Court of Appeal of The Hague

Docket No. 200.179.079

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

6 September 2019

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GLOSSARY

Term	Definition
First Avtonomov Report	Expert Report of Professor Avtonomov dated 6 November 2017
Second Avtonomov Report	Second Expert Report of Professor Avtonomov dated 14 August 2019
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
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 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")
ECT	Energy Charter Treaty

1994 FCL CC	1994 Federal Constitutional Law on the Constitutional Court of the Russian Federation
1997 FCL on the Government	1997 Federal Constitutional Law On the Government of the Russian Federation
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
Resolutions	Judgments of the Constitutional Court of the Russian Federation on the merits of a constitutional issue listed in Articles 3(1)(1), 3(1)(2), 3(1)(3), 3(1)(3.1), 3(1)(3.2), 3(1)(4) and 3(1)(5.1) of the 1994 FCL CC, including judgments containing interpretation of provisions of the Constitution ("Postanovlenie", "Постановление")
RSFSR	Russian Soviet Federative Socialist Republic

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 the Second Report.

II. INSTRUCTIONS AND INDEPENDENCE

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

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

(a) the allocation and separation of powers under the Constitution, specifically in relation to international treaties, and

(b) the effect of a provisionally applicable international treaty in Russian law.

4 I confirm that my statement of independence contained in my 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 into two parts, which correspond to the two issues on which I have been asked to opine.

PART I — THE ALLOCATION AND SEPARATION OF POWERS

I. INTRODUCTION

6 In my First and Second Reports, I demonstrated that:

(a) the Constitution grants broad powers to the President and the Government to negotiate and sign international treaties, while Parliament has a limited role in that process;[1]

(b) the Constitution and other Russian laws did not, and still do not, preclude the President and the Government from agreeing to provisional application of international treaties that are subject to ratification, such as the ECT or the Crimea Treaty, even where those treaties contradict federal statutes;[2] and

(c) the provisional application of international treaties – including international treaties that are inconsistent with Russian federal law – does not contravene the principle of the separation of powers.[3]

7 Professor Avtonomov does not dispute the substance of any of my arguments. In the Second Avtonomov Report, he repeatedly refers to constitutional principles such as the separation of powers and the "*hierarchy of legal norms*" (elevating the latter to the level of a fundamental principle of the Constitution). However, Professor Avtonomov does not conduct any normative analysis, he does not discuss the case law of the Constitutional Court in this area, and he does not mention or engage with the academic literature on these topics.

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1 First Report, paras. 127-145; Second Report, paras. 20, 108-114.

2 First Report, paras. 166-181; Second Report, paras. 25-30, 74-85, 100-103.

3 First Report, paras. 243-255; Second Report, paras. 12-30.

8 In this Part, I will accordingly revisit the operation of the principle of separation of powers and the respective roles of the bodies of state power in international treaty-making.

II. THE OPERATION OF THE PRINCIPLE OF SEPARATION OF POWERS

9 Professor Avtonomov takes no issue with the conclusions that I reached in my Second Report that:

(a) the separation of powers in the Russian Federation cannot properly be understood or applied based on an isolated reading of Article 10 of the Constitution, as that provision does not go beyond establishing the separation of powers in a general and abstract sense;[4]

(b) Article 10 of the Constitution must be read in conjunction with other provisions of the Constitution, federal constitutional laws and federal laws 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;[5]

(c) the Constitutional Court adopted precisely this approach in the context of international treaty-making and provisional application in Resolution No. 6-P of 19 March 2014;[6]

(d) there is no instance in which 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;[7] and

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4 First Report, paras. 246-254; Second Report, paras. 15, 18-19.

5 First Report, paras. 28-122; Second Report, paras. 12-19.

6 First Report, paras. 220-227; Second Report, paras. 17, 25-27, 79.

7 Second Report, para. 18.

(e) 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.[8]

10 Further, Professor Avtonomov appears to have abandoned his untenable argument that 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*."[9] I showed in my Second Report, and Professor Avtonomov no longer contests, that:

(a) none of the sources relied upon by Professor Avtonomov[10] offer any guidance on how Article 10 of the Constitution is to be understood and, in any event, do not suggest that the Constitution embraces a classic version of the separation of powers;[11]

(b) the key participants in the drafting of the Constitution[12] all confirmed that the Constitution does not provide for a classic separation of powers, variously accepting that, for example, "*the initial idea of enshrining the balanced power and its functional limitation in the Constitution turned out to be unfulfilled*"[13] and that the Constitution's conception of the separation of powers "*differs from the 'classical' version*"[14]; and

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8 First Report, paras. 248-250; Second Report, para. 19.

9 First Avtonomov Report, para. 31.

10 Namely the 1989 Sakharov Draft, 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 – see First Avtonomov Report, para. 35.

11 Second Report, paras. 31-43.

12 First Avtonomov Report, para. 34.

13 S.S. Alekseyev, *Collected Writings, In 10 Volumes* (Moscow, 2010), Volume. 4 (ASA-064), p. 87 (translation in **Exhibit M-144**).

14 S.M. Shakhrai, *Constitutional Law of Russian Federation. Textbook for Undergraduate and Postgraduate Students* (Moscow, 2017) (ASA-083) (translation in **Exhibit M-128**).

(c) this understanding is also shared by contemporary scholars and practitioners of Russian constitutional law, including Chief Justice Zorkin.[15]

11 It is against this common ground that Professor Avtonomov and I appear to have reached that his arguments in the Second Avtonomov Report must be assessed.

12 First, there is no basis for Professor Avtonomov's continued reliance of the principle of the separation of powers in a purely generic and abstract sense. The Constitution and the Constitutional Court's case law require any argument on the basis of the separation of powers to be made in a properly particularized fashion, tailored precisely to the specific powers of the various bodies of state power at issue. In other words, under the Constitution, the fundamental constitutional principle of the separation of power does not exist in a vacuum, but only as it manifests itself in the provisions of the Constitution that allocate different powers among the bodies of state power.

13 Second, Professor Avtonomov is mistaken when he suggests that there is a fundamental constitutional principle of the "*hierarchy of legal norms*" that applies uniformly throughout the Constitution and prescribes how Article 15(4) of the Constitution must be interpreted.[16] Professor Avtonomov has pointed to not a single provision of the Constitution, not a single judgment of the Constitutional Court and not a single commentary on the Constitution that would embrace his novel theory. That is unsurprising, as this reading of the Constitution is untenable on a number of levels:

(a) The Constitution itself defines its own fundamental principles in its Chapter I, which is accordingly entitled "*The Fundamentals of the Constitutional System*". These include principles such as democracy, republicanism, the rule of law, the supreme value of rights and

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15 Second Report, paras. 39-43.

16 See, *e.g.*, Second Avtonomov Report, paras. 8, 22, 32, 33.

liberties of an individual, popular sovereignty and indeed the separation of powers.

(b) The "*hierarchy of legal norms*" is not among the specifically enumerated fundamental principles of the Constitution. In fact, there is not a single provision of the Constitution that lays down a general principle of the "*hierarchy of legal norms*". Rather, there are specific provisions of the Constitution – including Articles 76, 90 and 115 – that establish hierarchies of legal norms in certain fields of activity of the bodies of state power.

(c) Article 15(4) of the Constitution is one such specific provision, laying down as it does a hierarchy of legal norms as between international treaties of the Russian Federation and federal laws by explicitly giving the former unqualified precedence over the latter. Just as the principle of the separation of powers, but unlike the non-existent generic notion of a universal hierarchy of legal norms, this important provision is to be found in Chapter I of the Constitution, and thus constitutes a fundamental principle of the Constitution. In other words, according to the text and structure of the Constitution, the primacy of international treaties over inconsistent federal laws is a fundamental principle of the Constitution.

III. THE RESPECTIVE ROLES OF THE BODIES OF STATE POWER IN INTERNATIONAL TREATY-MAKING

14 Professor Avtonomov also appears to accept that, as I explained in detail in my First and Second Reports,[17] the Constitution allocates clearly defined powers to each branch of state power at different stages in the treaty-making process, and notably confers broad powers in this area to the President (who, pursuant to Article 86 of the Constitution, "*shall govern the foreign policy of the Russian Federation*" and "*conduct negotiations and sign international treaties of the Russian Federation*") and the Government (which implements foreign policy as determined by the President pursuant to Article 114(e) of the Constitution). Likewise,

17 First Report, paras. 124-139, 146-164; Second Report, paras. 20-23.

Professor Avtonomov does not dispute that, in Resolution No. 9-P of 29 November 2006, the Constitutional Court accordingly held that the guidelines of foreign policy, determined by the President, are binding for all bodies of state power, including the Parliament.[18]

15 However, much like with his unexplained generic references to the separation of powers and the "*hierarchy of legal norms*", Professor Avtonomov simply chooses to ignore the constitutional text, the case law of the Constitutional Court and constitutional practice in his analysis. In effect, Professor Avtonomov's argument rests on the predicate that one could meaningfully evaluate the respective competences of the bodies of state power in international treaty-making, and the legal effects of the exercise of these competences, without considering and applying all the provisions of the Constitution (as interpreted and applied by the Constitutional Court) that speak to these issues. It goes without saying that it is unsound as a matter of Russian constitutional law and legal method simply to ignore, as Professor Avtonomov does, the Constitution, federal constitutional laws, federal laws, other normative legal acts and the jurisprudence of the Constitutional Court that do not accord with one's self-developed theory.

16 Professor Avtonomov's only argument of substance in this context is the observation that, in Resolution 8-P of 27 March 2012, "*the Russian Constitutional Court has directly endorsed the Russian Government's use of the provisions such as the Limitation Clause found in the ECT's Article 45(1)*".[19] The Constitutional Court did no such thing. Rather, it simply confirmed the uncontroversial point that, as a matter of both Russian law and public international law:

> "[*t*]*he 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*

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18 Constitutional Court Resolution No. 9-P of 29 November 2006, para. 2 (**Exhibit M-130**); Second Report, para. 20.

19 Second Avtonomov Report, para. 11.

> *Federation or the laws or other regulatory legal acts of the Russian Federation.*"[20]

17 My reading of Resolution 8-P of 27 March 2012 is shared by other commentators, whose analysis confirms that the reasoning and decision of the Constitutional Court did not include any "*direct*[ ] *endorsement*" of a specific practice on the part of the Russian Federation's Government of using particular treaty provisions.[21]

18 At any rate, I welcome Professor Avtonomov's implicit acceptance of Resolution 8-P of 27 March 2012 as one of the leading cases of the Constitutional Court on provisional application, not least because in the sentence immediately following the one relied upon by Professor Avtonomov the Constitutional Court held that:

> "*consent to provisional application of an international treaty means that it becomes a part of the legal system of the Russian Federation and shall be applied on the equal basis with those international treaties that have entered into force (unless specifically stipulated otherwise by the Russian Federation), because otherwise provisional application would be meaningless.*"[22]

19 It is to that core holding – namely that, pursuant to Article 15(4) of the Constitution, provisionally applied international treaties prevail over inconsistent Russian federal law – that I turn in the next Part.

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

21 See, *e.g.*, L.O. Ivanov (ed.), *The Constitution in the Resolutions of the Constitutional Court of Russia* (2nd ed., Moscow 2015), pp. 78-80 (**Exhibit M-148**).

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

PART II — INTERNATIONAL TREATIES OF THE RUSSIAN FEDERATION

I. INTRODUCTION

20 In my First and Second Reports, I explained that, as stipulated by Article 15(4) of the Constitution and confirmed repeatedly by the Constitutional Court in its consistent jurisprudence, 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.[23]

21 Professor Avtonomov had accepted (and still appears to accept) 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.[24] However, he maintained that 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, such that they cannot take precedence over inconsistent federal law.[25]

22 I demonstrated that Professor Avtonomov's cramped and internally inconsistent interpretation of the constitutional concept of "*international treaties of the Russian Federation*" was unsupported and untenable, not least since the Constitutional Court had held repeatedly and explicitly that provisionally applied international treaties override inconsistent federal laws pursuant to Article 15(4) of the Constitution.[26]

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23 First Report, paras. 182-239; Second Report, paras. 51-103.

24 First Avtonomov Report, paras. 56, 78-81.

25 First Avtonomov Report, paras. 56-69.

26 Second Report, paras. 72-82.

23 In the Second Avtonomov Report, Professor Avtonomov does not attempt to rationalize his internally inconsistent interpretation of Article 15(4) of the Constitution, nor does he engage with substantial parts of my analysis in the Second Report. Instead, he simply repeats his claim that "*Article 15(4) of the Constitution does not permit any unratified treaty to prevail over* [a] *statute enacted by the Federal Assembly*".[27] Professor Avtonomov maintains this conclusion:

(a) without engaging with the text and context of Article 15(4) of the Constitution;

(b) by emphasising that even though the drafters of the Constitution consciously chose not to limit the scope of Article 15(4) of the Constitution to "*ratified international treaties*" (as had been proposed several times), that is of no significance because the drafters allegedly did not expressly discuss the issue of provisional application;[28]

(c) by discarding the case law of the Constitutional Court on the purported basis that "*not even one*" of these cases "*involved evaluating any unratified, provisionally applicable treaty that was 'inconsistent with provisions in the laws enacted by the Russian Parliament*'" but "*addressed different types of conflicts*", which is both irrelevant and incorrect;[29]

(d) by implying that his interpretation is supported by the statements of Government officials and scholars;[30]

(e) by advancing an entirely new reading of Article 15(4) of the Constitution, pursuant to which it is supposedly a "*conflict rule*" that cannot be part of the Russian "*Constitution, laws and regulations*" within the meaning of Article 45(1) of the ECT;[31] and

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27 Second Avtonomov Report, section III.

28 Second Avtonomov Report, para. 27.

29 Second Avtonomov Report, para. 30.

30 Second Avtonomov Report, paras. 16-17, 49-50.

31 Second Avtonomov Report, paras. 11-20.

(f) by maintaining that international treaties of the Russian Federation, despite being addressed specifically in Article 15(4) of the Constitution, are caught by other provisions of the Constitution that subordinate Presidential decrees and normative acts of the Government to federal laws.[32]

24 I will respond to Professor Avtonomov's arguments in turn.

II. THE TEXT, CONTEXT AND DRAFTING HISTORY OF ARTICLE 15(4) OF THE CONSTITUTION

25 Professor Avtonomov does not even attempt to explain how the same term – "*international treaties of the Russian Federation*" – can have starkly different meanings in the first and the second sentence of Article 15(4) of the Constitution. He also accepts, as he must, that the notion of "*international treaties of the Russian Federation*" is used in other provisions of the Constitution apart from Article 15(4) of the Constitution,[33] and in a variety of federal constitutional laws and federal laws,[34] in a manner that does not contain an express or implied exclusion of provisionally applicable international treaties.

26 That is consistent with the drafting history of Article 15(4) of the Constitution, which shows that the drafters of the Constitution considered (but ultimately rejected) limiting the overriding legal effect of international treaties to ratified international treaties.[35]

27 Even though Professor Avtonomov now agrees that the drafters of the Constitution specifically decided not to limit the notion of "*international treaties of the Russian Federation*" in Article 15(4) of the Constitution to

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32 Second Avtonomov Report, paras. 22-24.

33 See, *e.g.*, Articles 46, 62, 63, 86, 106 and 125 of the Constitution (**Exhibit M-141**).

34 See Second Report, paras. 53-57; Articles 88-91 of the 1994 FCL CC (**Exhibit M-139**), Article 2(7)(5) of the Federal Constitutional Law No. 3-FKZ of 5 February 2014 on the Supreme Court of the Russian Federation (**Exhibit M-137**), 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-138**).

35 First Report, paras. 188-190; Second Report, paras. 58-71.

"*ratified international treaties of the Russian Federation*",[36] he attempts to downplay this important decision by claiming that provisionally applied international treaties were not being explicitly discussed or considered by the drafters of the Constitution. Professor Avtonomov does not substantiate this assertion and does not explain how he knows exactly what the drafters of the Constitution were and were not discussing over the many years in which drafts of the Constitution were prepared.

28 His argument is in any event entirely beside the point. The fact of the matter is that Professor Avtonomov's position is that the second sentence of Article 15(4) of the Constitution contains a limitation to ratified treaties, whereas the drafting history of this very provision shows that the drafters of the Constitution specifically decided not to limit the second sentence of Article 15(4) of the Constitution to ratified treaties. This directly contradicts Professor Avtonomov's position.

29 Importantly, and as I also described in my First and Second Report,[37] the rejection of a more limited ambit of what is now Article 15(4) of the Constitution did not occur in a conceptual vacuum. The drafts of the Constitution that featured a limitation of the precursor of Article 15(4) to ratified treaties were also characterized by far greater powers for Parliament in the area of foreign policy and treaty-making, whereas the drafts that excluded such a limitation were characterized by the primacy of the President and Government in foreign policy and treaty-making. As the late Professor Danilenko pointed out in 1994:

> "*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).*"[38]

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36 See First Avtonomov Report, paras. 127-133; Second Avtonomov Report, para. 27.

37 First Report, paras. 188-190; Second Report, paras. 58-71.

38 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**).

30 Moreover, the absence of a limitation in Article 15(4) of the Constitution to ratified international treaties naturally leads to the conclusion that provisionally applied international treaties fall squarely within that provision's ambit. That is precisely the conclusion reached by the Constitutional Court in Resolution 8-P of 27 March 2012, in which it held that Article 15(4) of the Constitution treats provisionally applied international treaties in exactly the same way as ratified international treaties.[39]

III. THE BINDING INTERPRETATION OF ARTICLE 15(4) OF THE CONSTITUTION BY THE CONSTITUTIONAL COURT

31 There is no disagreement between Professor Avtonomov and myself that the Constitutional Court, whose resolutions and decisions are binding in their entirety (*i.e.*, the motivational as well as the operative parts) on all state bodies, has decided that:

(a) "*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*";[40]

(b) "*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*";[41] and

(c) a provisionally applied treaty that is inconsistent with federal law "*is not inconsistent with the Constitution of the Russian Federation in terms of the separation of powers into legislative, executive, and judicial branches as*

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

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

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

established by the Constitution or in terms of the delimitation of competence among the federal State bodies".[42]

32 As a matter of Russian constitutional law, this must be where the debate ends. Where the Constitutional Court has articulated how a constitutional provision must be read, interpreted and applied, as it has done with Article 15(4) of the Constitution, this becomes part of the Russian Federation's constitutional law and must be followed by all state organs, organizations and individuals. Norms interpreted by the Constitutional Court cannot be applied in any other interpretation that disagrees with the constitutional legal meaning of such norms established by the Constitutional Court. As such, it is strictly irrelevant in which procedural or factual context the Constitutional Court has authoritatively interpreted Article 15(4) of the Constitution.

33 In his Second Report, Professor Avtonomov again attempts to sideline the Constitutional Court's judgments on the legal status and effect of provisionally applied treaties in the Russian Federation, by suggesting that each of these cases has somehow not dealt with the issue at hand. In particular, Professor Avtonomov argues that:

(a) Resolution 8-P of 27 March 2012 (referred to by Professor Avtonomov as the "*Customs Case*") dealt only with a "*conflict between (1) an unpublished treaty provisionally applied by the Government and (2) a unilateral resolution which was also promulgated by the Government (specifically the Government's Resolution No. 718)*" and "*this case does not implicate the hierarchy of legal norms or the separation of powers in any respect*";[43]

(b) Decisions 476-O and 477-O of 3 April 2012 (referred to by Professor Avtonomov as the "*Transport Cases*") "*involved all of the same legal*

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

43 Second Avtonomov Report, para. 31.

norms as [Resolution 8-P]" and "*neither case involved any questions pertaining to the hierarchy of legal norms or the separation of powers*";[44]

(c) Decision 1820-O of 18 September 2014 (referred to by Professor Avtonomov as the "*Free Economic Zones Case*") "*did not implicate any conflict between a statute enacted by the Federal Assembly and any provisionally applicable treaty*" because although the treaty in question was (1) not ratified, (2) provisionally applied, and (3) contained provisions that directly contradicted a federal statute, the treaty had somehow been "*approved by the Federal Assembly in a statute enacted in 2011 and in a separate treaty ratified in 2009*";[45] and

(d) in Resolution 6-P of 19 March 2014 (referred to by Professor Avtonomov as the "*Crimea Case*"), the Constitutional Court merely "*analyzed the "constitutionality" of a treaty under Article 125(2)(d) of the Russian Constitution*".[46]

34 Professor Avtonomov's arguments expose a number of fatal flaws in his approach and fail, yet again, to deal with the express reasoning and holdings of the Constitutional Court contained in these judgments.

35 First, Professor Avtonomov still has not referred to any authority or offered any support for his reading of these judgments of the Constitutional Court, or for the manner in which he decides what is binding in these judgments and what is not. The reason for this is simply that there is no support for Professor Avtonomov's approach in Russian constitutional law or doctrine.

36 By contrast, I have pointed to numerous Russian legal commentaries and articles that specifically confirm that the Constitutional Court's judgments on provisional application mean what they say:

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44 Second Avtonomov Report, para. 33.

45 Second Avtonomov Report, para. 34.

46 Second Avtonomov Report, para. 35.

(a) In her commentary on the Federal Law of International Treaties of the Russian Federation, Dr. Ageshkina highlights Resolution 8-P's confirmation of the Russian Federation's legal practice that "*rules of provisionally applied international treaties become part of the Russian Federations legal system and prevail, just as in-force treaties of the Russian Federation, over domestic laws*". Dr. Ageshkina also notes that provisionally applied treaties are "*essentially equivalent*" to ratified treaties under Article 15(4) of the Constitution:

> "*As the RF Constitutional Court noted* [in Resolution 8-P], *public authorities and officials of the Russian Federation consistently pursue a juridical policy whereby the rules of provisionally applied international treaties become part of the Russian Federations legal system and prevail, just as in-force treaties of the Russian Federation, over domestic laws, even in the absence of an officially published text, and including cases where they impact on the human and civil rights, freedoms, and obligations. In terms of the requirements of part 4 Article 15 of the RF Constitution, taken together with Articles 2, 17.1 and 19.1, provisionally applied international treaties of the Russian Federation, in terms of their legal consequences and their effect on individual and civil rights, liberties, and duties in the Russian Federation, are essentially equivalent to those international treaties that have entered into force and have been ratified and duly published officially in the manner provided for by federal laws. Consequently, provisionally applied international treaties must be published (promulgated) in an official manner, just as in-force international treaties.*"[47]

(b) Professor Kurdyukov's publication on "*Agreement on provisional application of international treaties*" similarly confirms that Resolution 8-P "*ruled* […] *on the fact that* [provisionally applied treaties] *must be treated the same as international treaties that have been ratified*" and that "*such treaties have priority over Russian laws*":

> "*The Constitutional Court ruled* [in Resolution 8-P] *on the need to officially promulgate provisionally accepted international treaties as well as on the fact that these treaties must be treated the same as international treaties that have been ratified and have entered in force in terms of their legal implications (VII, para. 4.1). Hence, the Constitutional Court of the Russian Federation has confirmed that an international treaty becomes part of the legal system of the RF by*

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47 N.A. Ageshkina, *Commentary to the Federal Law on International Treaties of 1995* (ConsultantPlus, 2013), p. 75 (**Exhibit M-70**) (emphasis added). See also First Report, para. 203.

> *provisional adoption, and art. 15, par. 4 of the RF Constitution extends this to these treaties*. [Even] *In the absence of an officially promulgated text, such treaties have priority over Russian laws*."[48]

(c) In his analysis of the legal context and aspects of the Constitutional Court's Resolution 6-P, Professor Karzov – an Advisor to the Constitutional Court – underlines that under Russian law the President and Government are not "*limited in their right to make independent decisions with respect to provisional application of international treaties, including those that require adoption of a law in order to be entered into*":

> "*The Russian Federation belongs to a third group of States, which also includes, among others, Spain and Switzerland. In these States, the relevant authorized bodies of state power are not limited in their right to make independent decisions with respect to provisional application of international treaties, including those that require adoption of a law in order to be entered into.*
>
> *According to Federal Law On the International Treaties of the Russian Federation (Article 23), provisional (i.e., preceding the entry into force) application of an international treaty or any part thereof is possible if provided for by the treaty itself or if a separate agreement to this effect has been reached with the parties signatory to the treaty. A decision concerning provisional application of an international treaty falls within the competence of the body that resolved to sign it. At the same time, the Law cited above includes no reservations or restrictions concerning provisional application of international treaties similar to the one considered by the Constitutional Court.*"[49]

37 Second, Professor Avtonomov invokes alleged (procedural) facts or circumstances that are either not mentioned at all in the Constitutional Court's judgments, or not relied upon by the Constitutional Court in deciding on the permissibility and legal effect of provisional application of international treaties, to superimpose a more limited or different meaning of the Constitutional Court's judgments. In doing so, Professor

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48 G. Kurdyukov, 'Agreement on provisional application of international treaties', (2014) 156(4) *Bulletin of the Kazan University*, pp. 35-42, at p. 41 (**Exhibit M-80**) (emphasis added). See also First Report, para. 191.

49 A.S. Karzov, 'On the question of realization of constitutional control in respect of international treaty on including a new subject into the Russian Federation', (2015) 4(46) *Journal of Constitutional Justice* (retrieved from ConsultantPlus), pp. 1-8, at p. 8 (**Exhibit M-73**) (emphasis added). See also First Report, para. 161.

Avtonomov mischaracterizes the (procedural) facts and circumstances and ignores completely the proper legal context of the judgments.

38 Third, I note that while Professor Avtonomov argues that Resolution 8-P and Decisions 476-O and 477-O are not dispositive of the issues in this case because they purportedly do not deal with "*the hierarchy of legal norms and the separation of powers*" – which is incorrect, as further explained below – he makes no such argument with respect to Resolution 6-P and Decision 1820-O. Evidently even Professor Avtonomov is forced to accept that these judgments of the Constitutional Court conclusively rebut his misconceived arguments on the separation of powers and the hierarchy of legal norms.

39 Specifically, in his discussion of Resolution 6-P, Professor Avtonomov does not even attempt to dispute that the Crimea Treaty was inconsistent with Russian federal laws when it was signed and when it was agreed that it would be applied provisionally. This is unsurprising. The Crimea Treaty contained immediately apparent far-reaching changes to Russian law (including to "*statutes enacted by the Federal Assembly*" such as federal laws and federal constitutional laws), which the Constitutional Court explicitly recognised in Resolution 6-P. This includes:

(a) Article 2 of the Crimea Treaty, which provides that "*new subjects, i.e., the Republic of Crimea and the Federal City of Sevastopol, shall be created within the Russian Federation as of the date of admission of the Republic of Crimea to the Russian Federation*";[50]

(b) Article 4 of the Crimea Treaty which regulates matters "*related to the State border of the Russian Federation following the admission of the Republic of Crimea to the Russian Federation*";[51]

(c) Article 5 of the Crimea Treaty which establishes that the inhabitants of "*the territory of the Republic of Crimea or within the territory of the*

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50 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 4 (**Exhibit M-85**).

51 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 4 (**Exhibit M-85**).

Federal City of Sevastopol […] *shall be recognised, as of this date, as citizens of the Russian Federation*";[52]

(d) Article 6 of the Crimea Treaty, which provides for "*a transition period*" for the incorporation of the "*Republic of Crimea to the Russian Federation*" into *inter alia* the "*legal systems of the Russian Federation and in the system of the bodies of state power of the Russian Federation*";[53] and

(e) Article 9 of the Crimea Treaty, which "*essentially determines the effect of legislative and other normative legal acts within the territory of the Republic of Crimea and the Federal City of Sevastopol in connection with the admission of the Republic of Crimea to the Russian Federation and the creation of new subjects within the Russian Federation*".[54]

40 Similarly, Professor Avtonomov does not dispute that the Constitutional Court also held explicitly in Resolution 6-P that, notwithstanding these fundamental changes and implications of the Crimea Treaty, the provisional application of the Crimea Treaty meant that it took effect immediately, and therefore prior to its required ratification by the Federal Assembly:

> "*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, which, in accordance with the law of international treaties, is a condition for their entry into force.* […] *The admissibility of this statutory concept* [provisional application] *has been confirmed by the Constitutional Court of the Russian Federation in* [Resolution 8-P], *which states, among other things, that provisional application of an international treaty is generally used by the Russian Federation in its inter-State practices where the subject matter of a treaty is of special interest to its parties and, therefore, makes them interested in making the treaty effective before its ratification or entry into force. For purposes of the Treaty in question, the use of the opportunity, as permitted under both Russian and international law, to apply an international treaty prior to its entry into force also means that as of the time of the signing of the Treaty in*

52 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 4 (**Exhibit M-85**).

53 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 4 (**Exhibit M-85**).

54 Constitutional Court Resolution No. 6-P of 19 March 2014, para. 4 (**Exhibit M-85**).

> *question* […] *both the Republic of Crimea and the Federal City of Sevastopol have been within the Russian Federation as its subjects*."[55]

41 Professor Avtonomov does not deny that the Constitutional Court decided explicitly in Resolution 6-P that the provisionally applied Crimea Treaty did not in any way contravene the constitutional separation of powers, because ultimately the "*question of its ratification shall be resolved by the Federal Assembly*".[56]

42 This plainly confirms that, contrary to Professor Avtonomov's position, Russian law does not require that the legislature approve the provisional application of treaties that are inconsistent with Russian federal laws. Similarly, and also contrary to Professor Avtonomov's position, this resolution confirms that the provisional application of international treaties that regulate matters within the Russian Federation's federal domain – such as the admission of a new republic or city, changes to the Russian Federation's borders and the transitional regime of federal laws in a republic – does not encroach upon a constitutional prerogative of the legislature to legislate.

43 These core findings of the Constitutional Court in Resolution 6-P, which Professor Avtonomov does not and cannot dispute in any way, conclusively and directly refute Professor Avtonomov's central position that the Constitution precludes provisional application of international treaties that contradict federal laws through the separation of powers and by making provisionally applied treaties hierarchically subordinate to Russian federal laws.

44 Professor Avtonomov's attempt to distract from these core holdings of the Constitutional Court by stating that what it was analyzing in Resolution 6-P was merely the "*constitutionality of a treaty under Article 125(2)(d) of the Russian Constitution*", and that Article 125(2)(d) of the

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

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

Constitution "*does not permit any other type of analysis*", is difficult to follow and in any event unavailing.

45 The entire premise of Professor Avtonomov's position is that the provisional application of international treaties that are inconsistent with federal laws would contravene the Constitution and specifically the constitutional separation of powers as between the legislative branch and the President and Government. Indeed, Professor Avtonomov built his entire analysis in his First Report on the "*constitutional separation of powers*" and argued that "*one of the clearest manifestations of the separation of powers within the Russian Federation's legal system is the hierarchy of legal norms*".[57] Since Professor Avtonomov does not and cannot dispute that (1) this is a "*constitutional*" matter on which the Constitutional Court is exclusively empowered to decide, (2) that this matter is squarely within the constitutional review of international treaties under Article 125 of the Constitution, and (3) that the Constitutional Court actually reviewed and decided on this precise matter in Resolution 6-P – in a manner that refutes Professor Avtonomov's position – Professor Avtonomov can gain little from whatever nuance he seeks to introduce here.

46 Further, what Professor Avtonomov overlooks is the consequence of a determination of the Constitutional Court, in proceedings pursuant to Article 125(2)(d) of the Constitution, that a treaty is constitutional. As is clear from Article 125(6) of the Constitution, such a finding entails the definitive confirmation that the (provisional) application of the treaty in its entirety is constitutional; by contrast, if the Constitutional Court finds a treaty to be unconstitutional, such a treaty "*shall not be given effect or applied*".[58]

47 Fourth, Professor Avtonomov is simply wrong in asserting in his discussion of Resolution 8-P that "*the only legal questions before the*

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57 First Avtonomov Report, para. 38.

58 See also G. M. Danilenko, 'The New Russian Constitution and International Law', (1994) 88(3), *American Journal of International Law*, pp. 451-470, at pp. 456-457 (**Exhibit M-75**), noting that "*the legal consequences of an unconstitutional treaty are already spelled out. Treaties that conflict with the Constitution 'are not* [to be] *given effect and are not applicable'*."

Constitutional Court in the so-called "Customs Case" related to whether the Government's provisionally applicable treaty (which was unpublished) would be permitted to supersede the Government's unilateral resolution".[59]

48 Professor Avtonomov's latest reading of Resolution 8-P conflicts with his own reading of this judgment in his First Report, in which he claimed that "*Mr. Ushakov's argument* [in this case] *was essentially that compliance with the treaty was contrary to the Constitution, because the treaty had not been officially published*" and that "*the constitutionality of the treaty's provisional application pursuant to the hierarchy of norms was simply not at issue in this case*".[60] Professor Avtonomov now apparently accepts that the questions before the Constitutional Court related to whether the provisionally applied Customs Agreement "*would be allowed to supersede*" domestic Russian legal norms.[61]

49 However, Professor Avtonomov's latest reading of Resolution 8-P, which still attempts to constrict and change what the Constitutional Court actually decided, cannot be reconciled with how the Constitutional Court itself framed and decided the matters before it:

(a) In outlining the customs duty that had effectively been changed by the provisionally applied treaty, the Constitutional Court specified that this customs duty was provided by the Customs Code "*and*" a resolution of the Government, not by the resolution alone:

> "[The] *goods* [in question] *were released into the customs territory of the Russian Federation following a customs clearing procedure performed in compliance with the requirements of the Customs Code of the Russian Federation* ***and*** […] *Resolution No. 718 of the Government of the Russian Federation* […]."[62]

(b) In considering whether the provisionally applied treaty had the effect of changing the customs regime of the Customs Code in conjunction

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59 First Avtonomov Report, para. 31.

60 First Avtonomov Report, para. 141.

61 Second Avtonomov Report, para. 31.

62 Constitutional Court Resolution No. 8-P of 27 March 2012, para. 1.1 (**Exhibit M-79**) (emphasis added).

with the Government's resolution, the Constitutional Court highlighted that it was the Russian Federation's "*consistent juridical policy*" to give provisionally applied international treaties "*priority over Russian laws*", not just government resolutions or other lower normative acts:

> "[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 in the absence of an officially published text, including the instances where they change the normative content of both individual and civil rights, liberties, and duties.*"[63]

(c) The official representative of the Duma at the Constitutional Court Dr. Viatkin, who presented the Duma's formal position to the Constitutional Court, submitted that where there is a "*discrepancy between a federal law and a provisionally applicable treaty*, [the Duma] *nevertheless consider*[s] *that the treaty shall apply*".[64]

(d) The Constitutional Court concluded that precisely because provisionally applied treaties have the same legal effect under Article 15(4) of the Constitution as international treaties "*that have been ratified*" – which is to "*have priority*" over inconsistent federal laws – they must be officially published in the same way as ratified international treaties:

> "*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*

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

64 Statement of the State Duma of the Federal Assembly 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**.

> *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 published and/or promulgated just like those international treaties that have entered into force.*"[65]

Professor Avtonomov's latest reading of Resolution 8-P completely ignores, and cannot be reconciled with, these fundamental parts of the Constitutional Court's judgment, which plainly refute Professor Avtonomov's position.

50 Fifth, in his attempt to diminish the relevance of Decisions 476-O and 477-O, Professor Avtonomov ignores that these decisions confirm what he had previously sought to deny – that the matter of provisional application of international treaties had been "*resolved by Resolution No. 8-P of the Constitutional Court of the Russian Federation*". Professor Avtonomov also ignores that the Court's decision on this basis to dismiss the complaints of applicants that had been confronted with higher customs tariffs in a provisionally applied customs agreement than pursuant to the Customs Code, further confirms that such provisional application cannot present a constitutional violation.

51 Finally, with respect to Decision 1820-O of 18 September 2014,[66] Professor Avtonomov now presents yet another (incorrect) explanation to diminish the importance of this case. To recapitulate, in the First Avtonomov Report, Professor Avtonomov had argued that this case "*involved the provisional application of a ratified treaty, not the provisional application of an unratified treaty*".[67] I showed in my Second Report that this was plainly false, since the treaty in question – the Free Economic Zones Agreement[68] – had not been ratified and was still being provisionally applied when I submitted my Second Report.[69] As of 5

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

66 Constitutional Court Decision 1820-O of 18 September 2014, para. 2.2 (**Exhibit M-82**).

67 First Avtonomov Report, para. 144(b) (emphasis added).

68 Free Economic Zones Agreement of 18 June 2010 (**Exhibit M-84**).

69 Second Report, para. 86.

September 2019, according to the website of the Ministry of Foreign Affairs[70], that remains the case, *i.e.*, the Free Economic Zones Agreement is still being applied provisionally and is still awaiting ratification.

52 In the Second Avtonomov Report, Professor Avtonomov properly concedes that "*the relevant treaty was not ratified*",[71] but then proceeds to offer a novel theory, namely that the Free Economic Zones Agreement "*had been approved by the Federal Assembly in a statute enacted in 2011 and in a separate treaty ratified in 2009*"[72].

53 That is an absurd attempt to re-write Decision 1820-O. It finds no support in the Free Economic Zones Agreement, the Constitution and other rules of Russian law on treaty-making, and Decision 1820-O itself:

(a) The Free Economic Zones Agreement itself provides unambiguously in its Article 27 that it is "*subject to ratification and is provisionally applied from the day of entry into force of the Treaty of the Customs Code of the Customs Union of 27 November 2009*".[73] It neither provides for nor envisages some form of indirect parliamentary "*approval*", much less does it provide for or envisage the termination of its provisional application upon such indirect parliamentary "*approval*". The fact that the Russian Federation itself considers that the Free Economic Zones Agreement is still being applied provisionally and is still awaiting ratification demonstrates that Professor Avtonomov's theory of indirect parliamentary "*approval*" is ludicrous.

(b) Unsurprisingly, Professor Avtonomov does not explain or substantiate in any way how his theory of indirect parliamentary "*approval*" can be squared with the Constitution and the FLIT. Neither the Constitution nor the FLIT provide any basis for the indirect

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70 See a print out from the website of the Ministry of Foreign Affairs (**Exhibit M-149**).

71 Second Avtonomov Report, para. 34 (emphasis added).

72 Second Avtonomov Report, para. 34 (emphasis added).

73 Free Economic Zones Agreement of 18 June 2010 (**Exhibit M-84**) (emphasis added).

parliamentary "*approval*" of an international treaty via the ratification of another international treaty.[74]

(c) The only "*separate treaty* [that had already been] *ratified*" referenced by the Constitutional Court in Decision 1820-O is the Treaty on the Customs Code of the Customs Union of 27 November 2009 ("**Customs Code Treaty**").[75] However, as is immediately apparent from Article 27 of the Free Economic Zones Agreement itself and the text of Decision 1820-O, the definitive entry into force of the Customs Code Treaty through its ratification did not constitute any form of "*approval*" of the Free Economic Zones Agreement. Rather, it simply triggered the provisional application of the Free Economic Zones Agreement, which, according to its terms, was to be "*provisionally applied from the day of entry into force of*" the Customs Code Treaty. As the Constitutional Court explained in Decision 1820-O:

> "*Article 27 of said Agreement stipulated that the Agreement shall be subject to ratification and shall apply provisionally from the date of entry into force of the Agreement on the Customs Code of the Customs Union of November 27, 2009.*"[76]

(d) Finally, Professor Avtonomov is unable to point to any part of Decision 1820-O in which the Constitutional Court would have referred to the indirect parliamentary "*approval*" of the Free Economic Zones Agreement. Rather, in the core part of Decision 1820-O that Professor Avtonomov chooses to ignore, the Constitutional Court specifically held that the Free Economic Zones Agreement,

> "*was subject to application on the territory of the Russian Federation from the day of entry into force of the Treaty on the Customs Code of the Customs Union of 27 November 2009, i.e., from 06 July 2010 until the day of its publication, i.e. 13 July 2012*",[77]

and that,

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74 See, *e.g.*, Article 106 of the Constitution and Articles 15, 17, and 20 of the FLIT.

75 Constitutional Court Decision 1820-O of 18 September 2014, para. 2.2 (**Exhibit M-82**).

76 Constitutional Court Decision 1820-O of 18 September 2014, para. 2.1 (**Exhibit M-82**).

77 Constitutional Court Decision 1820-O of 18 September 2014, para. 2.2 (**Exhibit M-82**).

> "*as a result, as from July 6, 2010, legal entities (by virtue of Article 15 (part 4) of the Constitution of the Russian Federation pursuant to which, 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*",[78]

to avail themselves of the provisions of the relevant federal law enacted by the Federal Assembly that were inconsistent with the Free Economic Zones Agreement. The Constitutional Court could not have been clearer. The Free Economic Zones Agreement displaced inconsistent provisions of federal law for over two years because of Article 15(4) of the Constitution, not because of some form of indirect parliamentary "*approval*" conjured up by Professor Avtonomov.

IV. COMMENTARY AND DOCTRINE

54 In my Second Report, I emphasized that 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. Importantly, Professor Avtonomov had been unable to point to any authority to the contrary in the First Avtonomov Report.

55 In the Second Avtonomov Report, Professor Avtonomov announces that he will deal with my analysis of "*the statements of several scholars and Government officials*",[79] but then does not do so. That confirms my assessment in the Second Report that Professor Avtonomov is simply unable to point to any authoritative publication that endorses his interpretation of Article 15(4) of the Constitution (as opposed to the binding interpretation of the Constitutional Court). Neither can he rebut the sources that I am using. It is telling that Professor Avtonomov cannot offer any response to, for example, one of the leading commentators who notes in his commentary on Article 15(4) of the Constitution that "[*t*]*his Constitutional provision does not make a distinction between different types of*

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78 Constitutional Court Decision 1820-O of 18 September 2014, para. 2.1 (**Exhibit M-82**).

79 Second Avtonomov Report, para. 28.

international treaties and does not impose a condition of ratification for their priority over national laws."[80]

56 Finally, I note that Professor Avtonomov no longer places any reliance on 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, to which he had devoted more than a dozen pages of the First Avtonomov Report.[81] That is a proper concession on his part because, first, none of these statements has any legal effect and cannot affect the position of the provisionally applied ECT in the Russian legal system and, second, none of these statements addressed the ECT's provisional application and did not convey any formal (or binding) position of the State Duma or indeed of any other body of state power.

V. PROFESSOR AVTONOMOV'S FUNDAMENTAL MISTAKES

57 As he is unable to find support for his interpretation of Article 15(4) of the Constitution in that provision's text, context or drafting history, in the jurisprudence of the Constitutional Court, or in commentary and doctrine, Professor Avtonomov advances two extrinsic theories, namely that:

(a) Article 15(4) of the Constitution is a "*conflict rule*" to which Article 45(1) of the ECT (itself allegedly a "*conflict rule*") cannot refer; and

(b) international treaties must be equated with decrees and other normative acts of domestic law-making by the President and the Government and thus are subject to the constitutional rules that subordinate the latter to federal laws.

Neither theory has any merit as a matter of Russian constitutional law.

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80 Yu.A. Dmitriev, *Constitution of the Russian Federation. Doctrinal commentary* (2nd ed., Statute, 2013) (retrieved from ConsultantPlus), pp. 37-39, at p. 38 (**Exhibit M-120**).

81 First Avtonomov Report, paras. 14, 94-98.

A. Article 15(4) of the Constitution is not a "*conflict rule*"

58 In the Second Avtonomov Report, Professor Avtonomov contends for the first time that Article 15(4) of the Constitution is merely a "*conflict rule*". While he provides miscellaneous generic references to the private international law of the Soviet Union and the Russian Federation (to explain "*the Russian approach to conflict rules generally*"), he does not point to a single source on Russian constitutional law to support his novel theory. In fact, Professor Avtonomov does not refer to anyone – a court, a commentator, etc. – who has ever postulated that Article 15(4) of the Constitution is a "*conflict rule*".

59 The absence of such references is unsurprising given that Article 15(4) of the Constitution is not a "*conflict rule*". It is a rule of incorporation (first sentence) and a rule of hierarchy (second sentence). Put differently, while the first sentence provides that international treaties form an integral part of the Russian legal system, the second sentence stipulates that international treaties prevail over inconsistent federal law. It is plain that Article 15(4) of the Constitution forms no part of the Russian conflict of laws regime, and no court and no commentator has ever suggested otherwise.

60 Specifically, neither the Constitutional Court (in the various judgments that Professor Avtonomov and I discuss at length, including Resolutions 8-P and 6-P) nor the Supreme Court (on whose Plenum Resolutions Professor Avtonomov mistakenly places considerable reliance) has ever even so much as observed incidentally that Article 15(4) of the Constitution was a "*conflict rule*" or that it should be interpreted and applied as such. Instead, the Constitutional Court – which, as Professor Avtonomov and I appear to agree, has the exclusive authority to interpret the Constitution – has consistently analysed Article 15(4) of the Constitution as I outline it above, that is to say as comprising a rule of incorporation in the first sentence (making international treaties a part of the Russian legal system) and a rule of hierarchy in the second

sentence (giving international treaties priority over inconsistent federal laws).[82]

61 Likewise, authoritative commentators on the Constitution such as Chief Justice Zorkin have never classified Article 15(4) of the Constitution as a "*conflict rule*", emphasising instead that it "*establishes the mechanism of coordination and interaction*" of international law and the national legal order, with "*such coordination and interaction is performed within the framework of national legal order*"[83]. In other words, unlike a conflicts rule that refers to another national law as a whole, Article 15(4) of the Constitution incorporates international treaties into the Russian legal system and, within that system, gives them priority over inconsistent federal laws. The consequence is, as Chief Justice Zorkin pointedly observed, that "[*b*]*y* […] *virtue of constitutional entrenchment and direct constitutional command, these* […] *norms* [of international treaties] *explicitly bind the legislator, the executive branch and the judiciary, guide them, define the limits of discretion and establish certain prohibitions*".[84]

62 Professor Vereshchetin, one of the Russian Federation's most influential international legal scholars and a former Judge of the International Court of Justice, observed in similar terms that Article 15(4) of the Constitution was a "*supremacy clause*" (not a "*conflict rule*") that "*does not draw any distinction*" between different types of international treaties.[85]

63 In sum, Professor Avtonomov's unsubstantiated attempt to reclassify Article 15(4) of the Constitution as a "*conflict rule*" is irreconcilable with the constitutional text, the jurisprudence of the Constitutional Court, commentary and doctrine.

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82 See, *e.g.*, Constitutional Court Resolution No. 8-P of 27 March 2012, para. 2 (**Exhibit M-79**).

83 V.D. Zorkin (ed.), *Commentary to the Constitution* (2nd ed., 2011) (retrieved from ConsultantPlus), p. 110 (**Exhibit M-150**).

84 V.D. Zorkin (ed.), *Commentary to the Constitution* (2nd ed., 2011) (retrieved from ConsultantPlus), p. 110 (**Exhibit M-150**).

85 V. Vereshchetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National Law', (1996) 7 *European Journal of International Law* pp. 29-41, at p. 34 (**Exhibit M-151**).

B. Decrees and normative acts of the President and the Government cannot be equated with international treaties

64 Lastly, in the First Avtonomov Report, Professor Avtonomov had posited – with a passing reference to Articles 15(2), 90(3) and 115(1) of the Constitution – that the President and the Government cannot agree to (the provisional application of) international treaties that are inconsistent with federal laws.[86]

65 I showed in my Second Report[87] that Articles 90(3) and 115(1) of the Constitution deal exclusively with the role and powers of the President and the Government in domestic law-making, and that there is no support in the Constitution or in the jurisprudence of the Constitutional Court for Professor Avtonomov's attempt to equate decrees and normative acts that the President and the Government enact in the process of domestic law-making (pursuant to 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 very broad foreign policy and treaty-making powers).[88] That is also echoed by the leading commentators on the Constitution, none of which argues that Articles 90 and 115 of the Constitution would also apply to the treaty-making powers of the President and the Government.[89]

66 Importantly, Professor Avtonomov does not dispute that, whilst Articles 90(3) and 115(1) and (3) of the Constitution 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,

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

87 Second Report, paras. 104-114.

88 First Avtonomov Report, paras. 38-40.

89 See, *e.g.*, Yu.A. Dmitriev, *Constitution of the Russian Federation. Doctrinal commentary* (2nd ed., Statute, 2013) (retrieved from ConsultantPlus), pp. 439-441, 552-554 (**Exhibit M-152**); L.A. Okunkov (ed.), *Commentary on the Constitution of the Russian Federation* (2nd ed., 1996) (retrieved from ConsultantPlus), pp. 316-318, 390-392 (**Exhibit M-153**); E.Yu. Barkhatova (ed.), Commentary on the Constitution of the Russian Federation (2nd ed., Prospect 2015) (retrieved from ConsultantPlus), pp. 100-101, 136-137 (**Exhibit M-154**).

and thus cannot supersede, federal laws, there is no such limitation in the provisions of the Constitution that grant broad powers to the President and the Government in the areas of foreign policy in general and treaty-making in particular (namely Articles 80(3), 86 and 114(e) of the Constitution).

67 Similarly, there now seems to be no disagreement between Professor Avtonomov and myself that the Constitutional Court has repeatedly confirmed that, even in the area of domestic law-making in which Article 90(3) of the Constitution stipulates that a decree of the President must not conflict with federal laws enacted by the Federal Assembly, the President is constitutionally empowered to "*legislate*" by issuing a decree even to override inconsistent federal law (if only on a temporary basis).[90]

68 The absurdity of Professor Avtonomov's position is illustrated by his inability to deny that if he is right and "*permitting the President* […] *to contravene a federal statute by means of concluding an international agreement would directly violate Article 15(2) of the 1993 Constitution*"[91], then President Putin acted unconstitutionally by signing and agreeing to the provisional application of the Crimea Treaty, which radically changed the borders and composition of the Russian Federation (of which the Republic of Crimea and the City of Sevastopol became new subjects) with immediate effect and thus before (a) the Constitutional Court had verified constitutionality of the Crimea Treaty, (b) a federal law on the ratification of the Crimea Treaty had been adopted, and (c) a federal constitutional law on the acceptance of new subjects had been adopted. Yet, as explained above (and as Professor Avtonomov accepts), the Constitutional Court in Resolution 6-P specifically held that the signing of the Crimea Treaty and the agreement to its immediate provisional application were constitutional.

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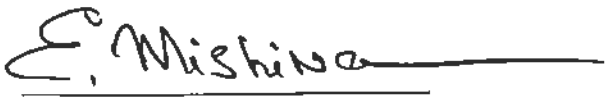
90 See First Report, para. 37; Second Report, para. 109. See also Constitutional Court Resolution No. 11-P of 30 April 1996, para. 4 (**Exhibit M-12**); Constitutional Court Resolution No. 9-P of 25 June 2001, para. 5 (**Exhibit M-13**).

91 First Avtonomov Report, para. 54.

Ann Arbor, 6 September 2019



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