PCA Case No. 2019-28

IN THE MATTER OF AN ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

UKRAINE

- and -

THE RUSSIAN FEDERATION

- in respect of a -

DISPUTE CONCERNING THE DETENTION OF UKRAINIAN NAVAL VESSELS AND SERVICEMEN

DECISION ON CHALLENGES

6 March 2024

ARBITRAL TRIBUNAL:

Judge Gudmundur Eiriksson (Acting President)
Sir Christopher Greenwood
Professor Alexander N. Vylegzhanin

REGISTRY:

The Permanent Court of Arbitration

TABLE OF CONTENTS

I. INTRODUCTION

1. This Decision addresses the challenges raised by the Russian Federation against Professor Donald McRae, President, and Judge Rüdiger Wolfrum, Member of the Arbitral Tribunal, for lack of independence and impartiality as a result of their votes in support of the Institute of International Law (*Institut de Droit International*, "**IDI**" or "**Institute**") declaration of 1 March 2022, entitled "Declaration of the Institute of International Law on Aggression in Ukraine" ("**IDI Declaration**"). In accordance with Article 19, paragraph 1, of the Rules of Procedure of the Arbitral Tribunal and Procedural Order No. 8 dated 15 December 2023, the three unchallenged Members, with Judge Gudmundur Eiriksson presiding and without the participation of Professor McRae and Judge Wolfrum, hereby issue a decision on the challenges.

II. PROCEDURAL HISTORY

A. INSTITUTION OF THE PROCEEDINGS

2. These challenges arise out of arbitration proceedings between Ukraine and the Russian Federation (together, the "**Parties**") under Annex VII to the 1982 United Nations Convention on the Law of the Sea ("**UNCLOS**" or the "**Convention**"), commenced by Ukraine by a Notification and Statement of Claim served on the Russian Federation on 1 April 2019.

3. This arbitration concerns the interpretation and application of the Convention in respect of a dispute that arose from events which took place on 24 to 25 November 2018, involving the arrest and detention by the Russian Federation of three Ukrainian naval vessels (the *Berdyansk*, the *Nikopol* and the *Yani Kapu*) and their respective crew of 24 Ukrainian naval personnel for alleged violations of Russian criminal law.

B. CONSTITUTION OF THE ARBITRAL TRIBUNAL

4. In its Notification and Statement of Claim, Ukraine appointed Sir Christopher Greenwood KC as member of the Arbitral Tribunal pursuant to Article 3(b) of Annex VII to the Convention.

5. By a *note verbale* to Ukraine dated 30 April 2019, the Russian Federation appointed Judge Vladimir Vladimirovich Golitsyn as member of the Arbitral Tribunal pursuant to Article 3(c) of Annex VII to the Convention.

6. Since the Parties were unable to reach an agreement on the appointment of the remaining members of the Arbitral Tribunal, on 12 June 2019, Ukraine requested that H.E. Judge Jin-Hyun Paik, President of the International Tribunal for the Law of the Sea ("**ITLOS**"), make the appointments

pursuant to Article 3(d) of Annex VII to the Convention. On 8 July 2019, Professor Donald M. McRae, H.E. Judge Gudmundur Eiriksson and H.E. Judge Rüdiger Wolfrum were appointed as members of the Arbitral Tribunal, with Professor McRae as President of the Arbitral Tribunal. At the same time, the Parties agreed to request the Permanent Court of Arbitration ("**PCA**") to act as registry for the arbitration, which the PCA confirmed on 19 July 2019, appointing Mr. Martin Doe, then Senior Legal Counsel and now Deputy Secretary-General and Principal Legal Counsel at the PCA, to serve as Registrar.

7. On 18 November 2019, the Registrar transmitted to the Parties signed Declarations of Acceptance and Statements of Impartiality and Independence in respect of each member of the Arbitral Tribunal.

8. Professor McRae appended the following disclosure to his Statement of Impartiality and Independence:

> **Statement of Professional Relationships**
>
> I was co-counsel with Professor Alain Pellet before the ICJ (Cambodia v. Thailand) and was a colleague of Professor Pellet on the United Nations International Law Commission for 5 years.
>
> I also meet Professor Pellet, Professor Treves and Professor Soons occasionally in the context of meetings of the Institut de droit international.
>
> I currently chair an investment tribunal hearing a dispute between Ukrainian investors and the Russian Federation (PCA Case No. 2015-29).

9. Judge Wolfrum appended the following disclosure to his Statement of Impartiality and Independence:

> **Statement of professional relationships with the Parties**
>
> Concerning Ukraine:
>
> I was co-arbitrator with Professor Alfred H.A. Soons in the South China Sea Arbitration (Philippines v. China) and we are both members of the Institut de Droit International where we met recently at the bi-annual meeting (August/September). Professor Soons was one of the co-Founders of the Rhodes Academy on Oceans Law and Policy until he retired from his position as the director of the Law of the Sea Institute.
>
> I am teaching the General Course at The Hague Academy in the winter session 2020. Therefore, I will be, as far as administrative issues are concerned, in loose contact with Professor Jean-Marc Thouvenin.
>
> Concerning Russian Federation
>
> I am in academic contact with Professor Alain Pellet who is, as I am, a member of the Institut de Droit International. He has contributed to the Max Planck Encyclopedia of Public International Law of which I am the general editor.

> Professor Tullio Treves was a judge as I was from 1996 until his retirement at ITLOS; we are both members of the Institut de Droit International and meet at the bi-annual meetings. He has contributed to the Max Planck Encyclopedia of Public International Law of which I am the editor. Until two years ago, Professor Treves was member of the advisory board of the above mentioned Encyclopedia.
>
> I have been asked – and accepted – to teach a general course on international law in September 2021 at the Russian Academy of Sciences. The organizer is professor Roman Kolodkin, also a member of the Institut de Droit International.
>
> In general
>
> The group of academics and practitioners in public international law is limited; we meet for various reasons in conferences and seminars occasionally and we cooperate in publications.

10. Sections 4.7 and 4.8 of the Terms of Appointment subsequently adopted by the Arbitral Tribunal state:

> 4.7 The members of the Arbitral Tribunal declare that they are and shall remain impartial and independent of the Parties. The members of the Arbitral Tribunal shall promptly notify the Parties and the other arbitrators of any circumstances likely to give rise to justifiable doubts as to their impartiality or independence that may subsequently come to their attention during this arbitration.
>
> 4.8 The Parties confirm that the members of the Arbitral Tribunal have been validly appointed in accordance with the Convention, and that they have no objection to the appointment of any member of the Arbitral Tribunal on the grounds of conflict of interest or lack of independence or impartiality in respect of matters known to them at the date of these Terms of Appointment.

11. On 21 November 2019, the Arbitral Tribunal held a procedural meeting with the Parties at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands, to consider the procedure and timetable for the arbitration.

12. On 22 November 2019, the Arbitral Tribunal adopted Procedural Order No. 1 with the agreement of the Parties, setting forth the Terms of Appointment of the Arbitral Tribunal ("**Terms of Appointment**") and the Rules of Procedure of the Arbitral Tribunal ("**Rules of Procedure**").

C. WRITTEN SUBMISSIONS AND AWARD ON PRELIMINARY OBJECTIONS

13. On 22 May 2020, Ukraine submitted its Memorial.

14. On 24 August 2020, the Russian Federation submitted five preliminary objections to the Arbitral Tribunal's jurisdiction (the "**Preliminary Objections**"). Following exchanges of written submissions and the Preliminary Objections Hearing held from 11 to 15 October 2021, the Arbitral Tribunal issued its Award on the Preliminary Objections of the Russian Federation dated 27 June 2022 ("**Award on Preliminary Objections**").

15. On 14 April 2023, the Russian Federation submitted its Counter-Memorial.[1]

D. RECONSTITUTION OF THE ARBITRAL TRIBUNAL AND REQUEST FOR SUSPENSION OF PROCEEDINGS

16. On 4 April 2023, the PCA informed the Parties of the passing of Judge Vladimir Golitsyn on 26 March 2023.

17. On 25 April 2023, the Russian Federation applied for a suspension of the proceedings on account of an outstanding contribution by Ukraine to the deposit to secure the fees and expenses of the Arbitral Tribunal and pending the appointment of an arbitrator in replacement of the late Judge Golitsyn, and requested an extension until 31 May 2023 of the deadline for the appointment of an arbitrator. Ukraine opposed both requests on 3 May 2023.

18. On 9 May 2023, the President and the other members of the Arbitral Tribunal communicated the following to the Parties:

> Taking account of both the provisions of Article 3 of Annex VII of the Convention and the Rules of Procedure for the arbitration, the President and the other members of the Arbitral Tribunal consider that it is in the interests of good order in the progression of this arbitration that the replacement arbitrator for the late Judge Golitsyn be appointed by the Russian Federation and thus they have no objection to the time limit for the appointment of the replacement arbitrator being extended until 31 May 2023.
>
> In respect of the other matters raised in the communications of the Parties, they will be considered by the Arbitral Tribunal once the replacement arbitrator has been appointed.

19. On 30 May 2023, the Russian Federation appointed Professor Alexander N. Vylegzhanin as an arbitrator pursuant to Article 6(1) of the Rules of Procedure and Article 3(c) and (f) of Annex VII to the Convention.

20. On 13 June 2023, the Arbitral Tribunal transmitted Professor Vylegzhanin's signed Declaration of Acceptance and Statement of Impartiality and Independence to the Parties, and indicated that it would revert to the Parties in respect of other pending matters.

21. On 21 July 2023, the Arbitral Tribunal (a) invited Ukraine to indicate the date by which it anticipated being able to pay the balance of the supplementary deposit requested by the Arbitral Tribunal and (b) invited each Party to submit any views they might have on the further timetable of the arbitral proceedings, and in particular whether they wished to have the possibility of making further written submissions or whether they wished to proceed directly to an oral hearing.

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[1] On 8 January 2024, Ukraine submitted its Reply. The deadline for the submission of the Rejoinder of the Russian Federation is 8 April 2024.

22. On 1 August 2023, the Russian Federation reiterated its request in its letter of 25 April 2023 that the proceedings be suspended or terminated on account of the outstanding balance of the supplementary deposit to be paid by Ukraine.

23. On 2 August 2023, Ukraine stated that it "anticipate[d] paying the balance [of its share in the supplementary deposit] by the end of [the 2023] calendar year", and requested that a date for a hearing be set without need for a second round of written pleadings.

24. On 23 August 2023, the Russian Federation maintained its application that the proceedings be suspended or terminated pursuant to Article 27(3) of the Rules of Procedure and that, should the proceedings continue, a second round of written submissions be directed.

25. On 24 August 2023, Ukraine reiterated that a suspension or termination of the arbitration would be inappropriate and prejudicial, and opposed a second round of written submissions, requesting that a hearing be scheduled for early 2024.

26. On 9 October 2023, the Arbitral Tribunal issued Procedural Order No. 6, which (a) deferred consideration of the Russian Federation's request for suspension; (b) invited Ukraine to make further written submissions by 11 December 2023; (c) invited the Russian Federation to submit a Rejoinder by 12 February 2024; and (d) reserved further directions for a hearing to be held in April or May 2024.

E. THE IDI DECLARATION

27. On 17 October 2023, the Russian Federation brought to the Arbitral Tribunal's attention the fact that Professor McRae and Judge Wolfrum had voted, as members of the IDI, in favour of the IDI Declaration of 1 March 2022. According to the Russian Federation, Professor McRae's and Judge Wolfrum's votes in favour of the IDI Declaration "raise[d] serious concerns about their impartiality and the prejudicial effect that may have on Russia's rights in the present proceedings, as well as on the fair administration of justice and party equality".

28. The Statutes of the IDI describes it as a learned society comprised of scholars and lawyers who have distinguished themselves in the field of international law,[2] with the stated purpose of promoting the progress of international law.[3]

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[2] Statutes of the Institute of International Law, art. 7, available at https://www.idi-iil.org/app/uploads/2017/06/Statutes-of-the-Institute-of-International-Law.pdf .

[3] Statutes of the Institute of International Law, art. 1, available at https://www.idi-iil.org/app/uploads/2017/06/Statutes-of-the-Institute-of-International-Law.pdf .

29. The IDI Declaration, in its English version, reads in full:[4]

DECLARATION OF THE INSTITUTE OF INTERNATIONAL LAW ON AGGRESSION IN UKRAINE (1 MARCH 2022)

The members of the Institute of International Law are following with dismay the ongoing Russian military operations in Ukraine.

According to its Statutes, the Institute aims to contribute, "within the limits of its competence, either to the maintenance of peace, or to the observance of the laws of war". Building on a tradition that won it the Nobel Peace Prize in 1904, the Institute sees it as its duty to firmly denounce the aggression for which the Russian Federation is responsible through its massive military intervention in Ukraine.

The Institute of International Law emphasizes that this action:

(1) is contrary to the most fundamental principles of international law, repeatedly reaffirmed and clarified in the resolutions it has adopted in the past, whether it concerns

(a) the prohibition of the use of armed force in international relations, and the territorial integrity of States, both proclaimed by Article 2, paragraph 4, of the Charter of the United Nations (hereinafter the Charter) (Resolutions relating to *Present Problems of the Use of Force in International Law*, in particular that on the *Authorization of the Use of Force by the United Nations* of 2011 adopted at the Rhodes session and the *Bruges Declaration on the Use of Force* of 2003),

(b) the equal rights of peoples and their right to self-determination as a basis for friendly relations among nations in accordance with Article 1, paragraph 2, of the Charter (Resolutions relating to *Present Problems of the Use of Force on International Law*, in particular that on *Military Assistance on Request* of 2011 adopted at the Rhodes session); or

(c) non-intervention in the affairs of other States as prohibited by paragraph 7 of Article 2 of the Charter (Resolution on *The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States* of 1989 adopted at the Session of Santiago de Compostela);

(2) cannot find any legal justification, either in the principle of the inherent right of self-defence provided for in Article 51 of the Charter in the absence of an armed attack on the part of Ukraine, or in a Security Council resolution adopted under Chapter VII of the Charter;

(3) is inconsistent with specific commitments made by Russia to Ukraine (Budapest *Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons* of 1994 and the "Minsk Agreements" of 2014 and 2015, unanimously approved by the Security Council in Resolution S/RES/2202) and cannot be justified as lawful "countermeasures", which must not themselves violate peremptory norms of general international law (jus cogens) in any circumstance.

No argument of a political nature, including security arguments, can serve as a justification to disregard the basic rules of the legal system that the international community has established at the cost of so many sacrifices in the past. Multilateralism, and not recourse to unilateral action, must guide the conduct of States with a view to the maintenance of international peace and security.

The Institute notes that the international responsibility of the Russian Federation is engaged for its serious breach of obligations arising from peremptory norms of international law and that, as such, Russia exposes itself to appropriate measures in accordance with international law and without prejudice to Ukraine's right of self-defence.

[4] For the avoidance of doubt, the Arbitral Tribunal takes no view of any kind on the matters addressed within the IDI Declaration.

> The Institute recalls that the ongoing military operations call *ipso facto* for the application of international humanitarian law, including the rules relating to occupation, as well as all the other rules applicable in times of armed conflict. It recalls also that persons responsible for international crimes as defined by international law may be prosecuted and sentenced in accordance with the law in force.
>
> Faithful to its mission, the Institute remains convinced that, while international law alone cannot prevent the outbreak of violence, it must remain the compass by which States are guided, and it is more than ever determined to strengthen its work to promote "the progress of international law". The Institute adds its voice to that of other actors in the international community, including the learned societies acting in defense of the rule of law, who call for an end to the war in Ukraine and the settlement in good faith of disputes between the States concerned through all appropriate means of peaceful settlement.

30. The IDI Declaration was rendered in both English and French versions, both equally authoritative. The Parties in these arbitral proceedings have both referred to the English version of the IDI Declaration, and neither has raised any issue of translation. For completeness, the French version of the IDI Declaration is reproduced in an annex to this Decision.

31. The IDI Declaration was adopted on 1 March 2022, with 110 votes in favour, 0 against and 5 abstentions, and published on the IDI website on the same day.[5] Subsequently, the IDI Declaration was also published in the Yearbook of the Institute of International Law, Volume 83 ("**IDI Yearbook**"), which the Parties agree became commercially available in its printed form in June 2023.[6] In addition to reproducing the full text of the IDI Declaration in both English and French, the IDI Yearbook was the first publication to publish the full voting record on the IDI Declaration, including a full list of the members who voted in favour of the IDI Declaration or abstained, as well as the explanations that some members attached to their votes.[7] The voting results show that Professor McRae and Judge Wolfrum voted in favour of the IDI Declaration, with neither of them attaching any explanation to their votes.[8] The IDI Yearbook further described the process of adoption of the IDI Declaration as follows:

> On 26 February, the President and the Secretary-General, after consultation and with several answers supporting the idea of a declaration, submitted a draft that took into account the suggestions received. Given the urgency, an amendment procedure, which would have risked considerably slowing down, or even ruling out, the adoption of the text, was not envisaged. The deadline for voting online was established at 8 a.m. CET on 1 March. The Declaration was adopted with 110 votes in favour, 0 against and 5 abstentions. Some members indicated that they did not take part in the vote (or abstained) in order to respect their duty of discretion and restraint.

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5 *See* Declaration of the Institute of International Law on Aggression in Ukraine, 1 March 2022, available at https://www.idi-iil.org/app/uploads/2022/03/Declaration-of-the-Institute-of-International-Law-on-Aggression-in-Ukraine-1-March-2022-EN.pdf .

6 *See* Supplementary Statement, p. 3; Ukraine's letter of 28 November 2011, pp. 2-3.

7 Institut de Droit International, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (Vol. 83), pp. 21-23.

8 Institut de Droit International, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (Vol. 83), pp. 21-23.

> The Declaration was widely publicized. It was forwarded to the Secretary-General of the United Nations, the President of the General Assembly, the Permanent Missions to the United Nations, as well as other institutions and the media.[9]

F. THE STATEMENTS OF PROFESSOR MCRAE AND JUDGE WOLFRUM

32. On 24 October 2023, Professor McRae and Judge Wolfrum each submitted to the Arbitral Tribunal their comments on the circumstances outlined in the Russian Federation's 17 October 2023 letter, which statements were transmitted to the Parties on 2 November 2023.

33. Professor McRae's statement read as follows:

> The Russian Federation has raised questions, as it is entitled to do, about my impartiality in this case because I supported the resolution of the Institute of International Law regarding the invasion of Ukraine. Russia has invited the Arbitral Tribunal and the Registry to "consider the facts" in its letter.
>
> In order to assist the Arbitral Tribunal and the PCA in considering this matter, I thought I would provide some comments.
>
> I gave considerable thought to whether I should indicate support for the resolution. Three considerations influenced my ultimate decision.
>
> First, I was being asked as a member of the Institute whether the Institute should make a statement on the matter. In my view this was a matter on which the Institute should express a position and thus I supported the Institute in doing so. My understanding is that the resolution is a resolution of the Institute and not simply a resolution of certain members of the Institute.
>
> Second, although the subject-matter of the resolution was between the same parties as those involved in this case, it was separate from the issues before the Arbitral Tribunal. It relates to events that occurred subsequently to the events with which the Arbitral Tribunal is concerned and facts that are unrelated to this case. It is thus irrelevant to the Arbitral Tribunal's deliberations. It is not a matter that the Arbitral Tribunal would or should be considering in deciding the case.
>
> Third, I was already the chair of an investment arbitration in a claim against the Russian Federation which had to consider the actions of Russia. That case was unrelated to the present case, even though it involved Ukrainian investors in Crimea and the Russian Federation. That I would have to take a position in that case on the actions of the Russian government was not seen by the parties as affecting my impartiality in the present proceedings.
>
> I appreciate that others have taken a different approach in respect of the Institute resolution and that a perception of a lack of impartiality is a matter on which there can be differing views. However, I do not consider that I lack impartiality in this case and I intend to continue to act in the same impartial way.

34. Judge Wolfrum's statement read as follows:

> Dear colleagues,
>
> The Russian Federation is questioning my impartiality and independence from both parties in referring to the fact that I have agreed that my name may be added to those who have subscribed to the Declaration of the Institut de droit international in 2022 concerning the situation prevailing between the Russian Federation and the Ukraine. The Russian Federation

[9] Institut de Droit International, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (Vol. 83), p. 17.

> has invited the Arbitral Tribunal as well as the Registry to "consider the facts mentioned in this letter" (of 17 October 2023). This note is meant to explain to you why I felt that, when I agreed to be named as one of the signatories of the declaration, that such fact was not incompatible with my position as an arbitrator in the case before us. After the issue was raised by the Russian Federation, I reconsidered the issue again and I am still convinced that my original view is correct. This adherence to a declaration of the Institut, an academic institution and long time after the occurrence of the dispute, cannot be used to cast doubts concerning my impartiality and independence. I was impartial and independent when I was selected as an arbitrator for the case before us and I am still impartial and independent.
>
> Let me explain why as I see it, my name under the declaration of the Institut is irrelevant for the case the arbitral tribunal has to decide on.
>
> The subject matter of the case before the arbitral tribunal has a limited scope. It is of a technical legal nature. To be more specific, it concentrates on the movements and activities of two groups of vessels, one group from Ukraine the other from the Russian Federation. Two issues will have to be dealt with by the arbitral tribunal namely how to qualify these movements of the two groups of vessels (this is a matter of jurisdiction) and to decide on the legality of these actions under UNCLOS. The relationship between the Russian Federation and Ukraine, in general, is not an issue on which the arbitral tribunal is called upon to decide as can be seen clearly by the requests of both parties.
>
> Apart from that, it should be taken into account that the dispute between Ukraine and the Russian Federation deals with an incident, which happened on 24-25 November 2018 whereas the declaration of the Institut was issued much later. The situation between Ukraine and Russia, which has been addressed by the declaration of the Institut, is thus irrelevant for a decision upon the dispute before us.
>
> One word about the Institut and its declaration. This is not an individual declaration of each member of the Institut but the adherence to a declaration of the Institut, which I considered and still consider irrelevant for deciding on the case before us as already explained.
>
> Finally, the Russian Federation mentioned some colleagues from the Institut who refrained from joining the declaration of the Institut. There may be several reason why they so decided. Perhaps they were involved in disputes where the subject matter of the dispute were broader than the one before this arbitral tribunal.
>
> To conclude, I consider that the situation between Ukraine and the Russian Federation as addressed by the declaration of the Institut is irrelevant for the case before us. Therefore, I consider my name under the declaration irrelevant, this includes the past and the future deliberations. I do not consider that I am lacking impartiality or independence from both parties in respect of the case before us.

35. On 26 October 2023, Ukraine requested that each Party be granted a four-week extension to file its next submission, and that the hearing in these arbitral proceedings be scheduled for the week commencing 27 May 2024.

G. THE CHALLENGES TO PROFESSOR MCRAE AND JUDGE WOLFRUM

36. On 24 November 2023, the Russian Federation: (a) asserted challenges against Professor McRae and Judge Wolfrum and requested their disqualification as arbitrators in this case (the "**Challenges**"); (b) requested the Arbitral Tribunal, in consultation with the Parties and the Registry, to devise a procedure for deciding the Challenges; and (c) indicated that it would be premature in the circumstances to set the dates for the hearing and further submissions in this matter until the Challenges were resolved (the "**Statement of Challenges**").

37. On 28 November 2023, Ukraine commented on, *inter alia*, the Challenges, stating that "[g]iven the amount of time that had elapsed, Russia had waived any right to challenge the appointments of Professor McRae and Judge Wolfrum", and requested the Arbitral Tribunal, if it decided to establish a procedure to decide said Challenges, to proceed with a view to resolving them as expeditiously as possible.

38. By letter dated 1 December 2023, the three unchallenged Members of the Arbitral Tribunal, with Judge Gudmundur Eiriksson presiding, decided that, in accordance with Article 19, paragraph 1, of the Rules of Procedure, (a) Professor McRae and Judge Wolfrum would not take part in any deliberations of the Arbitral Tribunal pending a decision on the Challenges; (b) the three unchallenged Members of the Arbitral Tribunal would revert to the Parties with a proposal in respect of the procedure to be followed for a decision on the Challenges; and (c) Professor McRae and Judge Wolfrum would continue to receive copies of any communications between the Arbitral Tribunal and the Parties.

39. Also on 1 December 2023, the three unchallenged Members of the Arbitral Tribunal, with Judge Eiriksson presiding, issued Procedural Order No. 7, which (a) extended Ukraine's deadline to submit its Reply to 8 January 2024; (b) extended the Russian Federation's deadline to submit its Rejoinder to 8 April 2024; and (c) reserved the week of 27 May 2024 for a hearing.

40. The three unchallenged Members of the Arbitral Tribunal, with Judge Eiriksson presiding, further considered whether to keep the Parties' submissions on the Challenges confidential. In light of the importance of the issues raised by the Russian Federation, and mindful of the relations of the Parties and the background of the arbitration, the three unchallenged Members of the Tribunal, with Judge Eiriksson presiding, decided not to make any modifications to the application of Article 28, paragraph 2, of the Rules of Procedure which provides that:

> The submissions of the Parties shall be confidential until the opening of the hearing to which they relate, save that any confidential information shall remain confidential at all times. On the opening of the hearing, the Registry shall publish the Parties' submissions as well as any non-confidential documentary evidence submitted with the submissions on the PCA website. The Parties shall refrain from publishing their submissions prior to their publication by the Registry.

H. CHALLENGE PROCEDURE

41. By separate letter dated 1 December 2023, the three unchallenged Members of the Arbitral Tribunal, with Judge Eiriksson presiding, communicated a proposal to the Parties in respect of the procedure for determining the Challenges and invited the Parties' comments thereon by 8 December 2023.

42. On 8 December 2023, Ukraine indicated that it had no objections to the proposed procedure. No comments on the proposed procedure were received from the Russian Federation.

43. On 15 December 2023, the three unchallenged Members of the Arbitral Tribunal, with Judge Eiriksson presiding, issued Procedural Order No. 8, which laid out the following challenge procedure:

> 1. The Russian Federation's letter dated 24 November 2023 shall be taken as the principal statement of the grounds for the challenges to Professor McRae and Judge Wolfrum.
> 2. The Russian Federation is invited to submit by **Friday, 22 December 2023** a supplementary statement in response to Ukraine's objection that "[g]iven the amount of time that has elapsed, Russia has waived any right to challenge the appointments of Professor McRae and Judge Wolfrum".
> 3. Ukraine shall submit by **Friday, 19 January 2024** a response to the challenges as set out in the Russian Federation's letter dated 24 November 2023 and supplementary statement.
> 4. Professor McRae and Judge Wolfrum are invited to submit by **Friday, 26 January 2024** any comments they may have on the challenges.
> 5. The Russian Federation shall submit by **Wednesday, 7 February 2024** a reply on the challenges.
> 6. Ukraine shall submit by **Monday, 19 February 2024** a rejoinder on the challenges.
> 7. The Arbitral Tribunal shall thereafter issue a decision on the challenges, made by a majority vote of the three unchallenged Members of the Arbitral Tribunal.

44. On 22 December 2023, the Russian Federation submitted its Supplementary Statement responding to Ukraine's letter of 28 November 2023 on the timeliness of its Challenges (the "**Supplementary Statement**").

45. On 19 January 2024, Ukraine submitted its Response to the Challenges and the Supplementary Statement (the "**Response**").

46. On 24 January 2024, Judge Wolfrum submitted that "apart from [his 24 October 2023] statement before the Tribunal" he had "no further comments to submit on the challenge". Judge Wolfrum again confirmed "that [he was] impartial and independent and […] shall remain so".

47. On 25 January 2024, Professor McRae submitted that he had "nothing further to add to [his] statement to the Tribunal on the challenges which ha[d] already been forwarded to the Parties".

48. On 7 February 2024, Russia submitted its Reply on the Challenges (the "**Reply**").

49. On 19 February 2024, Ukraine submitted its Rejoinder on the Challenges (the "**Rejoinder**").

50. On 20 February 2024, the Russian Federation was invited to submit any comments it may have on the assertion, made by Ukraine in its Rejoinder, that the Russian Federation "has admitted before other international tribunals that it acquired *actual knowledge* of the voting record [on the IDI Declaration] as early as 1 September 2023". Should the Russian Federation submit any such comments, Ukraine was invited to submit a response.

51. On 22 February 2024, the Russian Federation submitted its comments on Ukraine's assertion in its Rejoinder (the "**Supplementary Comment**").

52. On 24 February 2024, Ukraine submitted its response to the Russian Federation's Supplementary Comment (the "**Supplementary Response**").

III. POSITIONS OF THE PARTIES

A. TIMELINESS OF THE CHALLENGES

1. Ukraine's Position

53. Ukraine submits that the Challenges should fail because they are untimely. Ukraine argues that the Russian Federation waited more than 19 months since the issuance of the IDI Declaration, and at least several months after the votes of Professor McRae and Judge Wolfrum were made public, to assert the Challenges.[10] Given the time that has elapsed, the Russian Federation should be deemed to have waived its right to raise these Challenges.[11]

54. According to Ukraine, the Russian Federation should have known that Professor McRae and Judge Wolfrum supported the IDI Declaration as of 3 March 2022, when the Institute announced that the vast majority of its voting members had voted in favour of the IDI Declaration.[12] Alternatively, Ukraine argues that the Russian Federation would have known of the votes of Professor McRae and Judge Wolfrum as early as 24 November 2022, when it retained its former counsel Professor Bing Bing Jia,[13] himself a member of the Institute, who had received the voting record as distributed directly to all IDI members on 1 March 2022.[14] According to Ukraine, the knowledge of its representative is "necessarily imputable" to Russia as of that date.[15] At the very latest, Ukraine asserts that the Russian Federation should be taken to have known of the voting result as of June 2023 when the IDI Yearbook was published.[16] Furthermore, Ukraine, referring to a publicly available article on the website IAReporter (the "**IAReporter Article**"), asserts that the Russian Federation has admitted before other international tribunals that it gained actual knowledge of the IDI voting record on 1 September 2023.[17]

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10 Response, p. 1.

11 Ukraine's letter of 28 November 2023, pp. 2-3; Response, p. 4.

12 Response, p. 3; Rejoinder, p. 5.

13 Prof. Bing Bing Jia was retained as counsel by the Russian Federation from 24 November 2022 until his engagement was terminated on 26 January 2024.

14 Ukraine's letter of 28 November 2023, p. 2; Response, p. 4; Rejoinder, p. 5.

15 Response, p. 4; Rejoinder, p. 5.

16 Ukraine's letter of 28 November 2023, pp. 2-3.

17 Rejoinder, p. 4, citing L. Bohmer, *Appointing authority dismisses Russia's challenges to Pierre-Marie Dupuy and Vaclav Mikulka in two Crimea arbitrations* (IAReporter, 1 February 2024), available at: www.iareporter.com/articles/appointing-authority-dismisses-russias-challenge-to-pierre-marie-dupuy-and-vaclav-mikulka-in-two-crimea-cases/.

55. Citing the tribunal decision on the challenge to Judge Christopher Greenwood in the *Chagos Marine Protected Area* arbitration ("***Chagos* Challenge Decision**"), Ukraine argues that the provisions of the PCA Optional Rules for Arbitrating Disputes Between Two States ("**PCA Optional Rules**") concerning arbitrator challenges "form part of the practice of inter-State arbitral tribunals" applicable to an arbitrator challenge in an Annex VII arbitration.[18] In particular, Ukraine relies on Article 11 of the PCA Optional Rules, which provides that "[a] party which intends to challenge an arbitrator shall send notice of its challenge […] within thirty days after [the circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence] became known to that party".[19] Ukraine asserts that a similar 30-day deadline for bringing a challenge has been adopted in the rules of procedure of every Annex VII tribunal that has adopted rules for arbitrator challenges.[20]

56. Ukraine argues that the *Chagos* tribunal followed well-established practice by applying the PCA Optional Rules, notwithstanding that the parties to the dispute had not themselves adopted the PCA Optional Rules.[21] The deadline for challenges under the PCA Optional Rules similarly constitutes a well-established practice of inter-State tribunals. Therefore, considering that the Russian Federation agrees that the applicable legal standard for arbitrator challenges is as stated in the *Chagos* Challenge Decision and taken from the PCA Optional Rules, Ukraine contends that the timeliness requirement must also apply.[22]

57. Ukraine further considers that a timeliness requirement is also consistent with the general requirement of good faith under UNCLOS, which requires that challenges be asserted in a timely manner in order to prevent parties from abusing the challenge mechanism to frustrate or delay the proceedings, especially when proceedings are well advanced.[23] Ukraine suggests that, having

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18 Response, p. 2, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Reasoned Decision on Challenge, 30 November 2011, para. 151; Rejoinder, p. 2.

19 Response, p. 1.

20 Response, p. 1, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Rules of Procedure, Rule 6.2; *ARA Libertad Arbitration (Argentina v. Ghana)*, PCA Case No. 2013-11, Rules of Procedure, Rule 7.1; *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Rules of Procedure, Rule 8.1; *MOX Plant Case (Ireland v. United Kingdom)*, PCA Case No. 2002-01, Rules of Procedure, Rule 6.1; *The South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Rules of Procedure, Rule 8.1; Rejoinder, p. 2.

21 Rejoinder, p. 2, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Reasoned Decision on Challenge, 30 November 2011, para. 151.

22 Rejoinder, p. 2.

23 Response, pp. 2-3; Rejoinder, p. 3, citing J. Levine, *Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes* in C. Giorgetti (ed.), CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS (2015), pp. 248-49; K. Daele, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION (2012), paras. 3-001, 2-094; G. Horvath & S. Wilske, GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION (2013), p. 9.

failed in its application to suspend or terminate the proceedings, the Russian Federation has now resorted to the Challenges in a further attempt to derail and disrupt the proceedings.[24]

58. Ukraine rejects the Russian Federation's invocation of an actual knowledge standard, to the exclusion of a constructive knowledge standard, whereby timeliness is only measured from when the Russian Federation *actually knew* of the IDI voting record. According to Ukraine, the Russian Federation does not cite any authority applicable to inter-State cases in this regard.[25] Regardless, even under an actual knowledge standard, Ukraine submits that a party's knowledge of the relevant circumstances could be demonstrated with ordinary evidence, including evidence that the relevant information was made known or available to a party's representative, which demonstrates that it is more likely than not that such party had knowledge of the relevant circumstances.[26]

59. In any event, given the IAReporter Article, Ukraine asserts that this argument is now irrelevant, as the Russian Federation has admitted before other international tribunals that it acquired actual knowledge of the voting record on 1 September 2023.[27] Ukraine rejects the Russian Federation's arguments on the admissibility and materiality of the IAReporter Article. First, Ukraine notes that the Russian Federation in any event does not deny the underlying fact that it gained actual knowledge of the IDI voting record on 1 September 2023.[28] Second, Ukraine argues that it has not presented illegally obtained evidence, but a public report, and that the Russian Federation does not offer to seek consent from its counterparties to share the relevant challenge decisions.[29] Third, Ukraine submits that "there is no support for Russia's assertion that timeliness is determined only 'by taking into account the knowledge of the representatives in this Arbitration'"; rather, Ukraine argues that the standard is when a *party* became aware of the circumstances giving rise to the challenge.[30]

60. Ukraine concludes that, given that the Russian Federation first raised the IDI Declaration on 17 October 2023, and only filed its Challenges on 24 November 2023, the Russian Federation failed to meet the 30-day time limit from even the latest of the dates when it likely acquired knowledge

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24 Response, p. 3.

25 Response, pp. 3-4; Rejoinder, p. 4.

26 Response, p. 4; Reply, p. 5.

27 Rejoinder, p. 4

28 Supplementary Response, p. 1.

29 Supplementary Response, p. 1.

30 Supplementary Response, p. 2, citing PCA Optional Rules, Art. 11(1); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2002, para. 269.

of the IDI voting record.[31] Ukraine submits that this is sufficient to dismiss the Challenges on a preliminary basis.[32]

2. The Russian Federation's Position

61. The Russian Federation rejects Ukraine's contention that there is a time limit on bringing challenges. The Rules of Procedure do not establish such a time limit, and the right to challenge a biased arbitrator *per se* must be considered "indisputable" and of fundamental importance.[33] In the Russian Federation's view, Ukraine's attempt to import a 30-day time limit under the PCA Optional Rules and other rules of procedure of Annex VII arbitrations is unavailing, on the following grounds:

(a) *First*, the present arbitration is governed exclusively by Annex VII to UNCLOS, the Rules of Procedure and the Terms of Appointment. None of these instruments provides for a specific challenge timeframe, nor do they incorporate the PCA Optional Rules.[34]

(b) *Second*, the Arbitral Tribunal cannot transpose time limits from extraneous procedural rules not expressly agreed upon by the Parties—including the PCA Optional Rules—without violating the consensual nature of an arbitration.[35]

(c) *Third*, the *Chagos* Challenge Decision did not import the PCA Optional Rules wholesale, but only recognized them as instructive of the general standard applicable to arbitrator challenges in inter-State disputes.[36]

(d) *Fourth*, other Annex VII arbitrations which adopted a 30-day time limit did not cite the PCA Optional Rules, and thus cannot be used as a basis for arguing that the PCA Optional Rules are universally applicable to Annex VII challenges.[37]

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31 Response, pp. 3-4; Rejoinder, pp. 4-5.

32 Response, pp. 4-5; Rejoinder, p. 6.

33 Supplementary Statement, p. 1; Reply, para. 25(g).

34 Reply, para. 14.

35 Reply, para. 12.

36 Reply, paras. 17-18.

37 Reply, para. 19.

(e) *Fifth*, the Statute of the International Court of Justice ("**ICJ**") and the ITLOS Statute—which the *Chagos* Challenge Decision also identified as authoritative in terms of inter-State practice—are silent on a time limit for challenges.[38]

62. The Russian Federation contends that in the absence of explicit rules or the Parties' agreement setting the time limit for challenging arbitrators, the Arbitral Tribunal should assess the timeliness of the Challenges based on general principles of waiver and the particular circumstances of the case.[39] In that connection, the Russian Federation submits that the present circumstances show that the Challenges were brought within a reasonable time:

(a) The primary source of a Party's knowledge of the voting on the IDI Declaration ought in its view to have been Professor McRae's and Judge Wolfrum's disclosure, required under the Terms of Appointment. Their failure to disclose as required ought to be taken into account.[40]

(b) The Russian Federation asserts that it only recently learned about the votes.[41] Neither the IDI Declaration nor the IDI's website identifies any of the members who voted for the Declaration.[42] As for the IDI Yearbook, it is not freely accessible online, and various payment and shipping restrictions *vis-à-vis* Russia have made procuring foreign publications unreliable.[43] The Russian Federation argues that it is in any event not obliged to constantly monitor the arbitrators' activities, and that the release of the IDI Yearbook did not relieve Professor McRae and Judge Wolfrum of their duty to disclose.[44]

(c) The Russian Federation submits that it had no reason to believe that Professor McRae and Judge Wolfrum had participated in the voting on the IDI Declaration. Only 112 out of 177 members of the Institute took part in the voting.[45]

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38 Reply, para. 20.

39 Reply, paras. 12, 22-23, citing International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Commentary to Article 45, pp. 122-123, paras. 9, 11.

40 Reply, paras. 25(a), (c).

41 Supplemental Statement, p. 3; Statement of Challenge, para. 42. *See also*, Russian Federation's letter of 17 October 2023, p. 1, where the Russian Federation stated that Professor McRae's and Judge Wolfrum's votes in favour of the Declaration of 1 March 2022 became known to it from the publication of the voting record in the Yearbook of the Institute of International Law, Volume 83, 2022 – 2023.

42 Reply, para. 25 (c).

43 Supplementary Statement, p. 3; Reply, para. 25(b).

44 Reply, para. 25(c).

45 Reply, para. 25(d), citing Institute of International Law, Official website, section 'Members': https://www.idi-iil.org/en/membres.

(d) The Russian Federation notes that Professor Jia was only retained as counsel some nine months after the voting in March 2022, and did not inform the Russian Federation of his own vote or those of Professor McRae and Judge Wolfrum.[46] Moreover, the Russian Federation asserts that voting details did not become available to Institute members until the IDI Yearbook's publication in June 2023.[47] Hence, no actual or supposed knowledge can be imputed to the Russian Federation upon Professor Jia's addition to Russia's legal team.[48]

63. The Russian Federation also submits that Ukraine failed to establish the conditions for a valid waiver. First, the gravity of the circumstances excludes in its view any application of waiver.[49] Second, it submits that, in accordance with international practice, a waiver requires proof that a State consciously refrained from exercising its rights—i.e. that it actually knew the circumstances giving rise to the challenge and decided not to proceed with asserting it.[50] Accordingly, the Russian Federation submits that evidence of *actual* prior knowledge—not merely "constructive knowledge"—is required in determining the timeliness of a challenge, and that this standard of actual knowledge is "generally high".[51] According to the Russian Federation, the PCA Optional Rules as well as rules of procedure in other Annex VII arbitrations cited by Ukraine have also adopted this actual knowledge standard.[52]

64. As for proof of actual knowledge, the Russian Federation repeats that Professor Jia's supposed knowledge cannot be imputed to it. *First*, it submits that only the knowledge of a State's agent,

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46 Reply, para. 25(e).

47 Supplementary Statement, p. 3; Reply, para. 25(e).

48 Reply, para. 25(f).

49 Supplementary Statement, p. 4; Reply, paras. 27, 43.

50 Supplementary Statement, p. 2; Reply, para. 28, citing I. Feichtner, *Waiver*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 5; C. Tams, *Waiver, Acquiescence, and Extinctive Prescription* in J. Crawford et al. (eds.), THE LAW OF INTERNATIONAL RESPONSIBILITY (2010), p. 1036; P. Saganek, WAIVER IN PUBLIC INTERNATIONAL LAW IN UNILATERAL ACTS OF STATES IN PUBLIC INTERNATIONAL LAW (2016), p. 565; L. Caflisch, *Waivers in International and European Human Rights Law* in M. Arsanjani et al. (eds.), LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (2011), pp. 407, 414; A. Cassese, INTERNATIONAL LAW (2005), p. 184; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 266, para. 292; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary to Article 45, p. 122, para. 5; *The 'Kronprins Gustav Adolf' (Sweden, United States of America)*, 18 July 1932, UNRIAA, Vol. II, p. 1299.

51 Supplementary Statement, pp. 1-3; Reply, paras. 29-30, citing *Vito Gallo v. The Government of Canada*, PCA Case No. 2008-03, Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009, para. 24; *CC/Devas (Mauritius) Ltd. et al. v. Republic of India*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña, 30 September 2013, para. 47; D. Caron, L. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2nd ed. 2013), pp. 245-246; J. Levine, *Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes* in C. Giorgetti (ed.), CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS (2015), pp. 254-255, 262.

52 Reply, para. 32.

not its counsel, can be attributed to the State.[53] *Second*, the Russian Federation contends that knowledge has to be both actual and specific, and even publicly available information might not suffice to meet this requirement.[54] In this case, not only was the identity of the IDI members who voted for the declaration not "notoriously public", it was not public at all.[55] The Russian Federation submits that, for confidentiality reasons, it cannot disclose the specific date when it obtained actual knowledge of the voting record, but that in any case it acted on the information as soon as reasonably possible.[56]

65. The Russian Federation rejects Ukraine's contention in its Rejoinder that Russia has admitted before other international tribunals that it had actual knowledge of the voting on the IDI Declaration since 1 September 2023. Russia submits that the Arbitral Tribunal should disregard the IAReporter Article, for the following reasons:

(a) *First*, it argues that the evidence is inadmissible.[57] The Russian Federation submits that the Arbitral Tribunal's power to determine the admissibility, relevance, materiality and weight of evidence is informed by the principles of good faith, and thus the Tribunal should not admit evidence that would result in a procedural injustice against the Russian Federation.[58] The IAReporter Article concerns unconfirmed claims in confidential arbitration proceedings of which the author could not have had any first-hand knowledge.[59] Accordingly, the Russian Federation asserts that the alleged details of the two confidential proceedings reported therein could only have been obtained through an unlawful leak of information, in plain disregard of the confidentiality interests of the parties.[60]

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53 Reply, para. 34, citing L. Caplan, *Arbitrator Challenges at the Iran-United States Claims Tribunal* in C. Giorgetti (ed.), CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS (2015), p. 133.

54 Reply, para. 36, citing *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of Gabrielle Kaufmann-Kohler, 12 May 2008, para. 45.

55 Reply, para. 37.

56 Reply, para. 38.

57 Supplementary Comment, para. 3.

58 Supplementary Comment, para. 4-8, citing R. Wolfrum, M. Möldner, *International Courts and Tribunals, Evidence*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013); C. Amerasinghe, EVIDENCE IN INTERNATIONAL LITIGATION (2005), p. 179; S. Wilske, *The Search for Truth v. The Preservation of the Integrity of International Investment Arbitration Proceedings: The Issue of Admissibility of Illegally Obtained Evidence under the Revised ICSID Arbitration Rules* in HUMAN FLOURISHING: THE END OF LAW (2023), p. 932; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, Part II, Chapter I, para. 53-54; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3, 29 August 2008, para. 38.

59 Supplementary Comment, paras. 2-3.

60 Supplementary Comment, paras. 9-11.

(b) *Second*, the Russian Federation argues that the information in the IAReporter Article is in any event immaterial.[61] International proceedings concerning the Russian Federation are handled by different and entirely independent governmental bodies: investor-State arbitrations (as that reported in the IAReporter Article) are handled by the Prosecutor General's Office, while all inter-State disputes, including this arbitration, fall within the competence of the Ministry of Foreign Affairs.[62] The Prosecutor General's Office is not authorized to represent the Russian Federation in this arbitration, and its knowledge is therefore not attributable to the Russian Federation.[63] In the Russian Federation's view, Ukraine's seeming reliance on the rules of attribution under the International Law Commission Draft Articles on State Responsibility is unavailing, as "[t]he question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes".[64]

66. Finally, the Russian Federation rejects Ukraine's argument that the Challenges are a "procedural tactic" intended to delay the proceedings, and submits that the Challenges do not impair the rights of Ukraine or cause it any other procedural prejudice.[65] A potential delay in the conduct of this arbitration cannot, in its view, outweigh the risk of unfair administration of justice posed by a possibility that the dispute would be decided by arbitrators whose impartiality and independence are in question.[66]

B. LEGAL STANDARD FOR ARBITRATOR CHALLENGES

1. The Russian Federation's Position

67. The Russian Federation asserts that the standard for arbitrator challenges is found in the *Chagos* Challenge Decision:

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61 Supplementary Comment, para. 12.

62 Supplementary Comment, para. 13.

63 Supplementary Comment, paras. 14-20, citing F. Berman, *Article 42* in A. Zimmermann, K. Oellers-Frahm et al. (eds.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (2012), p. 1080, para. 7, p. 1209, para. 11; *Barcelona Traction,* Preliminary Objections, Judgment of 24 July 1964, I.C.J. Reports 1964, p. 24.

64 Supplementary Comment, paras. 22-23, citing International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 39, para. 5.

65 Reply, paras. 39-42.

66 Reply, paras. 43-44.

> [A] party challenging an arbitrator must demonstrate and prove that, applying the standards applicable to inter-State cases, there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case.[67] (emphasis added)

68. The Russian Federation submits that it is "sufficient for a party asserting a challenge to demonstrate that there are grounds to justifiably doubt the challenged arbitrator's impartiality and/or independence".[68] Citing the Dissenting Opinion of Judge Buergenthal in the challenge to Judge Elaraby in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case ("***Wall* Challenge Order**"),[69] Russia argues that impartiality and independence may be impinged where an arbitrator "holds views that may influence the outcome of their decision-making process".[70] Such views, including views that may not directly touch upon the subject matter of the case, will still suffice if they "attest to the appearance of the arbitrator's bias against one of the parties".[71] In this connection, the Russian Federation cites examples of self-recusals by judges in various ICJ cases.[72] The Russian Federation also refers to various national court decisions, including a decision of the Swiss Federal Tribunal holding, in the Russian Federation's view, that a judge's or arbitrator's opinion expressed outside the proceedings may put into question their impartiality or independence, even when such opinion does not directly focus on the subject-matter of a particular dispute.[73]

69. The Russian Federation argues that there is no legal rule preventing an arbitrator's publicly expressed opinion from being qualified as circumstances putting into question his or her impartiality and/or independence, even where such opinion does not directly address the subject matter of the case.[74] In its view, the standard laid out in the *Chagos* Challenge Decision—i.e., justifiable grounds for doubting the independence and impartiality of an arbitrator—is sufficiently broad to encompass all of an arbitrator's extrajudicial opinions, not only those bearing directly on

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67 Statement of Challenges, para. 7; Reply, paras. 3-5, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Reasoned Decision on Challenge of 30 November 2011, para. 166.

68 Statement of Challenges, paras. 8-9.

69 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, I.C.J. Reports 2004.

70 Statement of Challenges, para. 10, citing, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, I.C.J. Reports 2004, Dissenting Opinion of Judge Buergenthal, p. 9, para. 10.

71 Statement of Challenges, para. 10.

72 Statement of Challenges, paras. 14-17. The Russian Federation cites as examples the recusal of Judge Rau in the *Anglo-Iranian Oil Co.* case, the recusals of Judges Fleischhauer and Higgins in the *Bosnian Genocide* case and the recusal of Judge Weeramantry in the *Phosphate Lands in Nauru* case.

73 Statement of Challenges, paras. 18-19; Reply, para. 47, citing *Sun Yang v. World Anti-Doping Agency (WADA) and International Swimming Federation (FINA)*, Case 4A_318/2020, Judgement of the First Civil Law Court, 22 December 2020, para. 7.9.

74 Reply, paras. 46, 55-56.

the subject matter of the dispute.[75] Relying on the challenge decisions in *Perenco Ecuador v Ecuador* and *Canfor v United States*, the Russian Federation argues that "subject matter relatedness" is not *per se* determinative but is only one of the potential factors to be examined as a whole while considering the merits of a challenge.[76] According to the Russian Federation, "general comments with respect to a State or even a religious tradition pertaining to a specific culture, not *stricto sensu* related to the subject-matter of the dispute, were sufficient to warrant satisfaction of a challenge".[77] These cases demonstrate, the Russian Federation submits, that the approach adopted by Judge Buergenthal in his Dissenting Opinion in the *Wall* Challenge Order has gained wide support from both scholars and practitioners.[78]

70. The Russian Federation adds that the Terms of Appointment require the members of the Arbitral Tribunal to "promptly notify the Parties and other arbitrators of any circumstances likely to give rise to justifiable doubts as to their impartiality or independence that may subsequently come to their attention during this arbitration".[79] The Russian Federation argues that, where there are reasonable grounds for justifiable doubts, an arbitrator's failure to disclose may further aggravate the justifiable doubts that have already arisen.[80]

2. Ukraine's Position

71. Ukraine agrees with the Russian Federation that the legal standard for arbitrator challenges in an Annex VII arbitration is that stated in the *Chagos* Challenge Decision.[81] However, Ukraine adds

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75 Reply, para. 47.

76 Reply, paras. 48-52, citing *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator, 8 December 2009, paras. 27, 49, 51; B. Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 ARBITRATION INTERNATIONAL I, pp. 243-245 (2005).

77 Reply, paras. 53-54, referring to the challenge against Mr. Charles Poncet on account of his critical remarks against Muslim women's tradition of wearing veils in public, which challenge was upheld by the ICC International Court of Arbitration. (*See* Global Arbitration Review, *Poncet disqualified from Iranian mega-case after "burkini" remarks* (30 November 2023), available at: https://globalarbitrationreview.com/article/poncet-disqualified-iranian-mega-case-after-burkini-remarks).

78 Reply, para. 57, citing Y. Shany, S. Horovitz, *Judicial Independence in The Hague and Freetown: A Tale of Two Cities*, 21 LEIDEN J. INT'L L, pp. 124-125 (2008); A. Seibert-Fohr, *International Judicial Ethics* in C. Romano, K. Alter et al. (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (2013), pp. 769-770; C. Giorgetti, *Between Legitimacy and Control: Challenges and Recusals of Arbitrators and Judges in International Courts and Tribunals*, 49 GEORGE WASHINGTON INT'L L REV, pp. 253-254 (2016); G. Born, INTERNATIONAL COMMERCIAL ARBITRATION (2021), §12.05 [A][4].

79 Statement of Challenges, para. 6.

80 Statement of Challenges, para. 20.

81 Response, p. 1, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Reasoned Decision on Challenge of 30 November 2011, para. 166. Russia agrees that this legal standard applies to its challenges. *See* Reply, para. 3.

that the *Chagos* tribunal did not consider that principles and rules relating to arbitrators, developed in the context of international commercial arbitration and arbitration regarding investment disputes, are applicable to inter-State disputes.[82] Ukraine thus rejects reliance on jurisprudence pertaining to commercial and investment arbitration practice.

72. Citing the ICJ's *Wall* Challenge Order, Ukraine argues that in inter-State cases, "the independence and impartiality of judges and arbitrators is not called into question by virtue of having expressed opinions on issues that are outside the scope of the case in which they are sitting, even if those views concern the parties to the dispute".[83] The challenge in that case related to Judge Elaraby's public comments regarding Israel's "illegitimate occupation" of Palestinian territory, accusing Israel of committing "atrocities" and "[g]rave violations of humanitarian law".[84] In rejecting Israel's challenge, the ICJ ruled that "Judge Elaraby expressed no opinion on the question put in the present case" in his prior remarks.[85] Ukraine also cites *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, where the ICJ rejected South Africa's challenge to the participation of Judge Morozov, who had previously made public remarks condemning the actions of South Africa in Namibia.[86]

73. Ukraine criticizes the Russian Federation's reliance on the Dissenting Opinion of Judge Buergenthal in the *Wall* Challenge Order, stating that his proposal to apply an "appearance of bias" standard for deciding challenges failed to convince the thirteen other judges who considered the question.[87] Moreover, the premise was also rejected in the *Chagos* Challenge Decision which expressly rejected an "appearance of bias" standard in Annex VII challenges.[88]

74. Ukraine refutes the Russian Federation's argument that there is no legal rule preventing an arbitrator's publicly expressed opinions from putting into question his or her impartiality or

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82 Response, p. 1, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Reasoned Decision on Challenge of 30 November 2011, paras. 156, 165.

83 Response, p. 5, citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, p. 3; Rejoinder, p. 6.

84 Response, p. 5, citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, Dissenting Opinion of Judge Buergenthal, para. 8.

85 Response, p. 5, citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, para. 8.

86 Response, p. 5; Rejoinder, p. 6, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 9.

87 Response, p. 5.

88 Response, pp. 5-6; Rejoinder, pp. 6-7, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Reasoned Decision on Challenge of 30 November 2011, para. 169.

independence, even where such opinion does not directly address the subject matter of the case.[89] In Ukraine's view, the standard upheld in the *Wall* Challenge Order constitutes precisely such a rule: international law and the practice of international dispute resolution benefit from the appointment of leading international jurists, whose contributions to public discourse in turn benefit the field. This standard balances "the need for independence and impartiality in adjudication with the role of members of the international legal community in contributing to public discourse in the field".[90]

75. Ukraine also counters that the Russian Federation's reliance on instances of recusal by ICJ judges is of limited value in a challenge context, as judges may recuse themselves simply out of an abundance of caution.[91] In any event, the examples cited have no bearing on the instant Challenges, as such recusals were made pursuant to Article 17(2) of the ICJ Statute, and the judges "accordingly recused themselves because they had been previously involved in the dispute that was before the Court—not because of any public statements or opinions they had expressed regarding the parties to the case".[92]

C. GROUNDS FOR THE CHALLENGES

1. The Russian Federation's Position

76. The Russian Federation contends that Professor McRae's and Judge Wolfrum's votes in favour of the IDI Declaration raise justifiable doubts regarding their impartiality and independence in this arbitration,[93] and asserts its Challenges on the following grounds:

(a) The Russian Federation submits that the IDI Declaration is drafted in manifestly accusatory language—commented on even by some of the Institute's members[94]—that takes a clear stance on the Russian Federation's alleged responsibility for "gross violations of

89 Reply, para. 46.

90 Response, p. 6; Rejoinder, p. 7.

91 Response, p. 6.

92 Response, p. 6.

93 Statement of Challenges, para. 21.

94 Statement of Challenges, paras. 27-29. The Russian Federation highlights the comments of other members of the Institute who expressed concerns regarding the language of the IDI Declaration, in particular Judge Kateka (who indicated that the language is "excessively harsh" and its members "could be accused of double standards if [they] act with strong language"); Professor Torres Bernárdez (who commented that the Institute should have followed the more careful approach adopted in the 2003 Bruges Declaration); and Dr. Pemmaraju Rao (who opined that the Institute is not well placed to assign blame or find a State guilty of violating international law).

international law", while completely ignoring the actions of Ukraine.[95] In particular, the Russian Federation highlights that the IDI Declaration states that the Institute "sees it as its duty to firmly denounce the aggression for which the Russian Federation is responsible through its massive military intervention in Ukraine" and states that "the international responsibility of the Russian Federation is engaged for its serious breach of obligations" for which "Russia exposes itself to appropriate measures in accordance with international law".[96] Such harsh pronouncements against a Party are unacceptable, especially when such views were endorsed by the President of the Arbitral Tribunal whose position requires him to be "particularly unbiased and unprejudiced".[97]

(b) The Russian Federation contends that justifiable doubts cannot be dispelled by simply attributing the IDI Declaration to the Institute rather than to its individual members.[98] Professor McRae and Judge Wolfrum voluntarily participated in the voting in their personal capacity, and the IDI Declaration "very clearly purports to represent that the views expressed therein pertain not only to the Institute itself but also to each of its undersigned members individually".[99] Accordingly, the members who endorsed the IDI Declaration effectively agreed with these "severe accusations" and "could reasonably be viewed as being presupposed towards the Russian Federation's alleged violations of international law and more negatively predisposed against the Russian Federation in decision-making".[100]

(c) Both arbitrators had an opportunity to preserve their neutrality by choosing to abstain—as have other Institute members who participate in proceedings between the Parties as arbitrators, judges or counsel, out of consideration of possible conflict with their current positions.[101] That, by contrast, Professor McRae and Judge Wolfrum did not do so

95 Statement of Challenges, para. 34; Reply, paras. 60(a)-(b).

96 Statement of Challenges, para. 22, quoting the IDI Declaration (emphasis added by the Russian Federation).

97 Russian Federation's letter of 17 October 2023, p. 1; Statement of Challenges, para. 40.

98 Reply, para. 61.

99 Statement of Challenges, paras. 23-24; Reply, paras. 61(a)-(b).

100 Statement of Challenges, paras. 34-35; Reply, para. 64.

101 Russian Federation's letter of 17 October 2023, p. 2; Statement of Challenges, paras. 24-25; Reply, para. 61(c). In particular, the Russian Federation identifies Judge Jin-Hyun Paik and Professor Vaughan Lowe, who are arbitrators in *Coastal States Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, PCA Case No. 2017-06, and Professor Jean-Marc Thouvenin, who is counsel for Ukraine in both pending Annex VII arbitrations and two other disputes before the ICJ. Russia also points out that no incumbent judge of the ICJ endorsed the IDI Declaration, and that two judges, Judge Fausto Pocar and Judge Abdulqawi Yusuf, specifically abstained from voting (*see* Russian Federation's letter of 17 October 2023, p. 2; Reply, para. 60(d)).

aggravates, the Russian Federation asserts, concerns about their bias against the Russian Federation.[102]

(d) The Russian Federation states that the investment arbitration against Russia that Professor McRae references in his statement has seen an award rendered in late 2022, such that by the time Russia learned of Professor McRae's endorsement of the IDI Declaration, his functions as arbitrator in this other arbitration had already lapsed.[103]

(e) Neither Professor McRae nor Judge Wolfrum made, upon their endorsement of the IDI Declaration, a notification to the Parties as required by the Terms of Appointment, an omission that, in the Russian Federation's view, further contributes to the justifiable doubts as to their impartiality and independence.[104] The Russian Federation points out that Professor McRae and Judge Wolfrum, in their statements, appreciated a potential conflict, and still failed to make a disclosure.[105] At a minimum, the Russian Federation asserts that they should have done so upon learning of the conflict concerns of other IDI members such as Professor Lowe and Judge Paik.[106]

77. The Russian Federation disputes Ukraine's contention that the IDI Declaration is not directly relevant to the dispute in this arbitration. The Russian Federation contends that there is nothing to suggest that relevance requires complete identity of subject matter.[107] Regardless, the IDI Declaration is, in the Russian Federation's view, directly relevant and addresses the background circumstances involved in the present proceedings.[108] It addresses the armed confrontation that has unfolded "directly and precisely between the Parties", with the incident that is at the heart of the dispute in these arbitral proceedings occurring "against the background of increasing tensions between Ukraine and the Russian Federation in the Azov-Black Sea region".[109] The Russian Federation also points out that Ukraine has requested, as part of its prayer for relief, that the Tribunal order forward-looking assurances of non-repetition as well as moral damages.[110]

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102 Statement of Challenges, paras. 36, 41, 43; Reply, paras. 60(a), 61(c)-(d), 64.

103 Statement of Challenges, para. 42.

104 Statement of Challenges, para. 43.

105 Reply, para. 60(d).

106 Statement of Challenges, para. 43; Reply, para. 60(e).

107 Reply, para. 62.

108 Statement of Challenges, para. 37; Reply, para. 62.

109 Statement of Challenges, para. 37; Reply, para. 63.

110 Reply, paras. 63(d), (f).

78. The Russian Federation asserts that Ukraine uses these allegations of "Russian aggression" as part of its submissions in various fora, including the ICJ, ITLOS and both UNCLOS Annex VII arbitrations between the Parties, in order to "discredit the overall credibility of the Russian Federation's position".[111] Ukraine has in fact repeatedly raised the Russian Federation's "ongoing aggression" in these proceedings, in particular as an excuse for its late payment of its share of the supplementary deposit to secure the fees and expenses of the Arbitral Tribunal in this arbitration.[112] Thus, the IDI Declaration's specific denunciation of the conduct of Russia towards Ukraine escalates the "appreciable risk" that such negative framing would influence Professor McRae's and Judge Wolfrum's decision-making as regards Russia's conduct complained of in these arbitral proceedings.[113]

79. The Russian Federation also rejects Ukraine's contention that the IDI Declaration is a "strictly legal analysis", pointing out that it was written in absolute terms, with no space for alternative views and devoid of analysis of factual evidence or legal arguments.[114] Rather, it is a "polemic piece of writing" that should be regarded as an expression of public opinion of those who voted for it.[115] The Russian Federation adds that its concerns regarding Professor McRae's and Judge Wolfrum's decisions to endorse the IDI Declaration are confirmed by the fact that (i) the Declaration pronounces on a conflict between the Parties to this dispute; (ii) they admit that they gave thorough consideration to the potential implications of their votes and appreciated a potential conflict; (iii) other arbitrators and judges in cases involving Russia also voiced the same concerns and refrained from voting; and (iv) Professor McRae and Judge Wolfrum subsequently failed to disclose as required under the Terms of Appointment.[116]

2. Ukraine's Position

80. Ukraine submits that the Russian Federation's Challenges should fail on the merits as the IDI Declaration has no relation to the present dispute and raises no justifiable grounds for doubting the independence and impartiality of Professor McRae and Judge Wolfrum.[117]

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111 Statement of Challenges, paras. 38-39.

112 Reply, para. 63(e).

113 Statement of Challenges, para. 40; Reply, para. 63(f).

114 Reply, paras. 60(b), 64.

115 Reply, para. 60(b).

116 Reply, paras. 60(d), 64.

117 Response, pp. 1, 5; Rejoinder, p. 6.

81. Ukraine contends that the Challenges fall squarely within the principle elaborated in the *Wall* Challenge Order, i.e., that challenges cannot succeed on the basis of the views expressed on legal issues outside the scope of the case presented before the Arbitral Tribunal.[118] Ukraine distinguishes the subject matter of the IDI Declaration, which concerns "Russia's full-scale invasion of Ukraine beginning in February 2022, and the legal consequences of that full-scale invasion under the Charter of the United Nations".[119] In contrast, this arbitration "concerns the discrete events of Russia's arrest and detention of Ukraine's vessels and servicemen in 2018–2019, and the legal consequences of those acts under UNCLOS".[120]

82. Ukraine further rejects the Russian Federation's arguments which draw connections between the substance of the IDI Declaration and the subject-matter of this arbitration for the following reasons:

(a) With respect to the Russian Federation's reference to the mention in the IDI Declaration of the 1994 Budapest Memorandum, that instrument has never been at issue in this arbitration.[121]

(b) The fact that Russia's invasion temporarily prevented Ukraine from being able to pay the supplementary deposit in this arbitration has no connection to the subject-matter of this arbitration and the international law issues which must be decided on the merits.[122]

(c) While the Russian Federation has pointed to Ukraine's requested remedies of non-repetition of the UNCLOS violations and awarding of moral damages, it has failed to draw a substantive connection between these remedies and the IDI Declaration.[123]

83. Ukraine also observes that, as their statements indicate, Professor McRae and Judge Wolfrum were both of the view that the IDI Declaration was outside the scope of the case presented in this arbitration, and they voted for the Declaration with that understanding in mind.[124] Moreover, Professor McRae and Judge Wolfrum understood the IDI Declaration as a statement of the

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118 Response, p. 6; Rejoinder, p. 6, citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, I.C.J. Reports 2004, p. 3.

119 Response, p. 6; Rejoinder, pp. 7-8.

120 Response, p. 6; Rejoinder, p. 8.

121 Rejoinder, p. 8.

122 Rejoinder, p. 8.

123 Rejoinder, p. 9.

124 Response, pp. 6-7.

Institute, not of its individual members, and therefore, unlike in other challenges, the statements therein cannot be equated to public statements or opinions individually expressed.[125] Since the IDI Declaration reflects a legal evaluation by the IDI on a particular set of events, Ukraine asserts that there is also no basis to suggest that Professor McRae and Judge Wolfrum failed to carry out their duty to notify under the Terms of Appointment.[126]

84. As for the "general tone" of the IDI Declaration, Ukraine responds that the declaration "makes no general condemnations of Russia" and instead "contains strictly legal analysis concerning Russia's full-scale invasion of Ukraine in 2022".[127] Further, the IDI Declaration invites both Ukraine and the Russian Federation to resolve their issues through peaceful means, and expresses no specific support for Ukraine.[128] Thus, the IDI Declaration does not reflect a general negative predisposition towards the Russian Federation, but rather demonstrates views on the specific legal consequences of a specific set of events, different from what is at issue in these arbitral proceedings.[129]

85. As for the Russian Federation's reliance on the decision of some IDI members to abstain from voting, Ukraine observes that some of these members may have abstained as they may be involved in disputes whose subject matter is broader or more connected to Russia's 2022 full-scale invasion. In any event, the Arbitral Tribunal is not called upon to assess the appropriateness of other members' voting decisions, which could be driven by any number of reasons unknown to the Parties and the Tribunal in this case.[130]

86. Finally, Ukraine points out that Professor McRae's and Judge Wolfrum's votes in favour of the IDI Declaration are not justifiable grounds for doubting their independence and impartiality, as confirmed by Russia's representation in this case by Professor Jia, who as a member of the Institute also voted in favour of the Declaration.[131]

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125 Response, p. 7; Rejoinder, p. 8.

126 Response, p. 7.

127 Response, p. 7, citing Geneva Graduate Institute, *Intervention Militaire en Ukraine: La Responsabilité Internationale de la Russie Est Engagée*, 3 March 2023, available at: https://www.graduateinstitute.ch/fr/communications/news/intervention-militaire-en-ukraine-la-responsabilite-internationale-de-la-russie ("Pour la troisième fois dans son histoire […], l'Institut de Droit international se prononce sur une question qui touche un conflit spécifique […]. La Déclaration fait une analyse strictement fondée sur le droit international."). .

128 Response, p. 7; Rejoinder, p. 9.

129 Response, p. 7; Rejoinder, p. 9.

130 Response, p. 8.

131 Response, p. 8.

IV. ANALYSIS OF THE ARBITRAL TRIBUNAL

A. THE STANDARD OF INDEPENDENCE AND IMPARTIALITY

87. The documents governing the procedure of these arbitration proceedings—namely UNCLOS, the Terms of Appointment and the Rules of Procedure—are all silent on the procedure and standards to be followed in addressing challenges raised by Parties against Members of the Arbitral Tribunal for lack of independence and impartiality. Nevertheless, these documents indicate certain general principles pertaining to the qualifications of arbitrators. Annex VII provides that arbitrators should be "person[s] experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity".[132] The Rules of Procedure also require that the Parties always be treated with equality.[133] Furthermore, section 4.7 of the Terms of Appointment provides:

> The members of the Arbitral Tribunal declare that they are and shall remain impartial and independent of the Parties. The members of the Arbitral Tribunal shall promptly notify the Parties and the other arbitrators of any circumstances likely to give rise to justifiable doubts as to their impartiality or independence that may subsequently come to their attention during this arbitration.

88. From these general principles and the practice of inter-State arbitral tribunals, the *Chagos* tribunal was able to derive the applicable standard for upholding a challenge for lack of independence and impartiality in inter-State arbitration proceedings, which it set out in its Challenge Decision as follows:

> [A] party challenging an arbitrator must demonstrate and prove that, applying the standards applicable to inter-State cases, there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case.[134] (emphasis added)

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132 Annex VII, Article 2, paragraph 1, reads:

> A list of arbitrators shall be drawn up and maintained by the Secretary-General of the United Nations. Every State Party shall be entitled to nominate four arbitrators, each of whom shall be a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity. The names of the persons so nominated shall constitute the list.

Under Article 3(b), when an arbitral tribunal is constituted, the party instituting the proceedings shall appoint one member to be chosen preferably from the list referred to in Article 2. Under article 3(d), the three members other than the two appointed by the parties shall be appointed by agreement between the parties, preferably from the list. Under Article 3(e) when the parties are unable to agree on the appointment of the three other members, as in these proceedings, and the President of the International Tribunal for the Law of the Sea makes the appointments, they shall be made from the list referred to in Article 2. Professor McRae, Judge Wolfrum and Judge Eiriksson were on the list when the President of the International Tribunal for the Law of the Sea appointed them to the Arbitral Tribunal.

133 Rules of Procedure, Article 7(1), reads:

> Subject to the provisions of the Convention, including Annex VII to the Convention, and these Rules, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the Parties are treated with equality and that at any stage of the proceedings each Party is given a full opportunity to be heard and to present its case.

134 Statement of Challenges, para. 7; Reply, paras. 3-5, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Reasoned Decision on Challenge of 30 November 2011, para. 166.

89. The Parties are agreed on this standard, and the Arbitral Tribunal also concurs with it.

90. According to this standard, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. The "justifiable doubts" standard is an objective standard. This means that, while the perspective of the challenging party is part of the context of the challenge, it is not decisive. A challenge need not, however, demonstrate actual bias in order to be sustained. Rather, the doubts as to the arbitrator's impartiality or independence must be justifiable pursuant to an analysis of all relevant circumstances from the perspective of an objective, reasonable and informed third party. That is, doubts are justifiable if a reasonable person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that an arbitrator may be influenced by factors other than the merits of the case as presented by the disputing parties in reaching his or her decision.

91. Beyond this general standard, the Parties have made extensive and valuable efforts to identify, in the law and practice of other international courts and tribunals, such rules and principles and evidence of practice which they maintain should guide the Arbitral Tribunal in its application of the above standard of independence and impartiality. The Parties, however, differ in their assessment of the relevance of different sources. The Russian Federation cites a variety of decisions applying a "justifiable doubts" standard that it contends may be relied on by the Arbitral Tribunal. Ukraine argues, on the other hand, that the *Chagos* tribunal categorically excluded reliance on sources developed outside the strict confines of inter-State disputes. In this sense, the *Chagos* Challenge Decision stated:

> The Tribunal has decided that the law applicable to the present arbitration is that to be found in Annex VII of the Convention as described in paragraphs 133 to 139 above, supplemented by the law and practice of international courts and tribunals in inter-State cases. There is no reason, in the Tribunal's view, for considering challenges to arbitrators appointed under Annex VII of the Convention, be they appointed by the parties, or by an independent appointing authority, on grounds other than those contained in the law and practice of international courts and tribunals concerned only with inter-State cases. For this reason, the Tribunal does not consider the many other texts invoked by Mauritius, in particular the IBA Guidelines, to be relevant for the purposes of its analysis in the present proceedings.

92. For its part, the Arbitral Tribunal does not take any overriding position on what distinct sources are relevant or not relevant. The Arbitral Tribunal agrees with the *Chagos* tribunal's exhortation to adhere to "the standards applicable to inter-State cases". The standards applicable to inter-State cases may differ in various respects from those applicable in other types of arbitration and the Arbitral Tribunal should therefore derive its guidance principally from decisions and practice in inter-State cases. However, this does not imply that a wholly distinct standard is applicable to

inter-State arbitrations. Rather, it is a question of taking special care in the application of the standard to the particular context of inter-State disputes. For example, even if a comparable relationship with a private entity might be disqualifying, in the inter-State context, many relationships with States will not be. Likewise, a broader appreciation of inter-State relations may be relevant to the evaluation of a challenge in an inter-State context, even if a more forgiving standard of subject matter relevance is applied in the context of commercial or investment treaty arbitration.

93. This does not, however, render irrelevant all decisions and documents other than those in inter-State cases. There is a rich body of decisions, from investment treaty tribunals in particular, on different instances of alleged lack of impartiality, many of which could arise, but have not yet arisen, before inter-State tribunals. These materials have been cited by both Parties in the current proceedings. The Arbitral Tribunal will consider these insofar as they may shed light on the application to specific facts of standards applicable to arbitrators in inter-State cases.

94. Accordingly, it is the view of the Arbitral Tribunal that it can draw guidance from all materials emanating from bodies called upon to dispense justice with comparable concerns for impartiality, independence and equality of treatment of parties, provided that the Arbitral Tribunal properly examines to what extent any principles or holdings can be appropriately transposed to the inter-State context. Consequently, although the Arbitral Tribunal has closely reviewed all of the submissions of the Parties, it is not required to rule on each and every one of them. In particular, it need not rule on the exact weight to be given to any particular authority among the many cited to the Arbitral Tribunal by the Parties.

95. As a final matter pertaining to the standards to be applied to the present Challenges, the Arbitral Tribunal notes that the standards for disclosure, and the consequences of a failure to abide by an arbitrator's disclosure obligation, are also contested between the Parties. In this respect, the Terms of Appointment provide, in keeping with the established practice of inter-State arbitral tribunals, that an arbitrator must disclose "any circumstances likely to give rise to justifiable doubts as to their impartiality or independence". The distinction is a fine one as between circumstances that are "*likely to* give rise to justifiable doubts"—and must therefore be disclosed—and circumstances that *do* "give rise to justifiable doubts"—and therefore support the disqualification of an arbitrator. The disclosure standard refers to circumstances that are of such a nature that they *could* give rise to justifiable doubts if their gravity or appreciation in the context of a given case were such as to lead to disqualification. A disclosure by an arbitrator does not therefore imply an admission that their disqualification is warranted. Indeed, the disclosures made by Professor

McRae and Judge Wolfrum at the outset of these arbitral proceedings evidence this understanding of their disclosure obligations.

96. For that very same reason, though, it is evident to the Arbitral Tribunal that both of them ought to have disclosed their votes in favour of the IDI Declaration. The question then arises as to what significance should be attached to their failure to do so. In the Arbitral Tribunal's estimation, the failure to disclose does not automatically give rise to justifiable doubts as to their impartiality or independence. Rather, the practice of the Iran-US Claims Tribunal and the jurisprudence of investment treaty arbitration hold that the significance to be attributed to non-disclosure depends on the circumstances of the case, including whether the failure to disclose was the result of an honest exercise of discretion or an attempt by an arbitrator to hide or minimize obvious questions about his or her impartiality and independence.[135] The Arbitral Tribunal has no doubts that their colleagues' failure in this instance was an aberration on the part of two conscientious arbitrators, and does not on its own impact the assessment of their independence and impartiality.

B. TIMELINESS OF THE CHALLENGES

97. As noted above, the rules governing this arbitration are silent as to the procedure to be followed in respect of the assertion of a challenge against a Member of the Arbitral Tribunal, including the question of any applicable time limit to bring a challenge. Relying on the *Chagos* Challenge Decision's identification of the PCA Optional Rules as reflecting the established practice of inter-State arbitral tribunals, Ukraine argues that the 30-day deadline set forth in those Rules should apply to the Challenges. The Russian Federation disputes that this provision can be considered established to the same degree as the justifiable doubts standard.

98. Nevertheless, both Parties accept that a timeliness requirement can be derived from and applied on the basis of the general requirement of good faith, and the international law rules of waiver and acquiescence, both manifestly applicable to arbitral proceedings under Annex VII to UNCLOS. There may also be a stage when bringing such a challenge would impinge on the fair administration of justice and the principles of the equality of the Parties as mentioned above. Such rules do not, however, prescribe a fixed time limit regardless of the circumstances. Rather, they bar a State from exercising rights that it failed to assert promptly, i.e. that it consciously refrained from exercising within a reasonable period of time. What is a prompt and reasonable period of time will vary and must be appreciated in the circumstances of each case. In this connection, the

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135 S.A. Baker & M.D. Davis, THE UNCITRAL RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1992), p. 50; *Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador*, PCA Case No. 2012-10, Decision on Challenge to Arbitrator Judge Stephen M. Schwebel, 8 August 2012, para. 77.

30-day time limit in the PCA Optional Rules is a relevant benchmark to be considered, but not to be applied in a strict manner.

99. Much remains murky about the manner in which the Russian Federation became acquainted with the circumstances of adoption of the IDI Declaration. Yet, in the present case, the Arbitral Tribunal is satisfied that the Challenges were brought within a reasonable period of time, in particular given the decision of the Arbitral Tribunal not to suspend the proceedings while it dealt with the Challenges. Even if the Tribunal accepts Ukraine's assertion that the Russian Federation had actual knowledge as of 1 September 2023 that Professor McRae and Judge Wolfrum had voted in favour of the IDI Declaration, the Arbitral Tribunal finds that taking until 17 October 2023 to first raise these circumstances before the Arbitral Tribunal—i.e. a delay of approximately six weeks—is reasonable under the circumstances, even though it exceeds the 30-day default limit found in the PCA Optional Rules.

100. On this basis, the Arbitral Tribunal dismisses the timeliness objection by Ukraine.

C. THE CHALLENGES AGAINST PROFESSOR MCRAE AND JUDGE WOLFRUM

101. Having carefully reviewed the text of the IDI Declaration and the circumstances of its adoption, the Arbitral Tribunal concludes that Professor McRae's and Judge Wolfrum's votes in favour of the IDI Declaration raise justifiable doubts as to their impartiality in this arbitration. Accordingly, the Challenges must be upheld.

102. The Arbitral Tribunal does not arrive at this conclusion lightly. It remains a case of appreciation, by the reasonable observer, of the relationship between the statements in the IDI Declaration that may be addressed by the Arbitral Tribunal in the present case. Ukraine has drawn the attention of the Arbitral Tribunal to the decisions by the appointing authorities in the investment treaty cases of *Belbek v. Russian Federation*, *Privatbank v. Russian Federation* and *Akhmetov v. Russian Federation*. Without being privy to the particular reasoning in these cases, it may well have been easier to disassociate the text of the IDI Declaration from the issues addressed by the relevant investor-State arbitral tribunals. Indeed, Judge Greenwood has made a credible attempt in this respect in his Dissenting Opinion. The other unchallenged Members of the Arbitral Tribunal are, however, unable to agree that the issues faced can be confined in this rather narrow fashion, in circumstances where the sovereign weight of the armed and police forces have been aligned against the military vessels of a foreign State with the consequent alleged deprivation of the rights of military personnel of a foreign State.

V. DECISION

103. For the reasons set out above, the three unchallenged Members of the Arbitral Tribunal, with Judge Gudmundur Eiriksson presiding, by two votes to one, uphold the Challenges to Professor McRae and Judge Wolfrum.

IN FAVOUR: Judge Gudmundur Eiriksson, Professor Alexander N. Vylegzhanin

AGAINST: Sir Christopher Greenwood

Sir Christopher Greenwood appends a dissenting opinion to the Decision.

Done at the Peace Palace, The Hague, the Netherlands, this 6th day of March 2024,

For the Arbitral Tribunal:

Sir Christopher Greenwood KC

Professor Alexander Vylegzhanin

Subject to the attached dissenting opinion

Judge Gudmundur Eiriksson

For the Registry:

Mr. Martin Doe
Registrar

INSTITUT
DE DROIT
INTERNATIONAL
JUSTITIA ET PACE

ANNEX

1 mars 2022

DÉCLARATION DE L'INSTITUT DE DROIT INTERNATIONAL SUR L'AGRESSION EN UKRAINE

Les membres de l'Institut de Droit international suivent avec consternation le déroulement des opérations militaires russes en Ukraine.

Selon ses Statuts, l'Institut a vocation à contribuer, « dans les limites de sa compétence, soit au maintien de la paix, soit à l'observation des lois de la guerre ». S'inscrivant dans la tradition qui lui a valu le prix Nobel de la Paix en 1904, il considère qu'il est de son devoir de dénoncer fermement l'agression dont est responsable la Fédération de Russie par son intervention militaire massive en Ukraine.

L'Institut de Droit international souligne que cette action :

(1) est contraire aux principes les plus fondamentaux du droit international, maintes fois réaffirmés et précisés dans les résolutions qu'il a adoptées dans le passé, qu'il s'agisse

(a) de l'interdiction du recours à la force armée dans les relations internationales, et de l'intégrité territoriale des États, l'un et l'autre proclamés par l'article 2, paragraphe 4, de la Charte des Nations Unies (ci-après la Charte) (résolutions relatives aux *Problèmes actuels du recours à la force en droit international*, en particulier celle sur *L'autorisation du recours à la force par les Nations Unies* de 2011 adoptée lors de la session de Rhodes et la *Déclaration de Bruges sur le recours à la force* de 2003),

(b) de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes fondement des relations amicales entre les nations conformément à l'article 1er, paragraphe 2, de la Charte (résolutions relatives aux *Problèmes actuels du recours à la force en droit international*, en particulier celle sur *L'assistance militaire sollicitée* de 2011 adoptée lors de la session de Rhodes) ou

(c) de la non-intervention dans les affaires des autres États que prohibe le paragraphe 7 de l'article 2 de la Charte (résolution portant sur *La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des États* de 1989 adoptée lors de la session de Saint-Jacques-de-Compostelle) ;

(2) ne saurait trouver aucune justification juridique, ni dans le principe du droit naturel de légitime défense prévue à l'article 51 de la Charte en l'absence d'une agression armée de la part de l'Ukraine, ni dans une résolution du Conseil de sécurité adoptée en vertu du chapitre VII de la Charte ;

(3) est incompatible avec les engagements spécifiques pris par la Russie à l'égard de l'Ukraine (*Mémorandum de Budapest de 1994 relatif aux garanties de sécurité dans le cadre de l'adhésion de l'Ukraine au Traité sur la non-prolifération des armes nucléaires* et « Accords de Minsk » de 2014 et 2015, unanimement approuvés par le Conseil de Sécurité par sa Résolution S/RES/2202) et ne peut être justifiée à titre de « contre-mesures » licites, qui ne doivent en aucune circonstance violer elles-mêmes des normes impératives du droit international général (*jus cogens*).

Aucun argument de nature politique, y compris des arguments de sécurité, ne peut servir de justification au non-respect des règles de base du système juridique que la communauté internationale a forgées au prix de tant de sacrifices

par le passé. Le multilatéralisme, et non le recours à l'action unilatérale, doit guider la conduite des États en vue du maintien de la paix et de la sécurité internationales.

L'Institut constate que la responsabilité internationale de la Fédération de Russie est engagée pour la violation grave d'obligations découlant de normes impératives du droit international et qu'à ce titre, la Russie s'expose à des mesures appropriées conformément au droit international et sans préjudice du droit de légitime défense de l'Ukraine.

L'Institut rappelle que les opérations militaires en cours appellent *ipso facto* l'application de l'ensemble du droit international humanitaire, y compris les règles relatives à l'occupation, ainsi que toutes les autres règles applicables en temps de conflit armé. Il rappelle également que les personnes responsables de crimes internationaux définis par le droit international sont susceptibles d'être poursuivies et condamnées conformément au droit en vigueur.

Fidèle à sa mission, l'Institut demeure convaincu que, si le droit international ne peut à lui seul empêcher le déferlement de la violence, il doit demeurer la boussole par laquelle les États doivent être guidés, et il est plus que jamais décidé à approfondir son œuvre en vue de favoriser « le progrès du droit international ». Il joint sa voix à celles de toutes les composantes de la communauté internationale, y compris celles des sociétés savantes qui agissent en défense de l'état de droit, qui appellent à la cessation de la guerre en Ukraine et au règlement de bonne foi des différends existant entre les États concernés par tous les moyens de règlement pacifique appropriés.

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