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By Electronic Mail

Mr. Martin Doe
Deputy Secretary-General
The Permanent Court of Arbitration
Peace Palace, Carnegieplein 2
2517 KJ The Hague
The Netherlands

Re: PCA Case No. 2019-28 (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*)

Dear Mr. Doe:

Pursuant to Procedural Order No. 8, Ukraine hereby submits its response to Russia's challenge of Professor McRae and Judge Wolfrum, as set out in its letter of 24 November 2023 and supplementary statement of 22 December 2023.

Russia's challenge fails for two independent reasons. First, Russia's challenge is untimely, because Russia waited more than nineteen months since the issuance of the declaration of the Institut de Droit International (the "IDI Declaration"), and at least several months after the votes of Professor McRae and Judge Wolfrum on the Declaration were made public. Second, 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 in this case.

I. The Standard Applicable to Russia's Challenge

The legal standard for arbitrator challenges in an UNCLOS Annex VII arbitration, as set forth by the *Chagos* tribunal, requires a party challenging an arbitrator to "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."[1] 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,

[1] *See Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Reasoned Decision on Challenge of 30 November 2011 ("*Chagos*, Reasoned Decision on Challenge"), ¶ 166. Russia agrees that this legal standard applies to its challenge. *See* Russia's Letter of 24 November 2023, ¶ 7.

are applicable to inter-State disputes."[2] The tribunal further considered the provisions of the PCA Optional Rules for Arbitrating Disputes Between Two States concerning arbitrator challenges "to form part of the practice of inter-State arbitral tribunals" that it would apply.[3]

II. Russia's Challenge Is Untimely

Article 11 of the PCA Optional Rules provides that "[a] party which intends to challenge an arbitrator shall send notice of its challenge . . . within thirty days after the circumstances mentioned in articles 9 and 10 [*i.e.*, the circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence] became known to that party." A similar rule has been adopted in the Rules of Procedure for every Annex VII arbitral tribunal that has adopted rules for arbitrator challenges.[4] The requirement of timely challenges reflects the general requirement of good faith, which applies to all rights exercised under UNCLOS.[5] Good faith 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.[6] The Tribunal also retains inherent power to enforce such a timeliness requirement as necessary to

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[2] *See Chagos*, Reasoned Decision on Challenge, ¶ 156, 165.

[3] *See id.* ¶ 151.

[4] *See, e.g., 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.

[5] *See* UNCLOS Art. 300 ("States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.").

[6] *See, e.g.*, David Cameron & Lee Caplan, The UNCITRAL Arbitration Rules: A Commentary (2nd Ed., March 2013), p. 242 (the 15-day time limit in the 1976 UNCITRAL Rules was intended to "ensure that challenges were made at the earliest possible stage of the arbitral proceedings due to the high costs of challenges made once proceedings are well under way" and "after 15 days the right to challenge [i]s waived."). Although the UNCITRAL rules are not directly relevant, the PCA Optional Rules were "based on the UNCITRAL Arbitral Rules, with certain modifications 'to reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes.'" *Chagos*, Reasoned Decision on Challenge, ¶ 151. One such modification was to extend the time for challenge from 15 to 30 days.

Russia also claims that a party may waive its right to challenge only if it consciously decides not to assert it. *See* Letter of 22 December 2023, p. 2. This assertion misapprehends the concept of waiver in this context. Timeliness requirements function such that a party's right to challenge is waived automatically when it is becomes untimely, regardless of whether they decide to abandon it (the term "time-barred" is used interchangeably with "waived"). *See, e.g.*, Cameron & Caplan, *supra* p. 242.

ensure the fair administration of justice.[7]

The circumstance on which Russia bases its challenge is the IDI Declaration concerning Russia's full-scale invasion of Ukraine in February 2022, which was issued by the IDI on 1 March 2022.[8] On 3 March 2022, the IDI announced that the Declaration had passed with a large majority of 107 votes in favor, none against, and only five abstentions.[9] Professor McRae and Judge Wolfrum have been members of the IDI since the start of this proceeding, as reflected in their statements of independence and impartiality submitted to the Parties at the start of the arbitration.[10] If Russia had concerns regarding a possible lack of independence and impartiality in this case resulting from the Declaration, it should have brought its challenge within 30 days of 3 March 2022, at which point Russia knew of the very strong likelihood that Professor McRae and Judge Wolfrum had voted on the Declaration.

Instead, Russia raised the issue of the Declaration for the first time on 17 October 2023 — more than nineteen months after the issuance of the Declaration, and about a week after the Tribunal issued Procedural Order No. 6, rejecting Russia's application to suspend or terminate the proceeding, and fixing deadlines for the Parties' further written submissions.[11] In other words, having failed in its attempt to suspend or terminate the proceedings, Russia resorted to the challenge tactic in a further attempt to derail and disrupt the proceedings. The timeliness requirement for challenges, which is firmly established in the law and practice of international courts and tribunals in inter-State cases, affords the Tribunal the power to protect these proceedings from such tactics.

Russia argues that Ukraine must prove when Russia *actually* knew of the individual voting decisions of Professor McRae and Judge Wolfrum on the

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[7] Rules of Procedure, Art. 7 ("the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the Parties are treated with equality"); *see also* Andrew Mitchell & Trina Malone, *Abuse of Process in Inter-State Dispute Resolution*, *in* Max Planck Encyclopedias of International Law (December 2016), ¶ 18 (explaining that international tribunals "possess inherent powers to safeguard their judicial function which may be exercised to ensure fair administration of justice and to control the process and proper conduct of the proceedings").

[8] Declaration of the Institute of International Law on Aggression in Ukraine, 1 March 2022, available at: www.idi-iil.org/app/uploads/2022/03/Declaration-of-the-Institute-of-International-Law-on-Aggression-in-Ukraine-1-March-2022-EN.pdf ("IDI Declaration").

[9] *See* 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 (relaying the announcement of IDI Secretary-General Marcelo Kohen).

[10] *See* Donald McRae, Statement of Impartiality and Independence of 13 November 2019; Rüdiger Wolfrum, Statement of Impartiality and Independence of 13 November 2019.

[11] *See* Russia's Letter of 17 October 2023; Procedural Order No. 6 of 9 October 2023.

Declaration.[12] As an initial matter, Russia's argument on this point mischaracterizes the applicable standard, which, as described above, does not incorporate decisions and standards applicable in investor-State disputes.[13] Russia has failed to identify a single decision or standard applicable to inter-State cases in support of its lengthy discussion on the inapplicability of a constructive knowledge standard. Russia's unsupported rule would effectively nullify the requirement of timely challenges, so long as the challenging party asserts that it did not actually know of the circumstance giving rise to the challenge. Even if an actual knowledge standard were adopted, a party's knowledge of the relevant circumstances would be demonstrated with ordinary evidence, including evidence that the relevant information was made known or available to a party's representative.[14]

Here, Russia notably omits disclosing any specific date on which it maintains that it acquired "actual" knowledge of Professor McRae's and Judge Wolfrum's votes on the Declaration, stating only that it did not learn about the circumstances giving rise to its challenge "until recently."[15] Yet Russia does not dispute that the details of the voting record on the IDI Declaration were available to it no later than June 2023, upon publication of the IDI annual yearbook — at least four months before its letter of 17 October 2023.[16] This delay alone would be enough to dismiss Russia's challenge under any formulation of the timeliness requirement. In fact, however, Russia's delay is even greater, because Russia's counsel knew of the voting record well before June 2023. The results of the vote on the IDI Declaration were distributed directly to all IDI members on 1 March 2022, the day the Declaration was published. Russia retained Professor Bing Bing Jia — another IDI member who voted in favor of the Declaration — as counsel in November 2022.[17] The knowledge of Russia's representative in this proceeding is necessarily imputable to Russia as of that date.[18]

In short, Russia waited a year-and-a-half after the Declaration, nearly a year after retaining counsel who had knowledge of the votes in favor of the Declaration, and several months after the IDI publicized the voting records on the Declaration. It raised this issue only in the immediate wake of losing its attempts to suspend or

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[12] *See* Russia's Letter of 22 December 2023, pp. 2–3.

[13] *See id.* (citing authorities from private law to support its "high standard" for proving of actual knowledge while failing to identify any type of evidence that would suffice).

[14] *See, e.g.*, Lee Caplan, *Arbitrator Challenges at the Iran-US Claims Tribunal, in* Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals (Brill, 2015), p. 133 (citing, as proof of actual knowledge by the United States, notes of discussions on the relevant topic that took place in the presence of the agent of the United States).

[15] *See* Russia's Letter of 22 December 2023, p. 3.

[16] *See id*.

[17] *See* Russia's Letter of 24 November 2022.

[18] The Tribunal should therefore disregard Russia's assertion that its counsel "did not bring this issue to the attention of the Russian Federation." *See* Russia Letter of 22 December 2023, p. 3.

terminate the arbitration, when the prospect of a hearing on the merits became apparent. Russia thus failed to comply with the requirement applicable in inter-state proceedings of bringing challenges in a timely manner. For these reasons, Russia's challenge to Professor McRae and Judge Wolfrum should not be admitted.

III. <u>There Are No Justifiable Grounds for Doubting the Independence or Impartiality of Professor McRae and Judge Wolfrum</u>

Russia's belated challenge also fails on the merits because the IDI Declaration is outside the scope of the issues in this case and therefore raises no justifiable grounds for doubting the independence and impartiality of Professor McRae and Judge Wolfrum in this proceeding.

Under the standard applicable to challenges 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. This is the unequivocal conclusion of the ICJ's Order rejecting the challenge to Judge Elaraby in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("*Wall* Order").[19] There, Israel challenged the participation of Judge Elaraby, citing his public comments regarding Israel's "illegitimate occupation" of Palestinian territory and accusing Israel of committing "atrocities" and "[g]rave violations of humanitarian law."[20] The Court rejected the challenge because "Judge Elaraby expressed no opinion *on the question put in the present case*" in his prior remarks.[21] This standard was also applied by the ICJ in *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.[22]

Russia attempts to evade application of this standard by relying on the lone dissent of Judge Buergenthal from the *Wall* Order, including his proposal to apply an "appearance of bias" standard for deciding challenges.[23] This dissent failed to convince the thirteen other judges to consider the question.[24] Its premise was also rejected by the *Chagos* tribunal, which expressly rejected the applicability of an

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[19] Order of 30 January 2004, I.C.J. Rep. 2004, p. 3.

[20] *Wall* Order, Dissenting Opinion of Judge Buergenthal, ¶ 8.

[21] *Wall* Order, ¶ 8 (emphasis added).

[22] Advisory Opinion, I.C.J. Reports 1971, p. 16, ¶ 9; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa),* Pleadings, Oral Arguments, Documents, Vol. I, p. 438.

[23] *See* Russia's Letter of 24 November 2023, ¶¶ 10, 12–13.

[24] *Wall* Order, p. 5.

"appearance of bias" standard in Annex VII cases.[25]

While Russia cites three instances of recusal by ICJ judges,[26] recusals are of limited value in the challenge context, because adjudicators may recuse themselves out of an abundance of caution, or for reasons that would not meet the standard for a challenge.[27] In any event, the examples cited by Russia have no bearing on the challenge at issue here. In the cases on which Russia relies, the judges had all recused themselves pursuant to Article 17(2) of the ICJ Statute, which requires that "[n]o member may participate in the decision of any case in which he has previously taken part."[28] 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.[29]

Here, the issue of the IDI Declaration falls squarely within the principle elaborated by the ICJ in the *Wall* Order: the challenge cannot succeed on the basis of the views expressed on legal issues *outside the scope of the case presented here*. The IDI Declaration 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.[30] The case before *this* Tribunal, by contrast, 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. Further, as they explained in their statements in response to the challenge,

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[25] *See Chagos*, Reasoned Decision on Challenge, ¶ 169.

[26] Russia's Letter of 24 November 2023, ¶ 13–17.

[27] *See Chagos*, Reasoned Decision on Challenge, ¶ 144 (noting that Judge Zafrallah Khan's eventual decision to recuse himself in an ICJ case did not detract from the Court's decision to reject South Africa's challenge). One commentator observed that ICJ judges may recuse themselves to avoid "any possible appearance of bias." Chiara Georgetti, *The Challenge and Recusal of Judges of the International Court of Justice, in* Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals (Brill, 2015), p. 18. As discussed above, the *Chagos* tribunal made clear that an "appearance of bias" standard does not apply to arbitrator challenges in Annex VII cases.

[28] *See Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Section B, Oral proceedings concerning the preliminary objection, 1952, p. 427; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, CR 96/5, 29 April 1996, p. 6; *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, CR 2002/40, 4 November 2002, p. 8.

[29] Russia also references a decision of the Swiss Federal Tribunal overturning an award from a commercial arbitration. *See* Russia's Letter of 24 November 2023, ¶ 18. This case falls well outside the range of authorities relevant to an Annex VII arbitrator challenge. *See Chagos*, Reasoned Decision on Challenge, ¶ 165.

[30] The Declaration references provisions of the UN Charter relating to the use of force, international humanitarian law, certain bilateral security agreements, and peremptory norms of international law. *See* IDI Declaration.

Professor McRae and Judge Wolfrum were both of the view that the IDI Declaration was outside the scope of the case presented here, and voted on the Declaration with that understanding in mind.[31] Professor McRae and Judge Wolfrum also explained their understanding that the Declaration was a resolution of the Institut, not of its individual members, and therefore cannot be compared to public statements or opinions individually expressed.[32] Put otherwise, the Declaration reflects a legal evaluation by the IDI on a particular set of events. Accordingly, there is no basis on which to suggest that Professor McRae and Judge Wolfrum failed to carry out their duty in the Terms of Appointment to notify the Parties of circumstances giving rise to justifiable doubts as to their independence and impartiality.[33]

Nor do any of the complaints Russia raises with respect to the IDI Declaration present justifiable grounds for doubting the independence and impartiality of Professor McRae and Judge Wolfrum. For instance, Russia complains that the "general tone" of the IDI Declaration indicates that the Institut's members may be "more negatively predisposed against the Russian Federation in decision-making."[34] But the Declaration makes no general condemnations of Russia. As the Secretary-General of the Institut explained, the Declaration contains strictly legal analysis concerning Russia's full-scale invasion of Ukraine in 2022.[35] Further, it invites both States concerned (Ukraine and the Russian Federation) to resolve their issues through peaceful means, and expresses no specific support for Ukraine, or its people, in that regard.[36] It cannot reasonably be understood as reflecting a general negative predisposition toward Russia among those who voted for it, but rather a view on the specific legal consequences of a specific set of events, which are different from what is at issue here.[37]

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[31] *See* Statement of Professor Donald McRae, 24 October 2023; Statement of Judge Rüdiger Wolfrum, 24 October 2023.

[32] *See* Statement of Professor Donald McRae, 24 October 2023; Statement of Judge Rüdiger Wolfrum, 24 October 2023.

[33] *See* Russia's Letter of 24 November 2023, ¶ 43.

[34] *See id.* ¶ 35.

[35] *See* 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.").

[36] IDI Declaration, p. 3.

[redacted]

Russia also raises the decision of some members of the Institut to abstain from the vote. But as observed by Judge Wolfrum, some of those members may have abstained because they may be involved in disputes whose subject matter is broader or more connected to Russia's 2022 full-scale invasion than the UNCLOS dispute before this Tribunal.[38] Regardless, the 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. Russia also raises the fact that certain members of the Institut disagreed, for various reasons, with the precise language of the Declaration.[39] But Russia never explains why a difference of views among members of the Institut regarding the precise wording of the Declaration should cast doubt upon the capacity of Professor McRae and Judge Wolfrum to independently and impartially decide the Parties' dispute in this case.

In sum, the votes of Professor McRae and Judge Wolfrum in favor of the IDI Declaration are not justifiable grounds for doubting their independence and impartiality in this arbitration because the views expressed through the Declaration are outside the scope of the present case. The point is confirmed by Russia's continued representation in this case by Professor Jia. Professor Jia also voted in favor of the Declaration, and Russia evidently considers that this fact does not give rise to justifiable grounds for doubting his ability to act fairly in connection with the present unrelated dispute, or that it suggests he is unfairly predisposed against Russia.

For the foregoing reasons, Ukraine respectfully requests that the Arbitral Tribunal reject the Russian Federation's challenge to Professor McRae and Judge Wolfrum.

Respectfully submitted,

Ms. Oksana Zolotaryova
Agent for Ukraine

[38] For example, Professor Thouvenin is counsel for Ukraine in the case before the ICJ concerning Russia's invasion of 2022. *See Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order 16 March 2022, I.C.J. Reports 2022, p. 211, ¶ 13.

[39] *See* Russia's Letter of 24 November 2023, ¶¶ 27–29.