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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:

Further to your letter of 5 November 2024, Ukraine hereby presents its comments on the Russian Federation's submission of 6 December 2024. As discussed below, Russia's objections regarding the constitution of the Tribunal remain meritless. Ukraine accordingly reiterates its request from its submission of 22 November 2024 that the Tribunal dismiss Russia's challenge and confirm that it is properly constituted.

Russia's Preliminary Observations Are Irrelevant.

First, on the procedure for considering Russia's objections, Russia claims that Judges Kateka and Brown cannot participate in the decision.[1] Ukraine notes that the principle *nemo iudex in causa sua* operates to prevent a judge or arbitrator from deciding a challenge to him or herself.[2] It does not prevent an arbitral tribunal from deciding a challenge to its jurisdiction or constitution, which is governed by the principle of *compétence de la compétence*.[3]

Here, Judges Kateka and Brown (and Judge Eiriksson in the role of President of the Tribunal) are not being called upon to decide a challenge to themselves or to the validity of their own acts. Rather, the objections that Russia has raised to the constitution of the

[1] Russia's letter of 6 December 2024, pp. 2–3.

[2] *See, e.g.*, Peter Tzeng, *Self-Appointment in International Arbitration*, Max Planck Encyclopedia of International Procedural Law, ¶ 5 ("[I]f the appointing authority is called upon to decide on a challenge to him or herself[,] [t]his would arguably contradict the principle of *nemo iudex in causa sua* ('no one should be a judge in his or her own cause')."). The principle also is referenced as support for the rule that a state cannot invoke its internal law to justify breach of an international obligation. *See* Charles T Kotuby Jr, Luke A Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes (March 2017), pp. 154–55.

[3] *See* Ukraine's letter of 22 November 2024, p. 8, n.55.

Tribunal concern the propriety, under Annex VII and the Rules of Procedure, of Ukraine's requests to the ITLOS President, and of President Heidar's subsequent appointments in response to those requests. The new, fully-constituted Tribunal is competent to hear and decide these objections to its constitution, just like it is competent to decide other objections to its jurisdiction.

Second, with respect to the Russian Federation's "serious concerns" as to the impartiality of Judge Kateka, Ukraine notes that this issue does not fall within the scope of matters on which the Tribunal invited the Parties' comments in the PCA's letter of 5 November 2024. That letter concerned "the request of the Russian Federation set out in its letter dated 9 August 2024 as also addressed at the outset (pp. 1-2) of its letter dated 6 September 2024" (*i.e.*, Russia's objections regarding the constitution of the Tribunal) – which does *not* include the other issues raised by Russia in its letter of 6 September 2024 relating to Judge Kateka's impartiality.

The proper forum for consideration of Russia's concerns would have been a challenge to Judge Kateka, which Russia has failed to assert and which would be untimely if asserted now. Following Russia's letter of 6 September 2024 notifying its concerns regarding Judge Kateka's impartiality and inviting him to consider withdrawing from the case, Judge Kateka responded on 9 September 2024, explaining his view that he had not expressed any opinion raising justifiable doubts as to his independence and impartiality, and that he therefore saw no reason to withdraw.[4] Russia's failure to assert a challenge to Judge Kateka in the more than three months since this exchange indicates that it has waived its right to do so.[5]

In this respect, Russia's purported suspension of its participation in the arbitration would not excuse or justify its failure to timely assert a challenge to Judge Kateka. Russia announced its allegedly suspended participation on 9 August 2024, but thereafter has continued to engage in correspondence with the Tribunal regarding the replacement appointments; participated, with counsel, in consultations with Judge Eiriksson on 15 August 2024 conducted virtually; continued to engage in correspondence with the ITLOS President regarding Ukraine's requested appointments; and has participated in the present submissions regarding its challenge to the Tribunal's constitution.[6]

In other words, Russia's conduct squarely contradicts its purported non-participation. By presenting written submissions, attending consultations, corresponding with President Heidar, and participating in the Tribunal-directed briefing on its challenge to

[4] *See* Letter from Judge Kateka of 9 September 2024.

[5] In its Decision on Challenges of 6 March 2024, the Tribunal accepted that the 30-day time limit in the PCA Optional Rules is a relevant benchmark for assessing the timeliness of a challenge, even though what is a prompt and reasonable period of time must be appreciated in the circumstances of each case. Decision on Challenges, ¶ 98. Here, Russia knew of Judge Kateka's comments on the IDI Declaration well before his appointment on 8 August 2024 (indeed, Russia cited Judge Kateka's comments in its challenge to Prof. McRae and Judge Wolfrum dated 24 November 2023). Russia nevertheless waited four weeks following Judge Kateka's appointment to first raise its concerns, and has failed to act on those purported concerns in the more than three months since.

[6] *See* Russia's letter of 6 September 2024; Russia's letter to ITLOS of 25 October 2024 (Ex. P); Russia's letter of 6 December 2024; Procedural Order No. 9, ¶ 28.

the Tribunal's constitution, Russia plainly *is* participating, including by asserting its procedural rights, in the arbitration. Any allegation that its purported non-participation has excused its waiver of rights contravenes the principle of *nemo iudex in causa sua* and is meritless.

Ukraine's Requests to ITLOS Were Consistent With the Applicable Rules of Procedure and Annex VII.

Russia continues to insist that the Tribunal should have exercised its power pursuant to Article 1(2) of the Rules of Procedure to devise an *ad hoc* procedure for the replacement of Professor McRae and Judge Wolfrum.[7]

First, this ignores and mischaracterizes the Tribunal's prior ruling in Procedural Order No. 9, which already addressed the issues raised by Russia's challenge.

As Ukraine explained in its first submission, Procedural Order No. 9 confirmed that the procedure for replacing Professor McRae and Judge Wolfrum is governed by Article 3(e) of Annex VII. This issue therefore cannot implicate the Tribunal's powers under Article 1(2) of the Rules of Procedure, which are restricted to matters that are not addressed by either the Rules *or* Annex VII .[8]

Russia attempts to bolster its position by suggesting that the Tribunal was initially exercising its authority under Article 1(2) of the Rules of Procedure when the Tribunal encouraged the Parties to engage in further efforts to achieve agreement, but that has no basis.[9] At that time, the Tribunal expressly noted its view that "it is in the interests of good order" that the replacement arbitrators be appointed by agreement, "*if such agreement is possible*."[10] The Tribunal subsequently communicated to the Parties that its suggestions in this respect were based on the desirability of agreement between the Parties, *not* rooted in its exercise of procedural discretion under Article 1(2) of the Rules of Procedure:

> The Acting President and the other members of the Arbitral Tribunal wish to emphasize that their suggestions to the Parties on the procedure for the appointment of replacement arbitrators were predicated upon the agreement of the Parties. In the absence of such agreement, the Arbitral Tribunal will not seek to provide any further guidance to the Parties on the further procedure.[11]

The Tribunal further *expressly* declined to exercise its procedural discretion under Article 1(2) of the Rules of Procedure in Procedural Order No. 9:

> In its request for a ruling, the Russian Federation <u>has not identified any question of procedure which, in the terms of Article 1, paragraph 2, of the Rules of Procedure of the Arbitral Tribunal, "is not expressly governed by</u>

[7] Russia's letter of 6 December 2024, pp. 14–15.

[8] Ukraine's letter of 22 November 2024, p. 6.

[9] Russia's letter of 6 December 2024, p. 13.

[10] Tribunal's letter of 16 May 2024.

[11] Tribunal's letter of 12 July 2024.

> these Rules [of Procedure] or by Annex VII to the Convention or other provisions of the Convention", and the Arbitral Tribunal will not rule, in the abstract, on questions outside this scope.[12]

By confirming that Russia's request did *not* fall within the scope of the Tribunal's discretion under Article 1(2), and that Article 3(e) of Annex VII applies to fill the vacancies resulting from the successful challenges to Professor McRae and Judge Wolfrum, the Tribunal conclusively determined in Procedural Order No. 9 that the procedure for replacing Professor McRae and Judge Wolfrum is the procedure outlined in Article 3(e). Accordingly, there remained no role for the Tribunal in establishing an *ad hoc* procedure under Article 1(2) of the Rules of Procedure.

Second, Russia's position remains meritless in any event. The appointment of replacement arbitrators in these circumstances is expressly governed by the Rules of Procedure and Annex VII, and took place in accordance with those requirements.[13]

Russia emphasizes that Professor McRae and Judge Wolfrum cannot be considered to have "withdrawn" pursuant to Article 6 of the Rules of Procedure because they had already been "removed" or "disqualified" through the Decision on Challenges.[14] This is a distinction without a difference. Whether they are considered "withdrawals," "resignations," or "disqualifications," what matters is that as of 6 March 2024, there were two vacancies on the Tribunal requiring application of the agreed procedure for "replacement" of arbitrators.[15] Regardless, as Ukraine previously explained, even if the resignations of Professor McRae and Judge Wolfrum were not treated as "withdrawals" under Article 6(1) of the Rules of Procedure, the same rule governs their replacement under Annex VII: pursuant to Article 3(f), "*any vacancy* shall be filled in the manner prescribed for the initial appointment."[16]

On this issue, Russia overstates the significance of the Tribunal's observation in Procedural Order No. 9 that "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."[17] That observation does *not* equal an "explicit[]" statement by the Tribunal that

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[12] PO No. 9, ¶ 48.

[13] Russia's introductory observations regarding Professor Mossop's withdrawal have no bearing on the question of the prescribed procedures for appointing arbitrators under Article 3 of Annex VII. *See* Russia's letter of 6 December 2024, p. 6. The allegation that the procedure before President Heidar "proved to be [] inefficient" because Professor Mossop withdrew after her initial appointment is completely irrelevant to the question of the applicable provisions of the Rules of Procedure and Annex VII.

[14] Russia's letter of 6 December 2024, pp. 14–15.

[15] *See* Ukraine's letter of 22 November 2024, p. 9.

[16] Article 6(1) of the Rules of Procedure provides that vacancies in the event of withdrawal, incapacity or death "shall be filled in the manner prescribed for the initial appointment of the arbitrator in question[.]"

[17] PO No. 9, ¶ 44.

"disqualification of an arbitrator upon a successful challenge by a Party falls outside the scope of the procedural rules applicable in this Arbitration."[18]

The Tribunal may have been suggesting that Article 6(1) of the Rules of Procedure is unclear as to whether it applies to the replacement of arbitrators in the event of disqualification following a successful challenge. But even if one were to accept that Article 6(1) is not expressly applicable, it does *not* follow that the more general provisions of Article 3 of Annex VII would cease to apply to the situation. The opposite is true: Article 1(1) of the Rules of Procedure confirms that the arbitration "*shall* be conducted in accordance with these Rules *and* the relevant provisions of . . . Annex VII to the Convention."[19] In other words, even if the more detailed provisions of the Rules of Procedure do not explicitly address this issue, Annex VII still provides the relevant procedural guidelines. That is consistent with the Tribunal's finding in Procedural Order No. 9 that Russia's request for a ruling on the procedure concerned matters expressly governed by the Rules of Procedure and by Annex VII to the Convention.[20]

Russia's emphasis on the purported procedural "gap" caused by the fact that Article 3(d) does not specify when the 60-day time period for the Parties to attempt to reach agreement commences in this situation is irrelevant.[21] As Ukraine previously explained, regardless of when the 60-day period started (and regardless of the fact that it could not have started upon "receipt of the notification referred to in article l of this Annex"), there is no remaining dispute that the requirements of Article 3(d) were fulfilled: the Parties attempted to reach agreement for at least 60 days, after which Ukraine exercised its right to request the appointments from the President of ITLOS.[22] That is consistent with Russia's own prior statements that it was not opposed to the application of the rules set forth in Article 3(d) of Annex VII "*mutatis mutandis*."[23]

In summary, Russia's submission of 6 December 2024 adds nothing to support its obstructionist and dilatory position. In Procedural Order No. 9, the Tribunal already rejected Russia's position that the Tribunal must adopt an *ad hoc* procedure under Article 1(2) of the Rules of Procedure, and confirmed that Article 3(e) of Annex VII applies to filling the vacancies resulting from the successful challenges. In any event, Russia's objections to the procedure that was followed remain meritless: Ukraine's requests to President Heidar were consistent with the expressly applicable requirements of Annex VII and the Rules of Procedure.

The Procedure Before President Heidar Was Consistent with the Applicable Rules of Procedure and Annex VII.

Russia's objections to the procedure followed by President Heidar in responding to Ukraine's requests for appointments also remain meritless.

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[18] Russia's letter of 6 December 2024, p. 14.

[19] Rules of Procedure, Article 1(1) (emphasis added).

[20] PO No. 9, ¶ 48.

[21] *See* Russia's letter of 6 December 2024, pp. 16–17.

[22] Ukraine's letter of 22 November 2024, p. 11.

[23] Ukraine's letter of 22 November 2024, p. 11; Russia's letter of 7 May 2024, p. 3.

First, Russia emphasizes the "ministerial" role of the ITLOS President as an appointing authority to support its argument that "[i]t is to be inferred that the decisions of the appointing authority are amenable to review by the tribunal."[24] But it is not noteworthy that the role of the ITLOS President as appointing authority under Article 3(e) of Annex VII is distinct from the Tribunal's role in exercising jurisdiction under Articles 287 and 288 of the Convention to decide the Annex VII dispute. This is irrelevant, because the principle of implied powers (or *compétence de la compétence*) is not exclusive to conferred powers of a judicial character, and Russia has identified no support for its "inference" that decisions of the ITLOS President are reviewable by the arbitral tribunal.[25]

Here, because the ITLOS President is conferred with the power to act as appointing authority pursuant to Article 3(e) of Annex VII, he also enjoys the inherent or implied power to assess and apply the scope of his authority in executing that mandate.[26] This was recognized by the Tribunal in Procedural Order No. 9 when it concluded that "[i]t is not for this Arbitral Tribunal to comment on how the ITLOS President should respond to [Ukraine's] request."[27]

Contrary to Russia's arguments, this does not undermine the Tribunal's power to determine its jurisdiction or its so-called "judicial independence."[28] The Tribunal is empowered to conduct the arbitration and decide the dispute submitted to it (including to determine its jurisdiction) pursuant to the Terms of Appointment and the Rules of Procedure. The Terms of Appointment and the Rules of Procedure expressly confirm that the arbitration is governed by the Convention, including Annex VII. Russia's statement that the arbitral tribunal "retains full jurisdiction over all matters relating to the dispute, including its own composition,"[29] is not fully accurate. The constitution of Annex VII arbitral tribunals is governed by Article 3, which assigns to the ITLOS President the jurisdiction of the appointing authority role. In other words, the Tribunal's jurisdiction on matters relating to its constitution remains subject to the applicable rules of the Convention, which assign to the ITLOS President the mandate of appointing authority. The Tribunal thus has no jurisdiction, pursuant to the rules of its own mandate, to independently assess the legality of the ITLOS President's actions in the exercise of *his* mandate.

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[24] Russia's letter of 6 December 2024, p. 20.

[25] The rationale for implied powers applies with equal force to international organizations that do not fulfill a judicial function: constituent instruments cannot be expected to spell out in detail each and every specific power an international organization or authority will need to perform its functions, and it is impossible to foresee what specific powers will be necessary for future situations. The concept of implied powers has been applied in domestic contexts to federal states, to the external powers of the European Union, as well as to international institutions, including courts and tribunals. *See* Niels M Blokker, *International Organizations or Institutions, Implied Powers*, *in* Max Planck Encyclopedia of Public International Law, ¶¶ 3–8.

[26] *See* Ukraine's letter of 22 November 2024, p. 8.

[27] PO No. 9, ¶ 49.

[28] *See* Russia's letter of 6 December 2024, p. 20.

[29] Russia's letter of 6 December 2024, p. 20.

Second, Russia's complaints concerning the procedure before President Heidar remain meritless in any event.

Russia maintains that President Heidar "did not follow the proper procedure," but has failed to identify any procedural requirements of Annex VII that were not fulfilled. As explained in Ukraine's first submission, President Heidar's appointments were made consistent with the requirements of Article 3(e) of Annex VII that the appointments be made within 30 days of receipt of the request, and in consultation with the Parties.[30]

Russia complains that President Heidar failed to stay the process of organizing consultations pending the Tribunal's ruling on Procedural Order No. 9.[31] But there was no need for further delay at that time: the Tribunal already advised the Parties on 12 July that it did not intend to issue further guidance on the procedure for appointing replacement arbitrators. President Heidar had invited the Parties, in his letter of 10 July, to in-person consultations on 30 July. This would have been ample time for the Parties to make travel arrangements, if Russia had not been intent on undermining the Tribunal's decision to reject its request for an *ad hoc* procedure and on frustrating Ukraine's request to ITLOS.

Russia also complains that President Heidar ignored its objections following the issuance of Procedural Order No. 9 that it remained "incumbent on the Arbitral Tribunal, pursuant to Article 1(2) of the Rules of Procedure, to exercise its competence and to fill this gap by adopting a suitable ad hoc procedure."[32] But Russia's request that the Tribunal do so had already been *expressly rejected* in Procedural Order No. 9. There remained nothing for President Heidar to do on the issue.

Russia further complains that President Heidar failed to provide analysis in dismissing Russia's objections and that "Ukraine's request was simply acted upon."[33] But Russia's supposed expectation of a lengthy, reasoned decision on the *exact same issue* that was covered by Procedural Order No. 9 is inconsistent with its characterization of President Heidar's role as merely "ministerial." In any event, President Heidar's correspondence with the Parties clearly indicated that he had reviewed and considered the Parties' submissions, the terms of Procedural Order No. 9, and the relevant provisions of Annex VII in deciding how to address Ukraine's request consistently with the requirements of Annex VII.[34] Russia's allegation that President Heidar "simply acted upon" Ukraine's request has no basis, and is plainly contradicted by President Heidar's consideration of Ukraine's first request for a replacement for Professor Mossop.[35]

Russia further complains about the lack of in-person consultations with President Heidar, but this is a problem of its own making. Russia claims that until the Tribunal rendered Procedural Order No. 9 on 18 July, there were no grounds for it to take part in any

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[30] Ukraine's letter of 22 November 2024, pp. 12–13.

[31] Russia's letter of 6 December 2024, p. 21.

[32] Russia's letter of 6 December 2024, p. 21 (citing Russia's letter of 22 July 2024 (Ex. E)).

[33] Russia's letter of 6 December 2024, p. 22.

[34] *See* ITLOS letter of 26 July 2024 (Ex. G); ITLOS letter of 27 July 2024 (Ex. I).

[35] As noted by Ukraine in its first submission, President Heidar invited Russia's comments on this request before independently refusing it. Ukraine's letter of 22 November 2024, p. 13.

consultations.[36] But as previously noted, President Heidar first invited the Parties to consultations on 10 July, and the Tribunal had notified the Parties of its substantive decision on Russia's request for a procedural ruling as early as 12 July. Russia claims that after the issuance of Procedural Order No. 9 on 18 July, "it was highly unlikely that the requisite formalities would be completed within the remaining timeframe,"[37] but this is completely disingenuous. After the Tribunal issued Procedural Order No. 9, Russia *still* maintained its position that the Tribunal needed to adopt an *ad hoc* procedure pursuant to Article 1(2) of the Rules of Procedure, and refused to recognize the legitimacy of the Article 3 procedure before President Heidar.[38] Yet there remained more than sufficient time for the Parties to coordinate travel, particularly given that they had been on notice of the 30 July date from much earlier. In addition, as Russia is well-aware, ITLOS and the PCA would have been fully capable of facilitating visas and other travel requirements for these official purposes.

In any event, there is no support for the notion that under Article 3 of Annex VII, Russia had a "procedural right to take part in *in-person* consultations."[39] Article 3(e) provides only that the appointments "shall be made" "in consultation with the parties." In-person consultations may have taken place in other similar circumstances, but here, President Heidar was willing to adjust the procedure to accommodate Russia's stated inability to make timely travel arrangements to Hamburg. This does not render the procedure "obviously flawed and deficient," as Russia argues. In fact, there is no evidence that the lack of in-person consultations prejudiced Russia's rights. As Ukraine explained in its first submission, President Heidar treated the Parties equally and with due process.[40] Any prejudice to Russia resulted from Russia's choice not to participate in the consultations via correspondence, not from President Heidar's choice of procedure.

Ukraine Is Entitled to a Costs Award for This Part of the Proceeding.

As Ukraine previously explained, Article 7 of Annex VII confirms the Tribunal's authority to order costs in view of the particular circumstances, and the circumstances here warrant an allocation of costs for this phase of the proceeding.[41]

Russia claims that its position regarding the reappointment procedure is "well-grounded," but its position was in fact already squarely rejected by the Tribunal − nearly five months ago. The fact that the Parties are still briefing the exact same issues that culminated in the issuance of Procedural Order No. 9 in July 2024 is a testament to Russia's deliberately obstructionist and disruptive conduct. In these circumstances, an award of costs would not be premature, and is instead necessary to ensure that there are costs to unfounded procedural gamesmanship in this arbitration.

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[36] Russia's letter of 6 December 2024, p. 23.

[37] Russia's letter of 6 December 2024, p. 23.

[38] Russia's letter to ITLOS of 22 July 2024 (Ex. E).

[39] Russia's letter of 6 December 2024, p. 23 (emphasis added).

[40] Ukraine's letter of 22 November 2024, pp. 12–13.

[41] Ukraine's Memorial, Chapter 6, Part IV; Ukraine's letter of 22 November 2024, p. 14.

The Tribunal Should Reject Russia's Challenge to the Constitution of the Tribunal.

For the reasons described above and in Ukraine's prior correspondence on this matter, Ukraine respectfully requests that the Tribunal:

1. Decide Russia's challenge to the constitution of the Tribunal as the fully-constituted, five-member Tribunal;
2. Dismiss Russia's challenge to the constitution of the Tribunal;
3. Dismiss Russia's purported challenge to Judge Kateka as untimely and/or not properly asserted;
4. Adjudge and declare that it is properly constituted to hear and decide the claims and Submissions filed by Ukraine in this case; and
5. Award Ukraine its costs for the phase of these proceedings commencing since the resignations of Professor McRae and Judge Wolfrum.

Respectfully submitted,

Ms. Oksana Zolotaryova
Agent for Ukraine