the Russian Federation shall be official and binding for all representative, executive and judicial bodies of state power, bodies of local self-government, enterprises, agencies, organizations, officials, citizens and their associations.*"[128]

94 The Constitutional Court itself has confirmed that its judgments are final and binding. They are a primary source of law for all other state bodies that have an effect akin to normative acts.[129]

95 The Constitutional Court further held that its judgements are binding in their entirety, including both the motivational and the operative parts:

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125 1994 FCL CC (**Exhibit M-105**).

126 Article 6 of 1994 FCL CC (**Exhibit M-105**).

127 Article 79 of 1994 FCL CC (**Exhibit M-105**).

128 Article 106 of 1994 FCL CC (**Exhibit M-105**).

129 First Report, paras. 100-108. See also Constitutional Court Decision No. 88-O of 7 October 1997, para. 4 (**Exhibit M-45**), Constitutional Court Resolution No. 19-P of 16 June 1998, paras. 2 and 4 (**Exhibit M-53**) and Constitutional Court Resolution No. 4-P of 14 February 2002, para. 6 (**Exhibit M-54**).

> "*The provisions of the motivation part of a resolution of the Constitutional Court of the Russian Federation that contain interpretations of constitutional rules or reveal the constitutional meaning of a law, on which the Constitutional Court of the Russian Federation bases its conclusion contained in the operative part of this resolution, reflect the legal position of the Constitutional Court of the Russian Federation and are also binding.*"[130]

96 Russian legal scholars confirm that Constitutional Court judgments, including both the motivational and the operative parts, have binding force.[131] Notably, Dr Lazarev explains why the entire judgment of the Constitutional Court, and not just the operative part, has binding force by reference to Article 6 of the 1994 FCL CC:

> "*We are basing this definition of legal positions of the Constitutional Court as normative interpretative rulings on the fact that they are the result of judicial constitutional interpretation and the legal basis for the final judgment of the Constitutional Court, and that they are of a general and binding nature. They express the Constitutional Court's legal understanding of constitutional principles, norms, recognized principles and standards of international law, and in this context, the due constitutional content of the disputed legal provision. The normative nature of the legal positions is seen in their being official statements of a general and mandatory nature. The peremptory nature of the legal positions is predetermined by the fact that according to art. 6 of the Law on the Constitutional Court, not only the operative part of the Constitutional Court judgment but the judgment as a whole is universally binding. It is the fixing of legal positions as normative interpretative statements in Constitutional Court judgments along with normative precepts of the operative part that gives these judgments the nature, not of an individual, law-enforcement act, but of a normative interpretative act.*"[132] [emphasis added]

97 Professor Tumanov, the former Chief Justice of the Constitutional Court, in the preface to collection of 1992-1996 resolutions and decisions of the Constitutional Court published in 1997, notes that judgments of the

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130 Constitutional Court Decision No. 118-O of 8 October 1998, para. 2 (**Exhibit M-131**).

131 A.A. Malushin, *Law-making by Constitutional Courts in a Rule of Law State* (Norma, 2006) (retrieved from ConsultantPlus), pp. 7-8 (**Exhibit M-132**), p. 7; V.A. Cherepanov, 'On the direct effect of the Constitution and the Constitutional Court's decisions: problematic issues and the ways to solve them', (2017) 11 *Journal of Russian Law* (retrieved from ConsultantPlus), pp. 7-8 (**Exhibit M-133**), p. 7.

132 L.V. Lazarev, *Legal Interpretations of the Constitutional Court of Russia* (Moscow, 2003), p. 44 (**Exhibit M-134**).

Constitutional Court change the law and must be regarded as having "*the character of a precedent that has a prescriptive rule or directive, which in the future must be followed by the law-making or other bodies*".[133] As current Chief Justice Zorkin explains, judgments of the Constitutional Court do not only have binding force in the particular case they are deciding on, but also in all similar cases. They acquire precedential value and become sources of law:

> "*Some important features of Constitutional Court judgments bring them close to being precedents. Thus, its judgments extend not only to the particular case in question but also to all similar cases and have an official nature that makes execution of them obligatory throughout the whole territory of the country. Since the Constitutional Court possesses an independent law-making function, it should be recognized that its judgments take on the character of precedent and become sources of law.*"[134] [emphasis added]

98 Chief Justice Zorkin further explains that all interpretations by the Constitutional Court with respect to the Constitution have constitutional force:

> "*Constitutional Court judgments and the legal positions they contain have a special place in the overall system of sources of Russian law. Final judgments of the Constitutional Court are linked to interpretation of the Constitution, which can be special (in a special procedure for interpreting certain provision of the Constitution) or casual (incidental) – in all other cases decided by the Constitutional Court, including verification of the constitutionality of laws. The legal force of final judgments of the Constitutional Court exceeds the legal force of any law, and is therefore practically equal to the legal force of the Constitution itself, which cannot now be applied apart from the final judgments of the Constitutional Court that apply to the corresponding norms, and even less so against those decisions. It is appropriate to recall here the comment of the American judge that "the Constitution is what the judges say it is". Hence, any interpretation of the supreme law of the land that is issued by the*

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133 V. A. Tumanov, *Constitutional Court of the Russian Federation: Resolutions, Decisions, 1992-1996* (Moscow, 1997), preface, p. 5 (**Exhibit M-135**).

134 V.D. Zorkin, 'Precedent-setting Nature of Judgments of the Constitutional Court of the RF', (2004), 12 *Journal of Russian Law* (retrieved from ConsultantPlus) (**Exhibit M-136**), p. 2.

> *Constitutional Court in its legal positions has constitutional force*."[135] [emphasis added]

99 Therefore, the Constitutional Court has explicitly and repeatedly held that provisional application of international treaties of the Russian Federation is constitutional, and that provisionally applied international treaties can and in fact do override inconsistent federal laws. The Russian legal system leaves no doubt as to the binding nature of the Constitutional Court judgments in their entirety. The Constitutional Court's judgments are authoritative on the meaning and application of the Constitution, have precedential force and bind every state body.

IV. COMMENTARY AND DOCTRINE ACKNOWLEDGE THAT ARTICLE 15(4) OF THE CONSTITUTION DOES NOT EXCLUDE PROVISIONALLY APPLIED INTERNATIONAL TREATIES THAT OVERRIDE INCONSISTENT FEDERAL LAWS

100 Russian legal doctrine expressly confirms that Article 15(4) of the Constitution does not exclude from its ambit provisionally applied international treaties that override inconsistent federal laws. Professor Avtonomov cannot point to any authority to the contrary.

101 According to Professor Danilenko, international treaties that have not been ratified by Parliament form part of the Russian legal system and can override inconsistent laws adopted by Parliament:

> "*The final draft used the words "international treaties of the Russian Federation" instead of "international treaties ratified by the Russian Federation," as in the commission's draft. This change might be construed as enhancing the role of the President in the treaty-making process. Indeed, the new language suggests that even treaties that have not been approved by parliament might be considered part of the Russian domestic legal system (and overrule contrary provisions of internal legislation).*"[136]

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135 V. D. Zorkin, 'Precedent-setting Nature of Judgments of the Constitutional Court of the RF', (2004), 12 *Journal of Russian Law* (retrieved from ConsultantPlus) (**Exhibit M-136**), p. 3.

136 G. M. Danilenko, 'The New Russian Constitution and International Law', (1994) 88(3) *American Journal of International Law*, pp. 451-470, at pp. 464-465 (**Exhibit M-75**).

102 As Professor Dmitriev puts it, the Constitution does not distinguish between ratified and unratified treaties, and does not precondition the supremacy of international treaties over federal laws upon ratification:

> "[T]*his Constitutional provision does not make a distinction between different types of international treaties and does not impose a condition of ratification for their priority over national laws.*"[137]

103 This is further confirmed by Irina Vorontzova, who expressly states that Article 15(4) of the Constitution does not speak exclusively about ratified international treaties of the Russian Federation, and limiting Article 15(4) of the Constitution to ratified treaties would be a mistake.[138]

V. PROFESSOR AVTONOMOV'S CONTRARY CONCLUSIONS REST ON A SERIES OF UNTENABLE SUPPOSITIONS

A. Professor Avtonomov wrongly equates decrees and normative acts with international treaties

104 Referencing Articles 15(2), 90(3) and 115(1) of the Constitution, Professor Avtonomov asserts that the President and the Government cannot agree to (the provisional application of) international treaties that are inconsistent with federal laws.[139]

105 However, Professor Avtonomov ignores that these provisions deal exclusively with the role and powers of the President and the Government in domestic law-making. Consequently, Professor Avtonomov makes a fatal mistake, for which he can offer no support in the Constitution or in the case law of the Constitutional Court, by equating decrees and normative acts that the President and the Government enact in the process of domestic law-making (pursuant to

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137 Yu. A. Dmitriev, *Constitution of the Russian Federation. Doctrinal commentary* (2nd edition, Statute, 2013) (retrieved from ConsultantPlus), pp. 37-39 (**Exhibit M-137**), p. 38.

138 I. V. Vorontzova, 'International treaty as a source of Russian civil procedural law', (2012) 1 *Issues of Russian and International Law*, pp. 79-97 (**Exhibit M-138**), p. 84: "*The study manual edited by L.V. Tumanova contains wrong information. Thus, pursuant to Article 15(4) of the Constitution, the manual states that recognized principles and norms of international law and ratified international treaties of the Russian Federation form an integral part of its legal system. However, Article 15(4) of the Constitution does not speak of ratification.*"

139 Avtonomov Report, paras. 26, 54, and 86.

their specifically limited powers in that respect) with international treaties that the President and the Government may enter into on behalf of the Russian Federation (in exercise of their broad foreign policy and treaty-making powers).[140]

106 By their plain terms, Articles 90(3) and 115(1) of the Constitution are only concerned with what the President and the Government can and cannot do in domestic law-making. In so far as Professor Avtonomov relies on these provisions, he cannot validly derive from them any conclusions about the nature, scope and extent of the President's and Government's powers with respect to foreign policy and the negotiation and conclusion of international treaties. As I have explained in my First Report[141] and in **section II** of this Part, the President and the Government enjoy broad powers in the area of foreign policy in general and treaty-making in particular, which are not subject to any limitations that may be relevant in the domestic arena pursuant to Articles 90(3) and 115(1) of the Constitution.

107 In particular, Articles 90(3) and 115(1) and (3) of the Constitution specifically and expressly stipulate that the normative acts adopted by the President and the Government in the exercise of their domestic law-making powers must not conflict with, and thus cannot supersede, federal laws:

> **Article 90(3)**
>
> "*Decrees and orders of the President of the Russian Federation must not conflict with the Constitution of the Russian Federation and federal laws.*"
>
> **Article 115**
>
> "*(1) On the basis of the Constitution of the Russian Federation, the federal laws and normative decrees of the President of the Russian Federation and for the sake of their implementation the Government of the Russian Federation shall issue resolutions and orders and ensure their implementation.*

140 Avtonomov Report, paras. 38-40.

141 First Report, paras. 127-145.

> […]
>
> *(3) In the event that resolutions and orders of the Government of the Russian Federation conflict with the Constitution of the Russian Federation, federal laws and decrees of the President of the Russian Federation, they may be abolished by the President of the Russian Federation*." [emphasis added][142]

108 By contrast, the foreign policy and treaty-making powers of the President and the Government under Articles 80(3), 86 and 114(e) of the Constitution – which Professor Avtonomov simply ignores – are not limited in such a way. Likewise, whilst Articles 90(3) and 115(1) and (3) of the Constitution resolve a potential conflict between the President's or the Government's acts and a federal law in favor of the latter, Article 15(4) of the Constitution (on a plain reading and as interpreted and applied by the Constitutional Court) gives primacy to an international treaty of the Russian Federation (including a provisionally applied international treaty) if and to the extent that it conflicts with a federal law.

109 Even in domestic law-making, as explained in my First Report, the President may legislate by issuing a decree or an order whenever there are "*discrepancies*" or "*gaps, contradictions and outdated provisions*" in federal law.[143] The constitutionality of such Presidential power has been confirmed on numerous occasions by the Constitutional Court.[144] As the

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142 Articles 90(3) and 115(1) and (3) of the Constitution (**Exhibit M-94**).

143 See First Report, para. 37. See also Constitutional Court Resolution No. 9- P of 25 June 2001, para. 5 (**Exhibit M-13**): "*Within the meaning of Article 80.2 and 90.1 and 90.3, taken together with Articles 4.2, 7.2, 10, 11.1, 15.1, 15.2, 39, 45.1, 71(c and g), 72.1(g), 76.1, 76.2, 77.2, 78.1, 82.1, 110, 114.1 ("c", "d", and "f") and 115 of the Constitution of the Russian Federation, in this case where the subject of regulation is authority related in essence to the functioning of the executive branch and its bodies, and there are discrepancies throughout the body of law governing state pension funding – and in a situation where legislators have long failed to make the necessary corrections to the affected laws – the President of the Russian Federation, in exercise of his constitutionally delegated powers to ensure coordinated effort and cooperation among bodies of state power, and in fulfilment of his duty to safeguard human rights and civil freedoms, was in his right to legislate by issuing a decree, given that the decree would expire when relevant legislation entered into force.*"

144 See Constitutional Court Resolution No. 11-P of 30 April 1996, para. 4 (**Exhibit M-12**); Constitutional Court Resolution No. 9-P of 25 June 2001 (**Exhibit M-13**).

Constitutional Court explained, the President's power to "legislate" by issuing a decree follows directly from the Constitution.[145]

110 Similarly, Professor Avtonomov's contorted reading of Article 15(2) of the Constitution is unsustainable. Plainly, the constitutional duty of all bodies of state power to "*observe*" federal laws under Article 15(2) of the Constitution[146] cannot mean (and does not mean) that the bodies of state power may not exercise their specific constitutional powers in such a way as to modify, supplement or vary federal laws.

111 Were it otherwise, it would be contrary to Article 15(2) of the Constitution for Parliament – which is a body of state power and thus obliged to "*observe*" federal laws – to repeal a federal law or to enact a federal law that amends a previous federal law. Professor Avtonomov will undoubtedly confirm that he is not advancing such a preposterous position and point to the powers of Parliament (specifically Articles 105 and 106 of the Constitution) to adopt federal laws.

112 The same logic applies to the President's and the Government's foreign policy and treaty-making powers under Articles 80(3), 86 and 114(e) of the Constitution, which – as I have explained above[147] – do not contain an express or implied condition that any international treaty that the President and the Government enter on behalf of the Russian Federation

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145 Constitutional Court Resolution No. 10-P of 31 July 1995 (**Exhibit M-139**), paras. 4 and 6: "*The Constitution of the Russian Federation also holds that the President of the Russian Federation shall act in the order prescribed under the Constitution. In cases where this order is not stated in detail, and in regard to powers not enumerated under Articles 83 - 89 of the Constitution of the Russian Federation, the general scope of powers resides in the principle of the separation of power (article 10 of the Constitution) and the provisions of Article 90.3 of the Constitution, which state that decrees and orders of the President of the Russian Federation must not contravene the Constitution and laws of the Russian Federation. […] In the course of the examination of the case, the sides repeatedly pointed to gaps, contradictions and outdated provisions in the legislation on ensuring the country's defence and security. […] Such a state of legislation considerably increases the importance of direct application of constitutional norms. The point of view of the Council of the Federation representatives, according to which the Russian President's powers can only be realised if there is a respective law, is tantamount to a renunciation of the principle of direct effect of the Constitution, sealed by Article 15 Part I of the Constitution of the Russian Federation.*"

146 Article 15(2) of the Constitution (**Exhibit M-94**).

147 See para. 108.

in the exercise of their constitutional powers in this respect must not conflict with federal laws.

113 Accordingly, if the President and the Government sign a provisionally applicable international treaty of the Russian Federation that conflicts with a federal law pursuant to their constitutional power, that is not unconstitutional or in violation of Article 15(2) of the Constitution, but precisely in line with the constitutional division of power and the primacy over federal laws given to international treaties of the Russian Federation by the Constitution.

114 In fact, if Professor Avtonomov were right, then President Putin would have clearly violated Article 15(2) of the Constitution and acted unconstitutionally by signing the Crimea Treaty and agreeing to its provisional application from the day of its signature (since, as is undisputed, the Crimea Treaty overrode a range of inconsistent federal laws). However, the Constitutional Court in its Resolution No. 6-P of 19 March 2014 specifically confirmed the constitutionality of the Crimea Treaty including its provisional application to the effect that the Crimea Treaty took precedence over Russian federal law from the moment of its signature. Indeed, Professor Avtonomov properly accepts that the Crimea Treaty and President Putin's signature of it were constitutional.[148] In the premises, there is no room for Professor Avotnomov's misconceived theory that the agreement by the President and the Government to the provisional application of an international treaty that contradicts federal laws is somehow unconstitutional.

B. Miscellaneous public statements do not convey the official position of the State Duma, and in any case do not deal with the legal force and effect of provisionally applied international treaties

115 Professor Avtonomov attempts to base his argument on the status of provisionally applied international treaties on miscellaneous statements and comments made by various individuals in a session of a committee

148 Avtonomov Report, para. 144(d).

of the State Duma and a plenary session of the State Duma.[149] The statements that Professor Avtonomov invokes do not convey the official position of the State Duma and in any case do not deal with the effect of provisional application of international treaties.[150]

116 The only public statement that carries any authoritative value is the formal position of the State Duma addressing the legal force and effect of provisionally applied international treaties in the Russian legal system. It was made by Dr Vyatkin – the representative of the State Duma before the Constitutional Court[151] – in his submissions on the State Duma's official position to Constitutional Court in the proceedings that led to Resolution No. 8-P:

> "*The Vienna Convention on the Law of Treaties does not treat differently performance of a provisionally applicable treaty and a treaty which entered into force. In case of a discrepancy between a federal law and a provisionally applicable treaty, we nevertheless consider that the treaty shall apply, as the meaning of provisional application is, precisely, to apply the treaty immediately*."[152] [emphasis added]

149 Avtonomov Report, paras. 62, 87, 108, 115-119 and 128. 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); State Duma Hearing Transcript "on Draft Federal Statute 'on International Treaties of the Russian Federation'" dated 27 May 1994 (ASA-019).

150 Deputy Minister Krylov addressed which international treaties are subject to ratification and mentioned that parliamentary monitoring would be required for provisionally applied treaties (identical statements of Deputy Minister Krylov are referred to in Avtonomov Report, paras. 62, 87 and 128), Professors Osminin and Khodakov in the quoted statements did not comment on provisional application (statements of Professors Osminin and Khodakov are referred to in Avtonomov Report, paras. 115-119).

151 See para. 29.

152 Statement of the State Duma of the Parliament of the Russian Federation, Hearing before the Constitutional Court of the Russian Federation of the Case upon Review of Constitutionality of Article 23(1) of the Federal Law "*On International Treaties of the Russian Federation*", 13 March 2012, minutes 14:10-21:16. A transcript is provided as (**Exhibit M-78**).

C. The other authorities relied upon by Professor Avtonomov are not authoritative and do not deal with provisionally applied international treaties

a. The Plenum Resolutions and one cassation ruling

117 As explained in my First Report,[153] the Plenum Resolutions are of no relevance to understanding the position of provisionally applied international treaties since they do not deal with this issue. The Plenum Resolutions concern treaties that have permanently entered into force through ratification. This limited scope of application of the Plenum Resolutions was confirmed by the Constitutional Court.[154]

118 Similarly, the Supreme Court's Cassation Ruling No. 59-O09-35 does not deal with a provisionally applied international treaty and is therefore equally inapposite.[155] Further, Cassation Ruling No. 59-O09-35 concerned an international treaty in the field of criminal law, which is subject to specific rules in the Criminal Code of the Russian Federation.

119 Even if Professor Avtonomov's interpretation of the Plenum Resolutions and Cassation Ruling No. 59-O09-35 were accurate (which it is not), these authorities can offer no biding guidance on interpreting Article 15(4) of the Constitution. As I have explained in my First Report,[156] as a matter of Russian law, the Plenum Resolutions and one cassation ruling of the Supreme Court do not offer a binding interpretation of the Constitution and cannot undermine or detract from the binding interpretation of the Constitution as expounded by the Constitutional Court in its judgments (since the Constitutional Court has the exclusive constitutional

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153 First Report, paras. 112-115, 230-232.

154 Constitutional Court Resolution No. 1344-O-R of 19 November 2009 (**Exhibit M-140**): "*Thus resolutions of the Plenum of the Supreme Court of the Russian Federation of 31 October 1995 No. 8 and of 10 October 2003 No. 5 guided the courts in the application of international treaties that have entered into force but did not touch upon the legal situation which occurs after signing of an international treaty with the condition of its further ratification.*"

155 Cassation Ruling No. 59-O09-35 of 29 December 2009 of Supreme Court (ASA-063).

156 First Report, paras. 112-117.

prerogative of interpreting the Constitution in a binding fashion for all other bodies of state power).[157]

b. Intergovernmental and interagency agreements

120 The intergovernmental and interagency agreements that were concluded between Russian federal governmental entities (namely the Ministry of the Interior and the Federal Service for Environmental, Technological, and Nuclear Supervision respectively) and Polish and Cambodian governmental entities[158] are irrelevant, as is Professor Talalaev's article in the Moscow Journal of International Law on the legal position of intergovernmental and interagency treaties.[159]

121 Professor Avtonomov and I agree that the ECT is an international treaty of the Russian Federation, and not an intergovernmental or interagency agreement.

122 Accordingly, whatever the position may be with respect to intergovernmental and interagency agreements, it has no bearing on the legal force and effect of a provisionally applied international treaty of the Russian Federation (such as the ECT).

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157 See also S. A. Tatarinov, 'On the Issue of Legal Force of Resolutions of the Constitutional Court of the RF and Acts of the Courts of General and Arbitrazh Jurisdiction', (2015) 401 *Newsletter of the Tomsk State University*, pp. 244-248 (**Exhibit M-141**), p. 246.

158 Cooperation Agreement between the Ministry of the Interior of the Russian Federation and the Ministry of the Interior of the Kingdom of Cambodia of 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 of 10 November 2011 (ASA-073).

159 A.N. Talalaev, 'Correlation of International and National Law and the Constitution of the Russian Federation', (1994) 4 *Moscow Journal Of International Law* (ASA-015).

PART III — PROFESSOR AVTONOMOV'S RELIANCE ON 'PUBLIC DISCOURSE' IN THE STATE DUMA

I. INTRODUCTION

123 In my First Report, I was not instructed to opine on (and did not opine on) whether there were any inconsistencies between the ECT and specific federal laws.[160] I have also not been instructed to do so in this Report.

124 Nevertheless, I will discuss briefly the miscellaneous statements made by a number of Russian individuals in two parliamentary hearings of committees of the State Duma held in June 1997 and January 2001, which Professor Avtonomov refers to in his Report in an attempt to support his general view that there were some inconsistencies between the ECT and certain federal laws that were not "*eliminated*" by the ECT's provisional application.[161]

II. THE STATEMENTS MADE DURING PARLIAMENTARY HEARINGS HAVE NO LEGAL EFFECT

125 Parliamentary hearings are general discussion sessions organized by committees of the State Duma and are held on issues of interest to them. They are distinct from plenary sessions of the State Duma where federal (constitutional) laws are debated and adopted. Committees of the State Duma organize parliamentary hearings outside of formal plenary sessions of the State Duma. The parliamentary hearings of 1997 and 2001 that Professor Avtonomov refers to were organized respectively by the "Economic Policy Committee" and the "Energy, Transport and Communications Committee" for discussion purposes. As it is clear, no

160 First Report, paras. 8-9.

161 Avtonomov Report, paras. 14, 94-98. 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); State Duma Transcript of the Parliamentary Hearings "*On the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)*" dated 26 January 2001 (ASA-044).

plenary session of the State Duma on the ECT has ever been held and even Professor Avtonomov does not claim otherwise.

126 The conduct of parliamentary hearings is regulated by the Rules of Procedure of the State Duma ("**Rules of the State Duma**").[162] In particular, it follows from the Rules of the State Duma that parliamentary hearings do not form part of State Duma's plenary sessions and are the same as "*round tables and seminars*".[163] Not only members of the State Duma, but also invited members of the public can participate and make statements during parliamentary hearings.[164] For example, during the parliamentary hearings on the ECT referred to by Professor Avtonomov a range of representatives of academia, the business world, the energy industry and ministries made statements.[165]

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162 Rules of the State Duma adopted by the Resolution of the State Duma of the Parliament No. 80-1 GD of March 25, 1994 were in force from 6 July 1994 until 24 February 1998. Rules of the State Duma that are currently in force (**Exhibit M-142**) were adopted by the Resolution of the State Duma of the Parliament No. 2134-II GD of 22 January 1998 and entered into force on 25 February 1998.

163 Article 26(5) of the Rules of the State Duma (**Exhibit M-142**): "*To ascertain the actual situation and public opinion on matters of legislative drafting and other matters under the control of committees and commissions, the committees and commissions may conduct parliamentary hearings, conferences, meetings, round tables and seminars, and participate in their work.*"

This was also the understanding of participants of the parliamentary hearings, for example Mr Puzanovskyi mentioned: "*I think that the recommendations of the hearings may well be revised further, but the main conclusion is as follows. These documents concern fundamental, national interests, and thus serious further profound work on them is required.*" (State Duma Economic Policy Committee Transcript of the Parliamentary Hearing of 17 June 1997, pp. 104-105). As for Mr Burkov, who represented the Audit Chamber, he explicitly acknowledged that "*the Audit Chamber has not yet worked out its own official point of view.*" (State Duma Economic Policy Committee Transcript of the Parliamentary Hearing of 17 June 1997, p. 38).

164 Articles 63(2), 66(2) and 68 of the Rules of the State Duma (**Exhibit M-142**). Article 63(2): "*The composition of persons invited to parliamentary hearings is determined by the committees and commissions of the State Duma organizing these hearings*". Article 66(2): "*The chairperson at parliamentary hearings gives the floor to deputies of the State Duma and invited persons, chairs the discussion, and makes announcements.*" Article 68: "*1. Parliamentary hearings begin with a brief introduction by the chairperson who reports on the essence of the issue under discussion, its significance, the procedure for conducting the session, and who has been invited. The floor is then given for up to 20 minutes to the representative of the committee or commission of the State Duma to give a report on the issue being discussed, after which there are presentations from those participating in the parliamentary hearings, deputies of the State Duma and invited persons. 2. All invited persons only speak at parliamentary hearings with the permission of the chairperson.*"

165 100 people participated in the 1997 parliamentary hearings, and the incomplete transcript provided by Professor Avtonomov contains speeches of 4 of them (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*

127 As Professor Bezrukov points out in his treatise on parliamentary procedures, parliamentary hearings are essentially discussions which serve as a means for the State Duma to receive feedback from the public through an open exchange of views:

> "*Parliamentary hearings, being a form of parliamentary control, are not limited only to control – they are a tool for feedback between Parliament and the public, and serve to clarify and align the positions of their participants.*
>
> *The main purpose of hearings is to devise a mediated, final, agreed solution, which is achieved through the identification and exchange of views, and the alignment of positions.*
>
> *Parliamentary hearings may end with the adoption of recommendations on the issue under discussion. The recommendations of parliamentary hearings are adopted by approval of the majority of participants in the parliamentary hearings.*
>
> *Such hearings, where the topics of discussion are in the spheres of education, science, culture, health, transport, economic policy, and so, actively take place both in the State Duma, and also in the Council of the Federation. Committees and commissions of the chambers of parliament are also involved in the organization and holding of parliamentary hearings held in the other chamber of parliament, which is one of the forms of their interaction.*"[166] [emphasis added]

Aspects" dated 17 June 1997 (State Archive Vol. No. 10100-14-3308, Mar.-June 1997) (ASA-034)). Participants included representatives of the Audit Chamber, Ministry of Economy, Ministry of Atomic Energy, Ministry of Fuel Energy, Ministry of Justice, Ministry of Foreign Economic Connections, State Committee on Ecology, Committee on Geology and Use of Subsoil, heads of mining and processing industries, Energy Charter Secretariat, representatives of scientific and social organizations and establishments (http://duma2.garant.ru/analit/1997/vs97/05-02-04.htm submitted as Print out from the website listing participants of 1997 parliamentary hearings (**Exhibit M-143**))

300 people participated in 2001 parliamentary hearings and 24 of them spoke based on the exhibit submitted by Professor Avtonomov (State Duma Transcript of the Parliamentary Hearings "*On the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)*" dated 26 January 2001 (ASA-044)). Participants included representatives of the Government, Ministry of Foreign Affairs, Ministry of Energy, Ministry of Atomic Energy, Ministry of Economic Development, Ministry of Industry and Science, Ministry of Nature, Ministry for Antimonopoly Policy, State Customs Committee, State Standard Agency, Central Bank, major companies, scientific and social establishments and the press (http://iam.duma.gov.ru/node/1/4170 submitted as Print out from the website listing participants of 2001 parliamentary hearings (**Exhibit M-144**)).

166 A. V. Bezrukov, *Parliamentary Law and Parliamentary Procedures in Russia: Handbook* (Moscow, 2015), p. 79 (**Exhibit M-145**).

128 The Russian legal order has a closed list of sources of law, and "*public discourse*" of an informal nature is not one of them.[167] The statements made by participants during parliamentary hearings are not sources of law. If adopted by a majority of the members of the State Duma present, the feedback gathered during parliamentary hearings can, at most, lead to the adoption of recommendations of the hearings' participants that can be directed to the State Duma, the Government or any other body who in turn are free to proceed as they wish.[168] Notably, Professor Avtonomov did not point to any final recommendations adopted in these parliamentary hearings in support of his proposition.[169]

129 While it should be clear that anything that has been said in or which follows from the parliamentary hearings should not affect the position of the provisionally applied ECT in the Russian legal system, I will still note that, first, none of the statements quoted by Professor Avtonomov addresses the ECT's provisional application, and, second, Professor Avtonomov has provided only a truncated transcript of the 1997 parliamentary hearings and has left out statements made during the 2001 parliamentary hearings that portray a different picture on the application of the ECT.[170] A proper assessment of the debate in the parliamentary hearings shows that the debate did not concern the ECT's

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167 A. S. Pigolkin (ed.), *Theory of State and Law: Handbook for Law Schools* (2003) (retrieved from ConsultantPlus) (**Exhibit M-146**), p. 123; W. Burnham, P. Maggs and G. M. Danilenko, *Law and Legal System of the Russian Federation* (2012), pp. 9-28 (**Exhibit M-147**), p. 10.

168 Article 70 of the Rules of the State Duma (**Exhibit M-142**): "*Parliamentary hearings may end with the adoption of recommendations on the issue under discussion. The recommendations of parliamentary hearings are adopted by approval of the majority of deputies of the State Duma participating in the parliamentary hearings*."

169 The State Duma Transcript of the Parliamentary Hearings "*On the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)*" dated 26 January 2001 (ASA-044) as submitted by Professor Avtonomov includes only draft recommendations of the parliamentary hearings.

170 For example, Mr Ivanov mentioned: "*But any treaty is a balance. We feel that the balance is in Russia's favor. Note that we are actively using the treaty. For example, Articles 12 and 5 of the Agreement "On partnership and cooperation of Russia and EU" provide for a regime that is virtually identical. We used the ECT when we were promoting the "Blue Flow" project. We used the ECT when fighting against Polish obstacles to our meridional pipeline. Besides, as relates to CIS countries, direct references to the ECT were included in the CIS Agreement on the transit of oil products and in the last agreement on settlement of our gas relations with Ukraine.*" (The State Duma Transcript of the Parliamentary Hearings "*On the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)*" dated 26 January 2001 (ASA-044), p. 35) [emphasis added].

provisional application and did not convey any formal (or binding) position of the State Duma or indeed of any other body of state power.

130 The draft recommendations of the parliamentary hearings of 2001 annexed by Professor Avtonomov suggest a very different picture compared to the one being painted by him, noting as they do that "[t]*he provisions of the ECT essentially comply with the provisions of new Russian legislative acts, significantly supplementing and rendering these acts more precise, thereby aligning them with the applicable rules of international law*."[171] Additionally, the "Energy, Transport and Communications Committee" listed a number of positive consequences of the ECT's ratification in its draft recommendations. None of the limited disadvantages mentioned in the draft recommendations relate to the investment protection regime and no mention is made of any problem with investor-state dispute resolution under Article 26 of the ECT. Furthermore, in its recommendations made to the Government and the Duma, the "Energy, Transport and Communications Committee" was far from formulating a legal position on the ECT ratification. Rather, it recommended to the State Duma and the Government to consider certain discreet issues.

131 The informal character of parliamentary hearings which may or may not result in recommendations clearly distinguishes them from the plenary sessions. A plenary session of the State Duma is the formal mode of operation of the State Duma. Federal laws are adopted at the plenary sessions pursuant to Articles 103(3) and 105(2) of the Constitution.[172]

132 As Professor Avtonomov explicitly acknowledges, no plenary session of the State Duma was ever held on the ratification of the ECT or on any other matter in relation to the ECT.[173] Also, after the ECT was signed, the

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171 State Duma Transcript of the Parliamentary Hearings "*On the Ratification of the Energy Charter Treaty (ECT) (Editorial Version)*" dated 26 January 2001 (ASA-044), p. 77-78.

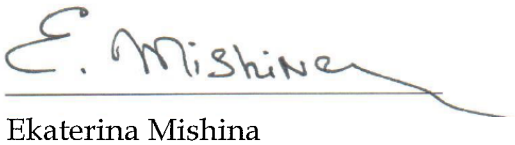
172 Parliamentary hearings may not be scheduled during parliamentary sessions of the State Duma. Article 67(3) of the Rules of the State Duma (**Exhibit M-142**): "*The holding of parliamentary hearings during sessions of the State Duma is prohibited, unless otherwise decided by the State Duma.*"

173 Avtonomov Report, para. 14.

State Duma did not refer the ECT to the Constitutional Court and did not pass any act in relation to the ECT.[174]

133 The State Duma has a right to express its formal position via its permanent plenipotentiary in the Constitutional Court when its acts are being challenged before the court.[175] As discussed above,[176] the State Duma did exactly that when Dr Vyatkin declared on its behalf before the Constitutional Court in the proceedings of Resolution No. 8-P that it was the official view of the State Duma that provisionally applied international treaties override inconsistent federal laws.[177]

Ann Arbor, 19 February 2019



Ekaterina Mishina

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174 See para. 20(c).

175 See Article 53 of the 1994 FCL CC (**Exhibit M-105**).

176 See para. 29.

177 Statement of the State Duma of the Parliament of the Russian Federation, Hearing before the Constitutional Court of the Russian Federation of the Case upon Review of Constitutionality of Article 23(1) of the Federal Law "*On International Treaties of the Russian Federation*", 13 March 2012, minutes 14:10-21:16. A transcript is provided as (**Exhibit M-78**).