Mr. Martin Doe
Deputy Secretary-General
Permanent Court of Arbitration

Moscow, «20» December 2023

Re: PCA Case No. 2019-28 – Ukraine v. Russian Federation

Dear Mr. Doe,

In your second letter to the Parties dated 1 December 2023 (your reference AG 449478), the Russian Federation was invited to submit a supplementary statement in response to Ukraine's objection contained in its letter of 28 November 2023, with regard to the timeliness of the challenge to Professors McRae and Wolfrum. In particular, Ukraine observed 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.'[1] In this respect the Russian Federation would like to convey the following.

At the outset, Ukraine's argument is based on an incorrect premise that the Russian Federation has allegedly waived its right to challenge the esteemed Arbitrators due to passage of time, because, in Ukraine's view, the Russian Federation 'would have known' about the grounds for the challenge as early as November 2022.

First, it is undisputed that the Rules of Procedure for the present case do not establish a time limit on a challenge procedure. While the right to challenge a biased arbitrator *per se* must be considered indisputable – Ukraine itself doesn't seem to put this into question – the precise modalities for such a challenge tend to vary. Like Ukraine itself notes, the Tribunal has already deviated from certain such modalities, e.g. the suspension of proceedings upon initiation of a challenge, that are established by other sets of arbitral rules.[2]

Second, there are no grounds for Ukraine to invoke the concept of constructive knowledge – to suggest that the Russian Federation 'would have known' about the relevant circumstances regardless of whether it was the case in reality.

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[1] Letter from the Agent of Ukraine dated 28 November 2023.
[2] ICSID Arbitration Rules, Rule 22(2).

The concept of waiver, on which Ukraine seems to rely in advancing its argument, implies that a party *consciously* refrains from exercising its rights. Accordingly, a party may be deemed to have waived its right to challenge an arbitrator only if it is proven that it actually knew the circumstances giving rise to the challenge and decided not to proceed with asserting it.

This knowledge cannot be presumed or implied: it has been notably held in *Gallo v. Canada* that 'allowing... to invoke evidence of constructive knowledge (even if reasonably proved) would relieve the arbitrator of a continuous duty to disclose' and 'unfairly place the burden on the Claimant to seek elsewhere the notice it should have received from the arbitrator.'[3] It was further held with regard to 'the Respondent's statement that counsel for the Claimant were "almost certainly aware" of the "merger" shortly after it occurred in June 2008' that '[s]uch speculative statements cannot replace proof of actual knowledge.'[4] Likewise, with regard to the Claimant's denial of obtaining certain materials, it was held that '[t]his denial need not be assessed... The burden of proof here lies with the Respondent. It would in any event be unreasonable to burden a party with the expectation that its counsel will have read every line of every page of every CV provided at a conference.'[5]

Besides, while Ukraine purports to draw analogies with *other* arbitration rules to back its argument about the alleged untimeliness of the Russian Federation's challenge, this attempt is nugatory as such other rules, in fact, do not establish any basis for implication or imputation of knowledge, instead referring to circumstances that 'became known' to the challenging party – *i.e.* a requirement of actual, not constructive, knowledge.

This has been confirmed by practice of various tribunals. In particular, the appointing authority in the Iran-US Claims Tribunal expressly rejected the concept of 'constructive knowledge', holding that 'absent conclusive proof that the challenging party had prior knowledge of a full and accurate nature, he cannot be deemed to have waived his right to bring the challenge.'[6] It also held the requirement of a party's actual knowledge to a high standard, commenting that "speculations", like general concerns, doubts, or rumors, do not suffice to establish a challenging party's prior actual knowledge'.[7]

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[3] *Vito G. Gallo v. The Government of Canada*, PCA Case No. 2008-03, Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009, ¶24.
[4] *Ibid.*
[5] *Ibid.*, ¶25.
[6] David D Caron, Lee M Caplan THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2ND EDITION), CHAPTER 5 THE CHALLENGE OF ARBITRATORS, p. 262.
[7] *Ibid.*

The timeliness of such challenge, as emphasised by Judge Tomka, should therefore be considered in relation to when the party *actually became aware* of the circumstances that may cast doubt on the challenged arbitrator's independence and impartiality.[8]

The Russian Federation reiterates that it did not learn about the circumstances outlined in its letters of 17 October 2023 and 24 November 2023 until recently. The Declaration, as originally published on the website of the Institute of International Law ('IDI'), included no details as to which of the IDI members voted in its favour. [12] The details were only publicised in the printed version included in the IDI's 2022-2023 Yearbook that was published, as Ukraine acknowledges, only in June 2023.

Ukraine's suggestions that the Russian Federation 'would have known as early as 24 November 2022 from its counsel, Professor Bing Bing Jia, about Professor McRae's and Judge Wolfrum's vote for the resolution' is nothing but an assumption and speculation. In reality, the voting details would not have been published and become available even to members of the Institute like Professor Jia until the issue of the IDI's Yearbook for 2022-2023 in June 2023. Furthermore, even at that time Professor Jia did not bring this issue to the attention of the Russian Federation, either with regard to Professor McRae's and Judge Wolfrum's votes, or his own.

Finally, Professor Jia was retained by the Russian Federation as counsel in this matter some nine months after the voting on the Declaration had taken place.

Ukraine's contention that 'the Yearbook has been available since at least June of this year' also misses the point. Again, there is no room to imply that the Russian Federation should or could have become aware of the Yearbook's contents as soon as it came out. Furthermore, the 2022-2023 Yearbook is not in open access. The web links that Ukraine uses to demonstrate its 'availability' lead to foreign online vendors that sell hard copies only, and which only became available for purchase and dispatch by regular post in 2023, likely to reach the buyers well into the second half of the year. Considering various payment and shipment restrictions *vis-à-vis* the Russian Federation, procuring books from foreign publishing houses, if such need exists, has become a slow and unreliable process. In light of this, it would be untenable to suggest that the Russian Federation 'would have' immediately obtained and checked this publication.

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[8] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited 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, ¶47.

[12] *See* Declaration of the Institute of International Law on Aggression in Ukraine, 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

Moreover, the timing of the Russian Federation's challenge demonstrates that it is indeed a genuine concern about the integrity of the arbitration process. It promptly informed the Tribunal about circumstances giving rise to the challenge shortly after it had learnt about them and did not wait until a later stage of the proceedings, when the challenge could have become more difficult to consider. Deciding on the challenge at this stage will not bring any disruption to the proceedings or indeed any prejudice to Ukraine.

In any event, as indicated above, the Rules of Procedure for the present Arbitration contain no timeframes for filing a challenge. Imposing them now, as Ukraine purports to do, would not serve the interests of fair administration of justice, especially considering that the Russian Federation proceeded to submit its challenge as soon as it became aware of the circumstances in question. Ultimately, the principle of impartiality of arbitrators is of paramount importance. The fact that the challenge is based on the facts that have materialised at some point of time in the past is irrelevant if the challenge is not frivolous and its consideration will not entail prejudice to the conduct of the proceedings or the other party.[13] The Russian Federation has acted in good faith by not opposing the decision of the Arbitral Tribunal not to fully stay the proceedings pending the outcome of the challenge. As noted by an appointing authority, 'after all, if an arbitrator is biased, he should be disqualified no matter how late the challenge.'[14]

Thus, the fact that Professor McRae and Judge Wolfrum have openly aligned themselves so closely to the interests of one of the Parties to the case and against the other Party, and neglected their duty to inform of this both the Parties and other members of bers of the Arbitral Tribunal, must be appropriately examined on the merits in order for the Arbitration to remain in line with this principle.

For the reasons outlined above, the Russian Federation respectfully submits that Ukraine's observations on the alleged belatedness of the challenge to Professors McRae and Wolfrum should be dismissed.

Yours sincerely,

Merry Christmas,

Gennady KUZMIN

Agent of the Russian Federation

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[13] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited 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, ¶49.

[14] UNCITRAL challenge decision of January 11, 1995, XXII Y.B. Com. Arb. 227–42 (1997), citing to Baker/Davis, the UNCITRAL Rules in Practice, cited in C. Koch, Standards and Procedures for Disqualifying Arbitrators, Journal of International Arbitration, 2013, Vol. 20, Issue 4, p. 336.