UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

THIRD DECLARATION OF ALEXEI S. AVTONOMOV

I, ALEXEI S. AVTONOMOV,[1] declare as follows:

1. In this Declaration, I respond to new criticisms raised by Petitioners and Professor E. Mishina (ECF 239, 242) regarding the Russian Constitutional Court's Decision 2867-O-R of December 24, 2020 ("2020 Decision") (ECF 234-6), which Prof. Mishina has strangely called the "Christmas Decision."[2]

[1] I am a Professor of Law. Since 1984, I have researched, written, and lectured on legal subjects including Russian and Soviet constitutional law, comparative constitutional law, and the international law of treaties.

As detailed in my earlier Declarations and Reports (ECF 182-18, 234, with annexes), I have authored a leading comparative-law textbook entitled *Constitutional (State) Law of Foreign Countries* (3d ed. 2012). I served from 2003 to 2020 on the United Nations' Committee on the Elimination of Racial Discrimination ("CERD"), including as Chairperson and Vice Chairperson. I have held other appointments with Russian and international institutions (*e.g.*, the Institute of State and Law, the State Duma's Expert Council on Constitutional Law, the Organization for Security and Co-operation in Europe ("OSCE"), and a Council of Europe Advisory Committee).

[2] I note respectfully that, for the Constitutional Court, December 24 was not Christmas. In the Russian Federation, Christmas is celebrated on January 6 and 7, as in many countries with sizeable Eastern Orthodox populations.

2. As explained in the 2020 Decision, neither the Russian Constitution nor any Russian statute authorizes the Executive Branch to agree to so-called "investor-State dispute settlement" ("ISDS")[3] in any treaty that has not been ratified by Parliament.[4] The Constitutional Court's legal reasoning was based on three principles:

(i) ***First***, disputes concerning "sovereign actions," such as assessment of taxes or alleged expropriation, are presumptively subject to "constitutional or administrative judicial review," and thus not arbitration, within the Russian legal system.[5]

(ii) ***Second***, the Russian Constitution recognizes the principle of "separation of powers," which does not give the Executive Branch the inherent power to deviate from the background principle described above absent a treaty ratified by Parliament.[6]

(iii) ***Third***, neither the 1999 "Foreign Investment" Law (ECF 120-6) nor any other statute "delegate[s] relevant authority" to the Executive Branch to deviate from the background principle described above in any unratified treaty—regardless of whether such an unratified treaty is in force or provisionally applicable.[7]

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[3] *See, e.g.*, EU Submission to United Nations, Jan. 18, 2019 (ASA-124) (defining "ISDS").

[4] **Note on Terminology**: In this Declaration, "**Parliament**" is the Federal Assembly, a national legislature composed of a lower chamber (State Duma) and an upper chamber (Federation Council), and established under Chapter 5 of the Constitution (ECF 235-14). "**Executive Branch**" is the Government of the Russian Federation and the component Ministries, Services, and Agencies, established under Chapter 6, which is constitutionally distinct from the President of the Russian Federation, who is the "head of State" established under Chapter 4. "**Prime Minister**" is the Chairman of the Government established under Article 110(2).

"**Statutes**" are laws enacted by Parliament. Unfortunately, many English translations of Russian legal documents exhibited in this case have confusingly used terms like "statute," "law," and "regulation" interchangeably. This is likely because some of the original Russian terms [*e.g.*, "*закон*"] are "traditionally understood" to have not only the "narrow meaning," which I use consistently in this Declaration, but also the "broader meaning" of "the corpus of all legal acts based on law," including lower-ranking normative rules (*e.g.*, regulations, executive orders). *E.g.*, M.N. Marchenko, *Sources of Law* (2008) (ECF 236-18), at 329 (noting this ambiguity). To avoid this confusion, the English translations of Russian authorities must be read with care.

[5] Decision 2867-O-R dated Dec. 24, 2020 (ECF 234-6) at 17-18. Petitioners concede this point: "'public law' disputes are not arbitrable under Russian law . . . ." Pet'rs' Br. (ECF 239) at 23.

[6] Decision 2867-O-R dated Dec. 24, 2020 (ECF 234-6) at 9-13.

[7] Decision 2867-O-R dated Dec. 24, 2020 (ECF 234-6) at 15-16, 18.

3. Petitioners and Prof. Mishina suggest that the 2020 Decision represents a so-called "dramatic departure" or "dramatic break" from previous decisions by Russian courts.[8] According to Petitioners, the 2020 Decision is supposedly "*not* an accurate description of Russian law as it existed" when the arbitration in this case began "in February 2005," and the 2020 Decision should not be given so-called "retroactive" or "*nunc pro tunc* effect."[9]

4. These criticisms are unfounded. As I will explain, the Constitutional Court's 2020 Decision fully accords with longstanding principles of Russian law concerning whether and how the Executive Branch is permitted to act independently of Parliament. These principles were established in the 1990s under the Russian Constitution and the Federal Law on International Treaties ("FLIT") (ECF 235-14, 242-19). These principles have been applied consistently by Russian courts since as early as 1995, as further described below.

5. To recall, the context of the present debate is the interpretation of the Energy Charter Treaty ("ECT"). Prime Minister Viktor S. Chernomyrdin directed the Executive Branch to sign the ECT in 1994, and later asked Parliament to ratify the ECT in 1996.[10] Even after extensive deliberations in 1997 and 2001, however, Parliament never accepted Prime Minister Chernomyrdin's calls for ratification.[11] The Russian Federation therefore never became a "Contracting Party" under the ECT, and remained only a "signatory," such that the Executive

[8] Pet'rs' Br. 26-27 (ECF 239); Mishina Decl. ¶¶ 30, 48-50 (ECF 242).

[9] Pet'rs' Br. 15, 27 (ECF 239); Mishina Decl. ¶¶ 30, 48-50 (ECF 242).

[10] *See* Prime Minister's Resolution 1390, Dec. 16, 1994 (ECF 235-21); Prime Minister's Decree 1016, Aug. 26, 1996 (ECF 235-29).

[11] *E.g.*, Parliamentary Transcript, June 17, 1997 (ECF 235-34); Parliamentary Summary and Recommendations, June 17, 1997 (ECF 237-29); Parliamentary Transcript, Jan. 26, 2001 (ECF 236-10); Parliamentary Summary and Recommendations, Jan. 26, 2001 (ECF 237-30).

Branch provisionally applied the ECT from 1994 until 2009.[12]

6. The ECT's provisional application, however, was subject to the following limitation under Article 45(1): "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory . . . to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."[13] The present case concerns, in particular, how this limitation interacts with the Contracting States' offer to participate in ISDS arbitration under the ECT's Article 26. That is, did the Executive Branch provisionally apply the ISDS clause, or exclude ISDS under Article 45(1) as "inconsistent" with the Russian "constitution, laws or regulations" in the absence of Parliamentary ratification?

7. Petitioners and Prof. Mishina purport to answer this question based on three distinct legal theories. All three are wrong. This is confirmed not only in the Constitutional Court's 2020 Decision, but also in many pre-2005 authorities—such as the May 2004 statement by the ECT's Deputy Secretary General explaining that the ECT's provisional application "does not" authorize recourse to "the dispute resolution mechanisms provided for by the treaty."[14]

8. ***First***, Petitioners suggest that the Constitution's Article 15(4) gives "provisionally applied international treaties *priority over* any contradictory Russian federal law."[15] Accordingly, Petitioners say, "it simply does not matter whether a separate Russian law barred arbitration of investor-State disputes, since the ECT would take priority."[16] More than any other legal authority,

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[12] *See* Letters to ECT Depository and Secretariat, Aug. 20-24, 2009 (ECF 236-22, 236-23).

[13] ECT (ECF 2-7), Art. 45(1).

[14] *See, e.g.*, A. Konoplyanik, *Energy Dialogue: From Summit to Charter* (Vedomosti, May 19, 2004) (ASA-123) (emphasis added).

[15] Pet'rs' Br. 19 (ECF 239); Mishina Decl. ¶ 14 (ECF 242).

[16] Pet'rs' Br. 19 (ECF 239).

Petitioners and Prof. Mishina purport to base this first theory on a single judicial decision, the Constitutional Court's Resolution 8-P of March 27, 2012 (ECF 237-5).

9. As I explain below in **Section 1** of this Declaration, however, Petitioners' first theory relies upon a shocking misunderstanding of Resolution 8-P. Prof. Mishina confuses the key facts and context of Resolution 8-P—specifically, what legal enactments were at issue and who promulgated them (*i.e.*, Parliament or the Executive Branch). Even more egregiously, Prof. Mishina conflates what the Constitutional Court "held" with a paragraph of Resolution 8-P that was actually summarizing a rejected argument raised by a litigant.

10. As further explained in **Sections 2 to 4**, none of Prof. Mishina's other authorities—*e.g.*, judicial decisions, commentaries, and so-called "treaty practice"—supports Petitioners' interpretation, which fundamentally contravenes the text and structure of the 1993 Constitution and the 1995 FLIT. Accordingly, as explained in **Section 5**, the 2020 Decision is not a so-called "dramatic departure," but rather shows consistency and continuity with longstanding Russian law.

11. ***Second***, Petitioners also propose a distinct theory of Parliamentary delegation, which the 2020 Decision likewise rejected.[17] This second theory purports to rely upon statutory references to "international treaties," including those found in Parliament's 1991 and 1999 laws on "Foreign Investment." According to Petitioners, these statutory provisions allegedly delegated to the Executive Branch the "'option'" to submit any "'dispute between a foreign investor and the Russian Federation'" to arbitration by provisionally applying an unratified treaty.[18]

12. As explained in **Section 6**, however, this category of ubiquitous references to "international treaties" (which are duplicated in more than 100 statutes) does not delegate power

[17] Decision 2867-O-R, Dec. 24, 2020 (ECF 234-6) at 15-16, 18.

[18] Pet'rs' Br. 22-23 (ECF 239) (quoting Dutch 2020 Judgment ¶ 4.7.47 (ECF 240-1)).

to the Executive Branch to deviate from Parliamentary statutes using unratified treaties, whether provisionally applied or in force. This understanding is confirmed by the Constitutional Court's consistent decisions regarding alleged "delegation" provisions from 1999 to 2005, as well as the Supreme Court's 2009 "Chinese Border" decision (ECF 236-29), which implicated a similar reference to "international treaties" set forth in the Criminal Procedure Code.[19] Additional support for this analysis is provided in **Appendix A**, which contains a representative sample of the numerous statutory references to "international treaties," and **Appendix B**, which chronicles the Parliamentary history of the individual statutes invoked (mistakenly) by Petitioners.

13. ***Third***, Petitioners likewise challenge[20] the 2020 Decision's characterization of ISDS clauses (*e.g.*, ECT's Article 26) as fundamentally concerning "sovereign actions . . . of a state" (*e.g.*, taxation, expropriation) which are presumptively subject to "constitutional or administrative judicial review" and thus not resolution by private arbitrators within the Russian legal system.[21] Remarkably, Petitioners suggest that ISDS challenges to taxation and alleged expropriation are supposedly "*not* 'of a public law nature.'"[22]

14. As explained in **Section 7**, Petitioners' assertion is contrary to all prior Russian judicial decisions, and originates from an egregious misreading of three academic articles. Indeed, the ECT's own history decisively refutes Petitioners' suggestion that the ISDS clause was already consistent with Russian law in February 2005, as illustrated in the Parliamentary history chronicled

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[19] *See also* Constitutional Court Decision No. 333-O-P, Mar. 1, 2007, ¶ 2 (ASA-120) (confirming that Article 1(3) of the Criminal Procedure Code "directly duplicates the provision of Article 15 (Part 4) of the Constitution" concerning international treaties (emphasis added)).

[20] Pet'rs' Br. 23 (ECF 239).

[21] Decision 2867-O-R, Dec. 24, 2020 (ECF 234-6) at 17-18 (citing, *e.g.*, EU Submission to United Nations, Jan. 18, 2019 (ASA-124)).

[22] Pet'rs' Br. 23 (ECF 239) (quoting Dutch 2020 Decision ¶ 4.7.37 (ECF 240-1)).

in **Appendix C**. From 1996 to 2006, the Executive Branch, Parliament, and the ECT Secretariat engaged in extensive public deliberations over the potential "consequences" of the ECT's ratification—*i.e.*, how Russian law would change if the ECT would be ratified, including with respect to "additional opportunities to resolve disputes . . . on issues of . . . foreign investments."[23] In other words, during the decade before this case began, none of these Russian or ECT Secretariat officials endorsed (or even predicted) the scattershot theories later concocted by Petitioners.

15. Accordingly, the Constitutional Court's rejection of Petitioners' three legal theories in the 2020 Decision fully accords with longstanding principles of Russian law, as well as the original and contemporaneous understanding of the ECT itself.

§ 1. UNDERSTANDING RESOLUTION 8-P

16. Prof. Mishina's principal contention is that the 2020 Decision supposedly "overrules . . . prior legal positions regarding the Russian Constitution, which were stated in previous cases including Resolution No. 8-P."[24] To see why this is wrong, it is necessary first to understand Resolution 8-P.

§ 1.1. RESOLUTION 8-P DID NOT ADDRESS SEPARATION OF POWERS OR ANY CONFLICT INVOLVING A PARLIAMENTARY STATUTE

17. As Professor Mishina correctly describes, "Resolution No. 8-P resulted from a case brought to the Court by Mr. Ushakov, . . . who had been assessed . . . customs duties" pursuant to a treaty which "had not been ratified at the time."[25] This treaty was "applied provisionally" by the

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[23] *E.g.*, Parliamentary Summary and Recommendations, Jan. 26, 2001 (ECF 237-30) (emphasis added); *see also* A. Konoplyanik, *Energy Dialogue: From Summit to Charter* (May 19, 2004) (ASA-123) (reflecting ECT Deputy Secretary General's agreement with Parliament's 2001 finding that "the dispute resolution mechanisms" would become available only after ECT ratification).

[24] Mishina Decl. ¶ 8 (ECF 242).

[25] *Id* ¶ 10.

Executive Branch, and obligated Mr. Ushakov to pay "higher duties" than would have been due under the Russian Federation's pre-existing customs regime.[26]

18. Prof. Mishina makes an egregious mistake, however, by suggesting that the lower amount of customs duties would have been "due under the Russian Customs Code,"[27] which is a statute enacted by Parliament. Based on this mistaken premise, Prof. Mishina wrongly attributes to Resolution 8-P the momentous "holding" that unratified treaties "provisionally applied" by the Executive Branch can supersede "any conflicting Russian laws" enacted by Parliament.[28]

19. This assertion is completely disconnected from the facts of Resolution 8-P or the actual dispute before the Constitutional Court. In reality, Mr. Ushakov was invoking the lower amount of customs duties imposed by the Executive Branch under an executive order ("Resolution 718").[29] In the Russian legal system, "the right to establish rates of . . . customs duties" is "delegated by federal law" to the Executive Branch.[30] Accordingly, the only conflict in Mr. Ushakov's case involved two legal rules (an executive order and an unratified treaty) adopted by a single actor (the Executive Branch) pursuant to a Parliamentary delegation.

20. Contrary to Prof. Mishina's confused description, therefore, Mr. Ushakov's case did not implicate the separation of powers or the normative hierarchy applicable to conflicts between Parliamentary statutes and unratified treaties.

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[26] *Id*.

[27] *Id*.

[28] Pet'rs' Br. 20 (ECF 239) (quoting Mishina Decl. ¶ 14 (ECF 242)) (emphasis added).

[29] *See* Resolution 8-P (ECF 237-5) ¶ 1.1 (citing Resolution 718 (ECF 238-6)); *see also* Zabaykalsky Court, 2011 Ruling (ASA-113) (describing the conflict in Mr. Ushakov's case in the first-instance proceedings).

[30] *See* Ruling 294-O, Dec. 15, 2000 (ASA-126); Ruling 193-O, Nov. 5, 1999 (ASA-125) (explaining that "the rates of [] customs duties are determined" by the Executive Branch).

§ 1.2. WHAT RESOLUTION 8-P ACTUALLY "HELD"

21. Unsurprisingly, given the context described above, the holding of Resolution 8-P was narrower than Prof. Mishina suggests. The Constitutional Court held only that, if the Executive Branch seeks to modify a pre-existing executive order—such as Resolution 718—by provisionally applying an unratified treaty, the Executive Branch must do so in compliance with the Constitution's Article 15(3) by "officially publishing" the new treaty.[31] The Constitutional Court's reasoning was straightforward and closely tethered to the facts of Mr. Ushakov's case. Because provisionally applicable treaties have "legal consequences and [an] effect on individual and civil rights, liberties, and duties," such treaties implicate the Executive Branch's duty under Article 15(3) to give notice to "persons concerned" (*e.g.*, Mr. Ushakov) by official publication.[32]

22. Prof. Mishina tries to attach a very different meaning to Resolution 8-P based upon three quotations (all set forth in ¶ 14 of the Declaration).[33] In all three instances, Prof. Mishina is significantly distorting what the Constitutional Court actually said.

23. ***First***, and most shockingly, Prof. Mishina mixes up the sections of Resolution 8-P that describe what "[t]he Constitutional Court held"[34] with a summary of a litigant's rejected argument. Confusingly, Prof. Mishina omits the bold, italicized words in this quotation:

> "[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*** . . . ."[35]

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[31] Resolution 8-P ¶¶ 4.1-4.3 (ECF 237-5).

[32] *Id* ¶ 4.1.

[33] Mishina Decl. ¶ 14 (quoting Resolution 8-P ¶¶ 4.0, 4.1).

[34] *Id*. (emphasis added).

[35] Resolution 8-P ¶ 4.1 (ECF 237-5) (emphasis added).

Contrary to what Prof. Mishina says, this passage does not describe what "the Constitutional Court held."[36] This was, rather, what the Executive Branch and other litigants (the "public authorities and officials") had been arguing in Mr. Ushakov's case—that an officially published text was unnecessary. That is precisely the argument that Resolution 8-P rejected.

24. The Dutch Court of Appeal made the same mistake in its February 2020 judgment (and added yet further confusion by quoting yet another rejected argument by Mr. Vyatkin, a third-party *amicus curiae*).[37] The following paragraphs of Resolution 8-P reveal, however, that the Constitutional Court dismissed all these arguments by the Executive Branch and the *amicus curiae*, and ultimately held that provisionally applicable treaties must be "officially published and/or promulgated just like those international treaties that have entered into force."[38]

25. ***Second***, Prof. Mishina also fundamentally misunderstands the meaning of the following quotation from Resolution 8-P:

> "Consent to provisional application of an international treaty means that it becomes a *part of the Russian Federation's legal system and shall be applied on an equal basis* with those international treaties that have entered into force . . . , *because provisional application would otherwise become meaningless*."[39]

The legal principle described in this passage is correct and uncontroversial—but it says nothing

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[36] Mishina Decl. ¶ 14 (emphasis added).

[37] Court of Appeal, Judgment ¶¶ 4.7.22-4.7.23 (ECF 176-1) (quoting Resolution 8-P and observing that Mr. Vyatkin "defended exactly the same system"—*i.e.*, the system that the Executive Branch was defending in Mr. Ushakov's case, which the Constitutional Court found unconstitutional). However Mr. Vyatkin's reasoning is properly understood, *see, e.g.*, First Avtonomov Expert Report ¶¶ 147-49 (ECF 234-2), Mr. Vyatkin's arguments were not successful. That is, the Constitutional Court explicitly rejected Mr. Vyatkin's suggestion that Russian law "does not contemplate . . . mandatory promulgation" of unratified, provisionally applicable treaties, as well as Mr. Vyatkin's assertion that international treaties supposedly fall outside the protections of the Russian Constitution's Article 15(3). *See* Vyatkin Transcript (ECF 237-17).

[38] Resolution 8-P ¶ 4.1 (ECF 237-5).

[39] Mishina Decl. ¶ 14 (quoting Resolution 8-P ¶ 4.0).

whatsoever about whether an unratified, provisionally applicable treaty will prevail over Parliamentary statutes. That topic is not mentioned. Nor does this passage suggest, as Prof. Mishina insinuates, that unratified, provisionally applicable treaties are to be applied "on an equal basis" as ratified treaties, which likewise are not mentioned.

26. To the contrary, this passage says only that provisionally applicable treaties are "equal" in the hierarchy to "international treaties that have entered into force" at the instance of the same constitutional entity (*e.g.*, the Executive Branch or a lower-ranking Ministry, Agency, or Service).[40] This passage thus refers to those "international treaties" that the Executive Branch has put "into force" without ratification pursuant to the FLIT's Articles 11(1), 20, 21, and 24(1).[41] Significantly, the Constitutional Court's phrase, "international treaties" is defined explicitly in Articles 1(2), 2(a), and 3(2) of the FLIT to include treaties that have entered into force without ratification (*i.e.*, "intergovernmental treaties" and "interagency treaties"), as Resolution 8-P itself acknowledges.[42]

27. The meaning of this quotation, therefore, unsurprisingly has nothing to do with separation of powers or conflicts between the Executive Branch and Parliament (which did not arise in Mr. Ushakov's case). This quotation means only that the Executive Branch may deviate from a pre-existing executive order (*e.g.*, Resolution 718) by using an unratified treaty that the Executive Branch either implements by "provisional application" or puts immediately "into force." Both categories of unratified treaties apply "on an equal basis."[43]

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[40] Resolution 8-P ¶ 4.0 (ECF 237-5) (emphasis added).

[41] Federal Law on International Treaties, Arts. 3(2), 11(1), 21, 24(1) (ECF 242-19).

[42] Resolution 8-P ¶ 3.1 (ECF 237-5) (analyzing Article 2(a) of the FLIT).

[43] Mishina Decl. ¶ 14 (quoting Resolution 8-P ¶ 4.0).

28. Regardless of which category of unratified treaty is used, however, all actions by the Executive Branch remain limited by Parliamentary statutes. This is stated expressly in Article 15(2) of the Constitution, and reaffirmed in Article 6(2) of the FLIT specifically as regards treaty making.[44] This structural limitation is further confirmed in Article 15(1) of the FLIT, which provides that treaties contrary to statutes "shall be subject to ratification" by Parliament.[45] The quotation cited above by Prof. Mishina addresses a completely different topic, and does not purport to discuss (let alone abrogate or modify) this structural limitation on the Executive Branch.

29. Indeed, as explained further below in Section 1.3, the Constitutional Court's phrase, "equal basis," is irreconcilable with Petitioners' confused theory that the Executive Branch somehow wields greater power merely by labeling an unratified treaty "provisionally applicable," and yet only wields lesser power by putting the same unratified treaty directly "into force."

30. ***Third***, Prof. Mishina also reproduces the following quotation, while yet again distorting the Constitutional Court's meaning by omitting[46] the bold, italicized words:

> "***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 published and/or promulgated just like those international treaties that have entered into force.***"[47]

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[44] Russian Constitution, Article 15(2) (ECF 235-14) ("The bodies of state authority . . . shall be obliged to observe the . . . laws."); Federal Law on International Treaties, Art. 6(2) (ECF 242-19) (providing that the "state organs of the Russian Federation" may only "consent . . . to be bound by an international treaty" in "accordance with their competence as defined by . . . legislative acts").

[45] Federal Law on International Treaties, Art. 15(1) (ECF 242-19).

[46] Mishina Decl. ¶ 14.

[47] Resolution 8-P ¶ 4.1 (ECF 237-5) (emphasis added).

As the omitted text reveals, this quote does not support Prof. Mishina's theory that provisionally applicable treaties are "essentially equivalent" to "ratified" treaties in all respects. To the contrary, Resolution 8-P recognizes such "essential equivalence" only from "the point of view of the requirements" of the cited constitutional provisions and for specific purposes.

31. Thus, under the first sentence of Article 15(4) of the Constitution, provisionally applicable treaties are undoubtedly "a component part" of the Russian legal system.[48] Similarly, under Articles 2, 17, and 19, the Executive Branch must respect Mr. Ushakov's "rights and freedoms" and "equal[ity] before the law," because the provisionally applicable treaty created "legal consequences" for Mr. Ushakov in the form of higher customs duties.[49] As the full passage says, this is why the unratified, provisionally applicable treaty had to be published. Contrary to Prof. Mishina's insinuation, however, this passage also says nothing about separation of powers, normative hierarchy, or conflicts between the Executive Branch and Parliament.

§ 1.3. RESOLUTION 8-P ITSELF REJECTS PETITIONERS' THEORY

32. Three other elements of Resolution 8-P further undermine Petitioners' arguments concerning the separation of powers and normative hierarchy.

33. ***First***, the essence of Petitioners' theory is that the Executive Branch lacks constitutional capacity to invoke the limitation clause under the ECT's Article 45(1) because "the . . . Constitution g[ives] provisionally applied international treaties *priority over* any contradictory Russian federal law."[50] Provisionally applicable treaties thus supposedly prevail over contrary statutes automatically, and hence can never be "inconsistent," according to Petitioners.

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[48] Russian Constitution, Article 15(4) (ECF 235-14) ("[I]nternational treaties of the Russian Federation . . . shall be a component part of its legal system.").

[49] Resolution 8-P ¶ 4.1 (ECF 237-5).

[50] Pet'rs' Br. 19-20 (ECF 239).

34. In a quote that Petitioners ignore, however, Resolution 8-P says exactly the opposite:

> "***The Russian Federation may*** agree to provisional application of an international treaty in whole or in part . . . 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."[51]

This passage tracks the substance of the ECT's Article 45(1), thus reflecting the Constitutional Court's conclusion that such limitation clauses are not automatically invalidated.

35. Remarkably, Petitioners have never been able to explain why this single passage from Resolution 8-P does not defeat their entire theory. Petitioners argue that "it simply *does not matter* whether a separate Russian law" is inconsistent with the ECT.[52] This passage, however, says explicitly that such inconsistency does matter, because the Executive Branch "may . . . precondition" the ECT's provisional application upon "consistency."

36. ***Second***, Petitioners and Prof. Mishina try to fabricate an alleged split of authorities, emphasizing constantly that "[t]he *Constitutional Court* (and not the Supreme Court) has the last word on what the Constitution means."[53] Resolution 8-P, however, shows that there is no division among the Russian courts on any relevant issue. That is, the Constitutional Court favorably cites the Supreme Court's Resolution 5 of October 10, 2003, as containing an authoritative description of the Russian law on international treaties.[54]

37. Significantly, the Supreme Court's 2003 ruling held that only an international treaty

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[51] Resolution 8-P ¶ 4.0 (ECF 237-5) (emphasis added).

[52] Pet'rs' Br. 19-20 (ECF 239).

[53] *E.g.*, *id*. at 25-26 (internal quotation and citation omitted); Mishina Decl. ¶ 11 (ECF 242).

[54] Resolution 8-P ¶ 3.3 (ECF 237-5) (citing Resolution 5 dated Oct. 10, 2003 (ECF 236-13)).

approved "in the form of a federal law" has "priority over the laws of the Russian Federation."[55] The Supreme Court further held that a lower-ranking treaty approved "other than in the form of a federal law," *i.e.*, by order of the Executive Branch or subordinate Ministry, Agency, or Service, can supersede only the "sub-legislated legal acts issued by [the] State authority or [the] authorized agency" responsible for "that particular treaty."[56] The hierarchy described in the Supreme Court's 2003 ruling was anticipated in an earlier 1995 decision, and subsequently applied in the Supreme Court's 2009 "Chinese Border" decision (discussed further below).[57]

38. Interpreting these 1995, 2003, and 2009 decisions, legal commentaries have consistently interpreted the Constitution's Article 15(4) as follows:

> "[T]he legal force of an international treaty approved by a resolution of the [Executive Branch] is equivalent to the legal force of that resolution. . . . International treaties approved . . . by [the Executive Branch] of the Russian Federation, prevail only over presidential, governmental or other legal acts issued by subordinate [governmental] bodies . . . .
>
> Speaking of the supremacy of the international treaties of the Russian Federation over domestic laws [enacted by Parliament], only those treaties that have been ratified and published in the manner stipulated by the law have such supremacy. . . [E]ach type of treaty has . . . supremacy at its own level . . . ."[58]

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[55] Resolution 5 dated Oct. 10, 2003 ¶ 8 (ECF 236-13) (emphasis added).

[56] *Id.*

[57] *See* Ruling 49-O09-35 dated Dec. 29, 2009 (ECF 236-29); Resolution 8 dated Oct. 31, 1995 (ECF 235-26).

[58] M.N. Marchenko, *Sources of Law* 327-29 (2008) (ECF 236-18) (emphasis added); *see also* A.N. Talalaev, *Correlation of International and National Law and the Constitution of the Russian Federation* 13 (1994) (ECF 235-15); D.A. Shlyantsev, *Commentary to the Federal Law "On International Treaties of the Russian Federation"* (2006) (ECF 236-15); B.R. Tuzmukhamedov, *International Law in the Constitutional Jurisdiction* 135-36 (2006) (ECF 236-16); V.S. Ivanenko, *International Treaties and the Constitution in Russian Legal System* 143 (2010) (ECF 236-33); B.L. Zimnenko, *International Law and Legal System of the Russian Federation* (2010) (ECF 236-32); S.Y. Marochkin, *Operation and Implementation of the Norms of International Law within the Legal System of the Russian Federation* 124-25 (ECF 236-35); G.V. Ignatenko, *International and National Law* 162-75 (2012) (ECF 237-10).

39. Indeed, Petitioners do not dispute that this constitutional hierarchy applies to all unratified treaties that have entered into force. Rather, Petitioners assert that somehow an exception to this constitutional hierarchy exists for unratified treaties that are provisionally applied (even though the text of Article 15(4) contains no such exception or distinction).[59] Each of Petitioners' arguments in this regard is meritless.

40. Like the Dutch Court of Appeal,[60] Petitioners suggest this hierarchy is somehow turned upside down based on **(1)** how the Executive Branch labels the treaty—*i.e.*, calling it a provisionally applicable "interstate" treaty rather than an "intergovernmental" treaty in force—or **(2)** whether the treaty is concluded by an "exchange of memoranda" rather than a single, consolidated document.[61] Both these criteria, however, are expressly rejected in Resolution 8-P based on the terms of Articles 1(2), 2(a), and 3(2) of the FLIT. As the Constitutional Court explained, the phrase used in the Constitution's Article 15(4), "international treaties of the Russian Federation," fully encompasses all international agreements "irrespective of their specific names" and "irrespective of whether such agreements are contained in a single document."[62] Such trivial details can be easily manipulated, and thus are not given any significance by Russian law (or by the Vienna Convention on the Law of Treaties).[63] Petitioners' reliance on such criteria, therefore,

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[59] Pet'rs' Br. 25-26 (ECF 239).

[60] Court of Appeal, Judgment ¶ 4.7.25 (ECF 176-1) (drawing an erroneous distinction between "international treaties of the Russian Federation" and "intergovernmental agreements," even though Article 1(2), 2(a), and 3(2) of the FLIT (ECF 242-19) explicitly define the former category as including the latter category).

[61] Pet'rs' Br. 25 (summarizing Court of Appeal, Judgment ¶¶ 4.7.25-4.7.26 (ECF 176-1)).

[62] Resolution 8-P ¶ 3.1 (ECF 237-4) (analyzing the FLIT, Article 2(a) (ECF 242-19)).

[63] *See* Vienna Convention on the Law of Treaties, Article 2(1)(a) (ECF 240-6) (defining "treaty" as meaning any international agreement "whether embodied in a single instrument or in two or more related instruments and whatever its particular designation").

is baseless and unsustainable.

41. What actually resolves instances of genuine normative conflict, as the Supreme Court explained consistently in 1995, 2003, and 2009, is the overarching "hierarchy of legal acts established by the Constitution."[64] The Supreme Court therefore has cited the Constitution's Article 113 and Article 115 as imposing structural limitations on the Executive Branch's use of unratified treaties.[65] Importantly, these provisions do not address treaty making specifically, and thus do not draw any distinction between various categories of unratified treaties (*i.e.*, "in force" or "provisionally applicable"). Rather, the Constitution's Articles 113 and Article 115 impose a structural limitation requiring all actions of the Executive Branch to "be consistent with . . . federal laws."[66] This same limitation is further confirmed in Article 15(2) of the Constitution, as well as specifically in the field of treaty making by Article 6(2) and Article 15(1) of the FLIT, as described above in Section 1.2.[67]

42. In the 2009 "Chinese Border" case, therefore, the Supreme Court held broadly and without qualification that the Executive Branch "is not entitled to adopt, amend, or abrogate"

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[64] *See* Ruling 49-O09-35 dated Dec. 29, 2009 (ECF 236-29) at 3-4.

[65] *See* Resolution 5 (ECF 236-13) (citing Article 113 of the Constitution); Ruling 49-O09-35 dated Dec. 29, 2009 (ECF 236-29) at 3-4 (citing Article 115 of the Constitution).

[66] *See* Ruling 49-O09-35 dated Dec. 29, 2009 (ECF 236-29) at 3-4 (interpreting Article 115 of the Constitution); *see also* Article 113, Constitution (ECF 235-14) (confirming that the Chairman of the Government shall act "[a]ccording to . . . the federal laws").

[67] Russian Constitution, Article 15(2) (ECF 235-14) ("The bodies of state authority . . . shall be obliged to observe the . . . laws."); Federal Law on International Treaties, Art. 6(2) (ECF 242-19) (providing that the "state organs of the Russian Federation" may only "consent . . . to be bound by an international treaty" in "accordance with their competence as defined by . . . legislative acts"); *Id*. Art. 15(1) (providing that treaties contrary to statutes "shall be subject to ratification" by Parliament).

Parliament's statutes by means of any "non-ratified Treaty."[68] This holding did not contemplate any exceptions or suggest that the Executive Branch can circumvent the constitutional hierarchy simply by switching the label—*i.e.*, reclassifying an "intergovernmental" treaty in force as, instead, a provisionally applicable "interstate" treaty (as the Dutch Court of Appeal wrongly suggested in the February 2020 judgment).[69]

43. ***Third***, the convoluted system hypothesized by Petitioners is directly contrary to the second passage that Prof. Mishina quoted from Resolution 8-P (*see* Section 1.2 above). To recall, the Constitutional Court explained in Resolution 8-P that a provisionally applicable treaty "shall be applied on an equal basis with those international treaties that have entered into force."[70] Petitioners' interpretation of the constitutional hierarchy, however, is irreconcilable with this reference to an "equal basis."[71] That is, Petitioners propose that a single category of functionally identical treaties—*i.e.*, treaties applied by the Executive Branch without Parliamentary approval—somehow have a "lower status" when they are in force, and a higher status when they are provisionally applicable.[72] A "lower status," needless to say, is not an "equal basis."

44. Accordingly, Petitioners' interpretation of Resolution 8-P must be rejected. Their interpretation is not only contrary to the Constitution and the FLIT, but also contrary to the text of Resolution 8-P. The Constitutional Court's 2020 Decision, by contrast, is fully consistent with the

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[68] Ruling 49-O09-35, Dec. 29, 2009 (ECF 236-29) at 3-4.

[69] Court of Appeal, Judgment ¶ 4.7.25 (ECF 176-1) (drawing an erroneous distinction between "international treaties of the Russian Federation" and "intergovernmental agreements," even though Article 1(2), 2(a), and 3(2) of the FLIT (ECF 242-19) explicitly define the former category as including the latter category).

[70] Mishina Decl. ¶ 14 (quoting Resolution 8-P ¶ 4.0) (emphasis added).

[71] *See* Pet'rs' Br. 25 (emphasis added).

[72] *See id.* (emphasis added).

hierarchy described by the Supreme Court in 1995, 2003, and 2009, as well as the "equal basis" principle articulated in Resolution 8-P.

§ 2. OTHER JUDICIAL DECISIONS

45. Petitioners suggest that the Constitutional Court's 2020 Decision also conflicted with several other Russian judicial decisions issued in 2012 and 2014, which supposedly confirmed Prof. Mishina's erroneous understanding of Resolution 8-P.[73] This is also wrong.

46. ***First***, Prof. Mishina briefly references Decisions 476-O and 477-O, which the Constitutional Court issued on April 3, 2012 (one week after Resolution 8-P).[74] These two decisions briefly address the same legal consequences arising from the same conflict between the executive order, Resolution 718, and the unpublished treaty on customs duties, which had already been addressed in Resolution 8-P. Those two 2012 decisions simply repeated the Constitutional Court's previous conclusions regarding the need for official publication (applied *mutatis mutandis* to somewhat different facts and procedural circumstances).[75] Neither 2012 decision addresses Prof. Mishina's theories regarding separation of powers or the normative hierarchy.

47. ***Second***, Prof. Mishina cites Decision 1820-O dated September 18, 2014 (the so-called "Free Economic Zones" case).[76] Tellingly, and much like Resolution 8-P and the two other 2012 decisions, this case yet again involved customs regulation—*i.e.*, an area where Parliament has repeatedly and explicitly delegated authority to the Executive Branch. This case likewise does not implicate the separation of powers or any conflict between the Executive Branch and

[73] Pet'rs' Br. 20 (ECF 239); Mishina Decl. ¶¶ 30-39 (ECF 242).

[74] Mishina Decl. ¶ 30 (ECF 242) (citing Decisions 476-O and 477-O (ECF 237-6, 237-7)).

[75] *See* Decisions 476-O (ECF 237-6); Decision 477-O (237-7).

[76] Mishina Decl. ¶¶ 31-34 (ECF 242) (describing Decision 1820-O, Sept. 18, 2014 (ECF 242-13)).

Parliament (nor did any of the litigants suggest that it did). Significantly, none of the Dutch courts endorsed Prof. Mishina's interpretation of Decision 1820-O or ever cited it in the Dutch litigation.[77]

48. This case involved a "free-customs-zone" procedure, which had been created by an agreement signed on June 18, 2010 (the "2010 Agreement"). Although the 2010 Agreement was provisionally applied and never ratified, it had been approved by Parliament and never operated of its own legal force exclusively. Indeed, Parliament approved the 2010 Agreement at least twice prior to the events of January-July 2012 at issue in Decision 1820-O, as detailed below.

49. The Constitutional Court explains (and Prof. Mishina ignores) that the 2010 Agreement was signed and provisionally applied pursuant to multiple earlier framework treaties creating a customs union with Belarus and Kazakhstan, including the 2009 Agreement on the Customs Code of the Customs Union (the "2009 Agreement").[78] The 2009 Agreement defined "customs legislation of the Customs Union" to include all "international treaties of the member-States" regulating customs activities, and provided that such instruments "shall apply on the customs territory of the Customs Union."[79] The 2010 Agreement unmistakably fell within this category. Moreover, Article 27(1) of the 2010 Agreement expressly provided that the 2010 Agreement would not be provisionally applied immediately upon signature. To the contrary, the 2010 Agreement could be provisionally applied only after the 2009 Agreement came into force, which took place one month after the 2010 Agreement was signed—*i.e.*, after the 2009 Agreement

[77] *See, e.g.*, Court of Appeal, Judgment (ECF 176-1).

[78] Decision 1820-O, Sept. 18, 2014 ¶ 2.1 (ECF 242-13).

[79] 2009 Customs Code of the Customs Union, Article 3(1), Article 3(2) (ECF 238-8).

had been ratified by Parliament.[80]

50. Moreover, in December 2011, Parliament removed all doubt about the status of the 2010 Agreement when, as the Constitutional Court further explains (and Prof. Mishina omits), Parliament incorporated the relevant provisions of the 2010 Agreement directly into a Parliamentary statute.[81] Prior to January 2012, therefore, when the complainant entity (Vichiunai-RUS LLC) in Decision 1820-O began to "carr[y] goods to the territory of the Republic of Belarus" from Russian territory, Parliament had already approved the "free-customs-zone" procedure under the 2010 Agreement on at least two occasions.[82] The complainant therefore never made any of the arguments that Prof. Mishina has now raised, and invoked a 2006 statute only because the 2010 Agreement "had not been officially published,"[83] much like in Resolution 8-P.

51. Indeed, as with Resolution 8-P, the sequence of events in Resolution 8-P simply would make no sense if Prof. Mishina's theories concerning Russian law were correct. Why would the Executive Branch wait to begin provisionally applying the 2010 Agreement until the entry into force (pursuant to ratification) of the 2009 Agreement—one month after the 2010 Agreement had been signed? Why would Parliament bother incorporating the 2010 Agreement into the 2011 statute, if the 2010 Agreement had immediate priority? If provisionally applicable treaties really superseded all conflicting Russian legal norms, then none of those steps would be necessary.

52. ***Third***, and finally, Prof. Mishina cites to Resolution 6-P of March 19, 2014 (ECF

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[80] Decision No. 1820-O dated Sept. 18, 2014 ¶ 2.1 (ECF 242-13); *see also* Law 114-FZ dated June 2, 2010 (ASA-130) (ratifying the 2009 Customs Code of the Customs Union).

[81] Decision 1820-O dated Sept. 18, 2014 ¶ 2.2 (ECF 242-13); *see also* Law 409-FZ dated Dec. 6, 2011 (ASA-114).

[82] Decision 1820-O dated Sept. 18, 2014 ¶ 1 (ECF 242-13).

[83] *Id.*

242-14), wherein the Constitutional Court assessed the constitutionality of a 2014 treaty that formally recognized the Crimean referendum of March 16, 2014, regarding accession to the Russian Federation. This treaty was provisionally applied for only three days—between the date of signature and March 21, 2014, when Parliament enacted a statute ratifying the treaty.[84] According to Prof. Mishina, Resolution 6-P purportedly shows that provisionally applicable, unratified treaties can "alter" Russian statutes.[85] Prof. Mishina also extensively cites a 2015 article by Professor A.S. Kartsov, which (she says) confirmed her interpretation of Resolution 6-P.[86]

53. In reality, both Resolution 6-P and Prof. Kartsov's commentary repeatedly disprove Prof. Mishina's arguments from multiple perspectives.

54. Fundamentally, Prof. Mishina fails to acknowledge the narrow scope of the Constitutional Court's jurisdiction in Resolution 6-P. As the Constitutional Court explained, the basis for this decision was Article 125(2)(d) of the Russian Constitution, which only permits the Constitutional Court to evaluate whether an international treaty is in "compliance with the Constitution" prior to the entry of such international treaty into force.[87] In Resolution 6-P, therefore, the Constitutional Court was faced only with determining if the unratified treaty of March 18, 2014, conflicted or did not conflict with the Constitution itself. The Constitutional

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[84] A.V. Bezrukov, *Refining and Delimiting the Process for Accession and Formation of New Subjects of the Russian Federation*, (2014) (ASA-131) (describing the timeline of these events).

[85] Mishina Decl. ¶¶ 36-38 (ECF 242) (citing Resolution 6-P dated Mar. 19, 2014 (ECF 242-14)).

[86] Mishina Decl. ¶¶ 36-39 (ECF 242) (citing Kartsov A. S., *On the Question of Realization of Constitutional Control in respect of International Treaty on Including a New Subject into the Russian Federation*, 4 Journal of Constitutional Justice (2015) (ECF 242-23)).

[87] *Compare* Resolution 6-P dated Mar. 19, 2014 (ECF 242-14) (citing Article 125(2)(d) of the Constitution) *with* ECF 242-6, Article 125(2)(5) ("The Constitutional Court . . . shall consider . . . cases on the compliance with the Constitution of the Russian Federation of . . . international treaties and agreements of the Russian Federation which have not come into force." (emphasis added)).

Court was not faced with deciding any questions regarding other conflicts—*e.g.*, conflicts between the unratified treaty and various statutes, which Prof. Mishina purports to identify.[88]

55. The narrow scope of Resolution 6-P is explicitly confirmed by Prof. Kartsov, who observes that evaluating any questions other than the treaty's "constitutionality" would constitute improperly broadening the Constitutional Court's jurisdiction under Article 125(2)(d). Prof. Kartsov states repeatedly that this type of jurisdiction only permits assessment of "conflicts between the Constitution and the international treaty,"[89] which thus excludes other distinct categories of "conflicts between an international treaty and current laws."[90] For the avoidance of doubt, Prof. Kartsov then repeats his point: "No other conflicting events in the context of this particular type of constitutionality test can serve as grounds for disqualification of the normative substance of an international treaty."[91]

56. In addition, both the Constitutional Court and Prof. Kartsov explain that many of the apparent conflicts identified by Prof. Mishina would subsequently need to be resolved in Parliamentary enactments during the nine-month "transition period" established under Article 6 of

[88] Resolution 6-P dated Mar. 19, 2014 (ECF 242-14). Indeed, it would be practically impossible for the Constitutional Court to determine comprehensively under Article 125(2)(d) whether an unratified treaty would be compatible with every single statute within the Russian legal system—regardless of whether any litigant had actually raised the individual conflicts. It is inconceivable, moreover, that the Constitutional Court would be given such broad authority, when the Supreme Court—not the Constitutional Court—is typically responsible for evaluating ordinary conflicts between treaties, statutes, and other normative acts (other than conflicts with rules found in the Constitution itself).

[89] Kartsov A. S., *On the Question of Realization of Constitutional Control in respect of International Treaty on Including a New Subject into the Russian Federation,* 4 Journal of Constitutional Justice (2015) (ECF 242-23)

[90] *Id*. (emphasis added).

[91] *Id* (emphasis added); *see also* Bezrukov A. V., *Refining and Delimiting the Process for Accession and Formation of New Subjects of the Russian Federation*, 8 State power and local government (2014) (ASA-131)).

the treaty.[92] These subsequent enactments would include the "adoption of a federal law on [the treaty's] ratification,"[93] "a federal constitutional law on the admission" of the new entity into the Russian Federation,[94] and "more specific . . . laws" to address "the integration" process.[95] The Constitutional Court noted that it had no jurisdiction to address any such issues in the case before it, although the "constitutionality of the respective legal provisions . . . may become a point at issue for consideration by the Constitutional Court" in future litigation.[96]

57. None of these statements by the Constitutional Court or Prof. Kartsov is reconcilable with the system imagined by Prof. Mishina, wherein the provisional application of the 2014 treaty automatically and immediately superseded all conflicting Russian legal rules.

§ 3. COMMENTARIES

58. The three academic articles quoted by Prof. Mishina (ECF 242 ¶ 18) do not give any reason to deviate from the above analysis.

59. Professor Osminin's summary merely reproduces the language of Resolution 8-P. He thus explains that provisionally applicable international treaties have "the same legal effect" as treaties in force. Such instruments therefore "take precedence" over Russian legal normative acts issued at the same level of the hierarchy. All these statements are correct—and have nothing to do with separation of powers or conflicts with Parliament's statutes. Indeed, Professor Osminin does not say that provisionally applicable treaties have higher status than treaties in force or higher

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[92] Resolution 6-P dated Mar. 19, 2014 (ECF 242-14).

[93] Kartsov A. S., *On the Question of Realization of Constitutional Control in respect of International Treaty on Including a New Subject into the Russian Federation,* 4 Journal of Constitutional Justice (2015) (ECF 242-23)

[94] Resolution 6-P dated Mar. 19, 2014 ¶ 4 (ECF 242-14).

[95] *Id.*

[96] *Id.*

status than the statutes enacted by Parliament. Like the Constitutional Court's reference to "essential equivalence," therefore, Professor Osminin's reference to the "same legal effect" contradicts Prof. Mishina's theory.

60. It is telling that Professor Osminin did not appear to think this conclusion established any kind of significant exception to the general rule that Professor Osminin had stated emphatically and categorically before Parliament in 1994 and 1995:

> "[C]onsent, whether by Parliament, or by the President, or by the Government, or by a department, to Russia being bound by an international treaty is granted only in accordance with their competence. And no more than that. A departmental treaty does not have the right to change the law. Neither does the Government, if the Government takes a decision, nor the President. Only, if it is approved in the form of ratification, signed by the President, only then can this treaty be above the law. Only in one instance." (ECF 235-18 at 74, emphasis added)

> "[I]nternational treaties that have been ratified by Parliament, in accordance with the Constitution, take precedence over statute, insofar as if an international treaty provides for rules different to those provided for by our statute, the rules of the international treaty apply." (ECF 235-24 at 5)

61. If Professor Osminin's 2014 commentary meant what Prof. Mishina believes it to mean, then he would certainly have described Resolution 8-P as an exception to these rules.

62. It is also telling that Professor Osminin makes his comment in the context of "[t]he extension of the *pacta sunt servanda* rule to provisionally applied international treaties." (*See* ECF 242 ¶ 18). That principle, of course, applies not exclusively to unratified treaties that are provisionally applicable—but also to unratified treaties in force (hence Prof. Osminin's reference to an "extension"). This is stated explicitly in Article 26 of the 1969 Vienna Convention on the Law of Treaties (ECF 240-6): "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." (Emphasis added.) There is simply no reason that *pacta sunt servanda* would give unratified, provisionally applicable treaties a higher normative status that unratified treaties in force. Indeed, *pacta sunt servanda* does not affect the domestic legal

hierarchy at all, because it is an international law principle.[97]

63. Prof. Mishina then quotes a commentary by Natalya Ageshkina (ECF 242 ¶ 18(b)), who also correctly summarizes Paragraph 4.1 of the Constitutional Court's decision. This commentary, however, merely repeats that provisionally applicable treaties are "essentially equivalent" to treaties in force, and thus does not agree with Prof. Mishina that provisionally applicable treaties have a higher status.

64. Prof. Mishina's final citation to Professor Kurdyukov (ECF 242 ¶ 18(c)) actually contains a serious mistake. Professor Kurdyukov suggests that "[i]n the absence of an officially promulgated text, such treaties have priority over Russian laws." Respectfully, that is exactly the opposite of the Constitutional Court's decision, which held that treaties must be officially published. Indeed, the Dutch Court of Appeal's citation to Professor Kurdyukov (ECF 240-1 ¶ 4.7.23) reflects the same mistake, and likewise confirms its unfortunate failure to read these Russian legal commentaries carefully.

65. Accordingly, the academic discussion summarized by Prof. Mishina does not change the correct interpretation of Resolution 8-P.

§ 4. SO-CALLED TREATY "PRACTICE"

66. Prof. Mishina (ECF 242 ¶¶ 41-48) also purports to identify conflicts between various Parliamentary statutes and unratified, provisionally applicable treaties. According to Prof. Mishina, these treaties all supposedly reveal instances where unratified, provisionally

[97] As an expert on comparative constitutional law, I note that Russian law and U.S. law are essentially similar in this regard, since both legal systems recognize the concept of "self-executing" and "non-self-executing treaties." *E.g.*, Yury Tikhomirov, "Russia," in *International Law and Domestic Legal Systems* 517, 522 (Shelton, ed. 2011) (ASA-116). Professor Osminin's discussion of *pacta sunt servanda* relates to international law consequences, not to domestic legal consequences.

applicable treaties have conflicted in some way with statutes enacted by Parliament.

67. This argument is also untenable. The existence of conflicting norms (if, indeed, any of these are genuine conflicts) says nothing whatsoever about how these conflicts are to be resolved. The record in this case is full of instances where the Constitutional Court or the Supreme Court have invalidated practices of the Executive Branch as contrary to the Constitution or statutes enacted by Parliament—including Resolution 8-P itself (ECF 237-5), as well as the Chinese Border case (ECF 236-29) and multiple other decisions summarized below in Section 6. This is an entirely ordinary feature of any constitutional system. As I have previously explained in my Expert Reports (ECF 234-2, 234-3, and 234-4), the Executive Branch cannot expand its own powers in the Russian legal system through so-called "practice."

§ 5. SO-CALLED "RETROACTIVE" EFFECT

68. As the above analysis reflects, Prof. Mishina's suggestion that the 2020 Decision is a "dramatic departure" from pre-existing Russian law is unsustainable. In reality, the 2020 Decision is fully in accord with a consistent line of judicial decisions rendered in 1995, 2003, 2009, and 2012 by the Constitutional Court and the Supreme Court of the Russian Federation. Moreover, the normative limitations applied by the Constitutional Court and Supreme Court in these cases (and reaffirmed in the 2020 Decision) were all enacted in the 1990s, including provisions of the 1993 Constitution adopted and the 1995 FLIT.

69. It is therefore not a question of applying the 2020 Decision "retroactively" to the beginning of the arbitrations in this case in February 2005. Indeed, this line of argument can hardly be taken seriously, since Petitioners and Prof. Mishina have routinely relied upon Russian judicial decisions that were decided after February 2005—and, indeed, even after the relevant phase of the arbitration was already concluded in 2009 (*see, e.g.*, ECF 2-4). Even the earliest Russian judicial decision that Prof. Mishina purports to rely upon, Resolution 8-P, was decided almost three years

after the Tribunal rendered its 2009 decisions (*e.g.*, ECF 2-4) concerning Russian law under the ECT's Article 45(1). This is not retroactivity, but rather *ex tunc* interpretation and standard for many judicial systems.

70. It is evident, therefore, that Prof. Mishina had always previously applied the same understanding of *ex tunc* interpretation that I have applied in this Declaration in all of her Expert Opinions in the Dutch proceedings.

§ 6. STATUTORY DELEGATION

71. The 2020 Decision also rejects Petitioners' second theory regarding an alleged Parliamentary delegation. Specifically, Petitioners cite several provisions of the so-called "Foreign Investment Laws" (or "FILs") enacted in 1991 and 1999, in which Parliament supposedly created the "option" for the Executive Branch to commit to arbitration of any "dispute between a foreign investor and the Russian Federation" in an unratified treaty.[98] The 2020 Decision rejects this argument, however, in accordance with previous judicial decisions rendered in 1997, 1999, and 2000, concerning whether and how Parliament can "delegate relevant authority" to the Executive Branch to promulgate legal enactments.[99]

72. The context of Resolution 8-P, for example, had been Parliament's valid delegation of authority to the Executive Branch for "setting customs duties," as recognized in earlier precedents.[100] In those older cases, the Constitutional Court had analyzed various "delegation"

[98] Pet'rs' Br. 22-23 (ECF 239); *see also* 1991 Foreign Investment Law, Arts. 5, 9 (ECF 120-5); 1999 Foreign Investment Law, Arts. 3, 5, 10 (ECF 120-6).

[99] Decision 2867-O-R dated Dec. 24, 2020 (ECF 234-6) at 15-18.

[100] Decision 2867-O-R dated Dec. 24, 2020 (ECF 234-6) at 15-16 (analyzing Resolution 8-P in light of prior decisions rendered in 1997, 1999, and 2000).

provisions set forth in Parliament's legislation on customs issues.[101] These included, for example, the 1993 Law "On the Customs Tariff," where Parliament provided that "[t]he rates of import customs duties are determined" by the Executive Branch,[102] and concluded that Parliament had appropriately and adequately delegated authority to the Executive Branch in these statutory provisions.[103]

73. In the 2020 Decision, the Constitutional Court distinguished those prior legislative delegations from provisions of the 1999 FIL cited by Petitioners in this case. As the Constitutional Court explained, the 1999 FIL does not contain any such appropriate or adequate delegation of authority, such that the Executive Branch has not been authorized under the 1999 FIL to commit the Russian Federation to "compulsory jurisdiction of international arbitration . . . in resolving disputes between a state and foreign investors."[104]

74. The Constitutional Court's analysis was fully in accordance with previous judicial decisions concerning statutory delegation. I explain below the three reasons why this is so.

75. ***First***, in multiple previous cases, the Constitutional Court has referred to "the federal legislator's discretionary right" to determine which "types of disputes [] may be referred for consideration to an arbitral tribunal."[105] In 2015, for example, the Constitutional Court noted the relation between Parliament's authority in this sphere and Article 47(1) of the Constitution,

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[101] *See, e.g.*, Ruling 294-O dated Dec. 15, 2000 (ASA-126); Ruling 193-O dated Nov. 5, 1999 (ASA-125) (explaining that "the rates of customs duties are determined" by the Executive Branch); Resolution 16-P dated Nov. 11, 1997.

[102] Law No. 5003-I dated May 21, 1993, Art. 3(2) (ASA-129).

[103] Ruling 193-O dated Nov. 5, 1999 (ASA-125) (analyzing Law No. 5003-I (ASA-129)).

[104] Decision 2867-O-R dated Dec. 24, 2020 (ECF 234-6) at 15-18.

[105] Resolution 10-P dated May 26, 2011 ¶ 3.1 (ASA-119); Ruling 5-O dated Jan. 15, 2015 ¶ 2.2 (ASA-136).

which provides that the jurisdiction [*подсудность*] of the courts must be regulated "by law."[106] Similarly, in the 2020 Decision, the Constitutional Court repeated the established principle that "the rule of Article 47 (Part 1) of the Constitution of the Russian Federation" is that "only a law can establish the competent court for hearing any category of cases."[107] Accordingly, because the ECT was merely signed by the Executive Branch pursuant to a resolution issued by Prime Minister Chernomyrdin, and never ratified by any Parliamentary enactment,[108] the Executive Branch lacked authority under Article 47(1) of the Russian Constitution to confer jurisdiction on an arbitral tribunal, as the 2020 Decision reaffirms.

76. ***Second***, neither the 1991 FIL nor the 1999 FIL could or did modify this understanding, because the provisions invoked by Petitioners do not satisfy the longstanding requirement that Parliament's statutory delegations of authority must comply with "the principle of certainty and clarity of legislative regulation."[109] For example, applying this principle in a 2005 case, the Constitutional Court found that Article 5 of the Federal Law on Obligatory Insurance of Civil Law of Owners of Vehicles, because Parliament had failed to specify adequate "criteria to determine the conditions for mandatory insurance contracts" violated the constitutional principle of separation of powers.[110] Similarly, in a 2004 case, the Constitutional Court held that Article 87(2) of the Merchant Marine Code was an unconstitutional and invalid delegation, because Parliament had failed to identify sufficiently certain "criteria or reference points" needed for the

[106] Ruling 5-O dated Jan. 15, 2015 ¶ 2 (ASA-136) (referring to the requirement of "statutory jurisdiction" under Article 47(1) of the Constitution).

[107] Decision 2867-O-R dated Dec. 24, 2020 (ECF 234-6) at 16.

[108] *See* Prime Minister's Resolution 1390 dated Dec. 16, 1994 (ECF 235-21)

[109] Constitutional Court, Resolution 7-P dated Apr. 6, 2004 (ASA-135).

[110] Constitutional Court, Resolution 6-P dated May 31, 2005 (ASA-134).

classification of non-State pilotage entities.[111]

77. In the present case, the provisions of the 1991 FIL and 1999 FIL invoked by Petitioners likewise lack adequate "certainty and clarity" regarding any purported delegation. To recall, Article 5 and Article 9 of the 1991 FIL contain references to "international treaties,"[112] as do Articles 3, 5, and 10 of the 1999 FIL.[113] Petitioners' argument is that these provisions authorize the Executive Branch to "agree to *any* type of method for resolving investor-State dispute."[114] Petitioners' argument is self-defeating, however, since such a broad delegation ("*any* type of method") could not possibly satisfy the Constitutional Court's principle of certainty and clarity applicable to statutory delegations, as explained above.

78. Indeed, the 1991 FIL provides merely that an international treaty may establish "another procedure" or "recourse to international means" for resolution of disputes involving

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[111] Constitutional Court, Resolution 7-P dated Apr. 6, 2004 (ASA-135).

[112] 1991 Foreign Investment Law, Articles 5, 9 (ECF 120-5) ("Should international agreements in force on the territory of the Russian Federation, determine other rules than those, contained in the RSFSR legislation, the rules of an international agreement shall apply. . . . Investment disputes, including disputes over the size, terms or procedure of paying compensation shall be settled by the Supreme Court of the Russian Federation or in the RSFSR Supreme Court of Arbitration, if no other procedure is envisaged by some international agreement in force on the territory of the Russian Federation. . . . An international agreement in force on the territory of the Russian Federation may envisage the use of international means of settling disputes, arising from foreign investments on the territory of the Russian Federation.").

[113] 1999 Foreign Investment Law, Articles 3, 10 (ECF 120-6) ("Legal regulation of foreign investments on the territory of the Russian Federation shall be governed by this Federal Law, other federal laws, normative acts of the Russian Federation and international treaties of the Russian Federation. . . . A foreign investor shall have full and unconditional protection of its rights and interests in the Russian Federation which are provided by this Federal law, other federal laws and normative acts of the Russian Federation and by international treaties of the Russian Federation. . . . Any dispute involving a foreign investor and related to the investments and business activities of such investor in the Russian Federation shall be settled in compliance with the international treaties of the Russian Federation and federal laws in a court, an arbitration court or international arbitration (arbitral tribunal).").

[114] Pet'rs' Br. 22-23 (ECF 239).

foreign investments. Neither of these provisions identify any criteria, however, as to what such "procedure" or "recourse" might entail.[115] The 1999 FIL likewise makes no mention of investor-State arbitration or the categories of disputes that might be referred to international arbitration. There is no mention, for example, of expropriation or taxation-related disputes, such as the dispute arising in the present case.

79. Even more significantly, neither the 1991 FIL nor the 1999 FIL even identify who may enter into these "international treaties" concerning dispute resolution. As noted above, the 2020 Decision referred favorably to cases where the Constitutional Court had upheld the delegation enacted by Parliament under the 1993 Law "On the Customs Tariff."[116] That statute provides that "the Government" shall exercise authority to establish customs duties.[117] Accordingly, as illustrated in Resolution 8-P, it is only the Prime Minister himself (*i.e.*, the "Chairman of the Government") who has exercised this power by promulgating resolutions to establish customs duties.[118] The phrase, "international treaties," used in the 1991 and 1999 FILs, by contrast, is defined in the FLIT to include "interagency agreements," which may be concluded by more than seventy different federal executive organs, including the Ministry of Sport, the Federal Penitentiary Service, and the Federal Agency for Youth Affairs.[119] I am not aware of any statutory delegation that has ever been upheld by the Constitutional Court, where Parliament failed to specify which of seventy potential entities was entitled to exercise the delegated power.

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[115] 1991 Foreign Investment Law, Arts. 5, 9 (ECF 120-5).

[116] Ruling 193-O dated Nov. 5, 1999 (ASA-125) (analyzing Law No. 5003-I (ASA-129)).

[117] Law No. 5003-I dated May 21, 1993, Art. 3(2) (ASA-129).

[118] *See* Resolution 8-P ¶ 1.1 (ECF 237-5) (citing Resolution 718 (ECF 238-6) (signed by the Chairman of the Government, Prime Minister Kasyanov).

[119] *See* First Avtonomov Expert Report ¶ 51 (ECF 234-2).

80. This analysis is confirmed by repeated statements by the Ministry of Foreign Affairs, as quoted in 2016 by the District Court of The Hague.[120] As the Ministry of Foreign Affairs explained, neither the 1991 FIL nor the 1999 FIL allowed the Executive Branch to conclude bilateral investment treaties (with Argentina, South Africa, or Japan) without Parliamentary ratification.[121] If either the 1991 FIL or the 1999 FIL had actually delegated such power to the Executive Branch—as Petitioners argue—then Parliamentary ratification would have been unnecessary.

81. ***Third***, the actual meaning of these references to "international treaties" in the 1991 and 1999 FIL has nothing to do with delegation. These references are examples of a common feature of Russian legislation, which I will call "duplication" rules.

82. As many legal scholars have noted, Parliament has frequently enacted statutes providing for "[u]nnecessary duplication of legal rules," including both word-for-word "simple duplication" or more approximate "duplication of meaning."[122] I have seen myself on many occasions that Russian legislators frequently "duplicate" the pre-existing constitutional rules because they are motivated to demonstrate affirmatively that the new legislation is constitutional. They do not seek to narrow or expand the preexisting constitutional rule. Professor Makovskiy and other scholars have criticized this practice as "unnecessary," but it is nonetheless a well-established element of Russian legislation.[123]

83. In particular, Parliament has duplicated Article 15(4) of the Russian Constitution

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[120] *See* District Court of The Hague, Judgment ¶¶ 5.62-5.63 (ECF 102-2).

[121] *See* District Court of The Hague, Judgment ¶¶ 5.62-5.63 (ECF 102-2).

[122] N.A. Vlasenko, *Logical and Structural Defects of the Soviet Law System* (1991) (ASA-127); N.I. Taeva, *Norms of the Constitutional Law* (2015) (ASA-128).

[123] Makovskiy, *Codification of the Civil Code* (2008), § 35 (ASA-137).

in more than one hundred codes and statutes.[124] The Constitutional Court noted this phenomenon in a 2007 decision, which noted that Article 1(3) of the Criminal Procedure Code "directly duplicates the provision of Article 15(4) of the Constitution."[125]

84. Based on the statutory text, it is evident that the provisions that Petitioners have cited as purported statutory delegations are merely duplications of the Constitution's Article 15(4) of the Constitution. This is illustrated in **Appendix A**, attached hereto, which reproduces the complete text of the duplication rules that Petitioners have cited at various times throughout this dispute (including those in the 1991 and 1999 FIL).

85. This textual analysis is further confirmed by commentary. As regards the 1999 FIL, legal scholars have confirmed that the references to "international treaties" found in both Article 3 and Article 5 of this statute should be interpreted as contemplating only "ratified international agreements," because these provisions merely duplicate the meaning of the Constitution's Article 15(4).[126] This same understanding must also therefore be applied to the reference to "international treaties" under Article 10 of the 1999 FIL, based on the principle that

[124] Makovskiy, *Codification of the Civil Code* (2008), § 35 (ASA-137); *see also* P.V. Krasheninnikov, *Commentary on the Civil Procedural Code* (2014) ("Part 2 of the commented article repeats the provisions of Art. 15(4) of the Constitution of the Russian Federation, as it applies to civil procedure . . . ."); A.S. Komarov, *Commentary on the Law "On International Commercial Arbitration"* (2007) ("Art. 1(5) mentions the interrelation between the rules of the Russian legislation and an international treaty, to which the Russian Federation is a party. The rule contained in this paragraph corresponds to Art. 15(4) of the Constitution . . . ."); V.V. Yarkov, *Commentary on the Commercial Procedural Code* (2011) ("Part 3 of Art. 3 reflects the general rule of the priority of international treaties over the national legislation . . . . This comes out of Article 15(4) of the Constitution . . . .").

[125] Decision No. 333-O-P dated Mar. 1, 2007 ¶ 2 (ASA-120) (emphasis added).

[126] S.N. Bratanovsky & A.B. Smushkin, *Commentary to Federal Law No. 160-FZ* (2005) (ASA-132); E.E. Veselkova, *Legislation and Economics* No. 8 (2012) (ASA-133).

words and phrases should be interpreted uniformly each time that they appear in a single statute.[127]

86. These scholars' understanding is confirmed when one considers the Parliamentary drafting history of the 1991 and 1999 FIL, as illustrated in the timeline set forth in **Appendix B**. Specifically, Article 5 and Article 9 of the 1991 FIL were intended to reflect the statute's compliance with Article 1.6 of the 1990 Draft Constitution: "If an international treaty of the Russian Federation contains rules different from those set forth in the Russian legislation, the rules of the international treaty shall apply." When Parliament began to revise the 1991 FIL in a lengthy process, several legislators—including Chairman Gusev and Chairman Sapiro—noted explicitly that the 1991 FIL and proposed amendments (which ultimately became the 1999 FIL) consistently "reproduce[d] a series of provisions of the Constitution," including Article 15(4).[128]

87. The consequence of this analysis is illustrated in the 2009 "Chinese Border" case, where the Supreme Court found that that the Criminal Procedure Code prevailed over contrary provisions of the an unratified treaty applied by the Executive Branch.[129] This decision shows both that the Constitution's Article 15(4) does not give the Executive Branch inherent authority to use unratified treaties to deviate from statutes and that Article 1(3) of the Criminal Procedure Code

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[127] A.V. Polyakov, *General Theory of Law* (2016) ("[T]he same wording of the same law can not be given a different meaning unless it follows from the law itself . . . ."); R.V. Kashanina, Legal Technique: A Textbook (2nd ed. 2011) (same); A.V. Petrov, *Theory of State and Law* (2002) ("[T]he same wording of the same law can not be given a different meaning, if it does not follow from the law itself.").

[128] December 1994 Letter from Federation Council to State Duma ¶ 2 (ASA-117); *see also* June 1997 Letter from Federation Council to State Duma (ASA-118), at 1 ("[R]epetition of the provisions of the Constitution of the Russian Federation in the draft Federal Law appears to be unjustified . . . . Article 5(3) duplicates the rule contained in Article 15 of the Constitution of the Russian Federation, pursuant to which where an international treaty of the Russian Federation provides for rules different from those set forth by the law, the rules of the international treaty shall apply.")

[129] Supreme Court Cassation Ruling 59-O09-35 dated Dec. 29, 2009 (ECF 236-29).

(which "directly duplicates" Article 15(4))[130] does not create a statutory delegation. The same category of provisions in the 1991 and 1999 FIL likewise do not authorize the Executive Branch to deviate from pre-existing Russian statutory law by means of an unratified treaty.

§ 7. PRESUMPTIVE "JUDICIAL REVIEW"

88. Finally, the 2020 Decision held that ISDS clauses fundamentally concern "the sovereign actions . . . of a state" (*e.g.*, taxation and alleged expropriation), which are presumptively subject to "constitutional or administrative judicial review" within the Russian legal system.[131] Accordingly, the Executive Branch cannot commit to ISDS without ratification by Parliament, regardless of whether the unratified treaty is provisionally applicable or in force.[132] Petitioners have now fully conceded that "'public law' disputes are not arbitrable under Russian law," but they assert that so-called "Russian authorities" have concluded that ISDS is supposedly "*not* 'of a public-law nature.'"[133] This is also wrong.

89. The only three "Russian authorities" cited for this proposition are three academic commentaries.[134] Remarkably, all three articles disagree with one another—and two of them fully reject Petitioners' arguments. Specifically, Professor Krupko says that ISDS can have "either a public law basis or a private law basis" depending upon the "nature of the claims," and that claims

[130] Decision 333-O-P dated Mar. 2, 2007 ¶ 2 (ASA-120).

[131] Decision 2867-O-R dated Dec. 24, 2020 (ECF 234-6) at 17-18 (citing, *e.g.*, EU Submission to United Nations, Jan. 18, 2019 (ASA-124)).

[132] Decision 2867-O-R dated Dec. 24, 2020 (ECF 234-6) at 17-18.

[133] Pet'rs' Br. 23 (ECF 239).

[134] G.M. Veliaminov, *International Economic Law and Procedure* ¶ 801 (WoltersKluwer 2004) (ECF 243-5 at Page 288); L.I. Volova, *The Mechanism of Settlement of International Investment Disputes*, 1(8) Econ. J. Rostov State Univ. 80 at 81 (2010) (ECF 243-5 at Page 289); S.I. Krupko, *Investment Disputes between a State and a Foreign Investor* at 16 (BEK 2002) (ECF 243-5 at Page

relating to "taxes" and "international law principles applicable to expropriation" have a "public law basis."[135] Similarly, Professor Volova confirms that—however such disputes are characterized—this category of disputes presumptively "must, first of all, be resolved in the national courts of one of the parties to the dispute."[136] Only Professor Veliaminov actually agrees unambiguously with Petitioners, and his discussion of the issue is a single paragraph without any reasoning or citations to authority.[137]

90. More importantly, Professor Veliaminov's article contradicts the long-standing criteria applied by the Constitutional Court to determine that "disputes arising out of administrative and other public law relations" are not subject to arbitration.[138]

91. Indeed, as the 2020 Decision observed, the European Union made a submission concerning the nature of ISDS to a U.N. working group in 2019.[139] As the European Union emphasized, ISDS is a "public law" regime because it concerns the "sovereign capacity of states to regulate" and creates a legal system "similar to public or constitutional law, in which individuals are protected from acts of the state and can act to enforce those protections."[140] The European Union cited numerous American and European scholars who have confirmed this understanding

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[135] S.I. Krupko, *Investment Disputes between a State and a Foreign Investor* (BEK 2002) at 16 (ECF 243-5 at Page 289).

[136] L.I. Volova, *The Mechanism of Settlement of International Investment Disputes*, 1(8) Econ. J. Rostov State Univ. 80 at 81 (2010) (ECF 243-5 at Page 289) (emphasis added).

[137] S.I. Krupko, Investment Disputes between a State and a Foreign Investor (BEK 2002) at 16 (ECF 243-5 at Page 289).

[138] *Compare* G.M. Veliaminov, *International Economic Law and Procedure* ¶ 801 (WoltersKluwer 2004) (ECF 243-5 at Page 288).

[139] EU Submission to United Nations, Jan. 18, 2019 (ASA-124).

[140] *Id.*

of ISDS in publications across decades.[141] Accordingly, the Constitutional Court's characterization of ISDS as a "public law" regime not only applies the traditional test used by Russian courts, but also fully corresponds to how ISDS is viewed throughout the world.

92. The above understanding is not only confirmed by the views concerning ISDS more broadly, but also by the specific debates concerning ratification. As I have listed in **Appendix C**, the Executive Branch, Parliament and ECT Secretariat engaged in extensive public deliberations over the potential "consequences" of the ECT's ratification—*i.e.*, how Russian law would change if the ECT would be ratified.[142] It was fully evident from this dialogue that none of the relevant participants—including Prime Minister Chernomyrdin himself—believed that ISDS was already permissible under the ECT beginning in 1994.

93. In 2001, the Parliament stated that ECT ratification would bring about "additional opportunities to resolve disputes . . . on issues of . . . foreign investments."[143] In 2004, the ECT Deputy Secretary General described his hope that Parliament would ratify the ECT, and noted that—until ratification—the ECT's provisional application by itself "does not" authorize recourse to "the dispute resolution mechanisms provided for by the treaty."[144] These statements coincide with numerous observations made by Russian public officials and lawmakers, showing that Petitioners' theories were never even anticipated, let alone endorsed, at the time.

94. Accordingly, it is evident that the Constitutional Court's 2020 Decision not only

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[141] *Id*.

[142] *E.g.*, Parliamentary Transcript, June 17, 1997 (ECF 235-34); Parliamentary Summary and Recommendations, June 17, 1997 (ECF 237-29); Parliamentary Transcript, Jan. 26, 2001 (ECF 236-10); Parliamentary Summary and Recommendations, Jan. 26, 2001 (ECF 237-30).

[143] *E.g.*, Parliamentary Summary and Recommendations, Jan. 26, 2001 (ECF 237-30) (emphasis added).

[144] A. Konoplyanik, *Energy Dialogue: From Summit to Charter* (May 19, 2004) (ASA-123) (emphasis added).

corresponds to longstanding principles of Russian law, but also the contemporaneous understanding of the ECT itself.

* * *

I declare under penalty of perjury under the laws of the United States of America that all opinions expressed here are in accordance with my sincere belief.

Executed on August 1, 2022, in Moscow, Russian Federation.

Alexei S. Avtonomov