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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 rejoinder on Russia's challenge of Professor McRae and Judge Wolfrum. Russia's challenge is both untimely and substantively unfounded.

I. Russia Failed to Make Its Challenge In A Timely Manner

Russia maintains its position that it brought this challenge in a timely manner, arguing that the PCA Optional Rules for Arbitrating Disputes between Two States ("PCA Optional Rules") and other Annex VII arbitrations do not provide relevant standards by which to assess the timeliness of its challenge. As explained below, both premises are wrong: (a) consistent with well-established inter-State practice, Russia was required to bring its challenge within 30 days of learning of the relevant circumstances; and (b) Russia failed to do so, since by its own admission it learned of the voting record of the declaration of the Institut de Droit International (the "IDI Declaration") as early as 1 September 2023.

A. Russia Was Required to Bring Its Challenge Within 30 Days After Learning of the Relevant Circumstances

Russia argues that it is not bound by the timeliness requirement reflected in the PCA Optional Rules because those rules were not adopted by the Parties for this proceeding and the Rules of Procedure that were adopted do not provide for a specific timeframe for challenging arbitrators.[1] But, as has already been established,

[1] *See* Russia's Reply of 7 February 2024 ("Russia's Reply on Challenge"), ¶ 14.

the Rules of Procedure did not contemplate a challenge procedure at all.[2] The well-established practice of inter-State tribunals provides the relevant source of rules to fill in this gap.

Russia agrees that "the legal test for challenging arbitrators in inter-State arbitrations has been authoritatively settled by the *Chagos* tribunal,"[3] and that the *Chagos* tribunal correctly applied the standard applicable to such challenges in Article 10 of the PCA Optional Rules.[4] The *Chagos* tribunal applied the standard from the PCA Optional Rules *even though* the parties to the dispute had not adopted the PCA Optional Rules, because the standard embodied in Article 10 of those Rules had also "been adopted in a number of PCA-administered arbitrations," and as such, "can be considered to form part of the practice of inter-State arbitral tribunals."[5]

The same is true of the timeliness requirement embodied in Article 11 of the PCA Optional Rules. As Ukraine explained, that 30-day timeliness requirement has been adopted in *every* set of rules of Annex VII arbitrations that included a challenge procedure, and plainly forms part of the practice of inter-State arbitral tribunals.[6] Thus, although Russia argues the *Chagos* tribunal's decision to apply Article 10 of the Optional Rules should not lead to the same conclusion for Article 11, there is no principled basis for such a distinction, and Russia offers none.[7]

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[2] *See* Procedural Order No. 8.

[3] Russia's Reply on Challenge, ¶ 3.

[4] Russia's Reply on Challenge, ¶ 17.

[5] Russia's Reply on Challenge, ¶ 17 (citing *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"), ¶ 151).

[6] *See* Ukraine's Response to Russia's Challenge of 19 January 2024 ("Ukraine's Response to Russia's Challenge"), p. 2. Russia points out that the ICJ and ITLOS do not have timeliness provisions for challenges, Russia's Reply on Challenge, ¶ 20, but the more relevant practice here is other PCA-administered inter-State arbitrations, and the PCA Optional Rules and Annex VII practice unambiguously provide for a 30-day timeliness requirement. In the case of other international courts or tribunals, nothing suggests that these institutions would fail to exercise their inherent authority to dismiss a challenge that was untimely or otherwise procedurally deficient. *See, e.g.*, Andrew Mitchell & Trina Malone, *Abuse of Process in Inter-State Dispute Resolution, in* Max Planck Encyclopedias of International Law (December 2016), ¶ 18.

[7] *See* Russia's Reply on Challenge, ¶¶ 17-18. Further, practice outside the inter-State context requires that parties to make challenges even more expeditiously. *See, e.g.*, UNCITRAL Arbitration Rules (2021), Article 13(1) (requiring a party to "send notice of its challenge . . . within 15 days after the [circumstances . . . that give rise to justifiable doubts as to the arbitrator's impartiality or independence] became known to that party"); *see* Ukraine's Response to Russia's Challenge, n. 6.

Russia argues that it would violate the "consensual nature of arbitration" to impose any constraints on its challenge not included in the Rules of Procedure.[8] But it is Russia that has disrupted these proceedings with an arbitrator challenge through a procedure not contemplated in the Rules of Procedure, having stated that the right to challenge is "indisputable."[9] So too is the obligation to exercise any such right of challenge in good faith.[10]

The timeliness requirement is essential to the good-faith exercise of an arbitrator challenge, since it serves to protect against abuse of that right.[11] This protection is particularly important when proceedings are well advanced, since arbitrator challenges are particularly disruptive when filed late in proceedings.[12] The challenge procedure is not only itself disruptive to the proceedings,[13] but if successful, requires appointing new adjudicators and often incurring associated delays.[14] Accordingly, "spurious late challenges . . . have been identified amongst the arsenal of 'guerrilla' tactics deployed by parties to slow down, derail, or undermine arbitral proceedings."[15]

The Tribunal has the inherent authority to enforce a timeliness requirement to prevent such abuses. Consistent with the *Chagos* decision whose reasoning Russia accepts, the Court should apply the 30-day requirement embodied in the PCA

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[8] *See* Russia's Reply on Challenge, ¶¶ 15-16. Russia argues that the Tribunal should apply the waiver doctrine as elaborated by the ILC in the context of losing the right to invoke State responsibility, and as applied in international practice applying human rights law and the law governing the use of force. *See* Russia's Reply on Challenge, ¶¶ 23, 28. This discussion is irrelevant, since it does not concern whether Russia made its challenge in a timely manner after learning of the circumstances giving rise to the challenge. On this issue, the relevant practice of inter-State tribunals overwhelmingly supports the 30-day timeliness requirement.

[9] *See* Russia's Supplementary Statement of 22 December 2023, p. 1.

[10] The obligation of good faith is embodied in Article 300 of UNCLOS, which the Tribunal has authority to enforce as among the "other provisions of the Convention" that govern this dispute, including questions of procedure. *See* Rules of Procedure, Art 1.1, Art. 1.2. The Tribunal also retains inherent power to enforce a timeliness requirement as necessary to ensure the fair administration of justice. Ukraine's Response to Russia's Challenge, pp. 2-3.

[11] *See, e.g.*, Judith Levine, *Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes*, *in* Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals, p. 248-49 (Brill, 2015); Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration, ¶ 3-001 (Kluwer Law International, 2012).

[12] *See, e.g.*, Günther Horvath & Stephan Wilske, Guerrilla Tactics in International Arbitration, p. 9 (Kluwer Law International, 2013); Daele, *supra* note 11, ¶ 2-094.

[13] *See* Levine, *supra* note 11, p. 248.

[14] *See* Daele, *supra* note 11, ¶ 2-094.

[15] Levine, *supra* note 11, p. 247 (citing, *inter alia*, Horvath & Wilske, *supra* note 12, p. 9).

Optional Rules as most reflective of the "the practice of inter-State arbitral tribunals."[16]

B. Russia Inexcusably Delayed Its Challenge, Well Beyond the 30-Day Requirement

Russia's failure to bring its challenge in a timely manner here reflects its abuse of its asserted challenge right. [redacted]

[redacted]

Russia fails to address its inexcusable delay, and instead argues that Ukraine has the burden to prove when Russia acquired "actual" knowledge of Professor McRae's and Judge Wolfrum's votes.[21] That is now irrelevant, [redacted] Russia's challenge is thus untimely under any interpretation of the knowledge standard.

[16] *See Chagos*, Reasoned Decision on Challenge, ¶ 151.

[17] Russia's Reply on Challenge, ¶ 38.

[redacted]

[21] Russia's Reply on Challenge, ¶ 38. In support of this argument, Russia relies exclusively on authorities that do not constitute relevant inter-State practice and do not bind this Tribunal. *See* Russia's Reply on Challenge, ¶¶ 29-32.

In fact, however, Russia had knowledge earlier, and its delay was even longer. Russia's position ignores that even under an actual knowledge standard, knowledge can be proven with objective evidence of the circumstances, for example that the relevant information was made known or available to a party or its representative.[22] This is consistent with the default standard of proof in inter-State disputes: a preponderance of the evidence.[23] In this case, knowledge is established if Ukraine can show that Russia more likely than not knew about the circumstances giving rise to the challenge.

As Ukraine explained in its Response, Russia should have known and actually knew of the circumstances giving rise to its challenge well before 1 September 2023. Professor McRae and Judge Wolfrum disclosed their IDI membership at the start of these proceedings, and the IDI announced on 3 March 2022 that the vast majority of its voting members had voted in favor of the Declaration.[24] If Russia believed that votes in favor of the Declaration constituted justifiable grounds to doubt an adjudicator's independence and impartiality in any case to which Russia is a party, it should have raised the issue in this proceeding then. In any event, the IDI disclosed the voting record to all of its members, including Professor Bing Bing Jia, on 1 March 2022 − a fact that Russia does not dispute. Professor Jia became counsel to Russia in this dispute in November 2022,[25] and his knowledge as Russia's party representative was attributable to Russia at that time.[26] Finally, the circumstances giving rise to this challenge became publicly available in June 2023, when the IDI published the voting record for the Declaration.[27]

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[22] Ukraine's Response on Challenge, p. 4; *see, e.g.*, American Bar Association, Model Rules of Professional Conduct, Rule 1.0 (f) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances"); International Bar Association, Guidelines on Party Representation in International Arbitration, Comments to Guidelines 9–11 (a Party Representative's "actual knowledge" of the false nature of a submission "may be inferred from the circumstances.").

[23] *See* Aniruddha Rajpu, *Standard of Proof, in* Max Planck Encyclopedia of International Procedural Law, ¶¶ 10-20 (February 2021) (explaining that the general standard of proof for issues in inter-State disputes is a "preponderance of the evidence," asking which party's position is more probable than the other's).

[24] *See* Ukraine's Response to Russia's Challenge, p. 3.

[25] *See* Russia's Letter of 24 November 2022, p. 3.

[26] Russia argues that knowledge of counsel cannot be imputed to a party for the purposes of timeliness. But the authorities Russia cites only support the proposition that knowledge of a State's agent is attributable to the State, and none support the notion that knowledge of a State's counsel is *not* imputed to the State. *See* Russia's Reply on Challenge, ¶¶ 34, n. 48, 52. Particularly on this type of procedural issue, it would be unreasonable *not* to impute knowledge of counsel to the State, since doing so would functionally absolve counsel of their responsibility to serve as a party representative in the proceeding. Relatedly, it is well-established that knowledge of government officials is imputed across departments for the purpose of timeliness. *See* Levine, *supra* note 11, pp. 255-56.

[27] *See* Ukraine's Response to Russia's Challenge, p. 4.

Russia argues that any delay should be overlooked because it has caused no prejudice to the proceedings.[28] As discussed above, the 30-day timeliness requirement is intended to protect generally against abuse of the right and does not depend on any specific showing of prejudice. Further, the key disruption and prejudice Russia intends to provoke will occur if its belated challenge succeeds and multiple arbitrators are disqualified at an advanced stage of the proceedings.[29]

For the foregoing reasons, the Tribunal should reject Russia's challenge on timeliness grounds, independent from the challenge's lack of substantive merit discussed below.

II. The IDI Declaration Does Not Establish Justifiable Grounds for Doubting the Independence or Impartiality of Professor McRae and Judge Wolfrum

[redacted]

Here too, it remains clear that the votes of Professor McRae and Judge Wolfrum in favor the IDI Declaration do not raise justifiable doubts as to their independence and impartiality.[31] This is established by the applicable principle that governs the merits of Russia's challenge: opinions expressed by arbitrators on issues outside the scope of case in which they are sitting do not generally give rise to justifiable grounds for doubting their independence or impartiality. As Ukraine explained in its Response to Russia's challenge, this is the rule applicable to challenges in inter-State disputes, consistent with the conclusions of the *Chagos* tribunal and of the ICJ in its Order rejecting the challenge to Judge Elaraby in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("*Wall* Order")[32] and in its rejection of the challenge to Judge Morozov in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.[33] Russia asks the Tribunal to apply Judge Buergenthal's lone dissent to the *Wall* Order,

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[28] *See* Russia's Reply on Challenge, ¶¶ 39-44.

[29] Russia also recognizes in its own Reply that the challenge has already diverted the attention of the parties away from their submissions on the substance of the dispute. *See* Russia's Reply on Challenge, ¶ 40.

[redacted]

[31] *See* Ukraine's Response to Russia's Challenge, pp. 5-8.

[32] Order of 30 January 2004, I.C.J. Rep. 2004, p. 3; Ukraine's Response to Russia's Challenge, p. 5.

[33] Advisory Opinion, I.C.J. Reports 1971, p. 16; Ukraine's Response to Russia's Challenge, p. 5.

rather than the applicable ICJ and *Chagos* standard, which expressly declined to adopt Judge Buergenthal's broader "appearance of bias" standard.[34] Judge Buergenthal's dissent does not establish an authoritative standard or relevant authority in the face of the *Wall* Order and subsequent inter-State practice.[35] As explained by the *Chagos* tribunal, it would not be appropriate to apply an "appearance of bias" standard from investor-State arbitration to an Annex VII arbitration, as it risks importing a "wholly subjective standard" to the inter-State context.[36]

Russia's proposed standard would threaten the ability of the leading members of the international legal community to contribute to public discourse on international law. Russia submits that "there is no legal rule preventing an arbitrator's publicly expressed opinion from being qualified as circumstances putting into question his or her impartiality and/or independence, even when such opinion does not directly address the subject matter of the case."[37] As explained above, the legal rule set forth in the *Wall* Order and applicable to inter-State disputes *does* prevent this. International law and the practice of international dispute resolution undoubtedly benefit from the appointment of leading international jurists. Equally, the field of international law benefits from such leading jurists contributing to academic commentary and public discussion on legal issues. An overbroad standard for arbitrator challenges would render these two roles incompatible.[38] By contrast, the standard upheld in the *Wall* Order − which allows adjudicators to express their views on matters outside the scope of the dispute − appropriately balances the need for independence and impartiality in adjudication with the role of members of the international legal community in contributing to public discourse in the field.

Russia's Reply fails to address how, consistent with the *Wall* Order, the votes in favor of the Declaration create justifiable doubts as to Professor McRae's and Judge Wolfrum's impartiality and independence in adjudicating the subject matter of *this* dispute. As Ukraine explained, and Russia fails to refute, the Declaration reflects strictly legal analysis, applying defined international law standards to the specific

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[34] *See* Russia's Reply on Challenge, ¶ 57; *Wall* Order, p. 5; *Chagos*, Reasoned Decision on Challenge, ¶ 169.

[35] *See* Russia's Reply on Challenge, ¶ 57. None of the scholars cited by Russia indicate that the dissent has become "authoritative" in inter-State dispute settlement.

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

[37] Russia's Reply on Challenge, ¶ 46.

[38] Scholars have already raised the alarm that such problems are threatening arbitrators in investor-State arbitrations, where the standard for challenges is closer to Russia's broad standard. *See* Stephan Schill, *Arbitrator Independence and Academic Freedom*, Journal of World Investment & Trade, Volume 15, 2014, pp. 1, 3-8 (explaining that an overbroad standard for arbitrator challenges "would not only be harmful for investment arbitration, it would have detrimental effects on the scholarship on investment law").

events of Russia's full-scale invasion commencing in February 2022.[39] *This* dispute, by contrast, concerns entirely separate events that took place in 2018-2019 and asks the Tribunal to apply an entirely distinct body of law.[40] The Declaration is therefore outside the scope of this dispute. Further, while Russia repeats its attempt to draw "inferred" meaning about what Professor McRae and Judge Wolfrum intended by signing the Declaration and the fact that they did not express any reservations (even though that was the practice of the vast majority of IDI members), both arbitrators have expressly stated that their votes supported a declaration on behalf of the Institut, not a pronouncement of their personal views.[41]

Furthermore, Russia still has failed to show a connection between the substance of the Declaration and the subject-matter of this dispute. This is [redacted] Here too, each of the purported connections that Russia attempts to draw between the IDI Declaration and the present dispute fails:

- Russia notes that the IDI Declaration mentions the Budapest Memorandum,[43] but that instrument has never been at issue in this dispute.

- Russia notes that Ukraine mentioned Russia's full-scale invasion in explaining its delayed payment on the supplementary deposit, but the fact that Russia's invasion temporarily prevented Ukraine from being able to pay the fees in this case has no connection to the subject-matter of this dispute and the international law issues the Tribunal must decide on the merits.[44]

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[39] *See* Ukraine's Response to Russia's Challenge, pp. 6-7; 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 ("La Déclaration fait une analyse strictement fondée sur le droit international.").

[40] *See* Ukraine's Response to Russia's Challenge, pp. 6-7.

[41] *See* Russia's Reply on Challenge, ¶ 61(b); Statement of Professor Donald McRae, 24 October 2023; Statement of Judge Rüdiger Wolfrum, 24 October 2023.

[42] [redacted] The baseless accusations Russia asserts against Ukraine in ¶ 60(a) are irrelevant to the IDI Declaration and the issues addressed therein, and have no relevance to this dispute and the present challenge. For the avoidance of doubt, Ukraine rejects these allegations.

[43] *See* Russia's Reply on Challenge, ¶ 63(c).

[44] *See* Russia's Reply on Challenge, ¶ 63(e). Nor has Russia been prejudiced, because Ukraine has since completed the payment of its deposit, which the Tribunal required as a precondition to schedule a hearing. *See* Procedural Order No. 6.

- [redacted]
- [redacted]

In summary, Russia is unable to point to anything specific in the Declaration's legal analysis indicating that those who voted in favor of the Institut adopting it would be incapable of impartially assessing the unrelated legal issues in this dispute. The Declaration draws the legal conclusion on behalf of the Institut that the Russian military operations commenced in February 2022 are contrary to international law, but that legal analysis does not express "radically anti-Russian views" or generally negative picture of Russia in all matters of international law.[47] [redacted] Fundamentally, it does not raise any justifiable grounds for doubting the independence and impartiality of Professor McRae and Judge Wolfrum in this case.

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

Respectfully submitted,

Ms. Oksana Zolotaryova
Agent for Ukraine

[redacted]

[redacted]

[47] *See* Russia's Reply on Challenge, ¶¶ 63(e)-(f), 64.

[48] [redacted]