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

Moscow, «24» November 2023

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

Dear Mr. Doe,

1. On 17 October 2023, the Russian Federation communicated to the Registry and the Arbitral Tribunal its concerns regarding the impartiality and independence of two members of the Arbitral Tribunal: Professor Donald McRae, President of the Tribunal, and Professor Rüdiger Wolfrum. By the same letter, the Russian Federation requested that this situation be considered by the Arbitral Tribunal and the Registry.

2. On 2 November 2023, Professors Donald McRae and Rüdiger Wolfrum provided comments on the circumstances outlined in Russia's letter. Both Members of the Arbitral Tribunal consider that the issues raised by the Russian Federation do not put their impartiality and independence into question. The Russian Federation respectfully disagrees.

3. Given that the concerns stated in the letter of 17 October 2023 have not been alleviated, the Russian Federation hereby asserts its challenge to Professors McRae and Wolfrum and respectfully requests their release as arbitrators in this case for the reasons set out below.

A. THE LEGAL TEST FOR ARBITRATOR CHALLENGES

4. It is trite that arbitrators must remain impartial and independent for the entire duration of the dispute resolution process.

5. Specifically, Article 2(1) of Annex VII to UNCLOS provides that the list of prospective arbitrators must include persons 'enjoying the highest reputation for fairness, competence and integrity'. As confirmed by the arbitral tribunal in the *Chagos* case, these criteria reflect general principles of international law, apply to all

arbitrators sitting in Annex VII cases and require them to adhere to these criteria throughout the proceedings.[1]

6. The Terms of Appointment in the present Arbitration also require that the members of the present Arbitral Tribunal 'shall remain impartial and independent of the Parties' and shall also 'promptly notify the Parties and the other arbitrators of any circumstances likely to give rise to justifiable doubts as to their impartiality or independence that may subsequently come to their attention during this arbitration.'[2]

7. The *Chagos* tribunal has established the threshold for arbitrator challenges as follows:

> ...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] [Emphasis added]

8. This well-established standard has been referred to on numerous occasions in other arbitrations under Annex VII to UNCLOS.[4]

9. Accordingly, it is sufficient for a party asserting a challenge to demonstrate that there are grounds to justifiably doubt the challenged arbitrator's impartiality and/or independence.

10. Impartiality and independence might be impinged, *inter alia*, where an arbitrator holds views that may influence the outcome of their decision-making process.[5] This could happen if these views preclude the arbitrator from approaching

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[1] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Reasoned Decision on Challenge, 30 November 2011, ¶¶135, 138.

[2] Terms of Appointment, ¶4.7.

[3] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Reasoned Decision on Challenge, 30 November 2011, ¶166.

[4] *See ARA Libertad Arbitration (Argentina v. Ghana)*, Article 6(1) of the Rules of Procedure; *South China Sea Arbitration*, Article 7(1) of the Rules of Procedure; *MOX Plant Case (Ireland v. United Kingdom)*, Article 6(1) of the Rules of Procedure. See also *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Reasoned Decision on Challenge, 30 November 2011, ¶¶140-151.

[5] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, 4, I.C.J. Reports 2004, Dissenting Opinion of Judge Buergenthal, p. 9, ¶10; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Section B, Oral proceedings concerning the preliminary objection, 1952, p. 427; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, CR 96/5, 29 April 1996, p. 6; *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and*

the matter with an open mind and without predispositions. Such cases are not limited to opinions regarding specific cases [6] and also cover views that may not directly touch upon the subject matter of the case but still attest to the appearance of the arbitrator's bias against one of the parties.[7]

11. Whether an arbitrator's opinion expressed elsewhere raises justifiable doubts as to his or her impartiality and/or independence, or creates an appearance of bias, should be examined on a case-to-case basis as the circumstances of each case differ.[8]

12. As aptly noted by Judge Buergenthal during the *Wall* advisory proceedings before the ICJ, when he discussed the effect of Judge Elaraby's statements made extra-judicially shortly before his appointment on his ability to consider the case without bias:

> ...when it comes to the validity and credibility of these arguments, what Judge Elaraby has to say in the part of the interview . . . creates an appearance of bias that in my opinion requires the Court to preclude Judge Elaraby's participation in these proceedings.[9] [Emphasis added]

13. The practice on self-recusals in the Court's case law shows that the concerns emphasised by Judge Buergenthal are shared by other judges. In all of the below cases, the judges considered it inappropriate to sit on a case where their judgment could be affected by their settled views on matters pertaining to the relations between the parties to the dispute.

14. Notably, in the *Anglo-Iranian Oil Co.* case, the Court agreed with Judge Rau that he should recuse himself. This was because Judge Rau previously sat on the Security Council when the latter dealt with the United Kingdom's complaint against

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Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, CR 2002/40, 4 November 2002, p. 8.

[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, 4, I.C.J. Reports 2004, Dissenting Opinion of Judge Buergenthal, p. 9, ¶10.

[7] J. Brubaker, The Judge Who Knew Too Much: Issue Conflicts in International Adjudication, *Berkeley Journal of International Law*, 2008, Vol. 26, Issue 1, p. 111.

[8] J. Brubaker, The Judge Who Knew Too Much: Issue Conflicts in International Adjudication, *Berkeley Journal of International Law*, 2008, Vol. 26, Issue 1, pp. 134-135; A. Seibert-Fohr, *International Judicial Ethics* in C. Romano *et al.* (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (OUP, 2013), p. 771.

[9] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, 4, I.C.J. Reports 2004, Dissenting Opinion of Judge Buergenthal, pp. 9-10, ¶13.

Iran for failure to comply with the interim measures previously indicated by the Court.[10] Although the proceedings before the Court did not concern the specific issue considered by the Security Council, Judge Rau still acknowledged that his impartiality might have been compromised.

15. In a similar vein, Judges Fleischhauer and Higgins decided to refrain from participating in the *Bosnian Genocide* case due to their earlier engagement with matters that may be material to their decision in the present case in their former capacities as Legal Counsel of the United Nations and Member of the United Nations Human Rights Committee, respectively.[11]

16. Furthermore, Judge Weeramantry chose to recuse himself in the *Phosphate Lands in Nauru* case because he had previously acted as the Chair of a Commission of Enquiry that reported on the matters that could be pertinent in the case.[12]

17. In all those instances the judges precisely considered that there may be justifiable doubts as to their impartiality and independence, were they to sit as adjudicators in the cases.

18. An arbitrator's public expression of a negative view concerning a particular State and/or its nationals outside the context of the case can also put his or her impartiality and independence in doubt.[13] For example, in a recent decision the Swiss Federal Tribunal overturned an arbitral award and stated, in particular, as follows:

> [A]n arbitrator can perfectly well defend his convictions on the various social networks. <u>This does not mean, however, that the arbitrator can express on the Internet everything he thinks, in extremely strong terms, without risking</u>

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[10] *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Section B, Oral proceedings concerning the preliminary objection, 1952, p. 427.

[11] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, CR 96/5, 29 April 1996, p. 6. *See* also *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, CR 2002/40, 4 November 2002, p. 8.

[12] I. Scobbie, Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections Judgment, *The International and Comparative Law Quarterly*, 1993, Vol. 42, Issue 3, p. 711, fn. 7.

[13] *Catalina (Owners) v Norma (Owners)* [1938] 61 Llyod's Law Reports 360 *et seq.*

arousing certain fears as to his impartiality, even if he does not act under his arbitrator's 'hat'.[14] [Emphasis added]

19. The above suggests that a judge's or arbitrator's opinion expressed outside the proceedings may put into question their impartiality and/or independence. Even when such opinion does not directly focus on the subject-matter of a particular dispute, it may signify the existence of circumstances giving rise to justifiable doubts as to the judge's or arbitrator's ability to approach the case with an open mind and act impartially and independently.

20. Where, as the case may be, the circumstances giving grounds for a well-informed and reasonable third party's justifiable doubts as to the arbitrator's impartiality and/or independence arise after that arbitrator's appointment, the arbitrator is expected and indeed required to disclose those circumstances to the parties and other tribunal members in due course. Failure to do so may further aggravate the justifiable doubts arisen.

B. CIRCUMSTANCES GIVING RISE TO THE CHALLENGE

21. In its letter dated 17 October 2023, the Russian Federation brought to the attention of the Arbitral Tribunal that both Professor McRae and Judge Wolfrum voted in favour of the Declaration of the Institute of International Law (the 'Institute') dated 1 March 2022 (the 'Declaration') condemning the Russian Federation's 'aggression' in Ukraine. It is the Russian Federation's view that the signing of the Declaration raises substantial concerns with respect to their impartiality and independence in the present Arbitration.

22. The Declaration states that the Institute 'sees it as its duty to *firmly denounce the aggression* for which *the Russian Federation is responsible* through its massive military intervention in Ukraine.' It further clarifies that the Institute 'notes that the *international responsibility of the Russian Federation* is engaged for its serious breach of obligations arising from peremptory norms' and in this manner '*Russia exposes itself to appropriate measures* in accordance with international law'.[15]

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[14] *Sun Yang v. World Anti-Doping Agency (WADA) and International Swimming Federation (FINA)*, Case 4A_318/2020, Judgment of the First Civil Law Court, 22 December 2020, ¶7.9.

[15] *Ibid.*, p. 20. [*Emphasis* added].

23. The Russian Federation finds it particularly alarming that the Declaration specifically notes that '[t]he *members of the Institute of International Law* are following with dismay the ongoing Russian military operations in Ukraine.'[16] The Declaration very clearly purports to represent that the views expressed therein pertain not only to the Institute itself but also to each of its undersigned members individually.

24. Both Professors McRae and Wolfrum voted in favour of adopting the Declaration.[17] They have also averred this in their respective statements prepared in response to the Russian Federation's letter dated 17 October 2023.[18] At the same time, other members of the Institute who participate in the proceedings initiated by Ukraine against the Russian Federation as arbitrators, judges, or counsel, chose to abstain from voting or not to participate in the vote at all, regardless of the link between the subject of the proceedings and the contents of the declaration.

25. In particular, Judge Jin-Hyun Paik and Professor Vaughan Lowe specifically stated that voting on this matter would be incompatible with their position as arbitrators in a parallel ongoing arbitration under Annex VII to UNCLOS, namely, the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*.[19]

26. Likewise, Professor Jean-Marc Thouvenin being counsel for Ukraine decided to refrain from voting in view of his role in both pending arbitrations between Ukraine and the Russian Federation under Annex VII to UNCLOS, as well as in two other disputes before the International Court of Justice.[20]

27. Other members of the Institute who abstained from voting or did not participate in the vote also expressed their concerns regarding the Declaration. Notably, Judge James Kateka indicated that the language of the Declaration adopted excessively harsh pronouncements as compared to the Institute's Bruges Declaration

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[16] Institute of International Law, Declaration on the Aggression in Ukraine, *Yearbook of the Institute of International Law*, 2022-2023, Vol. 83, p. 19. [*Emphasis* added].

[17] *Ibid.*, p. 21.

[18] Statement of Judge Rüdiger Wolfrum dated 24 October 2023; Statement of Professor Donald McRae dated 24 October 2023.

[19] Institute of International Law, Declaration on the Aggression in Ukraine, *Yearbook of the Institute of International Law*, 2022-2023, Vol. 83, p. 23.

[20] *Ibid.*

on the Use of Force dated 2 September 2003 (the 'Bruges Declaration') and considerations of good faith warranted 'the toning down of some of the language.'[21] It is notable that he apprehended that the members of the Institute 'could be accused of *double standards* if [they] act with strong language.'[22]

28. Professor Torres Bernárdez ascribed to the above line of reasoning and considered that the Institute should have followed the more careful approach adopted in the 2003 Bruges Declaration.[23]

29. Another troubling aspect of the Declaration, endorsed by Professors McRae and Wolfrum, was specifically highlighted by Dr Pemmaraju Rao, who also abstained from voting. In his opinion, the Institute was an improper forum for accusing a State of violating international law:

> I believe the Institute is not well placed to assign blame or find any party guilty. That was a role unique to the UN Security Council.[24] [Emphasis added]

30. In the light of the above, the Russian Federation has shared with the Arbitral Tribunal its legitimate concerns as to the impartiality and independence of Professors McRae and Wolfrum in its letter dated 17 October 2023. The ensuing reply statements by Professor McRae and Judge Wolfrum shared with the Parties on 2 November 2023, regrettably, do not fully address these concerns.

31. Both Professors McRae and Wolfrum have stated in unison that their votes in favour of the Declaration do not undermine their impartiality and independence because the Declaration is a document emanating from the Institute, rather from its particular members. Furthermore, they both stress that the Declaration does not address matters of which the Arbitral Tribunal is seised; rather it concerns events that occurred subsequently to the events underlying the dispute.

32. Professor McRae has added that his participation as the presiding arbitrator in another proceeding, an investment arbitration brought against the Russian

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[21] *Ibid.*

[22] *Ibid.* [*Emphasis* added]

[23] *Ibid.*

[24] *Ibid.*

Federation by Ukrainian investors, was not seen by the Parties to that arbitration as affecting his impartiality and independence.

33. However, to the regret of the Russian Federation, this does not dispel the Russian Federation's justifiable doubts in respect of Professor McRae's and Judge Wolfrum's ability to adjudge the present dispute impartially and independently in light of their stance expressed in the Declaration.

34. ***First***, as noted by Professor Torres Bernárdez and Judge Kateka, the Declaration is drafted in a clearly accusatory language proclaiming the Russian Federation responsible for grave violations of international law, even though the Institute is clearly not in a position to investigate and make conclusions on such matters. This leaves no doubt that the persons who endorsed the Declaration on behalf of the Institute agreed with these severe accusations lacking any appropriate justification.

35. Accordingly, the persons supporting the Declaration could reasonably be viewed as being presupposed towards the Russian Federation's alleged violations of international law and more negatively predisposed against the Russian Federation in decision-making. This is the general tone and language of the Declaration. In this context, one cannot but agree with Judge Paik and Professor Lowe that endorsement of the Declaration raises justifiable doubts as to its incompatibility with one's functions as an adjudicator in a pending dispute resolution process.

36. The objection voiced in the statements of Professors McRae and Wolfrum that the Declaration is attributable to the Institute rather than its individual members, regrettably, rings hollow in light of multiple Institute members abstaining from voting and voicing their intention to preserve neutrality and impartiality, as well as directly contradicts the Declaration's express wording, discussed above.

37. ***Second***, the Declaration addresses the armed confrontation that has unfolded *directly and precisely between the Parties* to the present Arbitration.

[redacted]

[redacted]

38. Allegations of "aggression" are consistently used by Ukraine to prop up its complaints against Russia in various fora, including the ICJ, the ITLOS, and most pertinently, both incumbent UNCLOS arbitrations between the Parties, including the present case. In particular, Ukraine persistently refers to the alleged "aggression" of the Russian Federation in order to accuse Russia of "aggravating" the dispute as well as discredit the overall credibility of the Russian Federation's position.[26]

[redacted]

40. This further escalates the level of concerns about the endorsement of the Declaration, which specifically denounces the conduct of one Party (the Russian Federation) towards the other Party (Ukraine) to the proceedings. There 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. It is all the more

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[26] See, e.g. Ukraine's Letter dated 3 May 2023, p. 2: 'In the present circumstances, it would be profoundly unjust for Russia to achieve a suspension of this arbitration due to timing difficulties with payments *caused by Russia's aggression in blatant violation of international law*' [*Emphasis* added]. See also Ukraine's Letter dated 2 August 2023, p. 2: 'Russia improperly seeks to benefit from timing difficulties Ukraine has experienced as a consequence of *Russia's own unlawful actions*' [*Emphasis* added].

[redacted]

[redacted]

concerning that the Declaration was approved by Professor McRae, considering his special role of the President of the Tribunal.

41. On the whole, the tone of the Declaration and the fact that multiple members of the Institute abstained from voting on it, would certainly doubt whether those members who chose to vote could still be reasonably perceived as having maintained their impartiality to resolve a dispute involving the Party whose conduct the Declaration purported to 'firmly denounce'.

42. ***Third***, Professor McRae's reference in his statement to him serving as an arbitrator in an investment arbitration to which Russia is a party is inapposite. Without prejudice to the Russian Federation's position in other proceedings, the arbitration alluded to by Professor McRae has seen an award rendered in late 2022. However, it is only recently that the Russian Federation learned of the fact of endorsement of the Declaration by Professors McRae and Wolfrum. Initially, the Declaration was published on the Institute's website without the details as to who of the Institute's members voted in favour of the Declaration.[29] It is only the recent publication of the Declaration in the Institute's Yearbook for the years 2022-2023 that revealed to Russia the fact of its endorsement specifically by Professors McRae and Wolfrum; by the time of this publication, the above-mentioned arbitration had already been long since concluded, and Professor McRae's functions as arbitrator had lapsed.[30]

43. ***Fourth***, neither Professor McRae nor Professor Wolfrum made, upon their endorsement of the Declaration, a notification to the Parties, as required by the Terms of Appointment,[31] leaving that wholly unknown to the Parties and other Members of the Arbitral Tribunal. Such notification would have been all the more apposite and pertinent in view of the opinions expressed by other members of the Institute, Judge Paik and Professor Lowe, to the effect that voting on the Declaration

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[29] *See* Declaration of the Institute of International Law on Aggression in Ukraine, available at: https://www.idi-iil.org/app/uploads/2022/03/Declaration-of-the-Institute-of-International-Law-on-Aggression-in-Ukraine-1-March-2022-EN.pdf

[30] *See* Institute of International law, *Yearbook, Volume 83, 2022-2023, 81st Session of Angers, 2023: Sesquicentenary, Preparatory Work.* Edited by: Marcelo G. Kohen and Iris Van Der Heijden.

[31] *See* Terms of Appointment, ¶4.7, requiring that the arbitrators 'promptly notify the Parties and the other arbitrators of any circumstances likely to give rise to justifiable doubts as to their impartiality or independence that may subsequently come to their attention during this arbitration.'

may reasonably viewed to be incompatible with their roles as arbitrators in another dispute involving the Russian Federation and Ukraine. Sir Christopher Greenwood also chose not to participate in the vote. This omission by Professors McRae and Wolfrum to notify the Parties and other Members of the Arbitral Tribunal of their support of the Declaration further contributes to the justifiable doubts as to their impartiality and independence.

44. Therefore, the Russian Federation submits that there exist justifiable doubts as to Professor McRae's and Professor Wolfrum's ability to impartially and independently adjudge the present dispute that warrant their release as arbitrators.

C. CHALLENGE PROCEDURE

45. Considering that neither the Convention, nor the Terms of Appointment, or the Rules of Procedure in this arbitration establish how arbitrator challenges are to be decided, the Russian Federation stands ready to consider possible mechanisms for the resolution of the present issue.

D. SUBMISSIONS

46. For the reasons set out above, the Russian Federation respectfully requests that the Arbitral Tribunal:

(a) in consultation with the Parties and the Registry devise a procedure for deciding on the challenge brought by the Russian Federation;

(b) acting in accordance with that procedure, uphold the Russian Federation's challenge to Professor McRae and Judge Wolfrum and release them from their office as arbitrators in the present case.

The Russian Federation reserves its right to supplement its pleadings and submissions.

Yours sincerely,

Gennady KUZMIN

Agent of the Russian Federation