

**DISSENTING OPINION  
OF DR. OF LAW, PROFESSOR ALEXANDER N. VYLEGZHANIN**

1. I agree with the Order of the majority regarding most of its substantive findings, including those that are provided in (a) Introduction, (b) Procedural Background, and (c) Positions of the Parties.
2. For the reasons noted below, I regret that I cannot agree with the majority's conclusions that:
  - (a) in the absence of the agreement of the Parties on the procedure for the appointment of replacement arbitrators, "the Arbitral Tribunal will not seek to provide any further guidance to the Parties";<sup>1</sup>
  - (b) the "Arbitral Tribunal will not rule, in the abstract", on questions outside the scope of the Rules of Procedure of the Arbitral Tribunal (the "**Rules of Procedure**") or Annex VII to the United Nations Convention on the Law of the Sea ("**UNCLOS**");<sup>2</sup> and
  - (c) the Arbitral Tribunal rejects the request to "rule on the procedure for the appointment of replacement arbitrators".<sup>3</sup>
3. The Parties to this dispute have chosen *arbitration* (and not the International Tribunal for the Law of the Sea ("**ITLOS**") or any other of the means for the settlement of disputes) according to Article 287 of UNCLOS. To be more precise, the Parties have chosen "an arbitral tribunal constituted in accordance with Annex VII" to UNCLOS.
4. According to Article 3 of Annex VII—which both Parties refer to in this case—the rules on the constitution of the Arbitral Tribunal are subordinated to a *rule of priority*, i.e., Annex VII applies "**unless the parties otherwise agree**". This priority of the agreement between the parties to any dispute is reflected in the fundamental source of inter-State arbitration, i.e., in the *1907 Convention for the Pacific Settlement of International Disputes* (the "**1907 Hague Convention**").<sup>4</sup>
5. This priority rule is also reflected in Article 5 of Annex VII. According to this article, "the arbitral tribunal shall determine its own procedure". This determination was done in this case and the Arbitral Tribunal adopted its own Rules of Procedure.

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<sup>1</sup> Procedural Order No. 9, para. 46.

<sup>2</sup> Procedural Order No. 9, para. 48.

<sup>3</sup> Procedural Order No. 9, para. 50.

<sup>4</sup> *See Convention de 1907 pour le règlement pacifique des conflits internationaux*, Titre IV. De L'arbitrage International, Article 51.

6. Article 6 of the Rules of Procedure provides for a wording which is *different* from the wording in Article 3, paragraph (f) of Annex VII. This is significant because:
- (a) According to Article 3, paragraph (f), of Annex VII, “[a]ny vacancy shall be filled in the manner prescribed for the initial appointment”;
  - (b) According to Article 6 of the Rules of Procedure, however, there is a *closed list of events* in which the vacancy shall be filled in the manner prescribed, i.e., “[i]n the event of withdrawal, incapacity or death of an arbitrator”; and
  - (c) The event in this case, i.e., the Arbitral Tribunal’s Decision on the Challenges adopted on 6 March 2024, is *beyond the scope of the list in Article 6*.
7. Both Parties to the dispute initially followed the Rules of Procedure, seeking to agree on the procedure to appoint the two new Members of the Arbitral Tribunal following the Decision on the Challenges dated 6 March 2024. The Parties have already started negotiations to agree on a procedure for appointment of the replacement arbitrators. The Parties have agreed on some elements of such a procedure (e.g., the criteria for selection of candidates) but have disagreed on others (i.e., the method of choosing the two new Members of the Arbitral Tribunal, either through a “double blind” exchange of the lists of candidates or through an “open list” method).
8. In my opinion, in the absence of an agreement between the Parties on the procedure for the appointment of replacement arbitrators, and taking into account the relevant circumstances noted above, the Arbitral Tribunal is still under obligation to provide further guidance to the Parties, for the following reasons:
- (a) As correctly noted in Procedural Order No. 9, “Article 6, paragraph 1, of the Rules of Procedure *does not refer to the event of disqualification of an arbitrator upon a successful challenge by a Party*”.<sup>5</sup>
  - (b) Annex VII to UNCLOS, though it provides a general legal framework, should be regarded as *lex generalis* in relation to the *lex specialis* Rules of Procedure. The wording of the *lex specialis* is different, as noted above. According to one of the general principles of law, *lex specialis derogat generali*.
  - (c) The Arbitral Tribunal, in these special circumstances, *should rely on Article 1, paragraph (2) of its Rules of Procedure*, according to which, “[t]o the extent that any question of

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<sup>5</sup> Procedural Order No. 9, para. 44 (emphasis added).

procedure is not expressly governed by these Rules or by Annex VII to the Convention, the question shall be decided by the Arbitral Tribunal after ascertaining the views of the Parties”. The word “shall” in this context means that the Arbitral Tribunal is under a relevant obligation to provide such guidance requested by any of the Parties.

9. I cannot agree with the majority’s statement that “the Arbitral Tribunal will not rule, in the abstract” on questions outside the scope of the Rules of Procedure or Annex VII to UNCLOS.<sup>6</sup> Such a statement might be interpreted as if the Arbitral Tribunal is limited to applying only its Rules of Procedure and UNCLOS Annex VII. However, UNCLOS does not provide for such a limitation. On the contrary, a broad international framework is available for settlement of disputes under UNCLOS. According to Article 293 of UNCLOS on applicable law, for example, the Arbitral Tribunal (as any other court or tribunal having jurisdiction under UNCLOS) “shall apply this Convention and *other rules of international law* not incompatible with this Convention”. Other rules of international law include the 1907 Hague Convention, as noted above.
10. Finally, I cannot agree with the majority’s final conclusion rejecting the request to “rule on the procedure for the appointment of replacement arbitrators”.<sup>7</sup> In the special circumstances of this case (in particular, the difference between the factual and legal context of this case and the context presumed under Article 3 of Annex VII to UNCLOS), and further:
- (a) with the aim of settlement of the dispute by arbitration as chosen by the Parties;
  - (b) with the objective of preventing the ITLOS President from being involved in a dubious action to appoint two additional Members of the Arbitral Tribunal, when there is a risk that such an action might not be legitimate (and where the ITLOS President is not empowered by UNCLOS to decide on his own competence, nor whether he is being inappropriately drawn into an attempt at forum shopping);
  - (c) taking into account the meaningful earlier statement of the Arbitral Tribunal that “[w]ithout taking a position on [the Parties’ disagreement on the proper interpretation and application of Article 3 of Annex VII to the Convention and the Rules of Procedure, the Acting President and the other Members of the Tribunal] would preliminarily point out that, if requested by one or both Parties to rule on the dispute or should they feel that they should

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<sup>6</sup> Procedural Order No. 9, para. 48.

<sup>7</sup> Procedural Order No. 9, para. 50.

so rule *suo moto*, they might find that *the proper application of Article 3 of Annex VII and the Rules of Procedure is not as straightforward as either Party submits*;<sup>8</sup> and

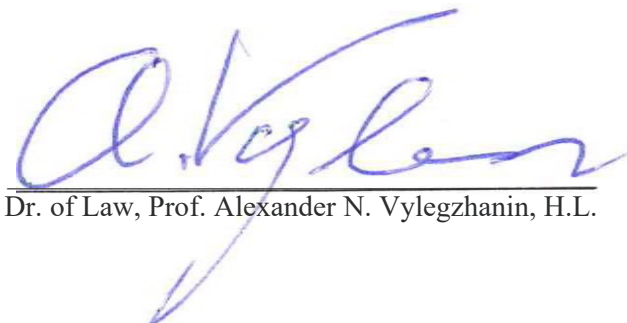
- (d) taking into account that the term “the manner prescribed” cannot “incorporate time periods commencing on the receipt” of the notification of the 1 April 2019;<sup>9</sup>

in my opinion this Arbitral Tribunal is under an obligation to rule on the procedure for the appointment of replacement arbitrators.

11. A reasonable basis for such a ruling might be the following:

- (a) the Parties are encouraged to complete their agreement on the procedure for appointing the two new Members of the Arbitral Tribunal *within a strict period of time established by the Arbitral Tribunal*;
- (b) if, within this period, the Parties are unable to agree upon such new Members, then the Arbitral Tribunal, relying in this particular case on Article 45 of the 1907 Hague Convention, aiming to create an environment conducive to agreement by the Parties on this particular disputed issue, and with a view to preventing a difficulty before the ITLOS President, adopts the following *lex specialis* procedure for the selection of the two new arbitrators:
- (i) *one* to be appointed by the Claimant; and
- (ii) *one* to be appointed by the Respondent.

Date: 26 July 2024



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<sup>8</sup> Procedural Order No. 9, para. 45 (emphasis added).

<sup>9</sup> Procedural Order No. 9, para. 40.