DISSENTING OPINION OF SIR CHRISTOPHER GREENWOOD

1. I agree with the decision of the majority as regards the substantive standard to be applied to the challenges in the present case.[1] I regret, however, that I cannot agree with the majority's application of this standard to the facts of the case. In my opinion the challenges brought by the Russian Federation to Professor McRae and Judge Wolfrum should be dismissed.

2. The requirement of impartiality applicable to all arbitrators in inter-State cases is an essential feature of the due process to which any and every State engaged in arbitration proceedings is entitled. Where an arbitrator is challenged for an alleged breach of that requirement, the test is that laid down in the *Chagos Islands* case.[2] It is not necessary for the challenger to show actual bias but nor is it sufficient for the challenger to establish that it perceives the arbitrator as lacking the required impartiality. As the majority decision in the present case makes clear, the test is an objective one. As the *Chagos* decision puts it:

> [A] party challenging an arbitrator must demonstrate and prove that, applying the standards applicable to inter-State cases, there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case.[3]

3. It is important not to lose sight of the last words of that sentence; the question is whether there are "justifiable grounds for doubting the independence and impartiality of that arbitrator *in a particular case*".[4] Impartiality is not an abstract issue. The duty of the arbitrator is to be impartial in the particular case they are called upon to decide. It is therefore important to be clear exactly what it is that the Tribunal in the present case will be called upon to decide.

4. The present case is about the events in the Kerch Straits on 24-25 November 2018 and the detention of Ukrainian vessels and naval personnel which followed. In its Award on the Preliminary Objections of the Russian Federation (the "Preliminary Objections Award"), the Tribunal upheld the objection of the Russian Federation that it had no jurisdiction over "disputes concerning military activities". Applying that decision to the facts of the case, the Tribunal identified three phases: an initial confrontation between military forces of the two States, the

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[1] Decision, paras. 87-94.

[2] *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), PCA Case No. 2011-03, Reasoned Decision on Challenge, 30 November 2011.

[3] *Ibid.*, para. 166.

[4] There is much discussion in the literature of the possible difference between "independence" and "impartiality". In my view, the former concerns a relationship between the arbitrator and a party, while the latter refers to the requirement that the arbitrator has no actual or reasonably perceived bias towards a party. The Russian Federation's challenge seems to me to relate only to the latter.

subsequent pursuit and arrest of the vessels and their crews and the detention of the vessels and their crews. It continued:

> . . . the Arbitral Tribunal concludes that the actions of the Parties in the first phase were military activities over which the Arbitral Tribunal has no jurisdiction. It also concludes that the actions of the Parties in the third phase were not military activities and the Arbitral Tribunal therefore has jurisdiction over the events in this phase. However, with regard to the second phase, the Arbitral Tribunal needs further elucidation by the Parties before reaching a definitive conclusion on when military activities came to an end. It thus postpones the decision with regard to the second phase to the merits.[5]

5. It follows that the Tribunal will have to decide, first, the point at which the actions of the Parties ceased to be military activities and thus outside the Tribunal's jurisdiction, and, secondly, whether the actions of the Russian Federation after that point constituted violations of UNCLOS or of some other rule of international law over which the Tribunal might have jurisdiction.[6] The Tribunal will also have to decide whether the Russian Federation's actions in not immediately releasing the vessels and their crews violated the provisional measures indicated by the International Tribunal for the Law of the Sea ("ITLOS") on 25 May 2019.

6. The question which must now be decided, therefore, is whether the fact that Professor McRae and Judge Wolfrum voted for the Declaration adopted by the Institut de droit international (the "IDI Declaration") on 1 March 2022 gives rise to justifiable doubts about their impartiality in deciding the issues summarised in the preceding paragraph. In answering that question, two features of the IDI Declaration have to be kept in mind.

7. First, the IDI Declaration was concerned exclusively with the Russian military operations in Ukraine which began on 24 February 2022. Whatever view one takes of those operations, they cannot retrospectively affect the legality or illegality of the events that are the subject of the present case, events which took place more than three years earlier.

8. Secondly, the IDI Declaration was concerned with rules of international law which are no longer at issue – if, indeed, they ever were – in the present case. The Declaration[7] states that the action of the Russian Federation beginning in February 2022 "is contrary to the most fundamental principles of international law" but it goes on to make clear that "fundamental principles" to which

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[5] Award on the Preliminary Objections of the Russian Federation, paras. 125 and 208(a) to (c).

[6] The Tribunal also held that it had jurisdiction to determine whether the Russian Federation was in breach of the Provisional Measures Order issued by ITLOS (para. 208(f)) and that the objections that UNCLOS does not provide for an applicable immunity and that Article 279 of UNCLOS provides no basis for jurisdiction do not possess an exclusively preliminary character (para. 208(d) and (e) and 208(g) and (h)).

[7] The full text of the Declaration is set out at para 29 of the Decision. I did not vote on this Declaration and take no position on it beyond what is stated in this Opinion.

it is referring are (a) "the prohibition of the use of armed force in international relations, and the territorial integrity of States", (b) "the equal rights of peoples and their right to self-determination" and (c) "non-intervention in the affairs of other States". None of these three "fundamental principles" has any bearing whatever on the issues which the Tribunal, following the preliminary Objections Award, will have to decide in the next phase of the present case. Nor do the principles of international humanitarian law, self-defence or the Russian Federation's various undertakings to, and agreements with, Ukraine to which the IDI Declaration goes on to refer.

9. The majority holds that it is "unable to agree that the issues faced can be confined in this rather narrow fashion, in circumstances where the sovereign weight of the armed and police forces have been aligned against the military vessels of a foreign State with the consequent alleged deprivation of the rights of military personnel of a foreign State".[8] I regret that I cannot agree with this analysis. It completely ignores the fact that the IDI Declaration is concerned with events significantly later in time and different in degree from those with which the Tribunal is concerned in the present case. Moreover, the effect of the Preliminary Objections Award is that the Tribunal is not, and cannot be, concerned with military activities. Yet the IDI Declaration is exclusively about military activities and makes no mention whatever of police forces or the alleged deprivation of rights of military personnel.

10. The IDI Declaration addressed different events, occurring later in time, and of a fundamentally different character from those with which the Tribunal is concerned. Nor do the rules and principles of international law to which the Declaration refers have any bearing on the decisions which the Tribunal will have to take in the present case. The action of Professor McRae and Judge Wolfrum in voting for the Declaration thus involved no prejudgment of the issues which will have to be decided in the next phase of the present case.

11. That leaves the question whether, even if there was no prejudgment of the issues, voting for the IDI Declaration nevertheless manifested such a hostility to the Russian Federation that a reasonable informed third person would consider there were justifiable doubts regarding the impartiality of Professor McRae and Judge Wolfrum. In advancing that argument, the Russian Federation invokes the decisions on disqualification in *Perenco v. Ecuador* [9] and *Canfor v. United States*.[10] However, neither case is in point. In *Perenco*, the comments made by the challenged

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8 Decision, para 102.

9 *Perenco Ecuador Limited v. The Republic of Ecuador and Petroecuador,* Decision on Challenge to Arbitrator, 8 December 2009.

10 *Canfor Corporation v. United States of America*, discussed in B. Legum "Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures", *Arbitration International,* vol. 21(2), p. 241.

arbitrator in an interview accused Ecuador, the respondent in the relevant arbitration, of having expressly declined to comply with provisional measures orders, including one given in the case in which that arbitrator was sitting. The appointing authority also considered that a reasonable reader of the interview would have concluded that the arbitrator's reference to "recalcitrant" States was intended to include Ecuador. He therefore upheld the challenge to the arbitrator.

12. In *Canfor*, the case concerned a claim relating to softwood lumber measures adopted by Canada. One member of the tribunal disclosed that he had stated in a speech that "[w]e 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." In that case, the arbitrator eventually resigned and there was therefore no decision on the challenge.

13. In both cases there was a degree of prejudgment of the issues that the tribunals would have to decide. In addition, the comments made expressly concerned the approach of a party to litigation. That is not the case here.

14. It is instructive to compare those cases with the approach taken by the International Court of Justice in the advisory proceedings concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[11] In that case, Israel challenged Judge Elaraby on the basis, *inter alia*, of an interview which he had given before the case was brought in which he had accused Israel of violating international law in respect of the occupied territories. The Russian Federation refers to the Opinion of Judge Buergenthal in which he concluded that the interview gave rise to reasonable doubts that Judge Elaraby would be able to be impartial. Yet Judge Buergenthal was a lone dissenting voice; the other thirteen judges ruled against the challenge. It is also noticeable that the comments which Judge Elaraby had made concerned the background to the issues on which the Court was asked to give an advisory opinion, whereas the IDI Declaration concerned issues which arose only after the events on which this Tribunal is required to decide.

15. There is one further consideration to which I feel it necessary to draw attention. The Russian Federation contends that, while the IDI Declaration was adopted on 1 March 2022, the Russian Federation did not become aware of the fact that Professor McRae and Judge Wolfrum had voted in favour of it until a date – which it does not disclose – in the summer of 2023. However, even if the Russian Federation was not aware of the voting until 1 September 2023 (see paragraph 99 of the Decision), it was aware of the Declaration much earlier. As the *Annuaire* of the IDI states:

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[11] *ICJ Reports, 2004*, p. 3.

> The Declaration was widely publicized. It was forwarded to the Secretary-General of the United Nations, the President of the General Assembly, *the Permanent Missions to the United Nations*, as well as other institutions and the media (emphasis added).[12]

16. The Russian Federation was, therefore, aware of the Declaration soon after it was adopted. At that time, the Russian Federation was involved in two inter-State cases with Ukraine, as well as three investor-State cases concerning investments allegedly made by Ukrainian investors in Crimea. At least eight of the arbitrators involved in these cases are members of the IDI.

17. In its observations to the present Tribunal, the Russian Federation says of the IDI Declaration that "such harsh pronouncements … are unacceptable for arbitrators in a dispute to which the Russian Federation is a party,"[13] refers to its "clearly accusatory language"[14] against what it describes as a "background of rising tension between Ukraine and the Russian Federation"[15] and asserts that "[t]here is a real appreciable risk that the negative picture framed by the Declaration would influence Professor McRae's and Professor Wolfrum's decision-making in relation to the Russian Federation's conduct complained of by Ukraine in the present arbitration, as well as with respect to further procedural steps in this case."[16]

18. What is surprising is that, having been made aware of the Declaration in the Spring of 2022 and feeling as it did, the Russian Federation made no inquiry of those arbitrators who are members or associates of the Institut in this, or apparently in the other cases to which the Russian Federation and Ukraine are parties, as to how they voted on this Declaration. The majority has found that those who voted in favour of the Declaration had a duty to disclose that fact. We know, however, from their statements in these proceedings that Professor McRae and Judge Wolfrum considered that their votes had no bearing on the present case. The Russian Federation has made clear that it takes a very different view. That being the case, the Russian Federation should surely have inquired of arbitrators in the cases to which it and Ukraine (or Ukrainian entities) are parties whether they had voted in favour of the Declaration. It did not do so in this case or, it would appear, in the other cases to which the Russian Federation and Ukraine or Ukrainian entities are

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[12] *Annuaire*, p. 17.

[13] Russian Federation letter, 17 October 2023.

[14] Russian Federation letter, 24 November 2023, para. 34.

[15] *Ibid.*, para. 37.

[16] *Ibid.*, para. 40.

parties. Nor, it would seem, did it inquire of Professor Bing Bing Jia how he had voted before retaining him as counsel in November 2022.[17]

19. In my opinion, its failure to do so makes the present request untimely. More importantly, it also raises considerable doubts about whether the Russian Federation originally considered the Declaration to have the relevance to the proceedings which it now asserts.

20. For all of these reasons I regret that I cannot agree with the views of my colleagues. I would dismiss the Russian Federation's application.

[17] *See* the letter from Professor Jia regarding the termination of his engagement, dated 3 February 2024, attached to the Russian Federation's submission of 7 February 2024.

Done at the Peace Palace, The Hague, the Netherlands, this 6th day of March 2024,

Sir Christopher Greenwood KC