IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL ACTION NO. 1:22-CV-00798 (CJN)

YUKOS CAPITAL LIMITED
Petitioner

V.

THE RUSSIAN FEDERATION
Respondent

EXPERT REPORT OF PROFESSOR PAUL B. STEPHAN

February 9, 2024

I. QUALIFICATIONS AND EXPERTISE

1. I am the John Jeffries, Jr., Distinguished Professor of Law and the David H. Ibbeken '71 Research Professor at the University of Virginia School of Law and a member of the bars of the Supreme Court of the United States, the United States Court of Appeals for the District of Columbia Circuit, the United States Tax Court, the District of Columbia, and the Commonwealth of Virginia. From August 2006 until December 2007, I served as Counselor on International Law in the Office of the Legal Adviser, U.S. Department of State, and from August 2020 to August 2021 as Special Counsel to the General Counsel of the U.S. Department of Defense, in both instances on leave from my university. My work at State and Defense entailed providing advice

on matters of international, constitutional, and administrative law of relevance to the national security and foreign relations of the United States.

2. Before attending Law School, I studied Russian history and politics at both the undergraduate and graduate level at Yale University. I then worked as an analyst responsible for Soviet domestic politics in the U.S. Central Intelligence Agency. After studying law at the University of Virginia and completing a clerkship with Justice Lewis F. Powell, Jr., of the Supreme Court of the United States, I joined the University of Virginia faculty in 1979. I was promoted to the rank of full professor in 1985, and held the Percy Brown, Jr., chair at the Law School from 1991 until 2003 and the Lewis F. Powell, Jr., chair from 2003 to 2009. At that time I was appointed to the Jeffries Distinguished Professorship. I have held the Ibbeken chair since 2021 as well as in earlier years. From the start of my academic career I concentrated on Soviet and Russian law, politics, and economics, in addition to tax law, international law, and the organization and regulation of international business transactions.

3. After the dissolution of the Soviet Union, I worked on the law reform process in the former republics of the Soviet Union, with the bulk of my activities in the Russian Federation. In 1992-1993, legal specialists working on behalf of the Russian government solicited my advice concerning the framing of the Russian Federation's new Constitution, which was ratified at the end of 1993. During this period I also advised members of the State and Law Administration of the Office of the President of the Russian Federation about organization of the judicial system and the conditions for promoting judicial independence. I played a central role in establishing the presence of the American Bar Association's Central and East European Law Initiative in Russia.

4. During the decade following the dissolution of the Soviet Union, I contracted with a number of government and international bodies to assist law reform projects in this region,

including the International Monetary Fund, the World Bank, the Organization for Economic Cooperation and Development, the U.S. Treasury, and the U.S. Federal Bureau of Investigation. I also organized or directed several programs to train Russian lawyers and judges, all of which were funded by the U.S. Agency for International Development.

5. In addition, I advised numerous law firms and private businesses on matters relating to the Russian legal system and its courts. From the late 1980s to the mid-1990s, I advised foreign investors on the structure of their operations in Russia and newly established Russian businesses on export operations. This advice included analyzing the law regarding the use of Russian legal entities and agency relationships to minimize legal, regulatory, and tax risks. Much, although not all, of this work arose as a result of my relationship with Wilmer Cutler & Pickering (now Wilmer Hale). During the mid-1990s, I shifted my focus to law reform projects sponsored by the U.S. government and the principal international financial institutions.

6. I began traveling to the Soviet Union in 1982, after certain restrictions on my travel occasioned by my intelligence work had expired. I have visited the Soviet Union and its successor states more than 50 times. I have met many of the leading figures in Soviet and Russian politics, including Presidents Gorbachev, Yel'tsin, and Putin (in the case of the latter two, before either had attained the post of President). I was the first U.S. academic in any field to offer a seminar at the Diplomatic Academy of the U.S.S.R. Ministry of Foreign Affairs, and also have offered courses or lectured at the Moscow State Institute for International Relations, Moscow State University, and the Institute of State and Law of the U.S.S.R. (later Russian Federation) Academy of Sciences, among other academic institutions in the region. I began offering classes to Soviet, including Russian, civil and criminal judges in 1990 under the auspices of the U.S. Agency for International Development. I organized several programs for arbitrazh court judges in the 1990s on behalf of

the U.S. Treasury and the Organization for Economic Cooperation and Development.[1] During this time I worked closely with the leadership of the High Arbitrazh Court, in particular its Chair, Venyamin Yakovlev, whom I knew from his earlier work as the U.S.S.R. Minister of Justice. Minister Yakovlev and I collaborated on the organization of a legal conference that took place in Moscow in 1990 under the auspices of the U.S.S.R. Union of Jurists and the American Bar Association.

7. I have visited the Constitutional Court of the Russian Federation on multiple occasions and consulted with its members and staff since its inception. I have known Valeriy Zor'kin, the first and current Chair of that Court and the only person to serve twice in that position, since 1991. One of my co-authors and sometimes colleague at the University of Virginia, Dr. Bakhtiyar Tuzmukhamedov, worked in, and for most of the time headed, the international section of that Court between 1992 and 2008. I remain in contact with Dr. Tuzmukhamedov, who currently is an ad hoc judge on the International Court of Justice and a member of the United Nations Committee Against Torture, in spite of the limitations created by Russia's invasion of Ukraine. Thanks to Dr. Tuzmukhamedov's support, I was invited by the International and Comparative Law Research Center of the Russian Federation to give a course on international law in Moscow during the summer of 2022, but the event could not take place due to the invasion.

8. From 1993 to 1998, I served as an adviser to the U.S. Treasury. In that capacity, I organized and selected most of the lawyers who worked on behalf of the Treasury to assist the Russian government and legislature (Federal Assembly) in the development of a tax code and the

[1] Notwithstanding their name, the arbitrazh courts in Russia are regular courts with jurisdiction over disputes between business entities, and between business entities and the government. In particular, they supervise and implement the Russian bankruptcy system. The use of the term arbitrazh, translated as arbitration, represents the hopes of the Soviet creators of these courts for greater informality, which were promptly dashed. Even during the Soviet period these bodies were formal and highly legalized courts.

judicial capacity to hear tax disputes. I concentrated on the procedures for the assessment and collection of taxes owed and the training of arbitrazh court judges, as most tax disputes come before this branch of the Russian judicial system. I organized and conducted numerous courses for these judges, in Russia as well as in the West. This work gave me many opportunities for informal, after-hours conversations with these judges, as well as a great deal of contact with the highest levels of the arbitrazh court system.

9. The U.S. Treasury team in Moscow, which I helped to pick and with whom I worked regularly, maintained ongoing contacts with a number of Russian policymakers, including the Office of the President, the relevant Federal Assembly committees, private sectors representatives, the Ministry of Finance, the State Tax Service, and the Tax Police. The focus of all these efforts was the creation of a Tax Code, Part I of which was enacted in 1998 and Part II in 2000.

10. From 2000, I cut back on my involvement in foreign-government-sponsored development projects in Russia, in large part because of a decline in Russian interest in Western (or at least U.S.) technical legal assistance after the successful completion of the Tax Code project. I correspondingly expanded my work as an adviser to law firms and private persons in connection with issues of Russian law. I remain in close contact with a number of experienced practitioners, both Russian and non-Russian, who work on transactions and disputes involving Russian clients. The transactions on which I have worked, either as an adviser in advance of or in subsequent dispute resolution, involved both acquisitions of Russian assets by foreigners and export operations by Russian companies. As described in greater detail below, since 2005 I have worked on several matters growing out of the Russian government's attack on the Yukos conglomerate.

11. I have written numerous books, book chapters, and scholarly articles regarding Soviet and Russian law. Dr. Tuzmukhamedov and I collaborated on the production of a textbook on Soviet and U.S. approaches to certain aspects of public international law that is still used as part of course materials at the Diplomatic Academy of the Russian Foreign Ministry. A book on postsocialist law reform in Central and Eastern Europe (including Russia) that I edited, and to which I contributed, was used as a text at the F.B.I. Academy, as well as in several U.S. university courses. My U.S. law school casebook, Doing Business in Emerging Markets, which I co-authored with pre-eminent legal practitioners, concentrates on the challenges facing business people operating in contemporary Russia (as well as China, India, Brazil and other emerging markets). The book analyzes both inbound (foreign investment) and outbound (export) transactions as well as tax issues and the enforcement of foreign judgments and arbitral awards.

12. I also have been conducting research on and writing about international law for over forty years. As noted above, I have served in a leadership position as an international lawyer in both the U.S. State and Defense Departments. From 2012 to 2018 I served as Coordinating Reporter of the Restatement (Fourth) of the Foreign Relations Law of the United States, a project of the American Law Institute published in 2018. In additional to courses offered at my home institution, I have taught and lectured about international law at universities in Australia, Austria, China, Estonia, France, Georgia, Germany, Israel, Russia, and Switzerland, as well as at the Diplomatic Academies of Austria and Russia. In 2023 I presented a special course on public international law at the Hague Academy of International Law.

13. I have appeared as an expert on Russian law in numerous cases in U.S. and British courts, in British Virgin Islands, Danish, German, and Dutch civil suits, various international

arbitrations, and judicial proceedings in Dutch, Belgian, Canadian, and French courts to enforce investment-treaty-based arbitral awards.

14. My involvement with the Yukos matter began in 2005 and is ongoing. I first provided advice on Russian law in a commercial arbitration between Yukos and Sibneft, which produced a private settlement. After my service in the U.S. State Department, I took part in the preparation of an espousal petition to the U.S. government, which has responsibility, in the absence of an investment treaty, to assert the interests of U.S. investors who have suffered an expropriation. I then participated as an expert witness in four arbitral proceedings concerning claims brought by foreign investors, one under the Russian-Spanish investment treaty and three under the Energy Charter Treaty ("**ECT**"). I also served as an expert witness in *Russian Federation v. Veteran Petroleum Ltd., Yukos Universal Ltd., and Hulley Enterprises Ltd.*, a proceeding before the Hague Court of Appeal and the Dutch Supreme Court initiated by the Russian Federation to set aside awards under the ECT issued against the Russian Federation and in favor of investors, as well as *The Russian Federation v. Luxtona Limited*, a proceeding in the Ontario Superior Court of Justice brought by the Russian Federation to challenge the arbitral award in favor of the arbitral tribunal's jurisdiction under the ECT.

15. In a different matter involving the Russian Federation and its energy industry, I served as an expert witness in an arbitration under the Russian-Ukrainian Investment Treaty regarding the seizure of the Crimean assets of Naftogaz, the Ukrainian state-owned energy company. That proceeding resulted in a substantial award against the Russian Federation and on behalf of Naftogaz, Ukraine's state-owned oil and gas company.

16. I appeared as an expert witness on Russian law in the arbitral proceedings that produced the award at the center of this proceeding, as well as in the case in the Swiss Supreme

Federal Court that rejected the Russian Federation's challenge to that award. My views in this opinion draw in part from my research and analysis in those two proceedings. I also address new issues of Russian and international law arising in this proceedings.

17. I attach my full curriculum vitae as **Annex A.** It includes citations to all judicial and arbitral judgments and awards that have referred to expert opinions I have submitted on matters of Russian and international law.

II. INSTRUCTIONS

18. I have been asked by Gibson, Dunn & Crutcher LLP (**"Gibson Dunn"**), counsel for Yukos Capital Ltd. (formerly Yukos Capital S.à r.l.) (**"Yukos Capital"**), to provide an opinion under Russian law with respect to Yukos Capital's petition to enforce the final award dated July 23, 2021 (**"Final Award"**) (ECF No. 1-2) rendered by an arbitral tribunal (**"Tribunal"**) in an arbitration between Yukos Capital and the Russian Federation (PCA Case No. 2013-31).

19. Specifically, Gibson Dunn has instructed me to address the following issues under Russian law:

a. In circumstances where "inconsistency" should be understood to mean that the provisional application of Article 26 of the ECT could not coexist with Russian law because it would conflict with a mandatory rule that precludes the executive from giving provisional application to that provision, is there an "inconsistency" between the provisional application of Article 26 of the ECT and the Russian constitution, legislation, and regulations? (Section III.A)

b. Does the Tribunal's interpretation of Article 15(4) of the Russian Constitution contradict the constitutional principle of hierarchy of norms under Russian law? (Section III.B)

c. How does the Russian constitutional conception of separation of powers apply to consent given by the Russian government to provisional application of a treaty? (Section III.C)

d. What does the legislative history and contemporaneous public discourse related to Russia's signing of the ECT indicate about the consistency of international arbitration under that treaty with Russian law? (Section III.D)

e. What is the relevance of the Constitutional Court's Decision No. 2867-O-P of December 24, 2020, to the issues raised in this proceeding? (Section III.E)

f. Does the use of diplomatic channels in accordance with Section 1608(a)(4) of the Foreign Sovereign Immunities Act violate either international law or Russian law? (Section III.F)

20. Gibson Dunn has also instructed me to opine on the decision reached by the Tribunal on these issues in the interim award dated January 18, 2017 ("**Interim Award**") (ECF No. 63-91) and the decision of the Swiss Supreme Federal Court confirming that Award in light of the Russian law arguments made by the Russian Federation in its memorandum of law of December 11, 2023 ("**Motion to Dismiss**") (ECF No. 61-1), as well as the expert declaration of Professor Alexei S. Avtonomov dated December 11, 2023 (**Avtonomov Report**) (ECF No. 63).

21. As mentioned in ¶ 16 *supra*, I appeared as an expert in the arbitral proceedings leading to the Interim Award, in which I submitted two reports, the first dated October 28, 2014 ("**Stephan I**") and the second dated June 10, 2015 ("**Stephan II**"). I also appeared as an expert in the Swiss confirmation proceedings, in which I submitted a report dated December 8, 2021 ("**Stephan III**"). I hereby confirm the statements made in these three reports, and incorporate them

be reference into this report. The reports are attached hereto as **Annexes B-D.** Where relevant and for ease of reference, I quote the relevant passages of these reports.

III. ANALYSIS

A. In circumstances where "inconsistency" should be understood to mean that the provisional application of Article 26 of the ECT could not coexist with Russian law because it would conflict with a mandatory rule that precludes the executive from giving provisional application to that provision, is there an "inconsistency" between the provisional application of Article 26 of the ECT and the Russian constitution, legislation, and regulations?

1. Does the Russian Constitution contain a provision that is inconsistent with the provisional application of Article 26 of the ECT?

22. No provision of the Russian Constitution forbids the provisional application of a provision, contained in an international treaty to which the Russian government has consented, that obligates the Russian Federation to accept international arbitration of disputes with foreign investors. The capacity of the Russian Federation to consent to treaties providing for such arbitration is well established as I explain in Section III.C. Provisional application of international treaties has been common in Russian practice, including treaties expressing consent to international arbitration. Because the Russian legislature has expressly authorized the government to consent to provisional application of treaties, particular instances of consent present no separation-of-powers problems, as also explained in Section III.C below.

23. The Avtonomov Report argues that public-law disputes are not subject to arbitration under Russian law in the absence of a statute or a ratified treaty. Avtonomov Report ¶¶ 48-80. The Avtonomov Report argues that this ban on arbitration includes suits for damages against state bodies, bankruptcy cases, and tax disputes. *Id.* The Motion to Dismiss relies in this portion of the Report similarly to argue that international arbitration of disputes involving Russian public law are inconsistent with Russian law. Motion to Dismiss, pp. 20-22.

24. First of all, this contention does not rest on the Russian Constitution. Russian law regards a wide range of public-law issues, including disputes with their origin in bankruptcy and tax, as arbitrable, that is susceptible to being addressed in a duly constituted arbitral proceeding. Four instances of Russian law dealing with disputes with foreign investors, all of which I discuss later in this report, include the Law on Foreign Investments in the Russian Soviet Federated Socialist Republic of July 4, 1991 ("**1991 FI Law**") (ECF No. 63-13), Russian Federal Law No. 225-FZ on Production Sharing Agreements of December 30, 1995 ("**1995 PSA Law**") (**Exhibit 1**), Russian Federal Law No. 160-FZ on Foreign Investments in the Russian Federation of July 9, 1999 ("**1999 FI Law**") (ECF No. 63-18), and Russian Federal Law No. 20-FZ on amending the Federal Law on the Subsurface of January 2, 2000, the amendment of Article 50 of the Law on the Subsurface of the Russian Soviet Federated Socialist Republic of February 21, 1992, that authorized disputes arising out of subsurface licenses, a public law instrument ("**2000 Subsurface Law Amendment**") (**Exhibit 2**).

25. Neither the Avtonomov Report nor the Motion to Dismiss disagree that the Russian Constitution is not inconsistent with the arbitration of public-law disputes. Their argument is not about the arbitrability of these matters, but rather about the constitutionally required procedure for valid consent to their arbitration. They argue that consent must take the form of a statute (as in the 1995 PSA Law) or through a ratified treaty.

26. The Avtonomov Report and the Motion to Dismiss refer to several legal authorities that refused to enforce an arbitral award because of the public-law nature of the dispute. These include High Arbitrazh Court Resolution No. 11535/13 of January 28, 2014 (ECF No. 63-44); and High Arbitrazh Court Resolution No. 11059/13 of February 11, 2014 (ECF No. 63-43). The cases are, of course, not referring to constitutional law, which is outside the jurisdiction of that court.

Neither of these disputes involved arbitration that rested on a validly enacted authorization to consent to arbitration, either by statue or by treaty, either ratified or provisionally applicable.

27. The Avtonomov Report and the Motion to Dismiss also refer to Russian procedural enactments that provided for judicial, rather than arbitral, resolution of certain tax and bankruptcy disputes. Avtonomov Report ¶¶ 63-80; Motion to Dismiss, pp. 21-22 (citing Arbitrazh Procedural Code Art. 198(3) (ECF No. 63-7); Tax Code (part 1) No 146-FZ (July 31, 1998) (ECF No. 63-6); RF Statute No. 229-FZ (Oct. 2, 2007) (ECF No. 63-21)). None of these enactments, however, rest on the Russian constitution, but rather express a legislative policy subject to modification and adjustment. As the legislation I cite above in ¶ 24 demonstrates, there is no constitutional impediment to the Russian Federation consenting to the arbitration of disputes involving investor's rights—including the right to be free from expropriation except with full compensation—even if the claim of violation of rights stems from a tax or bankruptcy dispute. Russian constitutional law understands the difference between a right to compensation for violation of a legally protected interest, on the one hand, and the duties imposed by public law, including taxation and bankruptcy.

28. In short, the various statutes cited by the Avtonomov Report and the Motion to Dismiss do not demonstrate that the Russian constitution precludes the arbitrability of public-law issues. The issue is instead the legal basis for Russia's consent to arbitrate a particular law of disputes, such as the rights of a foreign investor.

29. The Avtonomov Report rejects the possibility that a provisionally applicable treaty, adopted in conformity with Russian legislation on the legal force of treaties, can provide valid consent to an agreement to arbitrate disputes that otherwise are not arbitrable under Russian law. The definitive response to that claim can be found in the Russian Constitutional Court's Resolution No. 8-P of March 27, 2012 ("**Resolution 8-P**") (ECF No. 63-32). That decision held that

provisional application of an international treaty that resulted in higher taxes for Russian nationals had valid effect within Russian domestic law. The court specifically upheld the constitutionality of Article 25(2) of the Vienna Convention on the Law of the Treaties ("**VCLT**") (ECF No. 63-86), and Article 23(3) of the Federal Law No. 101-FZ of Jul. 15, 1995, on International Treaties ("**FLIT**") (ECF No. 63-15), which provide for provisional application of the international treaties of the Russian Federation. The court held that provisionally applicable treaties, under Article 15(4) of the Russian Constitution, enjoy the same hierarchical status as ratified treaties, in the sense that their rules apply when they contradict other Russian laws.

30. Other Constitutional Court decisions confirm the constitutionality of provisional application of treaties that have the effect of changing rules resting on legislative enactments. They include Constitutional Court Resolution No. 6-P of March 19, 2014 (**Exhibit 3**), which in discussed in detail in Stephan III.

31. The Avtonomov Report refers to early drafts of the 1993 Constitution and related discussions that contained the modifier "ratified" to describe the "treaties" included in what became Article 15(4) of the adopted constitution. Avtonomov Report ¶¶ 94-104; *see also id.* ¶ 99 (quoting Council of Nationalities of the Russian Federation Supreme Council, Hearing Transcript regarding Article 3 of the Russian Federation Constitution (Nov. 2, 1992) (ECF No. 63-73)). The Motion to Dismiss adopts his position that Article 15(4) in its present form applies only to ratified treaties. Motion to Dismiss, p. 24.

32. These earlier drafts and discussions, however, reflected a fundamentally different stage of the drafting process, when the president and legislature were deadlocked in a struggle that eventually devolved into violence. Following the events of October 1993, the president, no longer checked by legislative opposition, produced the final document, which focuses much more on the

primacy of the executive branch and diminishes legislative power.[2] The use of "ratified" as a limit on the supremacy of treaties over legislation accordingly gave way. Although the Constitution Court did not refer to these events in its Resolution 8-P, this historical backdrop certainly informed its understanding of the legal effect of Section 15(4).

33. The Avtonomov Report makes a broad separation-of-powers argument to the effect that consent to international arbitration by the Russian government, rather than the legislature, violates the separation of powers prescribed by the Russian constitution. Avtonomov Report ¶¶ 46-47; *see* Motion to Dismiss, pp. 19-20 & n.20 (relying on Avtonomov Report). He cites to Articles 10, 11, and 115 of the Constitution, which provide in general terms for legislative, executive, and judicial authority. None of the broad generalities in these provisions address the question at hand, namely the constitutional validity of a provisionally applicable treaty that awaits ratification. On this specific issue, the Constitutional Court is in the position to give the best guidance as to the question, and in Resolution 8-P it has.

34. The Avtonomov Report also refers to three resolutions of the Constitutional Court regarding a rule of non-usurpation implied by the principle of separation of powers. Avtonomov Report ¶¶ 27-29, citing Resolution 2-P of January 18, 1996 (ECF No. 63-24), Resolution No. 16-P of May 29, 1998 (ECF NO. 63-26), and Resolution No. 15-P of November 11, 1999 (ECF No. 63-27). These resolutions, however, are fully consistent with the understanding that what amounts to an unconstitutional usurpation depends on the specific circumstances of a dispute. None involves the treatymaking process under the Russian constitution in general or Article 15(4) of the Constitution in particular. Resolution 2-P involved legislative encroachment on executive power in a regional government. Resolution 16-P addressed "double hatting" of local government

[2] For fuller discussion of this process as it affects Section 15(4) of the Constitution, see G.M. Danilenko, *The New Russian Constitution and International Law*, 88 Am. J. Int'l L. 451, 459 (1994).

officials as members of the local legislature. Resolution 15-P held that the President and government of Russia could not exercise legislative power in the interval between the dissolution of a legislature and the election of a new one. None of these resolutions in any way undermine the subsequent determination of Resolution 8-P as to the constitutionality of provisional application of treaties, including the application of the hierarchy rule of Article 15(4) to provisionally applicable treaties.

35. The Avtonomov Report also refers to Article 47(1) of the Russian Constitution as a bar to the use of provisional application of a treaty to provide consent to arbitration of public-law disputes. Avtonomov Report ¶ 129; *see* Motion to Dismiss, pp. 19-20 & n.19 (relying on Avtonomov Report). This provision guarantees a right of access to justice for persons endowed with rights and interests protected by Russian law. This guarantee, however, does not express *a mandate* that such persons may seek justice only through Russian courts. It is fully consistent with valid legal enactments, including treaties having force in Russian under Article 15(4) of the Constitution, that provide persons endowed with rights and interests other avenues to pursue justice, including through legally valid arbitration.

36. In sum, it is my conclusion that no part of the Russian Constitution, any principle derived from it, or its structure is inconsistent with arbitration of a dispute between a foreign investor and the Russian federation, even if some of the issues underlying the dispute rest on Russian public law. Consent to arbitration through a provisionally applicable treaty has the same legal effect under Russian law to consent given by a ratified treaty, for the time of the treaty's provisional application.

2. *Does Russian legislation contain a provision that is inconsistent with the provisional application of Article 26 of the ECT?*

37. I agree with the conclusion of the Interim Award that no provision of Russian legislation is inconsistent with the provisional application of Article 26 of the ECT. No Russian legislation, and most importantly the 1999 FI Law (which was applicable at the time of Yukos Capital's ECT claim), contains any language that prohibits the application of such a norm when a treaty is provisionally applicable or that requires that the treaty be ratified (or have otherwise entered into force) for this provision to apply. In particular, no Russian legislation precludes Russia's executive from consenting to the provisional application of Article 26 of the ECT.

38. In the Interim Award, the Tribunal determined that Article 26 of the ECT, which provides for international arbitration of investment disputes covered by the treaty, establishes its jurisdiction over the dispute at hand. It ruled that such provisional application is not inconsistent with Russian law within the terms of Article 45 of the ECT. Its analysis focused on the 1999 FI Law, which was in effect at the time that the Tribunal was seized with this dispute. Article 10 of the 1999 FI Law recognizes international arbitration as a permissible means of resolving disputes between foreign investors and the Russian Federation in cases where such arbitration is provided by "international treaties of the Russian Federation." The Tribunal construed that term as "a reference to such treaties as are capable of creating legal obligations within the Russian legal system." Interim Award ¶ 283. Relying on the Russian Constitutional Court's jurisprudence, it determined that as a matter of Russian law "a treaty that is provisionally applied is applied on the same basis as treaties that have entered into force." *Id.* Thus, it reasoned, the 1999 FI Law's "reference to 'international arbitration' includes a treaty provision for the resolution of disputes through international arbitration, such as Article 26 of the ECT, in a treaty that is provisionally applied." *Id.* This determination was correct, as I explain here.

39. The Interim Award further determined that no provision in Russian law prohibits international arbitration of investment disputes to which the Russian Federation is a party when the commitment to arbitration rests on a provisionally applicable treaty. Interim Award ¶ 284. The Tribunal then decided whether the absence of a Russian-law prohibition, coupled with the provisions of the 1999 FI Law, was sufficient to render Article 26 "not inconsistent" with Russian law under Article 45 of the ECT. In reaching the conclusion that this absence was sufficient, it rejected the reasoning of the Hague District Court in its judgment of April 20, 2016. That reasoning also was rejected by the Hague Court of Appeals on November 9, 2020 and by the Dutch Supreme Court on November 5, 2021, after the Tribunal had issued its Interim Award.

40. The Russian Federation asserts, to the contrary, that Article 26 of the ECT is inconsistent with Russian law. It argues that, under Russian law, disputes involving "claims based on sovereign acts" cannot be submitted to arbitration absent a ratified treaty, Motion to Dismiss, p. 21, that the 1999 FI Law and other laws forbid arbitration of investment disputes except when provided by a ratified treaty, *id.*, pp. 22-30, and that public-law disputes are generally not arbitrable absent express permission through a statute or ratified treat, *id.*, pp. 20-22. For these arguments, it relies on a report of the Avtonomov Report.

41. The Avtonomov Report, in turn, asserts that Russian law prohibits arbitration of any international dispute implicating Russian public law absent an express legislative endorsement. The report seeks to treat the issue of arbitrability and the issue of consent as if they were identical. It argues that because neither Article 9 of the Law on Foreign Investments in the 1991 FI Law nor Article 10 of the 1999 FI Law expresses consent to arbitration under particular treaties, these provisions cannot overcome the presumption in Russian law against the arbitrability of public-law disputes. Avtonomov Report ¶¶ 137-50.

42. The confusion in the Avtonomov Report's argument is evident. The Avtonomov Report starts from the false premise that there is an inconsistency between the ECT and Russian law that the 1991 FI Law and the 1999 FI Law must "remove." To the contrary, the 1991 FI Law and the 1999 FI Law establish that international arbitration of disputes arising under a foreign investment treaty is consistent with Russian law. To be specific, they confirm the arbitrability under Russian law of this category of disputes. As a result, a particular treaty's expression of consent to arbitrate disputes is consistent with these enactments.

43. The Avtonomov Report argues that Article 9 of the 1991 Investment Law provides only "blanket" consent to arbitration of investment disputes. Avtonomov Report ¶ 141. In particular, Article 9(3) provides that an "international treaty in force within the territory of the RSFSR may provide for international means of resolution of disputes arising in connection with foreign investments within the territory of the RSFSR." The Avtonomov Report does not argue that any other provision of the 1991 Law limits the meaning of "disputes arising in connection with foreign investments" to exclude certain kinds of disputes. Rather, it argues that Article 9, along with Article 7 of that statute, limits arbitrability in the absence of a "treaty in force." Avtonomov Report ¶¶ 139-43. The Report thus accepts that the 1991 Investment Law recognizes the arbitrability of the public-law disputes, and argues only about whether it provides consent to arbitration by its own terms. The Motion to Dismiss adopts this argument. Motion to Dismiss, pp. 27-28.

44. As to the 1999 Investment Law, the Avtonomov Report questions whether it has any bearing to this dispute, given its adoption after Russia joined the ECT. The report dismisses its relevance also on the ground that its Article 10 contains only a "blanket" provision regarding treaties:

> A dispute of a foreign investor arising in connection with its investments and business activity conducted within [RF] territory shall be resolved in accordance with [RF] international treaties and federal statutes in [RF] courts, arbitrazh courts or through international arbitration (arbitral tribunal).

Avtonomov Report ¶¶ 146-50. Significantly, the modifier "in force" does not appear here, although the Avtonomov Report does not address the relevance of that absence.

45. In my report to the Swiss Federal Supreme Court, I argued that the 1999 Investment Law did apply to this dispute. Stephan III ¶ 22. It was in force at the time of the events leading to the violation of Yukos Capital's rights under the ECT. Moreover, as I indicated in my report to the arbitral tribunal, it did not change the Russian approach to international arbitration of investment disputes as expressed in law in force at the time that Russia signed ECT. Stephan I ¶ 55. It clearly indicates that investment disputes, including that stemming from the application of Russian public law, are arbitrable. The only remaining issue under Russia law is the validity of Russia's consent to arbitration of disputes under the ECT.

46. To the extent that Article 26 of the ECT constitutes an expression of consent to arbitration—an issue of treaty interpretation rather than of Russian law, and therefore an issue on which I do not offer an expert opinion—Article 9 of the 1991 FI Law and Article 10 of the 1999 FI Law indicate that this expression is legislatively authorized, and therefore is consistent with Russian law. To restate the point, these statutory provisions confirm the arbitrability of treaty-based investment disputes. In particular, Article 10 of the 1999 FI Law, which refers to "international treaties of the Russian Federation" without the qualifier "in force," indicates the intent of the legislature to authorize international arbitration pursuant to provisionally applicable treaties, not only those that have entered into force as a result of legislative ratification.

47. I continue to believe that my earlier reports correctly state and apply Russian law and demonstrate that the Interim Award correctly determined that Article 26 of the ECT does not

conflict with any part of Russian law, including any part of Article 10 of the 1999 FI Law. Stephan I ¶¶ 57-61; Stephan II ¶¶ 43-53.

48. Russian law regards disputes between foreign investors and the Russian Federation as amenable to international arbitration. Both the 1991 FI Law and the 1999 FI Law recognize this, as does other Russian legislation. Provisional application of Article 26 of the ECT thus is not inconsistent with any provision of Russian legislation, and indeed is anticipated by the most relevant legislative acts.

3. Do Russian regulations contain a provision that is inconsistent with the provisional application of Article 26 of the ECT?

49. There is no regulation that is inconsistent with submission of disputes between the Russian Federation and foreign investors to international arbitration. There does exist in Russian law a rule of statutory interpretation that presumes that matters of public law will not be submitted to third-party arbitration unless the Russian Federation has duly consented to the submission. This is a rule of interpretation only and, as many Russian legal sources make clear, its presumption can be rebutted by evidence of authorized consent. Under Russian law, the legislature has endorsed in advance that the Russian government may consent to provisional application of a treaty, and that such consent suffices to override sub-legislative rules of statutory interpretation. *See* Section III.C below.

B. Does the Tribunal's interpretation of Article 15(4) of the Russian Constitution contradict the constitutional principle of hierarchy of norms under Russian law?

1. Do provisionally applicable treaties take precedence over Russian legislation and Russian regulations?

50. In ¶ 256 of its Interim Award, the Tribunal quoted the Resolution 8-P ¶ 4.1, for the proposition that, in accordance with Article 15(4) of the Russian Constitution, Article 25(2) of the VCLT, and Article 23(3) of the FLIT, validly hold that "provisions of a provisionally applied

international treaty become part of the legal system of the Russian Federation and, like international treaties of the Russian Federation that have entered into force, have priority over Russian laws."

51. I agree with these conclusions, as will be discussed in this report.

52. In this proceeding, the Russian Federation argues that the rule stated in Art. 15(4) of the Russian Constitution, namely the primacy of international law over domestic law, does not apply to provisionally applicable treaties. Motion to Dismiss, pp. 22-24.

53. In support of its argument, the Russian Federation relies on statements from the Avtonomov Report. The report argues that Russian law contains a hierarchy principle that "a treaty concluded by a lower-ranking authority cannot supersede the rules established by the acts of a higher-ranking authority." Avtonomov Report ¶¶ 81-84.

54. The Avtonomov Report's reading of the Tribunal's Interim Award bears no relation to what it says. The Tribunal emphasized that it was considering whether Russian constitutional law barred provisional application of a rule found in a treaty that, by its terms, called for provisional application and which could not enter into force before ratification. Relying on Resolution 8-P, the Tribunal concluded that "the institution of the provisional application of a treaty or part thereof is constitutionally valid under Russian law and gives rise to rights and duties within the Russian legal system that take precedence over other Russian laws." Interim Award ¶ 258. It thus followed the Constitutional Court in recognizing that, as a matter of Russian law, rules contained in a provisionally applicable treaty, like rules contained in a treaty that has entered into full and conclusive force after Federal Assembly ratification, have priority over rules prescribed by law (legislation). These conclusions of the Tribunal are, in my view, correct.

55. The Russian Federation, relying in part on Avtonomov Report ¶¶ 85-99, argues that the Plenum of the Supreme Court's Resolution 5 of October 10, 2003 (ECF No. 63-46), and Supreme Court's Decision No. 59-O09-35 of December 29, 2009 (ECF No. 63-47), establish that acts of the Russian legislature take precedence over rules found in provisionally applicable treaties binding the Russian Federation. Motion to Dismiss, pp. 22-23. None of the cited judicial acts, however, deals with a provisionally applicable treaty subject to later legislative ratification. In particular, Resolution 5 of October 10, 2003, does not say a word on provisionally applicable treaties. It only states that treaties that have entered into force have priority over Russian laws, which is not a point of contention in this case. Likewise, Decision No. 59-O09-35 of December 29, 2009, deals with an intergovernmental agreement that was never intended to receive legislative approval through ratification, was not provisionally applicable, and that never entered into force. It considers only the legal consequences of the mechanism through which a treaty enters into full and conclusive force. Finally, the decision of the Federal Arbitrazh Court of the Urals Circuit, Case No. F09-3124/03-AK of October 2, 2003 (ECF No. 63-42), involved an inter-ministerial international agreement that was neither ratified nor given provisional application in anticipation of ratification.

56. In sum, no decision discussed in the Avtonomov Report and cited in the Motion to Dismiss addresses the separate and independent question of the legal effect of provisional application of a treaty prior to its final and conclusive entry into force. As such, none of the international agreements at issue in those cases came within the terms of Article 23 of the FLIT Treaties, which expressly authorizes provisional application.

57. Russia also asserts that a "treaty's place in the RF legal hierarchy depends on the rank of the authority that signs it and decides on its provisional application." Motion to Dismiss,

p. 22. The general statement is correct, but with the critical proviso that Russian legislative enactments may, consistent with the Russian constitution, provide advance consent to provisional application of a treaty. It is my conclusion that the provisional application of an international treaty of the Russian Federation in full accordance with Russian legislation adopted before the signing of a treaty does respect that principle in every respect. Significantly, none of the examples in the Avtonomov Report on which the Motion to Dismiss relies, Avtonomov Report ¶¶ 85-93, involved provisional application of a signed treaty in accordance with extant Russian legislation.

2. Did the Tribunal misunderstand the significance of the pronouncements on provisional application of treaties found in the Constitutional Court's Resolution No. 8-P of March 27, 2012?

58. The Interim Award conducted an extensive analysis of Resolution 8-P by the Russian Constitutional Court and gave it considerable weight as an authoritative interpretation of Article 15(4) of the Constitution, Article 25 of the VCLT, and Article 23 of the FLIT. Interim Award ¶¶ 254-58.

59. The Russian Federation's Motion to Dismiss contains no reference to Resolution 8-P. It instead devotes substantial discussion to Constitutional Court's Decision No. 2867-O-P of December 24, 2020 ("**Decision 2867-O-P**") (ECF No. 63-37), which the Russian Federation apparently considers to have rendered Resolution 8-P irrelevant.

60. I discuss the legal significance of Decision 2867-O-P in ¶¶ 123-136 below. In a nutshell, I agree with the Swiss Supreme Federal Court that it can have no bearing on the validity of the arbitral award that is the subject of this proceeding.

61. The Avtonomov Report does discuss Resolution 8-P briefly. It argues that the Constitutional Court lacked jurisdiction to consider the constitutionality of provisional application of the treaty, as the Court had before it only the publication issue. The report asserts that the Court "did not consider, let alone hold, whether a provisionally applied treaty could supersede statutes."

Avtonomov Report ¶ 188. It further argues that the treaty at issue did not have an inconsistency clause and that Resolution 8-P recognizes the permissibility of such clauses. *Id.* The report argues, "Resolution 8-P limited its analysis to the issue of publication of provisionally applied treaties." *Id.*

62. On the jurisdictional point, I responded to the Avtonomov Report's contention in my second report in the arbitral proceedings. I explained:

> The Constitutional Court has jurisdiction only over disputes regarding constitutional law, including the constitutionality of enacted statutes of the legislature. As illustrated in the Resolution 8-P on Provisional Application, the Court will identify which constitutional issues it will address, and thus which constitutional issues it is not determining. But, in resolving such disputes, the Court may find it necessary to interpret a legislative act or other sub-constitutional laws. Its pronouncements on these non-constitutional issues are accorded wide respect within the Russian legal system. Indeed, the foundation of the legal arguments that the Russian Federation has made before other international tribunals in defense of its tax treatment of OAO Yukos Oil rested on statements by the Constitutional Court about the interpretation of Russian tax legislation, in particular the legal status of a "good faith taxpayer." If the interpretations of non-constitutional law by the Constitutional Court had no significance in the Russian legal system, I would not expect the Russian Federation to make such arguments.
>
> . . .
>
> In the Resolution 8-P on Provisional Application, the Constitutional Court held only that Russian practice concerning the official publication of treaties subject to provisional application complied with the Russian Constitution. To reach that conclusion, however, the Court had to determine questions of domestic law concerning the effect of such treaties in the domestic legal order. Those determinations were an essential predicate to its ultimate constitutional conclusions. Thus, the statements made by the Court on these issues must be seen as authoritative interpretations of Russian non-constitutional law.

Stephan II ¶¶ 34-35.

63. The Avtonomov Report misrepresents the Constitutional Court's clear language when the report asserts that the subject matter of the Court's decision in this case was limited to the constitutional publication rule, and not the legal force of provisionally applicable treaties. First, the Avtonomov Report cannot deny that Resolution 8-P expressly analyzes the legal effect in general of provisionally applied treaties under Article 15(4) of the Constitution. Second, the

Avtonomov Report ignores the fact that the Constitutional Court's analysis, which led it to reach its conclusion on publication, is binding. As the Constitutional Court has explained:

> The provisions of the motivation part of a resolution of the Constitutional Court of the Russian Federation that contain interpretations of constitutional rules [...], on which the Constitutional Court of the Russian Federation bases its conclusions contained in the decision part of this resolution, reflect the legal position of the Constitutional Court of the Russian Federation and are also binding.

Constitutional Court's Decision No. 118-0 of October 8, 1998 **(Exhibit 4)**.

64. The Federal Constitutional Law on the Constitutional Court of the Russian Federation, Article 79, point 5, makes a similar point about the legal force of decisions of the Constitutional Court that provide constitutional interpretations of laws:

> From the date of entry into force of a resolution of the Constitutional Court of the Russian Federation, by way of which a legal act or provisions thereof are declared not in conformity with the Constitution of the Russian Federation, or a resolution of the Constitutional Court of the Russian Federation declaring a legal act or provisions thereof to be in conformity with the Constitution of the Russian Federation in the interpretation provided by the Constitutional Court of the Russian Federation, it is prohibited to apply or implement in any other way the legal act or provisions thereof declared by such resolution of the Constitutional Court of the Russian Federation not in conformity with the Constitution of the Russian Federation, *as well as to apply or implement in any other way the legal act or provisions thereof in an interpretation inconsistent with the interpretation provided by the Constitutional Court of the Russian Federation in the resolution.* When examining cases after the entry into force of the resolution of the Constitutional Court of the Russian Federation (including cases with the interpretation provided by the Constitutional Court of the Russian Federation in the resolution whose examination started before the entry into force of this resolution of the Constitutional Court of the Russian Federation), Courts of general jurisdiction and arbitrazh courts shall not be guided by the legal act or provisions thereof declared by the resolution of the Constitutional Court of the Russian Federation not in conformity with the Constitution of the Russian Federation, and *shall not apply the legal act and provisions thereof in an interpretation inconsistent with the interpretation provided by the Constitutional Court of the Russian Federation in the resolution.*

Federal Constitutional Law on the Constitutional Court, Article 79(5) **(Exhibit 5)** (my translation; emphases added).[3]

[3] Later amendments to this Constitutional Law renumbered this provision as point 7, but did not otherwise change it.

65. The Constitutional Court's conclusion in Resolution 8-P that the Constitution's publication requirement applies to provisionally applicable treaties rests on an essential constitutional predicate. Namely, it recognizes that Article 15(4) of the Constitution extends to provisionally applicable treaties and gives priority to the rules of such treaties, rather than existing Russian law, from the moment of provisional application. Thus, the determination in Resolution 8-P that, pursuant to Article 15(4), provisionally applicable treaties are, as to their place in the Russian legal hierarchy, equivalent to ratified treaties, is the binding legal position of the Constitutional Court.

66. The Constitutional Court in Resolution 8-P did observe that the Russian Federation may insert preconditions to provisional application, if the other state parties to an international treaty concur. This observation was not relevant to the dispute before the Constitutional Court at the time, and has no bearing on the issues in this proceeding. The Constitutional Court did not rule that the Russian Federation must insist on such preconditions. Rather, it stated that the Russian Constitution does not forbid the acceptance of a requirement of consistency with "the laws or other regulatory legal acts of the Russian Federation" as part of indicating consent to provisional application of a treaty, any more than the Russian Constitution mandates such a requirement.

67. I do not profess to offer an opinion on whether as a matter of international law the Interim Award correctly interpreted Article 45 of the ECT. My opinion is simply that nothing in Resolution 8-P or any other authoritative source of Russian law is inconsistent with the Tribunal's interpretation of Russian law for the purposes of Article 45 of the ECT.

68. The relevant issue remains not whether Russia could provide for a contingency that it could invoke to avoid provisional application of a treaty-based rule. The issue is whether the

treaty in question, as a matter of international law, permits the Russian Federation not to apply the rule provisionally based on the state of its law at the time that it signed the treaty.

C. How does the Russian constitutional conception of separation of powers apply to consent to provisional application of a treaty given by the Russian government?

1. Is the Russian government empowered to consent to provisional application of a treaty?

69. I agree with the Tribunal's analysis that, under Russian law, the government has the authority to consent to the provisional application of a treaty. The Tribunal made clear that the provisional application of a particular treaty provision depends on the existence of prior legislative approval of this outcome. Provisional application of a treaty under Russian law thus both reflects and depends on the will of the Federal Assembly. As the Tribunal put it, "The provisional application of a treaty prior to its ratification and entry into force is an institution that is expressly contemplated by the FLIT. It was the Federal Assembly that enacted the FLIT as a federal law. It is by virtue of that law that Federal Assembly empowers the executive to commit Russia to such provisional application of treaties." Interim Award ¶ 269.

70. The Tribunal at no point indicated that the Russian government could use provisional application to thwart the will of the legislature. To the contrary, it made clear that the government's capacity to enter into provisionally applicable treaties depends on authority provided by the Federal Assembly, which the Federal Assembly also has the power to withdraw.

71. That the Russian legislature had not adopted any post-independence legislation addressing the process of making international treaties as of December 1994, when the government signed the ECT, did not mean that no law existed. Rather, the legislature of the Russian Federation (then the Russian Soviet Federal Socialist Republic) had imposed on itself the obligation to respect existing treaties of the Soviet Union when it joined the Commonwealth of Independent States. The

legislature endorsed this obligation through ratification of the Agreements establishing the Commonwealth of Independent States (Dec. 8, 1991) on December 12, 1991 (**Exhibit 6**). The ratifying resolution further provided that the legal norms of the former Soviet Union would continue to apply in the Russian Federation as long as they did not contradict the Russian Constitution or Russian legislation.

72. Among the treaties that remained in force in the Russian Federation from December 1991 was the VCLT, which the Soviet Union had entered into in 1986. In the period after the dissolution of the Soviet Union and before the signing of the ECT, Russian practice evidenced a belief that the executive had the capacity to enter into provisionally applicable treaties that anticipated subsequent ratification based on legislative consent.

73. Accession to the VCLT by the U.S.S.R., with the consent of the U.S.S.R. Parliament (Supreme Soviet), therefore endorsed the authority of the government of the U.S.S.R. to commit the Soviet state to provisional application of treaties. This confirmed the Soviet Union's consistent and longstanding practice. Accession to the VCLT authorized provisional application of treaties upon signature of the negotiating state at a time when, as a matter of Soviet legislation, the government had the authority to sign treaties.

74. In 1991, the Supreme Soviet endorsed the continuing effect of treaties of the former U.S.S.R. as part as its ratification of the Agreement Creating the Commonwealth of Independent States of December 8, 1991, the treaty that formalized the dissolution of the U.S.S.R. This enactment encompassed the VCLT, which the Russian Federation continues to accept as imposing binding obligations.

75. Russian practice immediately after the dissolution of the U.S.S.R. confirms that the rules of provisional application laid down in the VCLT were followed by the Russian Federation.

Significantly, at the time of the Supreme Soviet's acceptance of ongoing obligations under treaties to which the Soviet Union had been a party, a number of Soviet treaties had effect only due to provisional application. The Maritime Boundary Agreement dated June 1, 1990 (**Exhibit 7**) is a prominent example, which has been applied provisionally since then. Others include the Treaty on Conventional Armed Forces in Europe, signed on November 19, 1990,[4] and provisionally applied by the U.S.S.R., and then the Russian Federation, until the Russian Federation ratified it on July 8, 1992, and the Protocol on Telemetric Information related to the START Treaty (**Exhibit 8**), provisionally applied by the U.S.S.R., and then the Russian Federation, from July 31, 1991, until ratified on November 4, 1992. The Supreme Soviet's 1991 enactment concerning U.S.S.R. treaties, followed by the Russian Federation's continued provisional application of these treaties, provides evidence of the legislature's acceptance of provisional application based on the signing of a treaty. Thus, even before adoption of the FLIT in 1995, Russian legislation had expressly recognized the power of the President or government to enter into treaties that would apply provisionally pending ratification. It was further understood that the legislature retained the authority to revise that power, as it did to some extent through the adoption of the FLIT.

76. Russia's Motion to Dismiss argues that Article 23 of the FLIT does not contradict its position about the place in the Russian hierarchy of legal norms of rules contained in provisionally applicable treaties. It maintains that the principles of separation of powers and the consequent hierarchy of norms limit the capacity of the legislature to delegate authority to the government. Motion to Dismiss, p. 25.

77. The Avtonomov Report supports this argument, citing Resolution 2867-O-P of the Constitutional Court as well as certain instances of the legislative history of the FLIT. As I argue

[4] https://2009-2017.state.gov/t/avc/trty/108185.htm.

below, Resolution 2867-O-P cannot serve as a credible gloss on the meaning of the FLIT. *Infra* ¶¶ 123-136. As to the legislative history, the Avtonomov Report omits the most relevant evidence, as I discuss *infra* in this report at ¶¶ 112-118.

78. The Avtonomov Report further argues that, were Article 23 to be interpreted in accordance of the clear meaning of its language, it would constitute an unconstitutional delegation of the authority of the legislature to the executive branch. Avtonomov Report ¶ 130.

79. In my second report in the arbitration, I addressed this argument on the unconstitutionality of open-ended delegations to the executive to accept provisional application of an obligation to arbitrate investment disputes. Stephan II ¶ 47. I described the Constitutional Court Resolutions cited here by the Avtonomov Report as involving "delegations of lawmaking authority that, if constitutional, would have allowed the Russian Government to act in a way that created significant legal risk for private persons." *Id.* I then pointed out:

> Submission of the Russian Federation to mandatory arbitration of investment disputes, by contrast, affects only the interests of the Russian state. Enforcement of this obligation harms no private persons, but rather enhances the rights of those investors that enjoy treaty protection.

Id. ¶ 48.

80. I then observed the absurdity of extending this nondelegation argument to the FLIT:

> [This argument], if taken at face value, would nullify Article 23 of the FLIT. That provision expressly permits provisional application of treaties signed by the Russian Federation. Were provisional application of a treaty, no matter how limited the subject matter and the range of applicable legal outcomes, sufficient to violate the non-delegation doctrine, then any and all provisional application of treaty provisions would delegate unconstitutional discretion to the executive branch.
>
> . . . [T]he Constitutional Court in the Resolution 8-P on Provisional Application did not address the general constitutionality of the FLIT. Rather, it decided only the question of whether that Law's treatment of official publication of treaty terms subject to provisional application met constitutional requirements of notice. One nonetheless may note that if that Law's treatment of provisional application of treaties raised substantial constitutional questions in light of the Constitutional Court's earlier resolutions on non-delegation, those challenging the government's publication practice would have every

> reason to raise the argument and have the Court consider it. That the parties did not raise this issue, and that the Court made no mention of it, indicates that the claim is insubstantial.

Stephan II ¶¶ 49-50.

81. The Russian Federation further argues that in Russian law a "certainty" principle "requires any delegation of power to be *certain* and accord the RF Government no discretion." Motion to dismiss, p. 29 (citing Avtonomov Report ¶¶ 154-58; Constitutional Court Resolution No. 2-P (February 28, 2006) (ECF No. 63-41)).

82. Whatever the rigor of the nondelegation doctrine to which the Russian Federation refers, it is clear that Article 23 of the FLIT (as interpreted by the Constitutional Court, in particular through its Resolution 8-P), satisfies that standard.[5] As I explained in ¶¶ 52-53 of my Second Report, Article 23 does provide strict rules and does not encroach on the prerogatives of the Russian legislature under the Russian Constitution:

> [T]he reference to treaties, including those subject to provisional application, in the foreign investment legislation of the Russian Federation contain sufficiently clear limitations to satisfy any requirements that the non-delegation doctrine might impose.
> . . .
> [I]t is my opinion that provisional application of the ECT pursuant to the terms of that Treaty does not encroach on the prerogatives of the Russian legislature under the Russian Constitution. To the contrary, the Russian legislature has adopted several laws that approve of the assumption by the Russian Federation of an obligation to arbitrate investment disputes through treaties. These laws do not distinguish between an obligation assumed by way of provisional application of a treaty and one assumed upon the full and conclusive entry into force of a treaty.

Stephan II ¶¶ 52-53.

83. The Tribunal's conclusion that provisional application of treaties rested on the clearly expressed and constitutionally valid will of the Federal Assembly is correct. At the time of

[5] Constitutional Court Resolution No. 2-P cited by the Russian Federation, Motion to Dismiss p. 29, declared unconstitutional a wholesale assumption of legislative power by the President and government during the interval between dissolution of the legislature and the election of a new one. *See supra* at ¶ 34. The case did not involve limited delegations by the Federal Assembly to the Russian Government to agree to provisional application of a treaty. It therefore has no bearing on the application of the "certainty" principle to Article 23 of the FLIT.

signing of the ECT, the Russian legislature had not enacted the FLIT, which deals expressly with the authority of the government to enter into provisionally applicable treaties. Yet, the Constitution recognized the authority of the President to "govern the foreign policy of the Russian Federation" (Article 86(a)) and to negotiate and sign international treaties (Article 86(b)). It also recognized the authority of the government to "carry out measures to secure . . . the implementation of the foreign policy of the Russian Federation" (Article 114(e)). At that time, the foreign policy of the Russian Federation included the VCLT and its rules on provisional application. At the time of the signing of the ECT, then, it was evident from Russian practice that implementation of the foreign policy of the Russian Federation included the authority to sign treaties on behalf of the Russian Federation, subject to the President's general oversight.

2. *Is the Tribunal correct that application of a rule found in a provisionally applicable treaty conforms to the principle of hierarchy of norms under Russian law?*

84. I agree with the Tribunal's analysis of the application of the Russian principle of hierarchy of norms to the matters at issue in this dispute. The Tribunal addressed the question whether application of a rule found in a provisionally applicable treaty would violate that principle by permitting an act of the executive to supersede a legislative enactment. It observed that express endorsement of provisional application by the Russian legislature resolved that issue. As it said in ¶ 269 of the Interim Award:

> The provisional application of a treaty prior to its ratification and entry into force is an institution that is expressly contemplated by the FLIT. It was Parliament that enacted the FLIT as a federal law. It is by virtue of that law that Parliament empowers the executive to commit Russia to such provisional application of treaties.

85. As a result, the Tribunal concluded in ¶ 273 of the Interim Award, "the decision of the executive in Russia to give provisional application to the ECT was not inconsistent with its Constitution." I agree with this conclusion.

86. The Russian Federation repeats the argument it made before the Tribunal about the essential role of the hierarchy of norms as a gloss on the interpretation of Article 15(4) of the Constitution. As noted above, it asserts that a "treaty's place in the RF legal hierarchy depends on the rank of the authority that signs it and decides on its provisional application." Motion to Dismiss, p. 22. It cites ¶¶ 86-93 of the Avtonomov Report as support.

87. First, as I already have observed, the authority of the government of the Russian Federation to agree to provision application of the ECT did rest on legislatively bestowed authority, namely the Soviet Union's ratification of the Vienna Convention on Treaties and then the Russian Federation's confirmation of the same rules through the FLIT. *See supra* ¶¶ 71-76. Second, the Russian Federation's argument, which does not reflect Russian legal practice or relevant authorities, depends on a false premise—namely that the Federal Assembly is powerless to limit in advance what the Russian executive can do in the way of making international agreements. To the contrary, it is clear that the Federal Assembly may adopt laws forbidding the signing of certain categories of treaties or barring the provisional application of specified treaties.

88. The question is not what the Russian legislative authority could do, but what it actually has done. It was relevant, therefore, that it adopted the VCLT and later the identical language of the FLIT to expressly provide for provisional application.

89. By incorporating the VCLT into Russian domestic law and by enacting the FLIT, the Russian legislature unambiguously endorsed the principle of provisional application of international treaties without substantive limitation.[6] Neither the VCLT nor the FLIT contain the

[6] The Avtonomov Report also refers to the USSR Statute on the Procedure for Conclusion, Implementation, and Denunciation of International Treaties of July 6, 1978 (ECF No. 63-11). Avtonomov Report ¶¶ 105-09. As the report concedes, that legislation, adopted before the USSR joined the VCLT on April 29, 1986, says nothing about provisional application of Russia's treaty. Whatever limits it might have imposed on provisionally applicable treaties, however, would have been superseded by adoption of Article 15(4) of the Russian constitution in 1993, a year before

limitation that the Russian Federation tries to read into Russian law, namely that the rules governing legislative approval of a treaty's ratification also apply to provisional application. Besides distorting the meaning of the FLIT to reach an outcome not consistent with the legislature's intent, the Avtonomov Report also ignores evidence that the Russian legislature since adopting the FLIT has reaffirmed the principle of unrestricted provisional application even in cases when the treaty is inconsistent with a federal law. It did so most directly in the proceedings before the Constitutional Court that resulted in Resolution 8-P.

90. The Avtonomov Report notes correctly that the FLIT does not address expressly the issue of the place of provisionally applied treaties in the Russian legal hierarchy. Avtonomov Report ¶ 110. The report nevertheless attempts to employ a series of unfounded inferences to create a hierarchical rule that the FLIT does not support. First, it seeks to invoke the "hierarchy of norms" argument to *defeat*, rather than protect, the authority of the Federal Assembly. The report would strip from the executive an authority that the Federal Assembly expressly delegated to it, and over which the Federal Assembly retains ultimately control. The report's position, besides lacking any support in Russian practice or relevant authorities, contradicts the principle of respect for assertions of legislative authority and thus would upset the hierarchy of norms that they purport to defend.

91. In particular, the Avtonomov Report notes correctly that the FLIT requires ratification by legislative approval of treaties that provide for rules different than those under existing legislation. Avtonomov Report ¶ 111. It further notes that, under the FLIT, the government body with competence to sign a treaty may also take the decision as to whether to

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Russia signed the ECT. As Resolution 8-P of the Constitutional Court makes clear, under the constitution a provisionally applicable treaty does have direct effect in the Russian legal system and, like ratified treaties, requires the application of its rules when existing legislation contradicts them.

consent to provisional application. *Id.* ¶¶ 113-14. The report then makes the incorrect inference, one rejected by the Constitutional Court, that the competence to sign implies another limitation, namely a competence to consent to direct effect of a treaty's rules during its period of provisional application. *Id.* ¶ 115-16.

92. Again, this gloss is contradicted by the authoritative interpretation of the FLIT by the Constitutional Court. In its Resolution 8-P, it upheld the constitutionality of Article 23 of that statute even though, the Court held, that provision enabled the government to consent to provisional application of a treaty that contradicted existing legislation. In particular, the treaty given provisional effect in that case raised the taxes of certain persons doing business on Russian territory.

93. In the Interim Award ¶ 264, the Tribunal stated that "the reference in Article 15(4) of the Constitution to 'international treaties and agreements of the Russian Federation' includes treaties that are provisionally applied, as both Parties and their experts agree." In ¶ 269 of the Interim Award, the Tribunal observed that the "provisional application of a treaty prior to its ratification and entry into force is an institution that is expressly contemplated by the [FLIT]." As a result, it concluded in ¶ 273 that "the decision of the executive in Russia to give provisional application to the ECT was not inconsistent with its Constitution." I agree with all these statements.

3. Does the Tribunal's understanding of provisional application of a treaty under Russian law render provisional application legally indistinguishable from ratification?

94. In its analysis of the FLIT, the Tribunal determined that, pursuant to its terms, a provisionally applicable treaty "becomes, to the extent of such provisional application 'an international agreement concluded by the Russian Federation.'" As such, it qualifies as an international treaty and government for purposes of Article 15(4) of the Constitution. Interim Award ¶ 264. I agree with this conclusion.

95. Russia argues that the FLIT, to the extent it did reach this result, would produce an unconstitutional delegation of power to the executive. Motion to Dismiss, p. 29. I already have addressed this point. This report *supra* ¶¶ 78-82.

96. The argument that the Constitutional Court's interpretation of Article 15(4) of the Constitution and Article 23 of the FLIT, which the Interim Award followed, collapses the distinction between provisionally applicable treaties and those that have received legislative ratification ignores the distinctions that Russian law does make between the effect of provisionally applicable and legislatively ratified treaties.

97. Under Russian law, a wide array of treaties, including those that impose different rules from existing laws adopted by the Federal Assembly, cannot enter into final and conclusive force without ratification, namely, approval of both houses of the Federal Assembly. This kind of entry into force has important legal consequences under Russian law, distinct from those resulting from provisional application. A key difference is the stability of the treaty's legal effect as a matter of Russian law. Under Russian law, the President or government may terminate provisional application simply upon notice to the other parties. Termination of a treaty that has entered into force after legislative ratification, by contrast, requires a legislative act pursuant to Article 37 of the FLIT. Similarly, the Constitutional Court has jurisdiction to review the constitutionality of a provisionally applicable treaty, but not of a treaty that has entered into force.[7]

98. The Russian Federation's arguments seek to confuse the rules according to which treaties must be ratified with the separate and distinct question of Russian law's legal hierarchy with respect to provisional application of a treaty before its entry into force. In Russia, the specific

[7] The Federal Assembly's adoption of Federal Constitutional Law No. 7-FKZ of December 11, 2015 (**Exhibit 9**), discussed at ¶ 131 of this report, did not change this limitation. This constitutional law did not give the Constitutional Court jurisdiction to review the constitutionality of treaties in force, but only to consider the constitutionality of particular judgments of international tribunals established by a treaty.

purpose of provisional application of a treaty is to apply it immediately, without waiting for its ratification and entry into force. Ratification, by contrast, addresses the definitive and conclusive entry into force of a treaty. Ratification necessarily comes after provisional application, sometimes only after much time has passed, and cannot inform provisional application. Provisional application, on the one hand, requires agreement between the parties to a treaty, but also allows the party that has consented to provisional application to withdraw consent without any further action by the other treaty party. A higher barrier exists to ratification of a treaty exactly because withdrawal from a ratified treaty is not as straightforward and requires a legislative act under the FLIT.

99. Provisional application of a treaty does not dispense with the Federal Assembly in the making of treaties. Under Russian law, the Federal Assembly ultimately decides whether a provisionally applicable treaty that contains rules other than those found in Russian law may enter into force and thus become a permanent part of the Russian legal system. Accordingly, in the Constitutional Court's Resolution No. 6-P of March 19, 2014, the Constitutional Court held that the provisional application of the Crimea treaty signed on March 18, 2014, which was subject to ratification both because it changed the Russian Federation's international boundary and added to existing Russian law (by imposing Russian sovereignty over Crimea including the application of Russian private and public laws), did not contradict the principle of separation of powers because its entry into force would be decided by the Federal Assembly:

> [T]he Treaty in question is not inconsistent with the Constitution of the Russian Federation in terms of the separation of power into legislative, executive, and judicial branches . . . since . . . the question of its ratification will be resolved by the Federal Assembly.

Constitutional Court's Resolution No. 6-P of March 19, 2014.

100. The Court found no constitutional infirmity in the treaty's imposition of a period of provisional application and it stated:

> 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. At the same time, the possibility of application of an international treaty prior to its entry into force, if the treaty itself so provides or if an agreement to such effect has been reached among the parties, arises from paragraph 1 of Article 25 of the Vienna Convention on the Law of Treaties of May 23, 1969, to which the Russian Federation is a party, with the said paragraph being essentially reproduced in Article 23 of Federal Law No. 101–FZ of July 15, 1995, "On the International Treaties of the Russian Federation.". . . . [T]he Russian Federation provisionally applies international treaties in its relations with other states when the subject of the respective treaty is of special interest to its parties, so that these parties are interested in application of such treaty without waiting for its ratification and entry into force.

Constitutional Court's Resolution No. 6-P of March 19, 2014.

101. It then concluded that "the Treaty in question cannot be considered to violate the Constitution of the Russian Federation with respect to the order of signature, conclusion, and putting into effect that it envisages" and stated that Crimea became part of Russia from the moment when provisional application began.

102. Accordingly, the Constitutional Court's jurisprudence establishes that provisional application of a treaty that contains rules that differ from Russian law fully respects the Federal Assembly's competence in deciding on the content of the Russian law. This is because provisional application both is authorized by enacted legislation and does not interfere with the final say that the Federal Assembly has over the permanent entry into force of a treaty that has rules different from domestic law.

103. It is clear, then, that the Constitutional Court's understanding of the status of rules contained in provisionally applicable treaties, which the Interim Award adopts, does not erase the

distinction between provisionally applicable and ratified treaties under Russian law and does not render ratification irrelevant.

104. The Russian Federation cannot unilaterally adopt provisional application of a treaty. First, the treaty itself must provide for provisional application, therefore conditioning this status on the consent of the other parties. Second, since the adoption of the FLIT and according to its Article 23(2), the government must notify the legislature within six months that it has consented to provisional application and initiate the process of legislative ratification. However, the failure to comply with this requirement does not alter the Russian Federation's obligations under a provisionally applicable treaty. In my first report submitted in the arbitration proceeding, I explained that "failure to comply with [Article 23(2) FLIT] does not affect the Russian Federation's obligations under the ECT (as provisionally applied) on the international plane. [...] [T]he express terms of Article 23 provide that provisional application shall terminate either by the entry into force of the treaty in question or by notification to the other states of Russia's intention of termination. The six-month rule in Article 23(2) can have nothing to do with this." Stephan I ¶ 74, 77. I hereby confirm that statement. Third, a State may terminate provisional application unilaterally at any time, as Article 23 of the FLIT, which is based exactly on Article 25 of the VCLT, expressly stating the same. Denunciation of a treaty in force, by contrast, can be done only in accordance with the terms of the treaty or, in the absence of express provisions in the treaty, in accordance with the rules under the VCLT, which delays the effect of a denunciation for at least one year, something not found in the rules for terminating provisional application. Furthermore, under Russian law only the Federal Assembly may denounce a treaty.

105. Finally, the Russian Federation argues that the Russian Constitutions forbids limits the deprivation of the right of access of persons to the jurisdiction of Russian courts. Motion to

Dismiss, pp. 26-27. The argument rests on a false inference, that the expansion of options for persons seeking access to justice to include international arbitration somehow impairs the right to seek justice through domestic courts. Russian law contains no such inference, and instead recognizes the freedom of individuals to take advantage of valid arbitral options. Under Russian law, arbitration is valid if the subject of the dispute is arbitrable and if the parties have given valid consent to arbitration.

106. The access-to-justice argument rests on articles 46 and 47 of the Russian constitution. Article 46(2) guarantees the right to obtain redress from the Russian courts against Russian public bodies and officials, and Article 47(1) states that no one may be deprive of the right to have his or her case tried in a court with jurisdiction over the dispute. As I noted earlier in this report, however, neither of these provisions mandates that persons endowed with rights and interests by Russian law pursue justice only through the Russian courts. Russian law is replete with authorization of the right to alternative dispute resolution, including, where valid consent exists, through arbitration. *See supra* ¶ 34.

107. The cases cited in the Avtonomov Report are not to the contrary. It cites the Constitutional Court's Resolution 4-P of February 25, 2004 (ECF No. 63-29), a case involving the right to bring voting claims to the courts. The Constitutional Court ruled, under Article 47(1), it was unconstitutional to give the commission this right to the exclusion of the voters whose interests were the basis of a claim. Similarly, the court's Resolution 9-P of March 16, 1998 (ECF No. 63-25), ruled that provisions of the Criminal Procedure Code and the Civil Procedure Code allowing the heads of judicial bodies to decide on their own authority where venue of cases might lie violated the legislatively prescribed allocation of venue, an interest of important value to litigants.

Both cases were about the protection of individual interests in the face of bureaucratic arrogation, not about closing down the choices of individual litigants as to how to protect their interests.

108. The impairment-of-access-to-justice argument was advanced by the Russian Constitutional Court in Decision 2867-O-P. The Avtonomov Report recycles it. Avtonomov Report ¶¶ 127-36. I show below at ¶¶ 123-136 why this Decision is not reliable authority, and the Avtonomov Report's embrace of the argument does not rehabilitate it.

109. In my expert report in the Swiss proceedings, I explained by this particular aspect of the Decision's argument was implausible:

> The argument that *adding* an alternative means of dispute settlement impairs the ability of a person to seek judicial protection seems on its face incredible. The argument that any legal arrangement, whether a contract or an international treaty that meets the requirements of international law, that obligates the Russian Federation to accept mandatory dispute resolution violates the principle of equality before the law similarly represents an elevation of the rights of the state above all others, contrary to the principles that inspired the Constitution. Arguing that recognition of the authority of an international tribunal with competence to bind the Russian Federation internationally somehow alters the jurisdiction of Russian courts to bind the Russian Federation domestically simply makes no sense.

Stephan III ¶ 102.

110. Russian practice is very much to the contrary. Illustrative is the 1995 PSA Law. Its Article 22 provides:

> Disputes between the State and an investor connected with the performance, termination, or invalidity of agreements shall be resolved in accordance with the terms of the agreement in a court, arbitrazh court, or arbitral tribunal (including international arbitration institutions).
>
> This legislation gives a foreign investor a choice between Russian litigation and international arbitration with respect to a wide range of disputes with the Russian state, including public-law issues such as tax assessments. The dispute resolution provisions of both the 1991 and 1999 FI Laws similarly recognize the alternative of international arbitration and Russian litigation with respect to all kinds of disputes, including those based on Russian public law.

1995 PSA Law, art. 22.

111. As these statutes indicate, the constitutional guarantee of access to Russian courts does not preclude the arbitrability of a wide range of disputes, including those based on public law. The issue under Russian law is not arbitrability, but whether Russia has validly consented to arbitration. Decision 2867-O-P and the Avtonomov Report seek to confuse the two so as to avoid an obviously clear principle of Russian law, namely that access to arbitration does not compromise the constitutional guarantee of access to justice.

D. What does the legislative history and contemporaneous public discourse related to Russia's signing of the ECT indicate about the consistency of international arbitration under that treaty with Russian law?

112. In its interim award, the arbitral panel considered arguments by the Russian Federation that statements made by the Russian government to the parties of the ECT around the time of its signature, and later when seeking ratification of the treaty by the legislature, indicated its understanding that its consent to provisional application did not extend to Article 26's consent to arbitration. The panel fully considered Russia's evidence and found it wanting. Interim Award ¶¶ 232-42.

113. Among the items of evidence cited in the Award to support its decision were:

a. The government of the Russian Federation on December 16, 1994, resolved to sign the ECT subject to certain declarations about specific articles of the ECT. It did not authorize any declaration indicating inconsistency between provisional application of Article 26 and Russian law. Interim Award ¶ 235.

b. In 1997, representatives of the Russian Federation informed the state parties of the ECT that provisional application of the treaty was part of normal Russian practice and was proceeding as planned. Interim Award ¶ 236.

c. A 1996 analysis of the consistency of the ECT with Russian legislation, submitted to the Russian parliament in support of the ECT's ratification, stated that "the

provision on provisional application was in conformity with Russian legal acts" and "the legal regime of foreign investments envisaged under the ECT is consistent with the provisions of the existing law of the RSFSR." Interim Award ¶ 237.

d. In 2002, the Russian representatives to the ECT state parties assured the others that Russia "implements the Treaty from the day it entered into force." Interim Award ¶ 238.

e. In 2005, the Russian Ministry of Foreign Affairs stated that the Russian Federation applies the ECT on a provisional basis in accordance with the Vienna Convention on the Law of Treaties and the FLIT. Interim Award ¶ 239.

114. None of these statements indicated that the "legal regime" of the ECT did not include investor-state arbitration, a feature that was central to the entire ECT project. As I indicated in Stephan II:

> The ECT Explanatory Note was unequivocal in concluding there was no conflict or inconsistency between the ECT and existing Russian law. There is no reason why the arbitration provisions of the ECT should have been singled out for specific treatment in this regard and, had there been any such inconsistency, it is quite clear to me it would have been identified.

Stephan II ¶ 61.[8]

115. Professor Avtonomov takes the same path chosen by the Russian Federation during the arbitral proceedings, trying to read into these clear statements by the Russian government a silent proviso with respect to arbitration. Avtonomov Report ¶¶ 167-70. It is my judgment, reflected in that of the tribunal, that this reading is not consistent with Russian law.

[8] The same is true for explanatory memorandum later submitted by the State Duma Economic Policy Committee. *See* Motion to Dismiss, p. 30 (citing Explanatory Memorandum from State Duma Economic Policy Committee prepared to the Parliamentary Hearings on the ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (Feb. 19, 1997) (ECF No. 63-77)).

116. The Avtonomov Report refers to several statements made by the Russian government to the legislature when submitting various BITs for ratification. Avtonomov Report ¶¶ 160-64. Each noted that the BIT in question contained provisions different from that in existing law, in particular the 1991 and 1999 Laws on Investment respectively, and therefore was subject to ratification in accordance with FLIT Article 15. None of the treaties cited, however, provided for provisional application. According, those treaties did not give the government any say as to whether the treaty provisions might apply in advance of ratification. The statements made to the legislature thus say nothing about the authority of the Russian government to agree to provisional application of a treaty that would contain rules inconsistent with or not specifically provided for by domestic legislation.

117. The Avtonomov Report cites in particular a statement to the effect that the 1999 Law on Investment "does not provide for the mechanism of compensation in the effect of expropriation." That statement is true in the case where no treaty in effect under Russian law provides for that mechanism. As noted in this report at ¶ 44, Article 10 of the 1999 law does contemplate arbitration of all disputes arising from an international treaty to which the Russian Federation has consented. This determination of the arbitrability of such disputes encompasses claims based on expropriation.

118. The Avtonomov Report also cites a statement made by Professor Bystrov, a Russian energy expert, in the course of the legislative proceedings on ratification of the ECT. Avtonomov Report ¶ 174. It is clear from a reading of Bystrov's complete testimony and the contemporary legal context that he was not concerned with investor-state arbitration, but rather commercial arbitration between foreign investors and private counterparties of disputes concerning subsurface licenses, and in particular a Swedish arbitral proceeding between a Canadian company and a

Russian firm that had determined that current Russian law did not regard as arbitrable disputes regarding these licenses. Not long after this comment, however, the Duma amended the Law on the Subsurface to permit commercial arbitration of these disputes. *See supra* ¶ 24. Moreover, the Swedish District Court subsequently reversed the ruling of the arbitral tribunal on arbitrability, holding that Russian law permitted arbitration of the dispute even before the later amendment was enacted. *See* Richard N. Dean, James W. Skelton, Jr. & Paul B. Stephan, *Doing Business in Emerging Markets – A Transactional Course* (2022) **(Exhibit 10)** (reproducing excerpts from *Archangel Diamond Corporation v. OAO Arkhangelskoe Geologodobychnoe Predpriyatie*, Stockholm District Court, Case No. T 10401-01 (February 20. 2004); the Svea Court of Appeal Judgement No. T2277-04 (Nov. 15, 2005)). More details about the arbitral dispute and the subsequent litigation can be found in this textbook.

119. The Avtonomov Report cites 2001 testimony from former Prime Minister Chernomyrdin about possible conflicts between the ECT and extant Russian legislation. Avtonomov Report ¶ 176. Chernomyrdin's testimony, however, was limited to broad and theoretical generalizations rather than specific concerns and did not mention consent to arbitration as one of the examples of inconsistency.

120. Finally, the Avtonomov Report mentions a 2004 statement made by the deputy secretary general of the ECT secretariat that "today Russia applies the ECT on a temporary basis, which, in particular, does not give it the opportunity to use to its own interests the dispute resolution mechanisms provided for by the treaty." Avtonomov Report ¶ 166. This statement, rather than indicating that provisional application barred access of investors to ECT arbitration, makes clear that investors did have access. In the view of the deputy secretary, Russia itself did not have the ability to bring claims on its own behalf.

121. It is not clear what weight to attach to the view of this official, made nearly a decade after Russia signed the treaty, as to the effect of the ECT on Russian domestic law. One might note that the statements of responsible officials much closer to the time of signing indicate that provisional application of the treaty would not limit the right of protected foreign investors to seek dispute resolution through international arbitration.

122. In sum, I see nothing in the Avtonomov Report to undermine the conclusion of the arbitral tribunal, as well as my own views based on independent research, that statements by the Russian government between 1994 and 2005 do anything but confirm the understanding of provisional application of the ECT as including Article 26's consent to investor-state international arbitration.

E. What is the relevance of the Constitutional Court's Decision No. 2867-O-P of December 24, 2020, to the issues raised in this proceeding?

123. The Constitutional Court's Decision 2867-O-P,[9] purporting to clarify its Resolution 8-P, represents a legislatively mandated intervention by the Court in the ongoing lawsuits in many countries in the world regarding the validity of the several arbitral awards against the Russian Federation based on the ECT. The Constitutional Court issued this Decision pursuant to a new procedure created by Federal Constitutional Law No. 5-FKZ of November 9, 2020 (**Exhibit 11**). That law authorizes the Constitutional Court to provide an explanation of what it meant in earlier resolutions. In this case, the "explanation" amounts to a repudiation of the earlier Resolution 8-P. Specifically, the Constitutional Court declared that "delegating authority to resolve disputes to international investment arbitration (arbitral tribunal) and, as a result, changing (excluding) the

[9] This decision of the Constitutional Court is, in Russian, called an определение (*opredelenie*,) consistently translated as "decision," rather than a постановление (*postanovlenie*,) consistently translated as resolution. In the past practice of the Constitutional Court, a resolution requires more elaborate procedures than a decision, while a decision typically involves application of the Court's established jurisprudence to a different case, rather than the development of that jurisprudence. Under Federal Constitutional Law 5-FKZ of November 9, 2020 (**Exhibit 11**), the actions of the Court authorized by that enactment are characterized as decisions.

jurisdiction of national courts cannot be done without the federal parliament passing a law on ratification of the relevant international treaty." Decision 2867-O-P ¶ 5. This "explanation" repudiated what the Court had clearly said in the "explained" resolution.

124. The coincidence of the enactment of the new constitutional law and the adoption of this constitutional decision gives rise to an inference that the revision procedure was adopted so as to produce this particular outcome. The new law enables the Court to withdraw statements made in a resolution that had supported the analysis of tribunals constituted under the ECT and foreign court judgments regarding the validity of ECT awards against the Russian Federation. All these international and foreign court decisions involved Yukos group entities.

125. To be specific, one can infer that the new constitutional law adopted on November 9, 2020, and the decision of the Constitutional Court in its immediate wake, represents a direct response to the decision of the Court of Appeal of the Hague on February 18, 2020, to recognize the validity of arbitral awards under the ECT against the Russian Federation as a result of the expropriation of the Yukos Oil company.

126. Decision 2867-O-P relies on new and unprecedented arguments about what rights the Russian Constitution grants to the Russian state. First, the decision maintains that the establishment of an alternative method of dispute resolution, which does not limit in any way a person's right to seek protection of its rights in the regularly constituted courts, constitutes an abridgement of a person's right to judicial protection and access to justice. Second, it concludes that obligating the Russian Federation to make use of an alternative method of dispute resolution both infringes the right of the Russian Federation to exercise judicial jurisdiction in its territory and violates the principle of equality before the law. It argues in particular that the creation of an alternative dispute mechanism with the authority to bind the Russian Federation internationally

amounts to a modification of the jurisdiction of the Russian courts in violation of Article 47(1) of the Russian Constitution.

127. Decision 2867-O-P casts an immediate shadow over the many mandatory dispute settlement mechanisms to which over the last thirty years the Russian Federation has committed itself through treaties that have applied provisionally. It appears to forbid the Russian government from entering into commercial contracts, such as loans or the purchase of goods and services, that provide for dispute resolution through the domestic courts of foreign countries, absent a specific legislative enactment authorizing in each instance such contractual clauses.

128. The argument that *adding* an alternative means of dispute settlement impairs the ability of a person to seek judicial protection seems on its face incredible. The argument that any legal arrangement, whether a contract or an international treaty that meets the requirements of international law, that obligates the Russian Federation to accept mandatory dispute resolution violates the principle of equality before the law similarly represents an elevation of the rights of the state above all others, contrary to the principles that inspired the Constitution. Arguing that recognition of the authority of an international tribunal with competence to bind the Russian Federation *internationally* somehow alters the jurisdiction of Russian courts to bind the Russian Federation *domestically* simply makes no sense.

129. I previously have endorsed the position that, in the Russian legal system only the Constitutional Court, and not the Supreme Court, can provide an authoritative and conclusive interpretation of the Constitution. This is true when one compares the authority of the Constitutional Court to that of the Supreme Court. This does not mean that all acts of the Russian Constitutional Court represent valid interpretations of the Russian Constitution, even if other Russian courts lack the competence to challenge them. Where there exists evidence of

extraordinary political pressure combined with deeply incoherent and unpersuasive reasoning in the opinion in question, one validly can conclude that a decision represents the outcome of an overbearing of the Court's will by political authorities. It is my judgment that Decision 2867-O-P represents exactly such a decision, and I reject it as a correct statement of Russian law.

130. It is apparent that no Russian court, including the Constitutional Court, has been able to maintain its independence and to render decisions free from state interference when exercising jurisdiction over cases arising out of the Yukos dispute. The first instance where the Constitutional Court appeared to reach a result inconsistent with Russian law to facilitate the government's campaign to expropriate Yukos Oil Company was its Resolution No. 9-P of July 14, 2005 (**Exhibit 12**), regarding the applicable statute of limitations for determining a tax offense. The Court, over three dissents, ruled that the limitation period specified by the Tax Code did not apply because of exceptional circumstances, principally what it considered to be the bad faith of the Yukos Oil Company in its efforts to avoid tax liability. The European Court of Human Rights later determined that this ruling of the Constitutional Court lacked any basis in Russian law and constituted a violation of the rights of the company protected under the European Convention on Human Rights:

> "Overall, notwithstanding the State's margin of appreciation in this sphere, the Court finds that there has been a violation of Article 1 of Protocol No. 1 on account of the change in interpretation of the rules on the statutory time-bar resulting from the Constitutional Court's Decision No. 9-P of 14 July 2005 and the effect of this decision on the outcome of the Tax Assessment 2000 proceedings.

European Court of Human Rights' Judgment, *OAO Neftyanaya Kompaniya Yukos v. Russia*, Application No. 14902/04, at ¶ 574 (Sep. 20, 2011) (**Exhibit 13**).

131. Once the European Court of Human Rights on July 31, 2014, ordered the Russian Federation to pay damages to Yukos Oil Company in compensation for these treaty violations, the

Russian government took measures to frustrate this judgment. It first adopted an amendment to the Federal Constitutional Law on the Constitutional Court to permit the Constitutional Court to review awards issued by international tribunals to determine whether honoring such award would violate the Russian Constitution. Federal Constitutional Law No. 7-FKZ of December 11, 2015 The Constitutional Court reviewed these amendments before their adoption and pronounced them constitutionally valid. Resolution No. 21-P of July 14, 2015 (**Exhibit 14**).[10]

132. The Russian government then petitioned the Constitutional Court to consider whether honoring the July 14, 2014, judgment of the European Court of Human Rights would violate the Constitution. In Resolution No. 1-P of January 19, 2017 (**Exhibit 17**), the Constitutional Court ruled that payment of damages ordered by the European Court would be unconstitutional. First, it determined that compensation to Yukos Oil Company for violation of its procedural rights in the course of a tax assessment would constitute a tax refund. It found in the Constitution's Article 57, which provides that every person shall pay lawfully established taxes and fines, a constitutional prohibition of refunds of lawfully assessed taxes. It further held that the taxes collected from Yukos Oil Company were lawful because the European Court had no right to determine that its Resolution No. 9-P of July 14, 2005, constituted a breach of the European Convention on Human Rights due to the change in the interpretation of Russian law.

133. To summarize, the Constitutional Court to date has dealt with the Yukos case, a matter of deep political interest in which the President, government, and legislature have intervened, four times. The first case, coming after the seizure of the company's principal assets

[10] Reviewing these events, the Venice Commission of the Council of Europe expressed concern about the new authority bestowed on the Constitutional Court. Interim Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation adopted by the Venice Commission at its 106th Plenary Session, CDLad(2016)005 (**Exhibit 15**). Russia later doubled down on its position by amending its Constitution to expressly proclaim that it could not be bound by decisions of international tribunals that violated its Constitution. Russian Constitution Article 125(5[1]), as amended July 1, 2020 (**Exhibit 16**).

but before its complete liquidation, upheld the imposition of a huge fine that played a large role in that seizure in a manner that brought condemnation by the European Court of Human Rights. The remaining three cases, including Decision 2867-O-P, responded to either proposed or enacted legislation designed to thwart the implementation of outstanding international and foreign court judgments in the Yukos case. In all three instances the Constitutional Court implemented the legislative attacks on specific international and foreign judgments with decisions that depend on new and implausible claims about the Russian Constitution.

134. For these reasons, I regard Decision 2867-O-P as an unreliable source of Russian law. Any state engaging in legal relations with the Russian Federation going forward should be advised that the decision reflects current Russian thinking. Any person trying to reconstruct the specifics of Russian law with respect to earlier events, such as the period from the Russian Federation's accession to provisional application of the ECT until the issuance of the Interim Award, should regard Decision 2867-O-P with deep skepticism.[11]

135. The Swiss Supreme Federal Court both rejected the applicability of Decision 2867-O-P to the question of the validity of the arbitral award under review here and also cast doubt on the status of the decision as an accurate expression of Russian law at the time the award was made. ECF No. 32-4 ("Swiss Dec.") § 6.4.11. It observed that Swiss law ruled out the consideration of foreign law enacted after the issuance of an award when considering the award's validity. *Id.* It then noted that "it is quite conceivable that the Russian Constitutional Court decided, after re-examining the issue, to reverse the position it had previously adopted in its previous resolution on the disputed question." *Id.* Implicit in this observation is an assessment of Decision 2867-O-P as

[11] I have discussed Decision 2867-O-P in my recent scholarship and expanded on these views. Paul B. Stephan, The World Crisis and International Law – The Knowledge Economy and the Battle for the Future 246-49 (2023) **(Exhibit 18)**; Paul B. Stephan, Apply Municipal Law in International Disputes, 434 Recueil des Cours 9, 108-10 (2023) **(Exhibit 19)**.

a post hoc and made-to-order legal artifact, not a good faith attempt to interpret the constitutionality of provisionally applicable treaties under Russian law.

136. Provisions of the Russian Constitution reinforce the judgment of the Swiss Supreme Federal Court that Decision 2867-O-P may not be given retroactive effect. Article 54(1) enshrines the principle of legality, that is that no enactment may be given retroactive effect to the detriment of any person. Moreover, Article 135 forbids amendment of Chapter 2 of the Russian Constitution, of which Article 54 is part, by any means other than a constitutional assembly, a process that has never been invoked. Thus the various 2020 enactments that empowered the Constitutional Court to "revise" its earlier decisions could not authorize retroactive effect to the detriment of persons.

137. For all these reasons, I agree with the Swiss Supreme Federal Court's assessment of Decision 2867-O-P. The decision is not a reliable source for ascertaining the Russian law that applied for the duration of this dispute and has no legal effect regarding the validity the decisions of the arbitral tribunal.

F. Did the service of process on the Russian Federation in this case comply with Russian and international law?

138. It is my understanding that the Russian Federation was served with process in this case through diplomatic channels, namely the delivery of the relevant documents by the U.S. State Department to the Embassy of the Russian Federation in Washington. This method of service rests on Section 1608(a)(4) of U.S. Code Title 28 and 22 C.F.R. § 93 (2011). Both of these provisions describe the mechanism for notifying a foreign state through diplomatic channels of litigation in the United States. Section 93.1(c) of Title 22 of the Code of Federal Regulations authorizes delivery of the requisite documents either by the local U.S. embassy to the appropriate authorities

in the country subject to suit or by the State Department to the Washington, D.C. embassy of that country.

139. The Russian Federation, like the United States, is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (**Hague Service Convention**),[12] a multilateral treaty governing international service of process. In a declaration accompanying the depositing of its articles of ratification to the Convention, the Russian Federation stated that:

> It is highly desirable that documents intended for service upon the Russian Federation . . . are transmitted through diplomatic channels, i.e. by Notes Verbales of diplomatic missions of foreign States accredited in the Russian Federation.

Declaration of May 1, 2001, item IV.[13] In the same Declaration, Russia noted that, pursuant to the Convention, foreign diplomats may not effect service of process within Russian territory except with respect to nationals of the state represented by the diplomat. *Id.* item V. The necessary inference to be drawn from this latter statement is that Russia does not regard the delivery of a note verbale through diplomatic channels as inconsistent with the reservation of sovereignty expressed by item V of its Declaration. This inference in turn implies that Russia does not regard the delivery of a note verbale through diplomatic channels, whether in Washington or Moscow, as an incursion on the sovereignty of the Foreign Ministry or its missions.

140. Reading Russia's Declaration accompanying the Hague Service Convention as a whole, it is clear that Russia regards the use of diplomatic channels as a proper means of giving notice to the Russian state of suits brought against it in another country. Although the Declaration expresses a preference for the notice to be given in the form of a communication between the Moscow embassy of the state where the suit has been commenced and the Russian Ministry of

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[12] https://www.hcch.net/en/instruments/conventions/full-text/?cid=17.

[13] https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=418&disp=resdn.

Foreign Affairs, it does not rule out the alternative means of diplomatic communication, namely the delivery of documents by the originating state's foreign ministry and the Russian embassy in that state. What the Declaration precludes is the delivery of notice of the suit against Russia to the Russian Ministry of Justice, which is the designated Central Authority for purposes of carrying out service of process under the Convention. Declaration of May 1, 2001, item I.

141. The Vienna Convention on Diplomatic Relations (VCDR) (ECF No. 62-87), another multilateral treaty to which both Russia and the United States are parties, further indicates that the transmittal of notice of a lawsuit against a state through a communication between the foreign ministry of the state where the suit will take place and the embassy of the state being sued is consistent with an embassy's diplomatic mission and not a violation of the embassy's inviolability.

142. Article 3(1) of the VCDR identifies the functions of a diplomatic mission as, among other things, "[r]epresenting the sending State in the receiving State" and "[p]rotecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law." Article 41(2) then provides that "[a]ll official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed." Read together, these provisions make clear that the receipt of communications from a host nation's foreign ministry with respect to the home state of the mission is a normal and indeed essential diplomatic function.

143. Receipt of notice of a lawsuit in the host state from that state's foreign ministry thus falls within the core of a diplomatic mission's responsibilities. It is not an incursion by third parties seeking to exploit the location of the mission within the host country. The use of diplomatic

channels to give a state effective notice of a lawsuit against it is distinguishable from attempts by other official bodies, such as a court, to serve process on the embassy.

144. *Sudan v. Harrison*, 139 S. Ct. 1048 (2019), the only decision of the U.S. Supreme Court to address service of process under the Foreign Sovereign Immunities Act (**FSIA**), addressed a case of judicial service, not the use of diplomatic channels. The decision turned on the interpretation of FSIA, specifically its Section 1608(a)(3). In the course of interpreting the statute, the Court cited the VCDR, and especially its establishment of embassy inviolability, as a basis for its decision. 138 S. Ct. at 1060-61. It also relied on the argument of the United States that the Convention does not permit third parties, including courts, to send process to any embassy, absent consent by the recipient. The Court by implication accepted the argument of the United States that only the United States itself, acting through the State Department, could deliver such notice to an embassy, and that such delivery conforms to the Vienna Convention and international law generally. The FSIA implements this understanding of international law through its Section 1608(a)(4).

145. The State Department's express endorsement in 22 C.F.R. § 93.1(c)(2) of delivery of notification to a District of Columbia embassy when it effects that delivery, as well as decision to do so in this case, further confirms the legality of this mode of service under the Hague Service Convention and the VCDR. The views of the State Department, as the component of the U.S. government responsible for negotiating and administering these treaties, regarding the interpretation of these treaties should be afforded great deference.

146. Accordingly, both Russian and international law accept as valid the method of serving notice of this suit used here. Service was delivered through diplomatic channels, as specified in FSIA, the provisions of the Code of Federal Regulations implementing the FSIA, and

Russia law, as evidenced by Russia's Declaration at the time it joined the Hague Service Convention.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 9, 2024.

Paul B. Stephan