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

Moscow, « 7 » February 2024

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

Dear Mr. Doe,

1. Pursuant to Procedural Order No. 8 the Russian Federation hereby submits its reply (the 'Reply') on the challenge brought against Professor Donald McRae and Judge Rüdiger Wolfrum on 24 November 2023 (the 'Challenge'). This document seeks to address the points raised by Ukraine in its Response of 19 January 2024 (the 'Response'). The Russian Federation also acknowledges receipt of statements from both Judge Wolfrum and Professor McRae of 25 and 26 January 2024, respectively, informing that they both opted not to provide any further comments.

2. The Russian Federation maintains its overall position as outlined in its letters of 24 November 2023 and 22 December 2023. It further demonstrates below that the arguments advanced by Ukraine in its Response are unfounded both in fact and law. *First*, Ukraine's invocation of the UNCITRAL Rules and PCA Optional Rules as a source of relevant standards is misplaced, given that these Rules do not apply in the present Arbitration (**A**). *Second*, in the circumstances of this case, the Russian Federation brought the Challenge in a timely manner. Ukraine's contention that the right to challenge was waived is therefore without merit (**B**). *Third*, the circumstances giving rise to the Challenge clearly attest to the existence of justifiable doubts as to the impartiality and independence of Professor McRae and Judge Wolfrum (**C**).

A. UKRAINE PURPORTS TO MISCONSTRUE THE APPLICABLE LEGAL STANDARD

3. The Parties are in agreement that the legal test for challenging arbitrators in inter-State arbitrations has been authoritatively settled by the *Chagos* tribunal and requires to show

that 'there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case.'[1]

4. Ukraine's attempt to reproach the Russian Federation for 'mischaracterising' the applicable standard by 'incorporat[ing] decisions and standards applicable in investor-State disputes' must fail.[2]

5. According to the plain text of the Challenge, the Russian Federation relies on the standard of 'justifiable grounds for doubting the independence and impartiality of [an] arbitrator' adopted by the *Chagos* tribunal.[3] The references to other *fora*'s decisions in the Challenge[4] do not seek to invoke a new standard or add anything to the existing one. Rather, they are meant to portray the emerging consensus among different *fora* that in certain circumstances, arbitrators' public expression of opinion meets this benchmark. That is to say, decisions from other *fora* are resorted to only for the general approach reflected therein.

6. Nor does the Russian Federation intend to vary the standard applicable to establishing knowledge for a valid waiver of the right to challenge by reference to examples from the practice of investor-State tribunals. As explained in the Russian Federation's supplementary letter of 22 December 2023 (the 'Supplementary Statement'), the concept of waiver presupposes voluntary abandonment of rights.[5] The cited authorities merely reflect the same basic idea,[6] which is – as demonstrated below[7] – firmly embedded in public international law.

7. While accusing the Russian Federation of trying to modify the existing standard for establishing waiver by referring to the practice of investor-State tribunals, Ukraine itself extensively relies on various procedural rules extraneous to this arbitration, as well as

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[1] Russian Federation's Letter of 24 November 2023, ¶7; Ukraine's Letter of 19 January 2024, p. 1; both citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Reasoned Decision on Challenge, 30 November 2011, ¶166.

[2] Ukraine's Letter of 19 January 2024, p. 4.

[3] Russian Federation's Letter of 24 November 2023, ¶¶6-9.

[4] *Ibid.*, ¶¶18-19.

[5] Supplementary Statement, p. 2.

[6] *See* Supplementary Statement, p. 2, fn. 3; p. 3, fn. 8; p. 4, fn. 13-14.

[7] *See* Section C.

investment arbitration practice[8] in support of its position regarding the timeliness of the challenge.

8. Ukraine's criticism is thus inconsistent and baseless.

9. Therefore, the Arbitral Tribunal is respectfully requested to uphold the standard for challenge as described by the Russian Federation and disregard Ukraine's attempt to distort it by incorporating extraneous rules.

B. THE RUSSIAN FEDERATION HAS NOT WAIVED ITS RIGHT TO CHALLENGE

10. In the Response, Ukraine avers that the Challenge is belated by quoting Article 11 of the PCA Optional Rules for Arbitrating Disputes between Two States (the 'PCA Optional Rules') that imposes a 30-day time limit for making a challenge.[10] It insists that the PCA Optional Rules are applicable in the light of the *Chagos* tribunal's reasoning.[11] In Ukraine's view, this is reinforced by the fact that 'a similar provision' was allegedly 'adopted in the Rules of Procedure for every Annex VII arbitral tribunal that has adopted rules for arbitrator challenges'.[12] For these reasons, Ukraine concludes that by bringing the Challenge in an 'untimely manner', the Russian Federation has waived its right to challenge.

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[8] Ukraine bases its waiver argument solely on the 1976 UNCITRAL Rules and a commentary thereto, which, as Ukraine itself admits, are 'not directly relevant', *see* Ukraine's Letter of 19 January 2024, p. 2, fn. 6, citing the 1976 UNCITRAL Rules and D. Cameron, L. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2nd ed., OUP, 2013), p. 242.

Ukraine supports its rejection of the 'actual knowledge' test by relying on the practice of the Iran-US Claims Tribunal, *see* Ukraine also relies on the practice of the Iran-US Claims Tribunal, *see* Ukraine's Letter of 19 January 2024, p. 4, fn. 14, 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 (Brill | Nijhoff, 2015), p. 133.

Further, Ukraine quotes the 2021 UNCITRAL Arbitration Rules to support its argument on the Russian Federation's alleged waiver of the right to challenge Professor McRae and Judge Wolfrum, *see* Ukraine's Letter of 28 November 2023, p. 3, fn. 8.

[10] Ukraine's Letter of 19 January 2024, p. 2. Article 11(1) of the PCA Optional Rules provides as follows: 'A party who intends to challenge an arbitrator shall send notice of its challenge within thirty days after the appointment of the challenged arbitrator has been notified to the challenging party or within thirty days after the circumstances mentioned in articles 9 and 10 became known to that party.'

[11] Ukraine's Letter of 19 January 2024, p. 2.

[12] *Ibid.*, p. 2, fn. 4, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Rules of Procedure, Article 6(2); *ARA Libertad Arbitration (Argentina v. Ghana)*, PCA Case No. 2013-11, Rules of Procedure, Article 7(1); *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Rules of Procedure, Article 8(1); *MOX Plant Case (Ireland v. United Kingdom)*, PCA Case No. 2002-01, Rules of Procedure, Article 6(1); *The South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Rules of Procedure, Article 8(1).

11. Ukraine also maintains that a valid waiver of the right to challenge does not require actual knowledge of the facts giving rise to doubts as regards the impartiality and independence of arbitrators.[13] It argues that 'a party's right to challenge is waived automatically when it is becomes untimely, regardless of whether they decide to abandon it'.[14] Ukraine further asserts, as an alternative line of argument, that even if the actual knowledge standard is applied, the knowledge of the respective facts by Professor Bing Bing Jia is imputable to the Russian Federation. However, these assertions are deficient both in fact and law.

12. The Arbitral Tribunal cannot transpose time limits for challenging arbitrators from extraneous procedural rules not agreed upon expressly by the Parties. In the absence of explicit rules setting the time limit for challenging arbitrators the Arbitral Tribunal should assess the timeliness of the Challenge based on the circumstances of this dispute. Ukraine did not demonstrate that the criteria for a valid waiver were met, and thus its waiver argument should be dismissed on this basis alone.

i. <u>The time limits envisaged by the PCA Optional Rules are inapplicable in the present Arbitration</u>

13. Ukraine's attempt to import the 30-day time limit from the PCA Optional Rules must fail for the reasons set out below.

14. ***First***, the procedure of the present Arbitration is governed exclusively by Annex VII to UNCLOS, the Rules of Procedure, and the Terms of Appointment. None of these instruments provide for a specific timeframe for challenging arbitrators. Nor do any of these instruments incorporate the PCA Optional Rules.

15. ***Second***, adopting Ukraine's approach would be irreconcilable with the consensual nature of the Arbitration. Article 1(2) of the Rules of Procedure states that:

> To the extent that *any question of procedure is not expressly governed* by these Rules or by Annex VII to the Convention or other provisions of the Convention, the question *shall be decided* by the Arbitral Tribunal *after ascertaining the views of the Parties*. [*Emphasis* added]

[13] Ukraine's Letter of 19 January 2024, p. 4.

[14] *Ibid.*, p. 2.

16. The significance of the consensual nature of arbitration was highlighted by the *Chagos* tribunal. In rejecting the relevance of the IBA Guidelines on Conflict of Interest in International Arbitration invoked by Mauritius, the *Chagos* tribunal recalled 'that the system of inter-State dispute settlement is based upon the consent of the Parties' and stressed the need for express agreement by States.[15] The transposition of rules from the PCA Optional Rules, *i.e.* an instrument not agreed upon by the Russian Federation,[16] would clearly run afoul of the cornerstone of inter-State dispute resolution.

17. ***Third***, nothing in the *Chagos* decision on challenge lends support for Ukraine's attempt to import time limits from other procedural rules, such as the PCA Optional Rules. The *Chagos* tribunal never held that *all* provisions of the PCA Optional Rules concerning arbitrator challenges 'form part of the practice of inter-State arbitral tribunals', as Ukraine tries to argue.[17] On the contrary, the tribunal's pronouncement was limited to the general *standard applicable to such challenges* in Article 10 of the PCA Optional Rules, *i.e.* that the challenging party must prove the existence of justifiable doubts as to the arbitrator's impartiality or independence:

> ... *the standard for arbitrator impartiality and independence embodied in Article 10 of those Rules* has been adopted in a number of PCA-administered arbitrations, including those of the Eritrea-Ethiopia Boundary Commission, the arbitral tribunal in the OSPAR case, and the Annex VII Tribunal in the MOX Plant case. As such, *this standard can be considered to form part of the practice of inter-State arbitral tribunals.*[18] [*Emphasis* added]

18. In addition, these observations were made *after* the tribunal had already determined the applicable legal rules and principles: 'the *law applicable to the appointment of arbitrators in the present arbitral proceedings* requires that ... there be no

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[15] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Reasoned Decision on Challenge, 30 November 2011, ¶167.

[16] Article 1(1) of the PCA Optional Rules limits the scope of these Rules' application to instances of the parties' direct agreement: 'Where the parties to a treaty or other agreement have agreed in writing that disputes shall be referred to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.' The Introduction to the PCA Optional Rules also states that the Rules are '*optional* and emphasize flexibility and *party autonomy*.' [*Emphasis* added] Thus, the application of the PCA Optional Rules in the present proceeding could hardly be reconciled with the wording of the Rules themselves.

[17] *See* Ukraine's Letter of 19 January 2024, p. 2: 'The [*Chagos*] 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.' [*Emphasis* added]

[18] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Reasoned Decision on Challenge, 30 November 2011, ¶151.

circumstances that might give rise to justifiable doubts as to the arbitrators' impartiality or independence.'[19] The *Chagos* tribunal thus evidently gave weight to the rules *directly* governing the appointment and challenge of arbitrators. Therefore, the decision on challenge in *Chagos* cannot justify the application of any rules that contradict the procedure adopted for the proceeding at hand.

19. ***Fourth***, Ukraine's reliance on the purported adoption of the PCA Optional Rules' provisions on challenge in select Annex VII arbitrations[20] is misplaced. In the cases cited by Ukraine, the tribunals decided – within their discretion granted by Article 5 of Annex VII to UNCLOS – to *expressly* set a 30-day time limit for challenging arbitrators. It is also telling that the preambles of those rules of procedure do not include any references to the PCA Optional Rules.[21] In any event, the language of those rules of procedure varies from case to case and is not a *verbatim* reproduction of the PCA Optional Rules. It is therefore doubtful whether the specific provisions addressing the challenge of arbitrators in those rules of procedure were inspired by PCA Optional Rules at all.

20. ***Fifth***, the absence of a timeframe for making a challenge does not in principle attest to the existence of a gap that needs to be filled. By way of notable examples, the ICJ Statute[22] and the ITLOS Statute[23] – which the *Chagos* tribunal identified as authoritative in terms of challenges to arbitrators in inter-State cases[24] – similarly

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[19] *Ibid.*, ¶138. [*Emphasis* added]

[20] *See* Ukraine's Letter of 19 January 2024, p. 2, fn. 4, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Rules of Procedure, Article 6(2); *ARA Libertad Arbitration (Argentina v. Ghana)*, PCA Case No. 2013-11, Rules of Procedure, Article 7(1); *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Rules of Procedure, Article 8(1); *MOX Plant Case (Ireland v. United Kingdom)*, PCA Case No. 2002-01, Rules of Procedure, Article 6(1); *The South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Rules of Procedure, Article 8(1).

[21] Instead, the tribunals relied on Article 5 of Annex VII to UNCLOS.

[22] *See* ICJ Statute, Articles 17, 24.

[23] *See* ITLOS Statute, Article 8. *See* also Rules of ITLOS, Article 18.

[24] According to the *Chagos* tribunal: 'It follows that the Tribunal is not persuaded that such additional rules, which cannot be considered as a source of law as regards judges of ITLOS or the ICJ, are any more relevant to arbitral tribunals established under Annex VII of the Convention than they are to judges of ITLOS or the ICJ. The Tribunal in this context refers to Article 287(1) of the Convention, which gives States the option alternatively to submit a case to ITLOS, the ICJ, or arbitration under Annex VII (or, for purposes not relevant here, under Annex VIII). Article 287(1), together with Article 286 of the Convention, forms the expression of States' consent to the comprehensive dispute settlement framework created by the Convention. It cannot have been the intention behind that framework that different conditions would apply to the independence and impartiality of adjudicators in the third forum (arbitration under Annex VII) in comparison with the ICJ or ITLOS. In this context, where an Annex VII tribunal is an alternative forum to ITLOS or the ICJ, the Tribunal

contain no time limits. To the Russian Federation's knowledge, time-limits for challenging Judges have never been applied in the practice of the ICJ.

21. Accordingly, there are no grounds for importation of the time limits from the PCA Optional Rules to the procedural framework of this Arbitration.

ii. <u>In the circumstances of this case, the Challenge was made in a timely manner</u>

22. Where no specific time limits are prescribed by the applicable procedural rules, international courts and tribunals resolve the issues of timing on a case-by-case basis. Given the Parties' disagreement on this issue, and in light of the absence of any expressly agreed rules in this respect in the Terms of Appointment or the Rules of Procedure, the Arbitral Tribunal should decide on the timeliness of the Challenge based on the circumstances of the case.[25]

23. The issue of waiver of rights as a result of delay was discussed by the International Law Commission (the 'ILC') in the context of losing the right to invoke State responsibility. The ILC noted that 'clear-cut time limits' would be inappropriate in the international setting.[26] It then concluded that:

> International courts generally engage in a flexible *weighing of relevant circumstances* in the given case, taking into account such matters as the

takes the view that only the rules applying to, and practice of, inter-State tribunals are of relevance to the qualification and challenge of arbitrators in proceedings under Annex VII.' *See Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Reasoned Decision on Challenge, 30 November 2011, ¶168.

[25] Albeit in a different context, the ICJ adopted a case specific analysis approach in the *Certain Phosphate Lands in Nauru* case to assess whether the mere passage of time attests to the waiver of the right to object. *See Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 253-254, ¶32: 'The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. *It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.*' [*Emphasis* added]

The same logic was followed later in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 267, ¶293: 'The Court further observes that, in a situation where there is a delay on the part of a State in bringing a claim, it is "for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible" (*Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 254, para. 32). In the circumstances of the present case, the long period of time between the events at stake during the Mobutu régime and the filing of Uganda's counter-claims has not rendered inadmissible Uganda's first counter-claim for the period prior to May 1997.'

[26] 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, Commentary to Article 45, p. 122, ¶9.

conduct of the respondent State and the *importance of the rights involved.*[27] [*Emphasis* added]

24. It is to be inferred that there is no 'one-size-fits-all' approach to assess the timeliness of challenges. Instead, this evaluation is inherently case-specific and should lead to reasonable results.

25. The Russian Federation submits that the circumstances of the present dispute show that the Challenge was brought within a reasonable time:

(a) Despite the express requirement envisaged by the Terms of Appointment for the arbitrators to reveal '*any circumstances* likely to give rise to *justifiable doubts* as to [the arbitrators'] impartiality or independence *that may subsequently come to their attention during this arbitration*,'[28] Professor McRae and Judge Wolfrum did not disclose their voting in favour of the Declaration to the Parties or other Tribunal members, although this would definitely fall within the scope of their disclosure duties.[29]

(b) As explained in the Supplementary Statement, the Russian Federation only had limited and recent opportunity to learn about Professor McRae's and Judge Wolfrum's votes. Ukraine does not dispute that neither the Declaration nor the IDI's website identifies any of the members who voted for the Declaration. Ukraine also concurs that the relevant information first became available to the general public only in the printed version of the IDI Yearbook released in June 2023. Hard copies of this publication are not readily available to Russian readers given the normal time period for international distribution channels to ship them to Russia, not to mention the restrictions on money transfers and shipments that have been in place since spring 2022. Thus, the Russian Federation was precluded from getting promptly acquainted with the IDI voting results even in June 2023.

(c) The fact that the IDI Yearbook was released in June 2023 does not mean that the Russian Federation ought to have learnt of the grounds for the Challenge

[27] *Ibid.*, p. 123, ¶11.

[28] Terms of Appointment, ¶4.7. [*Emphasis* added].

[29] *See* below, ¶60.

immediately from that publication. All it means is that the publication was available for purchase from that moment. However, as previously noted, there were many obstacles for such purchase and delivery to the Russian Federation. Furthermore, Ukraine did not provide a reasonable explanation as to why Russia should have been expected to be immediately aware of the book's release, or even be interested in it in the first place (considering Russia had not been aware of the arbitrators' vote). Any finding, as advocated by Ukraine, that the Russian Federation ought to have learned about the voting on the Declaration immediately upon the IDI Yearbook's publication in June 2023, entails an irrational and absurd implication that the Russian Federation was required or under an obligation to purchase the Yearbook in question, which is not 'notorious' but a very specialized publication for a very small group of specialist users. On the contrary, there is no such obligation. As the Russian Federation explained in the Supplementary Statement, the procedural framework does not oblige the Russian Federation to keep constantly monitoring the arbitrators' activities.[30] A contrary suggestion would place an unreasonable burden on any party to a proceeding and render the arbitrators' duty of disclosure nugatory. The mere release of the IDI Yearbook thus did not relieve Professor McRae and Judge Wolfrum from their duty of disclosure, directly provided for by the Terms of Appointment of the current arbitration.[31] Their notices of disclosure should have been the primary source of the Russian Federation's knowledge of their voting for the Declaration. Such notices were never sent.

(d) In addition, the Russian Federation had no particular reason to believe that all IDI members, including Professor McRae and Judge Wolfrum, participated in the voting. According to publicly available sources cited by Ukraine itself, only 112 members took part in the voting (out of which 5 abstained), [32] while the IDI website indicates that it comprises 177 members.[33]

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[30] Supplementary Statement, p. 2.

[31] Terms of Appointment, ¶4.7

[32] Geneva Graduate Institute, *Intervention militaire en ukraine: la responsabilité internationale de la russie est engagée* (3 March 2022), available at: https://www.graduateinstitute.ch/fr/communications/news/intervention-militaire-en-ukraine-la-responsabilite-internationale-de-la-russie.

[33] Institute of International Law, Official website, section 'Members': https://www.idi-iil.org/en/membres.

(e) Ukraine does not dispute that Professor Bing Bing Jia was not acting for the Russian Federation at the time of the voting on the Declaration in March 2022. He only joined the Russian Federation's legal team in late November 2022 and never notified the Russian Federation on his voting on the Declaration. Neither did he notify Russia about the voting of Professor McRae and Judge Wolfrum.[35]

(f) As has been mentioned previously, the voting results were only published in the IDI Yearbook in June 2023, so the knowledge about the voting of Professor McRae and Judge Wolfrum for the Declaration cannot be imputed to the Russian Federation upon Professor Jia's joining to the Russian Federation's legal team in this Arbitration. Furthermore, Professor Jia, as any person professionally engaged in international law, hears a plethora of opinions on various topics, and it is inherently wrong to attribute the knowledge of all such opinions to his subsequent clients, such as the Russian Federation.

(g) It is trite that the Parties' right to have this dispute decided by arbitrators whose independence and impartiality would be beyond doubt is of fundamental importance.

26. Overall, in these circumstances the Russian Federation timely raised its concerns regarding the impartiality and independence of Professor McRae and Judge Wolfrum in October 2023, shortly after learning about the above facts. Therefore, Ukraine's objection to the timeliness of the Challenge must be dismissed.

iii. Ukraine failed to establish the conditions for a valid waiver

27. As a preliminary matter, the Russian Federation submits that the gravity of the prejudgment against it, as demonstrated below,[36] excludes in principle any application of waiver. Allowing a party to (implicitly) waive its rights in respect of such severe procedural deficiencies would encroach upon the exercise of the arbitral function and be incompatible with the notions of judicial propriety and fair administration of justice. Accordingly, the Russian Federation considers that Ukraine's waiver argument should be rejected for this reason alone.

[redacted]

[36] *See* Section C(ii).

28. In any event, Ukraine's rejection of the requirement to establish actual knowledge is untenable. The voluntary nature of waiver is widely recognised and intention is thus a *sine qua non* for effecting a waiver.[37] Accordingly, it is settled in international practice that waiver must be 'express',[38] 'unequivocal',[39] 'shown by conclusive evidence',[40] or at the very least '*unequivocally implied from the conduct* of the State'.[41] It is therefore clear that if a party is not actually aware of the factual basis for challenging an arbitrator, it cannot waive its right to challenge.[42] Ukraine's contention that 'a party's right to challenge is waived *automatically* when it becomes untimely'[43] – *i.e.* without establishing that the party's knowingly and intentionally failed to challenge – is erroneous.

29. It is telling that none of the sources relied upon by Ukraine actually corroborate its position. Thus, the Commentary to the UNCITRAL Rules, to which Ukraine refers, actually states that:

> Article 13(1) requires that a party send notice of challenge within 15 days after the circumstances underlying the challenge "became known" to that party. *The provision could have, but notably does not include, the phrase "should have known" or "ought to have known."* In the challenge by the United States of the three Iranian arbitrators on the Iran–US Claims Tribunal, the Appointing Authority interpreted corresponding Article 11 of

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[37] I. Feichtner, *Waiver*, MPEPIL, ¶5; C. Tams, *Waiver, Acquiescence, and Extinctive Prescription* in J. Crawford et al. (eds.), THE LAW OF INTERNATIONAL RESPONSIBILITY (OUP, 2010), p. 1036; P. Saganek, WAIVER IN PUBLIC INTERNATIONAL LAW IN UNILATERAL ACTS OF STATES IN PUBLIC INTERNATIONAL LAW (Brill | Nijhoff, 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 (Brill | Nijhoff, 2011), pp. 407, 414; A. Cassese, INTERNATIONAL LAW (OUP, 2005), p. 184.

[38] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 266, ¶292.

[39] 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, Commentary to Article 45, p. 122, ¶5.

[40] *The 'Kronprins Gustav Adolf' (Sweden, United States of America)*, 18 July 1932, UNRIAA, Vol. II, p. 1299.

[41] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 266, ¶292. [*Emphasis* added]

[42] Supplementary Statement, pp. 2-3; D. Caron, L. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2nd ed., OUP, 2013), p. 262; *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; *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. 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.

[43] Ukraine's Letter of 19 January 2024, p. 2, fn. 6. [*Emphasis* added]

the Tribunal Rules as requiring "evidence of actual prior knowledge."[44] [*Emphasis* added]

30. The Commentary then goes on as follows:

> The practice of appointing authorities generally confirms that *the standard for establishing actual knowledge is generally high.* In two leading cases, the appointing authorities respectively *found a challenge request to be untimely only when the challenging party had directly received the information that formed the basis for the challenge* more than 15 days before the notice of challenge was submitted.[45] [*Emphasis* added]

31. Nothing in the Commentary's text provides a persuasive authority for Ukraine's self-invented automatic waiver argument.

32. Likewise, the PCA Optional Rules[46] and various rules of procedure adopted in other Annex VII arbitrations,[47] also relied on by Ukraine, expressly adopted the actual knowledge standard.

33. Neither can Ukraine argue that Professor Jia's supposed knowledge of the voting could be imputed to the Russian Federation.

34. ***First***, as a matter of principle only the knowledge of a State's agent can be imputed to the State.[48] In inter-State disputes, States are normally represented by agents.[49]

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[44] D. Caron, L. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2nd ed., OUP, 2013), pp. 245-246. *See* also 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 (Brill | Nijhoff, 2015), pp. 254-255.

[45] D. Caron, L. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2nd ed., OUP, 2013), p. 246.

[46] PCA Optional Rules, Article 11(1): 'A party who intends to challenge an arbitrator shall send notice of its challenge within thirty days after the appointment of the challenged arbitrator has been notified to the challenging party or within thirty days after the circumstances mentioned in articles 9 and 10 *became known* to that party.' [*Emphasis* added]

[47] *ARA Libertad Arbitration (Argentina v. Ghana)*, PCA Case No. 2013-11, Rules of Procedure, Article 7(1): 'A Party that intends to challenge an arbitrator shall send notice of its challenge within thirty days after the circumstances mentioned in Article 6 *became known* to that Party.' [*Emphasis* added]; *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Rules of Procedure, Article 8(1): 'A Party that intends to challenge an arbitrator shall send notice of its challenge within thirty days after the circumstances mentioned in Article 7 *became known* to that Party.' [*Emphasis* added]; *The South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Rules of Procedure, Article 8(1): 'A Party that intends to challenge an arbitrator shall send notice of its challenge within thirty days after the circumstances mentioned in Article 7 *became known* to that Party.' [*Emphasis* added]

[48] L. Caflisch, Waivers in International and European Human Rights Law, p. 414: 'The Court's findings in these cases tally with the conclusions reached in the earlier ones: need for evidence of a clear and unambiguous intention to abandon a well-identified right, *resulting from the conduct of agents of the State* as interpreted in the context of the surrounding circumstances.' [Emphasis added] *See* also J. Levine, *Late-in-the-Day Arbitrator*

Although agents are often assisted by retained counsel, the latter's role is inherently different[50] and does not provide any basis for imputing their actions and knowledge to the state concerned. Notably, the PCA Secretary-General in its decision on the challenge of Judges Noori, Ameli, and Aghahosseini, to which Ukraine specifically refers,[51] concluded that the United States' challenge to the Iranian arbitrators was untimely precisely because the United States' *agent* possessed actual knowledge of the relevant circumstances.[52] The Russian Federation's agents in the present case had no knowledge of the circumstances in question until recently; Ukraine does not attempt to argue otherwise.

35. ***Second***, Ukraine's proposition that 'Russia waited a year-and-a-half after the Declaration' is simply wrong on the facts. The Russian Federation has addressed this point above in Section B(ii).

36. The Russian Federation reiterates its position that knowledge has to be both actual and specific. In certain circumstances even publicly available information might not meet this bar. Thus, in a prominent case the respondent challenged the arbitrator due to the

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Challenges and Resignations: Anecdotes and Antidotes in C. Giorgetti (ed.), CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS (Brill | Nijhoff, 2015), pp. 255-256.

[49] E. Sthoeger, M. Wood, *The International Bar* in C. Romano, K. Alter et al. (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (OUP, 2013), p. 641.

[50] F. Berman, G. Hernández, *Article 42* in A. Zimmermann, C. Tams et al. (eds.) THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), p. 1209: '*The Court is entitled to expect that any matter which requires particular knowledge of the country appearing as a party before it should have its authentic expression out of the mouth of the agent*, not that of employed counsel…' [*Emphasis* added] *'Grand Prince' (Belize v. France)*, ITLOS Case No. 8, Prompt Release, Judgment, ITLOS Reports 2001, Declaration of Judge Ad Hoc Cot, ¶14: 'The delegation of sovereignty by the flag State in appointing a lawyer as agent raises a different kind of problem. The dispute before the Tribunal remains an inter-State dispute. However, *the lawyer-agent is not necessarily in close contact with the authorities of the flag State. The credibility and reliability of the information he provides as to the legal position of the flag State may be questionable.*' [*Emphasis* added] *See* also J. Cot, *Appearing "for" or "on behalf of" a State: The Role of Private Counsel before International Tribunals* in N. Ando, E. McWhinney et al. (eds.), LIBER AMICORUM JUDGE SHIGERU ODA (Brill | Nijhoff, 2002), pp. 841-842; S. Rosenne, *The Agent in Litigation in the International Court of Justice* in W. Kaplan, D. McRae (eds.), LAW, POLICY, AND INTERNATIONAL JUSTICE. ESSAYS IN HONOUR OF MAXWELL COHEN (McGill-Queen's University Press, 1993), p. 49.

[51] Ukraine's Letter of 19 January 2024, p. 4, fn. 14.

[52] 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 (Brill | Nijhoff, 2015), p. 133: 'On April 19, 2006, the Appointing Authority, Judge Haak, dismissed the U.S. challenge as untimely. His decision was based on two pieces of evidence that he believed demonstrated that the U.S. government had prior knowledge of the Iranian practice: (1) handwritten notes of the Secretary-General from a 1984 budget meeting, according to which a former Iranian arbitrator explained the Iranian practice *in the presence of the U.S. Agent*; and (2) a 2006 letter from a former Iranian arbitrator stating that a U.S. arbitrator suggested in a 1981 Tribunal meeting, *in which the U.S. Agent was present*, that the Iranian arbitrators may wish to return the portion of their salaries that Iran found to be objectionable.' [*Emphasis* added]

latter's failure to disclose her position in the board of directors of a bank that held shares in the claimant companies. The claimants objected to the challenge, arguing that the arbitrator's appointment as a director was a 'notorious' fact. This objection was found to be ill-premised:

> We do not accept the Claimants' contention that the fact of her directorship was 'notorious,' by which the Claimants mean that the Respondent knew or should have known of this fact. *While the identity of directors of a publicly traded company, such as UBS, is a matter of public record, the knowledge of the fact that Professor Kaufmann-Kohler was a UBS director is not so public and wide-spread that one can reasonably assume that the Respondent actually knew or should have known of that fact.*[53] [*Emphasis* added]

37. The identity of the IDI members who voted for the Declaration was obviously not 'notoriously' public, it was not public at all. Both Professor McRae and Judge Wolfrum refrained from performing their prescribed duty to disclose this information to the Parties during the proceedings. As explained above, the Russian Federation had no valid reason to believe that all the IDI members took part in the voting or supported the declaration.[54] Accordingly, it cannot plausibly be argued that Russia's knowledge can be inferred from these circumstances.

38. Ukraine's claim that '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' is inapposite. As noted earlier,[55] it is not Russia's duty to disclose this information; it is the burden of Ukraine to prove when Russia had obtained such 'actual knowledge'. However, Russia is not being vague for the purpose of stymieing the proceedings; the reason why no specific date was provided is because the circumstances of obtaining actual knowledge of the voting are strictly confidential, and the Russian side is at no liberty to disclose this information to third parties, including, unfortunately, the Arbitral Tribunal. It is sufficient to say that Russia

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[53] *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, ¶45.

[54] *See* Section B(ii).

[55] See Russian Federation's Letter of 22 December 2023, p. 2; referencing *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

obtained the information from the IDI Yearbook only recently and acted as soon as reasonably possible.

iv. <u>In any case, the timing of submitting the Challenge does not cause any prejudice</u>

39. The Russian Federation firmly rejects Ukraine's allegations that the Challenge is a 'procedural tactic', or is anyhow aimed at or could prejudice or harm fair administration of justice.

40. The time that has passed since June 2023 – the earliest time Russia could have hypothetically learnt about the voting results – does not hinder Ukraine's ability to collect evidence or respond meaningfully to the Challenge. In addition, had the Russian Federation brought the Challenge as early as in June 2023, its arguments would still have to be considered at essentially the same stage of the proceeding. The Russian Federation recalls that it brought the Challenge following the submission of the Counter-Memorial, and during Ukraine's work on the Reply. In light of the recent changes to the Arbitral Tribunal's constitution and Ukraine's continuous unwillingness to pay its supplementary deposit of costs, the arbitration remained at that phase for a long period of time, which included both June and five months thereafter.[56] Likewise, the Challenge did not result in the suspension of the proceeding or affected the submissions schedule (*e.g.*, while this challenge procedure is ongoing, Russia is also working on its Rejoinder).

41. Furthermore, Ukraine's suggestion that the Russian Federation's Challenge is a tactic aimed at delaying the proceedings 'in the immediate wake of losing its attempts to suspend or terminate the arbitration when the prospect of a hearing on the merits became apparent' is plainly wrong on the facts. The request to suspend the proceedings was first articulated by the Russian Federation on 25 April 2023,[58] *i.e.* even before the discussion of the specific dates for the hearings started. Ukraine's assertion as to the Russian Federation's alleged tactic to avoid hearings is thus baseless.[59]

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[56] Ukraine paid its share of the supplementary deposit of costs only on 14 November 2023, *see* Letter from Mr. Martin Doe of 14 November 2023, while it was supposed to do so by 3 October 2022, *see* Letter from Mr. Martin Doe of 1 July 2022.

[58] The Russian Federation's Letter of 25 April 2023.

[59] In advancing this unmeritorious argument, Ukraine even goes as far as to misstate the Tribunal's ruling by alleging that the Russian Federation's request to terminate or suspend the proceedings was *rejected. See*

42. Moreover, the Russian Federation's requests to suspend or terminate the proceedings were caused by Ukraine's blatant disregard of its duty to provide its share of the advance deposit of costs.[60] The Russian Federation consistently conveyed that it was based on Article 27(3) of the Rules of Procedure. In contrast, the Russian Federation has paid its share of the advance deposit of costs timely and in good faith. If it had actually pursued a 'tactic in a further attempt to derail and disrupt the proceedings', it would have certainly refrained from making substantial financial contributions towards the costs of this Arbitration.

43. Finally, a potential delay in the conduct of this Arbitration due to the challenge procedure (which did not happen) can hardly outweigh the risk of any unfair administration of justice posed by a possibility that this dispute could be decided by arbitrators whose impartiality and independence are subject to justifiable doubts.

44. To sum up, given the limited impact of the Challenge on the further administration of the proceedings and the overriding significance of the impartiality and independence of all members of the Arbitral Tribunal, the Challenge does not impair the rights of Ukraine or cause it any other procedural prejudice. On the contrary, it is the Russian Federation that might be prejudiced in this case.

C. THE RUSSIAN FEDERATION'S CHALLENGE IS JUSTIFIED AND MEETS THE APPLICABLE STANDARD FOR CHALLENGING ARBITRATORS

45. Ukraine contends that the Challenge fails on the merits because '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'.[62] Ukraine purports to support this by reference to the Order in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case.[63] It also tries to distinguish the practice of ICJ Judges' self-recusals cited by the Russian Federation, based on its emanation from Article 17(2) of the ICJ Statute.

Ukraine's Letter of 19 January 2024, p. 3. In reality, that request was *deferred* by the Tribunal. *See* Procedural Order No. 6.

[60] *See* the Russian Federation's Letters of 25 April 2023, 1 and 23 August 2023.

[62] Ukraine's Letter of 19 January 2024, p. 5.

[63] *Ibid.*

Finally, Ukraine contests that the facts described in the Challenge give rise to justifiable doubts as to the impartiality and independence of Professor McRae and Judge Wolfrum.

46. The Russian Federation demonstrates below that Ukraine's criticism lacks merit. As a matter of principle, 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. It is submitted that the facts giving rise to the Challenge in the present case, taken as a whole, leave no doubt that the Challenge is well-founded and satisfies the applicable standard.

i. Publicly expressed opinions may give rise to justifiable doubts as to the impartiality and/or independence of an arbitrator

47. As discussed above, the standard applicable to arbitrator challenges is the existence of justifiable grounds for doubting the independence and impartiality of arbitrators in a particular case.[64] This test is sufficiently broad to encompass arbitrators' extra-judicial opinions. Contrary to the picture Ukraine wants to draw, it is impossible to infer from this wording any limitation that such opinions address only the *stricto sensu* subject matter of the dispute. In addition, public statements of an arbitrator are generally viewed as a source of potential concern with respect to impartiality and independence in both international[65] and domestic contexts.[66]

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[64] *See* Section A.

[65] The Burgh House Principles on the Independence of the International Judiciary, ¶7.1: 'Judges shall enjoy freedom of expression and association while in office. *These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.*' [*Emphasis* added] *See* also L. Caflisch, Impartiality and Independence of Judges, *The Law and Practice of International Courts and Tribunals*, 2003, Vol. 2, Issue 1, p. 172; S. Rosenne, The Changing Role of the International Court, *Israel Law Review*, 1985, Vol. 20, Issues 2-3, p. 196, fn. 33; F. Megret, International Judges and Experts' Impartiality and the Problem of Past Declarations, *The Law and Practice of International Courts and Tribunals*, 2011, Vol. 10, Issue 1, pp. 48-49.

[66] *See, e.g. Hoekstra and Others v Her Majesty's Advocate* 2000 J.C. 387 at [23]: '...what judges cannot do with impunity is to publish either criticism or praise of such a nature or in such language as to give rise to a legitimate apprehension that, when called upon in the course of their judicial duties to apply that particular branch of the law, they will not be able to do so impartially.' *Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor* [1999] EWCA Civ 3004 at [85]: 'Anyone writing in an area in which he sits judicially has to exercise considerable care not to express himself in terms which indicate that he has preconceived views which are so firmly held that it may not be possible for him to try a case with an open mind.' *See* also *Sun Yang v. World Anti-Doping Agency and International Swimming Federation*, Case 4A_318/2020, Judgment of the First Civil Law Court, 22 December 2020; *Catalina (Owners) v. Norma (Owners)*, [1938] 61 Llyod's Law Reports 360 *et seq.*

48. While having some indicative value, 'subject matter relatedness' is not a *per se* determinative factor in analysing an arbitrator's impartiality and independence. In other words, it is but one of the potential criteria to be examined *as a whole* while considering the merits of a challenge.

49. The reasoning in the decision of challenge in *Perenco Ecuador v. Ecuador and Petroecuador* is instructive in this respect. The respondents brought a challenge against Judge Charles Brower based on an interview in which he gave comments on Ecuador, after his appointment as arbitrator. In that interview Judge Brower described 'the most pressing issues in international arbitration' as follows:

> There is an issue of acceptance and the willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing. *Ecuador currently is expressly declining to comply with the orders of two ICSID tribunals with very stiff interim provisional measures*, but they just say they have to enforce their national law and the orders don't make any difference. But when *recalcitrant host countries* find out that *claimants are going to act like those who were expropriated in Libya*, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on.[67] [*Emphasis* added]

50. Despite its generality, this statement was deemed sufficient to uphold Judge Brower's disqualification from the tribunal because it conveyed 'negative connotations' and 'unfavourable views of Ecuador'.[68]

51. Similarly, in *Canfor Corporation v. United States*, an arbitrator was challenged by the respondent based on his remarks concerning a softwood lumber dispute between Canada and the United States:

> Aside from agricultural subsidies, there are other issues that we have with the US. Take the softwood lumber dispute, for example. This will be the fourth time we have been challenged. We have won every single challenge on softwood lumber, and yet they continue to challenge us with respect to those issues. Because they know the harassment is just as bad as the process.[69]

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[67] *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, ¶27.

[68] *Ibid.*, ¶¶49, 51.

[69] B. Legum, Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures, *Arbitration International*, 2005, Vol. 21, Issue 1, p. 243.

52. The United States argued that by equating its actions to 'harassment' the arbitrator showed its prejudiced attitude towards it.[70] The ICSID Secretary-General advised the arbitrator that the challenge would be upheld if the arbitrator did not recuse himself.[71]

53. In a recent development, the National Iranian Oil Company's challenge against Mr Charles Poncet was upheld by the ICC Court due to Mr Poncet's critical remarks in a television programme concerning swimwear, where he criticized supporters of Muslim tradition of women wearing veils in public.[72]

54. In all such instances, 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.

55. Therefore, the Russian Federation does not even have to prove the existence of a close relationship with the subject matter of the dispute insofar as other circumstances – including a negative perception of the Russian Federation – are sufficient to cast justifiable doubts as to the impartiality and/or independence of Professor McRae and Judge Wolfrum.

56. In the light of the above, Ukraine's attempt to build its objections on the *Wall* Order is misplaced and does not refute the above general position.

57. Although Judge Elaraby's challenge was ultimately dismissed in the *Wall* advisory proceedings, this does not in any way discredit the authoritative approach taken in Judge Buergenthal's Dissenting Opinion, which has gained wide support from both scholars and practitioners.[73] The precise wording of the ICJ Statute differs from the

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[70] *Ibid.*, p. 244.

[71] *Ibid.*, p. 245.

[72] The challenged arbitrator expressed the view that 'pashas of Islamic virtue... have taken over our swimming pools, where they claim to control the behaviour of our companions and daughters'. He also accused them of "forcing their unfortunate daughters or their female companions to cover themselves from head to toe in a grotesque outfit". Although Mr. Poncet considered the motion for disqualification meritless and the other party to the proceeding highlighted that "personal views of arbitrators about societal matters" were extraneous and irrelevant, the ICC Court decided to release him. *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.

[73] Y Shany, S. Horovitz, Judicial Independence in The Hague and Freetown: A Tale of Two Cities, *Leiden Journal of International Law*, 2008, Vol. 21, pp. 124-125; A. Seibert-Fohr, *International Judicial Ethics* in C. Romano, K. Alter et al. (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (OUP, 2013), pp. 769-770; C. Giorgetti, Between Legitimacy and Control: Challenges and Recusals of Arbitrators and Judges in

formulation of the applicable standard developed in *Chagos* as it refers to participation in a case.[74] The Court's requirement of complete overlap of Judge Elaraby's opinion with the subject matter of the case thus may be explained by this specific wording. However, there are no reasons for importing this limitation into the standard applicable in the present case.

58. On the whole, the absence of a *specific and direct* reference in the Declaration to the dispute at hand does not bar the Challenge. No such limitation is imposed by the standard applicable to the challenge of arbitrators. Instead, it is open for the Russian Federation to invoke any factors that affect the impartiality and independence of arbitrators.

ii. <u>In the circumstances of the present case, the voting of Professor McRae and Judge Wolfrum for the Declaration attests to the existence of justifiable doubts as to their impartiality and independence</u>

59. Turning to the particular facts giving rise to the Challenge, the Russian Federation submits that its justifiable doubts as to the impartiality and independence of Professor McRae and Judge Wolfrum are corroborated by overwhelming evidence.

60. ***First***, voting for the Declaration *per se* provides sound grounds for questioning the impartiality and independence of Professor McRae and Judge Wolfrum. As explained above, there is no need to establish that the arbitrators' pronouncement falls within the scope of the present proceeding, as Ukraine contends.[76] Instead, the arbitrators' generally negative attitude towards the Russian Federation and the risk of predisposition following from it could also meet the applicable standard, which is precisely the case here:

(a) The Declaration is drafted in a manifestly accusatory language and takes a clear stance on the Russian Federation's alleged responsibility for 'massive military

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International Courts and Tribunals, *The George Washington International Law Review*, 2016, Vol. 49, pp. 253-254; G. Born, INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International, 2021), §12.05 [A][4].

[74] Article 17(2) of the ICJ Statute provides that '[n]o member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity'.

[76] Ukraine's Letter of 19 January 2024, p. 6.

intervention in Ukraine' and 'gross violations of international law'.[77] At the same time, the Declaration completely ignores the actions of Ukraine, such as its repeated, massive attacks on the DPR and LPR since 2014, which caused tens of thousands of civilian casualties; or Ukraine's complete blockade of DPR and LPR, cutting the region off from water, food, electricity and medicine; or Ukraine's repeated violations of the Minsk Agreements (even though the Minsk Agreements are mentioned, but only in the context of Russia's alleged violations thereof). Incredibly, the Declaration does not even consider Russia's actions in light of the DPR and LPR's acts of self-determination; the only mention of self-determination is, again, in the context of Russia's alleged violations. Neither does the Declaration make any mention of the Russian Federation's security concerns related to NATO expansion. This blatantly obvious factual bias already leaves no room to doubt the extremely partial nature of the Declaration.

(b) Instead of expressing an opinion in a cautious or hypothetical style, the Declaration is written in absolute terms, which leave no space for alternative views. The Declaration is devoid of any analysis of factual evidence or legal arguments, and straight away asserts that there cannot be 'any legal justification' for Russia's actions.[78] Contrary to Ukraine's position,[79] this clearly differentiates the Declaration from a 'strictly legal analysis'. In addition, the IDI's appeal to other actors and learned societies who call 'to end the war in Ukraine'[80] also reveals that the Declaration is best qualified as a polemic piece of writing rather than a legal analysis. As aptly noted by one commentator, 'the decision by a group of academics to take a stance through a letter to a newspaper *denouncing an ongoing military operation without the benefit of an investigation*, whilst absolutely their right, *belongs more to the tradition of public intellectual stand*

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[77] *See* the Russian Federation's Letter of 22 December 2023, ¶¶22-23.

[78] Institute of International Law, Declaration on the Aggression in Ukraine, Yearbook of the Institute of International Law, 2022-2023, Vol. 83, p.20.

[79] Ukraine's Letter of 19 January 2024, p. 7.

[80] The Declaration concludes by stating that: '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 …' *See* Institute of International Law, Declaration on the Aggression in Ukraine, *Yearbook of the Institute of International Law*, 2022-2023, Vol. 83, p. 20.

taking than expertise'.[81] Thus, the Declaration may well be regarded as an expression of a public opinion of those who voted for it.

(c) The Declaration can in no way be characterised as a merely general comment. It employs very specific terms like 'aggression', makes references to particular legal acts and comes to very specific (yet unsupported) conclusions that Russia is allegedly responsible for an internationally wrongful act and 'exposes itself to appropriate measures in accordance with international law'.

(d) Professor McRae and Judge Wolfrum decided to endorse the Declaration long *after* the present Arbitration had been initiated, *i.e.* while being *fully aware* that the Declaration pronounces on a conflict between precisely the Parties to this dispute and that voting in its favour might put into question their impartiality and independence. In fact, they both admit that they gave thorough consideration to the potential implications of voting for the Declaration. This mere fact proves that Russia's concerns regarding their impartiality have merit. In particular, Professor McRae stressed that he '*gave considerable thought* to whether [he] should indicate support for the resolution'.[82] As demonstrated above, an arbitrator's duty to disclose is of paramount importance for ensuring impartiality and independence during the course of the proceedings as the parties' general ability to keep tracking conflicts on a regular basis is limited, especially when such facts are not notoriously known.[83] Thus, given that Professor McRae and Judge Wolfrum appreciated a potential conflict, their abstention from disclosing the voting is all the more alarming and incompatible with the provisions of the Terms of Appointment. This is further reinforced by the fact that the same concerns were voiced by other arbitrators and judges in the cases involving the Russian Federation who refrained from voting.[84] Furthermore, the notable absence of the

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[81] F. Megret, International Judges and Experts' Impartiality and the Problem of Past Declarations, *The Law and Practice of International Courts and Tribunals*, 2011, Vol. 10, Issue 1, p. 62. [*Emphasis* added]

[82] Statement of Professor McRae dated 24 October 2023. [*Emphasis* added]. Judge Wolfrum in his Statement explains 'why [he] felt that, *when [he] agreed to be named as one of the signatories of the declaration*, that such fact was not incompatible with [his] position as an arbitrator in the case'. *See* Statement of Judge Wolfrum dated 24 October 2023, p. 1. [*Emphasis* added]

[83] *See* above, ¶25(c).

[84] For example, Professor Lowe noted that he 'did not participate in the vote because [he] thought it might conflict with [his] position as a Ukraine-nominated arbitrator in one of the Ukraine v Russia arbitrations'. Similarly, Judge Paik 'considered it necessary to refrain from participating in the voting for the declaration of the

incumbent ICJ judges from the list of those who endorsed the Declaration also supports the above conclusion.[85]

(e) Even if Professor McRae's and Judge Wolfrum's initial consideration as to the voting's potential effect on their impartiality and independence did not give rise to the duty of disclosure (*quod non*), they were certainly obliged to disclose the voting results as soon as they learned that other IDI members – such as Professor Lowe and Judge Paik – characterised this as a serious conflict concern, *i.e.* at least upon the receipt of the IDI Yearbook.

61. ***Second***, these doubts cannot be dispelled based on the alleged attribution of the Declaration to the IDI rather than its individual members:[91]

(a) Professor McRae and Judge Wolfrum participate in the IDI's activities voluntarily and in their personal capacity.[92] It is thus hardly imaginable that Professor McRae and Judge Wolfrum, whose personal integrity is beyond doubt, do not align with those IDI' resolutions that they choose to support.

(b) The reservations appended to the Declaration demonstrate that the IDI members participated in its drafting or at least had an opportunity to express disagreement with its language or make suggestions to the text.[93] Since Professor McRae and Judge Wolfrum voted for the Declaration without reservations, it is inferred that they support each and every statement made therein, as well as its condemnatory tone towards the Russian Federation.

Institute due to the fact that [he] currently serve[s] as member and president of the arbitral tribunal dealing with the dispute between Ukraine and the Russian Federation in the Black Sea, Sea of Azov and Kerchi Strait'. *See* Institute of International Law, Declaration on the Aggression in Ukraine, *Yearbook of the Institute of International Law*, 2022-2023, Vol. 83, p. 23.

[85] Thus, ICJ Judges Tomka, Bennouna, Xue, Iwasawa, Nolte, and Charlesworth did not take part in the voting at all.

[91] Ukraine's Letter of 19 January 2024, p. 7. Professor McRae explained that it was his understanding that 'the resolution is a resolution of the Institute and not simply a resolution of certain members of the Institute', *see* Statement of Professor McRae dated 24 October 2023. Judge Wolfrum also found that the Declaration 'is not an individual declaration of each member of the Institut but the adherence to a declaration of the Institut', *see* Statement of Judge Wolfrum dated 24 October 2023, p. 1.

[92] IDI Statute, Article 1(1): 'The Institute of International Law is an exclusively learned society, *without any official nature*.' [*Emphasis* added]

[93] *See* reservations by Professor Bogdan, Judge Kateka, Mr. Torres Bernardez.

(c) Moreover, considerable number of IDI members who chose not to participate in the vote or abstained from voting additionally shows that Professor McRae and Judge Wolfrum would have had an opportunity to preserve neutrality.[94]

(d) In any case, individuals are susceptible to endorsement, consciously or unconsciously, of positions they have advocated for irrespective of the capacity in which such views were stated.[95] Such outcome would be also warranted by a wish, consciously or unconsciously, to avoid inconsistent behaviour. Any attempts to distinguish the voting for the Declaration from public statements or opinions individually expressed[96] is therefore of no avail. There are thus no grounds for attributing Professor McRae's and Judge Wolfrum's personal convictions to the IDI.

62. ***Third***, the Declaration is directly relevant to the present proceedings. Ukraine seems to have adopted a very narrow approach to construction of its 'relevance'.[97] However, there is nothing to suggest that relevance implies complete identity of subject matter. Instead, a broader conception that includes, *inter alia,* background circumstances is more suitable for avoiding bias-related risks.[98]

63. The Declaration is indeed of sufficient relevance to the present Arbitration, as evidenced by the following factors:

(a) The Declaration is devoted to the conflict between the Parties to this proceeding.

(b) This conflict was preceded by increasing tensions between the Parties, including various incidents, in the water area where the events considered in the present Arbitration took place.

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[94] *See* above, ¶25(d).

[95] Y Shany, S. Horovitz, Judicial Independence in The Hague and Freetown: A Tale of Two Cities, *Leiden Journal of International Law*, 2008, Vol. 21, p. 127: 'advocating a cause is likely to lead to self-persuasion and prejudice.'

[96] Ukraine's Letter of 19 January 2024, p. 7. *See* also Statement of Professor McRae dated 24 October 2023; Statement of Judge Wolfrum dated 24 October 2023, p. 1.

[97] Ukraine's Letter of 19 January 2024, p. 6: '... the challenge cannot succeed on the basis of the views expressed on legal issues outside *the scope of the case presented here.*' [*Emphasis* added]

[98] Y Shany, S. Horovitz, Judicial Independence in The Hague and Freetown: A Tale of Two Cities, *Leiden Journal of International Law*, 2008, Vol. 21, p. 126.

(c) The Declaration expressly refers to the 1994 Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons (the 'Budapest Memorandum'), which reaffirms the commitment of its parties to 'respect the independence and sovereignty and the existing borders of Ukraine'.[99] [redacted] The Award on Preliminary Objections also characterises the situation in Crimea as the *context* of the dispute.[101] Accordingly, considering that the Declaration unequivocally endorses the provisions of the Budapest Memorandum, there are reasonable grounds to believe that Professor McRae and Judge Wolfrum would be unable to distance themselves from cultivating a negative predisposition against the Russian Federation on this basis.

(d) [redacted]

(e) Since February 2022, Ukraine has repeatedly referred to the Russian Federation's 'ongoing aggression' against it and breaches of international law on multiple occasions, including as an excuse for late payment by Ukraine of the costs of this proceeding.[104] With this in mind, an arbitrator with a settled negative view

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[99] Budapest Memorandum, ¶1.
[redacted]

[101] Award on Preliminary Objections, ¶110.
[redacted]

[104] *See, e.g.* Ukraine's Letter of 9 November 2022, asking the Arbitral Tribunal to defer the payment of its share of the deposit to a later date, given that 'Russia launched an unprovoked *large-scale aggression* against Ukraine'. [*Emphasis* added]. Likewise, in its Letter of 1 December 2022 Ukraine objects to the extension for the submission of the Counter-Memorial arguing, *inter alia*, that 'the Russian Federation does not currently face challenges beyond those which it has created for itself as a consequence of its own *escalation of aggression*

regarding the Russian Federation as a State that allegedly does not honour its obligations at international law would be inclined to adopt a more sympathetic view with respect to Ukraine's assertions that the Russian Federation's alleged 'aggression' has a detrimental effect on Ukraine's ability to pursue its claims before the Arbitral Tribunal.

(f) [redacted]

64. In any event, the Declaration draws a negative picture of the Russian Federation as a State that does not abide by its obligations and engages in 'gross violations of international law'. The Declaration reflects no appropriate legal or factual premeditation to asserting this extremely adversarial conclusion. The mere fact that Professor McRae and Judge Wolfrum have unequivocally ascribed to the radically anti-Russian views set forth in the Declaration, without any sign of impartial consideration of the positions of all sides to the conflict, signals their readiness to follow the same inherently biased approach in the present case. This is further compounded by the fact of their failure to perform required disclosure. This failure is alarming in the light of the Declaration's

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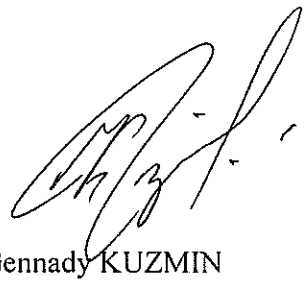
against Ukraine'. [*Emphasis* added]. The same accusations were articulated in Ukraine's Letter of 28 February 2023, asking the Arbitral Tribunal to reject the Russian Federation's request for extension because, in Ukraine's view, the circumstances invoked by Russia 'remain problems of its own making related to its *unlawful aggression* against Ukraine'. [*Emphasis* added]. In its Letter of 3 May 2023, Ukraine opposes the Russian Federation's request to suspend or terminate the proceedings, arguing that the 'timing difficulties with payments [were] caused by *Russia's aggression in blatant violation of international law'*. [*Emphasis* added]. In the same vein, Ukraine's Letter of 2 August 2023 explains that Ukraine's financial difficulties are 'caused by Russia's *aggression in blatant violation of international law'*. Ukraine also notes that 'Russia improperly seeks to benefit from timing difficulties Ukraine has experienced as a consequence of *Russia's own unlawful actions*' [*Emphasis* added]. Further, Ukraine's Letter of 24 August 2023 characterises the actions of the Russian Federation in the Black Sea, Sea of Azov, and Kerch Strait as 'wide-ranging conduct ... spanning nearly a decade *in breach of numerous obligations under the [UNCLOS]* across three separate bodies of water'. [*Emphasis* added].

[redacted]

relevance for the context of the present dispute and the perception of the Parties' submissions.

65. Therefore, the Russian Federation respectfully asks to uphold its Challenge and release Professor McRae and Judge Wolfrum from their positions as arbitrators in the present case.



Gennady KUZMIN
Agent of the Russian Federation

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