Mr. Martin Doe

Deputy Secretary-General
Permanent Court of Arbitration

Moscow, 22 February 2024

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

Dear Mr. Doe,

1. In Response to your Letter AG 456366 of 20 February 2024 inviting the Russian Federation to submit supplementary comments on the assertion made by Ukraine in its Rejoinder on the challenges dated 19 February 2024, the Russian Federation hereby communicates its observations on the matter.

2. Ukraine asserts, importantly - for the first time since the commencement of the challenge procedure, that the Russian Federation 'acquired *actual knowledge* of the voting record as early as 1 September 2023'[1] [redacted]

3. The Russian Federation respectfully submits that the Arbitral Tribunal should disregard the information reflected in the [redacted]. ***First***, reliance on that [redacted] purports to cause the Arbitral Tribunal to draw unwarranted inferences from unconfirmed claims regarding confidential proceedings [redacted] and thus this piece of evidence should be held inadmissible. ***Second***, that information is

[1] Ukraine's Letter dated 19 February 2024, p. 4.

[redacted]

in any case not instructive for the purposes of the present Arbitration and is therefore immaterial.

4. Under the Rules of Procedure of the current arbitration, the Arbitral Tribunal 'shall determine the admissibility, relevance, materiality and weight of the evidence adduced'.[3]

5. It is trite that legality as well as principles of good faith and procedural fairness play an important role in determining the admissibility of evidence. Most national systems exclude illegally obtained evidence, as using 'such evidence would be contrary to a general principle of law'.[4] This is consonant with the general principle – which equally applies to the exercise of procedural rights – that 'no right can arise from a wrong'.[5]

6. This approach is especially warranted where admitting such evidence would result in procedural injustice.[6] Arbitral tribunals have repeatedly excluded illegally obtained evidence. For instance, the *Methanex v. United States* tribunal, faced with Methanex's attempt to produce unlawfully obtained evidence, highlighted that:

> … the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of 'equal treatment' and procedural fairness …[7]

7. Accordingly, the tribunal declared inadmissible and refused to take into account evidence that would be irreconcilable with these basic principles.[8]

8. The same logic underlies the decision of the tribunal in *EDF v. Romania*, which stressed that it 'would be contrary to the principles of good faith and fair dealing required in

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[3] Rules of Procedure, Article 16(2).

[4] R. Wolfrum, M. Möldner, *International Courts and Tribunals, Evidence*, Max Planck Encyclopedia of Public International Law, 2013.

[5] C. Amerasinghe, EVIDENCE IN INTERNATIONAL LITIGATION (Brill | Nijhoff, 2005), p. 179.

[6] S. Wilske, *The Search for Truth v. The Preservation of the Integrity of International Investment Arbitration Proceedings: The Issue of Admissibility of Illegally Obtained Evidence under the Revised ICSID Arbitration Rules* in Human Flourishing: The End of Law (Brill | Nijhoff, 2023), p. 932: '…the principles of good faith and procedural fairness are frequently referred to by tribunals, and a violation of these principles may result in the inadmissibility of the respective evidence'.

[7] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, Part II, Chapter I, ¶54.

[8] *Ibid.*, ¶53.

international arbitration' to admit a recording created in plain disregard of an individual's right to privacy.[9]

9. [redacted]

10. [redacted]

11. [redacted]

12. [redacted]

13. Notably, Ukraine ignores the fact that international proceedings involving the Russian Federation are conducted on its behalf by different governmental bodies. While [redacted] are coordinated by the Prosecutor General's Office, all inter-State disputes, including the present Arbitration, fall within

[9] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 3, 29 August 2008, ¶38.

[redacted]

the competence of the Ministry of Foreign Affairs.[11] These are two separate State bodies working independently on the cases to which Russia is a party; and there are no legal or factual grounds for extrapolating to this Challenge the position formulated by another agency – the Prosecutor General's Office – in different proceedings based on different factual circumstances. Tellingly, Ukraine tends to adopt the same approach, whereby all investment arbitrations are curated by its Ministry of Justice, while inter-State cases are managed by the Ministry of Foreign Affairs.[12]

14. It is trite that in inter-State disputes, States are represented by agents.[13] The importance of the agent's role in international adjudication was aptly described by a distinguished commentator in the following terms:

> … *the agent is the intermediary between the Court and the appointing government*. This role is, therefore, essentially of a political and diplomatic character. As has been written, both in matters of procedure and in matters of substance, only declarations made by the agent engage the responsibility of the Government that he or she is representing. As far as the Court is concerned, *the agent has exclusive control over the relations between the Government and the Court in respect of that particular case*.
>
> … *the agent represents the appointing government vis-à-vis the Court* … The appointment or non-appointment of an agent concerns the relations of a party towards the Court *in respect of that particular case*, and has nothing directly to do with the general relations of that government with the Court or between the two parties themselves.[14] [*Emphasis* added]

15. Accordingly, only agents specifically appointed to the particular case have the exclusive right to articulate the views of the State and exercise control over the proceeding. No other State organs enjoy the same function.

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[11] In line with this, in its letter of 17 February 2023, the Russian Federation informed the Secretariat that it appointed as Agents of the Russian Federation in this Arbitration Mr Gennady Kuzmin, Ambassador-at-large, Ministry of Foreign Affairs, and H. E. Mr Alexander Shulgin, Former Ambassador of the Russian Federation in the Kingdom of the Netherlands.

[12] *See Olympic Entertainment Group AS v Ukraine*, PCA Case No. 2019-18, Award of 15 April 2021, available at: https://pcacases.com/web/sendAttach/27408 (with Ukraine represented by the Ministry of Justice). Cf. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening), Judgment of 2 February 2024, available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-00-en.pdf (with Ukraine represented by its Ministry of Foreign Affairs).

[13] This is also true for the present Arbitration, *see* Rules of Procedure, Article 4(1): 'Each Party shall be represented by an agent and, if it so decides, by one or more co-agents.'

[14] S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (4th ed., Brill | Nijhoff, 2006), p. 1124. *See* also Berman, *Article 42* in A. Zimmermann, K. Oellers-Frahm et al. (eds.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (2nd ed., OUP, 2012), p. 1082, ¶11: 'the agent is the formal representative of the State for all purposes connected with the litigation …'

16. This is additionally reinforced by the fact that only notifications communicated to the agent's address amount to have been duly delivered to the State. This basic rule is enshrined in the present Arbitration's Rules of Procedure, as well as in the International Court of Justice's Rules of Court:

> Communications or notifications *addressed to the Agents or advocates of the parties* shall be deemed to have been addressed to the parties.[15]

17. As the ICJ stressed in *Barcelona Traction,*

> …there is a general rule that, in relation to an understanding said to exist between States parties to a litigation, and to affect their rights in that litigation, it can only take account of the acts or attitudes of the governments or of the authorized agents of governments.[16]

18. This view is supported by legal doctrine:

> 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 […].[17]

19. With regard to the present Arbitration, the Prosecutor General's Office is not the "authorized agent" of the Russian Government. Nor can it be considered to generally represent the Russian Government (as can be said for the Head of State, Head of Government, or Minister of Foreign Affairs). It is thus hardly arguable that purported knowledge by the Prosecutor General's Office in other wholly unrelated proceedings is of any relevance in the present Arbitration.

20. In addition, as explained earlier, Ukraine's position that the right to challenge has been waived requires proof of actual knowledge of the circumstances giving rise to the

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[15] *see* Rules of Procedure, Article 4(1); ICJ Rules of Court, Rule 37-2(1). *See* also F. Berman, *Article 42* in A. Zimmermann, K. Oellers-Frahm et al. (eds.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (2nd ed., OUP, 2012), p. 1080, para. 7.

[16] *Barcelona Traction,* Preliminary Objections, Judgment of 24 July 1964, ICJ Rep. 1964, p. 24.

[17] *See* F. Berman, *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, para. 11.

Challenge.[18] Given that the Prosecutor General's Office has no authority to represent the Russian Federation in this proceeding, its alleged knowledge on 1 September 2023 of the voting results for the the IDI declaration, on which the Challenge in this Arbitration is based, cannot be relied upon to the establish the knowledge of Russia's authorized representatives in the present case.

21. Further, it is not just receipt of the voting record of the IDI that is relevant, but, crucially, also the knowledge that the Declaration was supported by *two of the members of the Arbitral Tribunal in this Arbitration.* This is clearly not the knowledge that the Prosecutor General's Office could have, not being in charge of this Arbitration.

22. Ukraine's argument that the Russian Federation 'acquired *actual knowledge* of the voting record as early as 1 September 2023' is therefore simply wrong. Ukraine seems to base its position on the logic embodied in the Articles on the Responsibility of States for Internationally Wrongful Acts that attribute the conduct of any State organ to the State itself.[19] However, these rules are confined to the realm of State responsibility and do not apply to issues concerning State representation in international adjudication: 'The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes…'.[20] Otherwise, if Ukraine's interpretation were accepted, a matter communicated privately, for example, to a President of a State, would by default be imputed to all agents and counsel representing a State in any legal proceedings. Ukraine thus cannot infer Russia's knowledge of the circumstances giving rise to the Challenge otherwise than by taking into account the knowledge of the representatives in this Arbitration.

23. This interpretation is also confirmed by the authorities on which Ukraine itself relies. Thus, in its response to the Challenge, Ukraine referred to the decision on the challenge of arbitrators Assadollah Noori, Koorosh Ameli, and Mohsen Aghahosseini of the Iran-

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[18] *See* the Russian Federation's Letter of 22 December 2023, p. 2; the Russian Federation's Letter of 7 February 2023, ¶¶28-32.

[19] *See* International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 4(1): 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.'

[20] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 39, ¶5.

US Claims Tribunal in support of its contention that 'a party's knowledge of the relevant circumstances would be demonstrated with ordinary evidence, including evidence that the relevant information was made known or available to a party's representative'. But in that case, the information in question was disclosed specifically to the US agent.[22]

24. Here, likewise, making certain information available to the Russian Prosecutor General's Office (*quod non*) does not automatically entail actual knowledge of this information on behalf of the Russian Federation's agents in this Arbitration.

25. For all these reasons, in addition to the [redacted] being inadmissible as evidence, it is not material to the Challenge and should be thus disregarded by the Arbitral Tribunal.

26. Finally, as the Russian Federation argued in its earlier submissions, the principles of impartiality of arbitrators and fair administration of justice are of paramount importance and may not be overshadowed by Ukraine's ill-founded and unsupported proposition that the Challenge in this Arbitration could be asserted in September 2023.[23]

27. In the light of the above, the Russian Federation respectfully asks the Arbitral Tribunal to dismiss Ukraine's argument on the untimeliness of the Challenge.

Yours sincerely,

Gennady KUZMIN
Agent of the Russian Federation

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[22] L. Caplan, *Arbitrator Challenges at the Iran-US 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.'

[23] *See* the Russian Federation's Letter of 22 December 2023, p. 4; the Russian Federation's Letter of 7 February 2023, ¶43.