

PCA Case No. 2019-28

IN THE MATTER OF AN ARBITRATION

- before -

**AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

- between -

UKRAINE

- and -

THE RUSSIAN FEDERATION

- in respect of a -

**DISPUTE CONCERNING THE DETENTION OF UKRAINIAN NAVAL VESSELS
AND SERVICEMEN**

**DECISION ON THE OBJECTION
TO THE CONSTITUTION OF THE ARBITRAL TRIBUNAL**

29 July 2025

ARBITRAL TRIBUNAL:

**Judge Gudmundur Eiriksson (President)
Sir Christopher Greenwood
Professor Alexander N. Vylegzhanin
Judge James Kateka
Judge Kathy-Ann Brown**

REGISTRY:

Permanent Court of Arbitration

TABLE OF CONTENTS

| | | |
|-------------|--|-----------|
| I. | INTRODUCTION | 1 |
| II. | RELEVANT PROCEDURAL HISTORY | 1 |
| A. | CONSTITUTION OF THE ARBITRAL TRIBUNAL | 1 |
| B. | WRITTEN SUBMISSIONS AND AWARD ON PRELIMINARY OBJECTIONS | 3 |
| C. | RECONSTITUTION OF THE ARBITRAL TRIBUNAL | 3 |
| D. | THE CHALLENGES TO PROFESSOR MCRAE AND JUDGE WOLFRUM | 4 |
| E. | DISPUTE ON THE PROCEDURE FOR THE APPOINTMENT OF REPLACEMENT ARBITRATORS | 5 |
| F. | PROCEDURAL ORDER NO. 9 | 9 |
| G. | APPOINTMENT OF ARBITRATORS BY THE PRESIDENT OF ITLOS | 13 |
| H. | THE RUSSIAN FEDERATION’S OBJECTIONS TO THE RECONSTITUTION OF THE ARBITRAL TRIBUNAL | 23 |
| III. | REQUESTED RELIEF | 30 |
| A. | THE REQUEST OF THE RUSSIAN FEDERATION | 30 |
| B. | THE REQUEST OF UKRAINE | 30 |
| IV. | POSITIONS OF THE PARTIES | 31 |
| A. | APPLICABLE PROCEDURE FOR THE APPOINTMENT OF REPLACEMENT ARBITRATORS | 31 |
| 1. | Position of the Russian Federation | 31 |
| 2. | Position of Ukraine | 33 |
| B. | PROPER OBSERVANCE OF ARTICLE 3 OF ANNEX VII TO THE CONVENTION | 35 |
| 1. | Position of the Russian Federation | 35 |
| 2. | Position of Ukraine | 38 |
| C. | COSTS | 40 |
| 1. | Position of Ukraine | 40 |
| 2. | Position of the Russian Federation | 40 |
| V. | ANALYSIS OF THE ARBITRAL TRIBUNAL | 41 |
| A. | THE OBJECTIONS OF THE RUSSIAN FEDERATION | 42 |
| B. | THE POWER OF THE ARBITRAL TRIBUNAL TO RULE ON ITS COMPOSITION | 42 |
| C. | OBJECTION 1: THE INTERPRETATION AND APPLICATION OF ARTICLE 3 OF ANNEX VII .. | 44 |
| D. | OBJECTION 2: COMPLIANCE WITH THE REQUIREMENT OF CONSULTATION | 50 |
| E. | COSTS | 59 |
| VI. | DECISION | 60 |

I. INTRODUCTION

1. This Decision addresses the objections to the constitution of the Arbitral Tribunal raised by the Russian Federation in its letters dated 9 August, 6 September and 6 December 2024 on the validity of the appointments of Judge James Kateka and, subsequently, Judge Kathy-Ann Brown as members of the Arbitral Tribunal, as well as the appointment of Judge Gudmundur Eiriksson as President of the Arbitral Tribunal, which appointments were made by the President of the International Tribunal for the Law of the Sea (“**ITLOS**”), H.E. Judge Tomas Heidar, pursuant to requests made by Ukraine under Article 3 of Annex VII to the United Nations Convention on the Law of the Sea (the “**Convention**”).

II. RELEVANT PROCEDURAL HISTORY

A. CONSTITUTION OF THE ARBITRAL TRIBUNAL

2. In its Notification and Statement of Claim dated 31 March 2019, Ukraine appointed Sir Christopher Greenwood KC as member of the Arbitral Tribunal pursuant to Article 3(b) of Annex VII to the Convention.
3. By a *note verbale* to Ukraine dated 30 April 2019, the Russian Federation appointed Judge Vladimir Golitsyn as member of the Arbitral Tribunal pursuant to Article 3(c) of Annex VII to the Convention.
4. Since the Parties were unable to reach an agreement on the appointment of the remaining members of the Arbitral Tribunal, on 12 June 2019, Ukraine requested that the then President of ITLOS, H.E. Judge Jin-Hyun Paik, make the appointments pursuant to Article 3(d) of Annex VII to the Convention.
5. On 8 July 2019, the President of ITLOS appointed Professor Donald M. McRae, Judge Gudmundur Eiriksson and Judge Rüdiger Wolfrum as members of the Arbitral Tribunal, with Professor McRae as President of the Arbitral Tribunal. At the same time, the Parties agreed to request the Permanent Court of Arbitration (“**PCA**”) to act as registry for the arbitration, which the PCA confirmed on 19 July 2019, appointing Mr. Martin Doe, then Senior Legal Counsel and now Deputy Secretary-General and Principal Legal Counsel at the PCA, to serve as Registrar.
6. On 18 November 2019, the Registrar transmitted to the Parties signed Declarations of Acceptance and Statements of Impartiality and Independence in respect of each member of the Arbitral Tribunal.

7. On 21 November 2019, the Arbitral Tribunal held a procedural meeting with the Parties at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands, to consult the Parties with respect to the procedure and timetable for the arbitration.
8. On 22 November 2019, the Arbitral Tribunal adopted Procedural Order No. 1 with the agreement of the Parties, setting forth the Terms of Appointment of the Arbitral Tribunal ("**Terms of Appointment**") and the Rules of Procedure of the Arbitral Tribunal ("**Rules of Procedure**"). Article 6 of the Rules of Procedure provides:

Replacement of an Arbitrator

Article 6

1. In the event of withdrawal, incapacity or death of an arbitrator during the course of the proceedings, the vacancy shall be filled in the manner prescribed for the initial appointment of the arbitrator in question in Article 3 of Annex VII to the Convention, with the understanding that the time periods stipulated in that Article should be calculated from the date of notification to the Parties of the withdrawal, incapacity or death of the arbitrator.
 2. In the event that an arbitrator is replaced in accordance with paragraph 1, the proceedings shall resume at the stage where the replaced arbitrator ceased to perform his or her functions, unless the Arbitral Tribunal decides otherwise.
9. Article 3 of Annex VII to the Convention provides:

Article 3

Constitution of arbitral tribunal

For the purpose of proceedings under this Annex, the arbitral tribunal shall, unless the parties otherwise agree, be constituted as follows:

- (a) Subject to subparagraph (g), the arbitral tribunal shall consist of five members.
- (b) The party instituting the proceedings shall appoint one member to be chosen preferably from the list referred to in article 2 of this Annex, who may be its national. The appointment shall be included in the notification referred to in article 1 of this Annex.
- (c) The other party to the dispute shall, within 30 days of receipt of the notification referred to in article 1 of this Annex, appoint one member to be chosen preferably from the list, who may be its national. If the appointment is not made within that period, the party instituting the proceedings may, within two weeks of the expiration of that period, request that the appointment be made in accordance with subparagraph (e).
- (d) The other three members shall be appointed by agreement between the parties. They shall be chosen preferably from the list and shall be nationals of third States unless the parties otherwise agree. The parties to the dispute shall appoint the President of the arbitral tribunal from among those three members. If, within 60 days of receipt of the notification referred to in article 1 of this Annex, the parties are unable to reach agreement on the appointment of one or more of the members of the tribunal to be

appointed by agreement, or on the appointment of the President, the remaining appointment or appointments shall be made in accordance with subparagraph (e), at the request of a party to the dispute. Such request shall be made within two weeks of the expiration of the aforementioned 60-day period.

- (e) Unless the parties agree that any appointment under subparagraphs (c) and (d) be made by a person or a third State chosen by the parties, the President of the International Tribunal for the Law of the Sea shall make the necessary appointments. If the President is unable to act under this subparagraph or is a national of one of the parties to the dispute, the appointment shall be made by the next senior member of the International Tribunal for the Law of the Sea who is available and is not a national of one of the parties. The appointments referred to in this subparagraph shall be made from the list referred to in article 2 of this Annex within a period of 30 days of the receipt of the request and in consultation with the parties. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.
- (f) Any vacancy shall be filled in the manner prescribed for the initial appointment.
- (g) Parties in the same interest shall appoint one member of the tribunal jointly by agreement. Where there are several parties having separate interests or where there is disagreement as to whether they are of the same interest, each of them shall appoint one member of the tribunal. The number of members of the tribunal appointed separately by the parties shall always be smaller by one than the number of members of the tribunal to be appointed jointly by the parties.
- (h) In disputes involving more than two parties, the provisions of subparagraphs (a) to (f) shall apply to the maximum extent possible.

B. WRITTEN SUBMISSIONS AND AWARD ON PRELIMINARY OBJECTIONS

- 10. On 22 May 2020, Ukraine submitted its Memorial.
- 11. On 24 August 2020, the Russian Federation submitted five preliminary objections to the Arbitral Tribunal's jurisdiction (the "**Preliminary Objections**"). Following exchanges of written submissions and the Preliminary Objections Hearing held from 11 to 15 October 2021, the Arbitral Tribunal issued its Award on the Preliminary Objections of the Russian Federation dated 27 June 2022 ("**Award on Preliminary Objections**").
- 12. On 14 April 2023, the Russian Federation submitted its Counter-Memorial.

C. RECONSTITUTION OF THE ARBITRAL TRIBUNAL

- 13. On 30 May 2023, following the passing of Judge Golitsyn on 26 March 2023, the Russian Federation appointed Professor Alexander N. Vylegzhanin as an arbitrator pursuant to Article 6(1) of the Rules of Procedure and Article 3(c) and (f) of Annex VII to the Convention.

14. On 13 June 2023, the Arbitral Tribunal transmitted Professor Vylegzhanin's signed Declaration of Acceptance and Statement of Impartiality and Independence to the Parties, and indicated that it would revert to the Parties in respect of other pending matters.
15. On 9 October 2023, the Arbitral Tribunal issued Procedural Order No. 6 which, *inter alia*, (i) invited Ukraine to make further written submissions, by way of a Reply, by 11 December 2023; (ii) invited the Russian Federation to submit a Rejoinder by 12 February 2024; and (iii) reserved further directions for a hearing on the merits to be held in April or May 2024.

D. THE CHALLENGES TO PROFESSOR MCRAE AND JUDGE WOLFRUM

16. On 24 November 2023, the Russian Federation asserted Challenges against Professor McRae and Judge Wolfrum and requested their disqualification as arbitrators in this case for lack of independence and impartiality as a result of their votes in support of the Institute of International Law (*Institut de Droit International*) declaration of 1 March 2022, entitled "Declaration of the Institute of International Law on Aggression in Ukraine" (the "**IDI Declaration**").
17. On 15 December 2023, the Arbitral Tribunal, constituted for the purposes of the Challenges against Professor McRae and Judge Wolfrum by Judge Eiriksson as Acting President and Sir Christopher Greenwood and Professor Vylegzhanin as Members, issued Procedural Order No. 8, setting out the procedure for a decision on the challenges.
18. Following an exchange of written submissions by the Parties and comments by Professor McRae and Judge Wolfrum, on 6 March 2024, the Arbitral Tribunal issued its Decision on Challenges, the dispositive portion of which read:

For the reasons set out above, the three unchallenged Members of the Arbitral Tribunal, with Judge Gudmundur Eiriksson presiding, by two votes to one, uphold the Challenges to Professor McRae and Judge Wolfrum.

IN FAVOUR: Judge Gudmundur Eiriksson, Professor Alexander N. Vylegzhanin

AGAINST: Sir Christopher Greenwood

Sir Christopher Greenwood appends a dissenting opinion to the Decision.

19. By letters dated 6 March 2024, the Arbitral Tribunal communicated the Decision and the Dissenting Opinion to the Parties, to Professor McRae and to Judge Wolfrum.
20. On the same date, Professor McRae and Judge Wolfrum resigned from the Arbitral Tribunal, with reference to the Decision communicated to them in the letters of the Arbitral Tribunal dated 6 March 2024.

E. DISPUTE ON THE PROCEDURE FOR THE APPOINTMENT OF REPLACEMENT ARBITRATORS

21. On 8 April 2024, the Russian Federation submitted its Rejoinder.
22. On 16 April 2024, the Arbitral Tribunal, noting the completion of the further round of written submissions set out in Procedural Order Nos. 6 and 7, and that the week of 27 May 2024 had been reserved for an oral hearing in this case, invited the Parties to communicate their views on the possible form and timing of further proceedings.
23. On 29 April 2024, Ukraine proposed to postpone the oral hearing until two replacement arbitrators had been appointed pursuant to Article 3 of Annex VII to the Convention, whereupon the Parties and the full Arbitral Tribunal could proceed to schedule an oral hearing in the fall of 2024.
24. On 30 April 2024, the Russian Federation submitted that the hearing that had been tentatively scheduled for the week of 27 May 2024 could not proceed as planned and that it would only be feasible to assign new hearing dates once the Arbitral Tribunal was fully reconstituted. In the same letter, the Russian Federation proposed that the Arbitral Tribunal develop and adopt an *ad hoc* procedure for the selection of replacement arbitrators following the successful challenges.
25. On 2 May 2024, the Arbitral Tribunal decided to postpone the oral hearing scheduled for the week of 27 May 2024 and invited the Parties to submit any comments they might have on each other's letters dated 29 and 30 April 2024.
26. On 6 May 2024, Ukraine opposed the Russian Federation's proposal regarding an *ad hoc* procedure for the selection of replacement arbitrators, noting that "[t]he Rules of Procedure [. . .] consistent with Annex VII, provide for arbitrator vacancies to be filled in the manner prescribed for the initial appointment of the arbitrator in question in Article 3 of Annex VII".
27. On 7 May 2024, the Russian Federation reiterated its request for guidance from the Arbitral Tribunal on the appropriate procedure for the appointment of replacement arbitrators, conveying its understanding that neither Annex VII nor "the Rules of Procedure [. . .] provide for such a mechanism following an arbitrator's removal as a result of a successful challenge" and that this question would therefore have to be decided by the Arbitral Tribunal in accordance with Article 1, paragraph 2, of the Rules of Procedure.
28. On 9 May 2024, Ukraine rejected the Russian Federation's proposed *ad hoc* procedure for the selection of replacement arbitrators as contrary to both the Rules of Procedure and Annex VII to the Convention.

29. On 13 May 2024, the Russian Federation reiterated its position that “neither the Rules of Procedure nor Annex VII regulat[es] the present situation” and thus it is “incumbent on the Tribunal to exercise its competence under Article 1(2) of the Rules of Procedure to regulate this issue on an *ad hoc* basis, like it did previously with the arbitrator challenge procedure”.
30. On 16 May 2024, the Arbitral Tribunal expressed its view that it would be beneficial for the Parties to engage in further efforts to reach agreement on the procedure for the appointment of replacement arbitrators. The Arbitral Tribunal also observed, with respect to the Parties’ disagreement on the proper interpretation and application of Article 3 of Annex VII to the Convention and the Rules of Procedure, as follows:

[T]he Acting President and the other members of the Tribunal note that the Parties disagree on the proper interpretation and application of Article 3 of Annex VII to the Convention and the Rules of Procedure. Without taking a position on this disagreement, they would preliminarily point out that, if requested by one or both Parties to rule on the dispute or should they feel that they should 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. This reinforces their view that it would be beneficial for the Parties to engage in further efforts to achieve agreement, at least until, in the first instance, 30 May 2024, at which time a re-evaluation could take place. If the Parties were to agree to engage in these efforts, they should explicitly agree on a suspension of the possible limiting deadline of “two weeks” set in the final sentence of Article 3(d) of Annex VII, pending their further efforts.

31. On 17 May 2024, the Russian Federation, *inter alia*, (i) advised the Arbitral Tribunal that the Parties were discussing the criteria for selecting candidates for appointment; (ii) reiterated its view that the Rules of Procedure and Article 3 of Annex VII do not explicitly regulate the matter of appointing replacement arbitrators in this case; and (iii) reiterated its request that the Arbitral Tribunal formally establish an *ad hoc* procedure for the appointment of new arbitrators.
32. On 18 May 2024, Ukraine informed the Arbitral Tribunal of an agreement reached with the Russian Federation, as follows:
1. That the two-week deadline for requesting an appointment by the ITLOS president is suspended until at least 30 May, without prejudice to the respective parties’ positions on whether Article 3, Annex VII ultimately applies to the situation at hand; and
 2. That Russia will not later invoke the provisions of Article 3, Annex VII, and in particular the two-week period referenced in Article 3(d), to argue that Ukraine is precluded from requesting an appointment by the President of ITLOS after 19 May.
33. In light of this development, Ukraine advised that for the time being it would not make any request to the President of ITLOS, and committed to continue efforts to achieve agreement with the Russian Federation until 30 May 2024.

34. On 20 May 2024, the Arbitral Tribunal noted that the Acting President and the other members of the Arbitral Tribunal remained prepared to consider any further views, proposals or requests which the Parties might choose to submit.
35. By separate letters dated 30 May 2024, the Parties indicated that they had agreed upon a set of criteria applicable to the selection of candidates and undertook to update the Arbitral Tribunal on further developments in their efforts to reach an agreement.
36. On 21 June 2024, the Arbitral Tribunal wrote to the Parties to enquire as to any further updates they could provide on their efforts to reach an agreement on the appointment of replacement arbitrators.
37. On 29 June 2024, the Russian Federation (i) indicated that the Parties had been discussing the modalities of the selection procedure since the last update but had not reached consensus in this regard; (ii) set out its proposed selection procedure and commented on the selection procedure proposed by Ukraine; and (iii) invited the Arbitral Tribunal to assist the Parties in reaching agreement in this respect by advising on the modalities that might be acceptable to both Parties.
38. On 1 July 2024, Ukraine (i) confirmed that the Parties continued to discuss the modalities of the selection procedure but were not able to reach a consensus; (ii) set out its proposed selection procedure and commented on the selection procedure proposed by the Russian Federation; and (iii) communicated its intent to proceed with requesting the President of ITLOS to make such appointments if no agreement was reached by 5 July 2024.
39. On 3 July 2024, the Russian Federation (i) urged the Arbitral Tribunal to proceed expeditiously with issuing advice to the Parties regarding a mutually acceptable solution; and (ii) invited the Arbitral Tribunal, either on a Party's request or *suo moto*: (a) to rule on the proper application of the Rules of Procedure and Article 3 of Annex VII to the Convention in respect of the appointment of replacement arbitrators; (b) to rule on prolonging the negotiations sufficient for the Arbitral Tribunal to issue its proposals and for the Parties to consider them; or (c) alternatively, to rule directly on the applicable procedure.
40. On 8 July 2024, Ukraine (i) reiterated its position regarding the selection procedure; (ii) objected to the Russian Federation's request that the Arbitral Tribunal devise an *ad hoc* procedure; (iii) notified the Arbitral Tribunal that it had sent a request for appointment of replacement arbitrators to the President of ITLOS, pursuant to Article 3 of Annex VII; and (iv) requested that the Arbitral Tribunal await the appointments by the President of ITLOS before making any other procedural or substantive rulings in this case.

41. On 10 July 2024, the Russian Federation, *inter alia*, requested that the Arbitral Tribunal:

- (a) Proceed with a ruling in respect of the proper procedure for appointment of replacement arbitrators,
- (b) Inform the ITLOS President that such a ruling is currently pending and that proceeding with making the appointments as requested by Ukraine would be considered inappropriate, and
- (c) Subsequently, inform the Parties and the ITLOS President of the ruling on the proper procedure for appointing the replacement arbitrators in the present case.

42. On 12 July 2024, the Arbitral Tribunal informed the Parties as follows:

Prior to the receipt of the Russian Federation's letter dated 10 July 2024, the Acting President and other members of the Arbitral Tribunal had instructed the Registrar to communicate to the Parties as follows:

The Acting President and the other members of the Arbitral Tribunal acknowledge receipt of Ukraine's letter of 8 July 2024 responding to their letter dated 5 July 2024 calling on Ukraine to submit any comments which they wish to provide on the Russian Federation's letter dated 3 July 2024 concerning the Parties' efforts to reach an agreement on the appointment of replacement arbitrators.

The Acting President and the other members of the Arbitral Tribunal, by a majority of two to one (In favour: Judge Gudmundur Eiriksson (Acting President) and Sir Christopher Greenwood; Opposed: Professor Alexander N. Vylegzhanin), take the following position on the appointment of replacement arbitrators:

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.

43. The Arbitral Tribunal further advised that, in light of the Russian Federation's request for a ruling in respect of the proper procedure for appointment of replacement arbitrators, it would proceed to deliver such a ruling on the Russian Federation's request and would expect to do so within one week, to prevent an undue disruption of the proceedings before the President of ITLOS. In addition, the Arbitral Tribunal informed the Parties that it had instructed the Registrar to inform the Registrar of ITLOS to that effect. Lastly, the Arbitral Tribunal suggested that a consultation take place between the Acting President and the Agents of the Parties and/or such persons as they designate, with the presence of the Registrar, in an online meeting to be convened after the Arbitral Tribunal had in principle decided on their ruling, but before its publication.

44. On 18 July 2024, consultations were held in which the Agents and counsel for each Party, the Acting President of the Arbitral Tribunal and the Registrar participated.

F. PROCEDURAL ORDER NO. 9

45. On 18 July 2024, the Arbitral Tribunal issued Procedural Order No. 9, rejecting, by a majority of two to one, the request of the Russian Federation that the Arbitral Tribunal rule on the procedure for the appointment of replacement arbitrators. Relevant portions of Procedural Order No. 9 read as follows:

38. The constitution of arbitral tribunals for the purpose of proceedings under Annex VII to the Convention is dealt with in Article 3 of Annex VII, which reads as follows:

Article 3

Constitution of arbitral tribunal

For the purpose of proceedings under this Annex, the arbitral tribunal shall, unless the parties otherwise agree, be constituted as follows:

- (a) Subject to subparagraph (g), the arbitral tribunal shall consist of five members.
- (b) The party instituting the proceedings shall appoint one member to be chosen preferably from the list referred to in article 2 of this Annex, who may be its national. The appointment shall be included in the notification referred to in article 1 of this Annex.
- (c) The other party to the dispute shall, within 30 days of receipt of the notification referred to in article 1 of this Annex, appoint one member to be chosen preferably from the list, who may be its national. If the appointment is not made within that period, the party instituting the proceedings may, within two weeks of the expiration of that period, request that the appointment be made in accordance with subparagraph (e).
- (d) The other three members shall be appointed by agreement between the parties. They shall be chosen preferably from the list and shall be nationals of third States unless the parties otherwise agree. The parties to the dispute shall appoint the President of the arbitral tribunal from among those three members. If, within 60 days of receipt of the notification referred to in article 1 of this Annex, the parties are unable to reach agreement on the appointment of one or more of the members of the tribunal to be appointed by agreement, or on the appointment of the President, the remaining appointment or appointments shall be made in accordance with subparagraph (e), at the request of a party to the dispute. Such request shall be made within two weeks of the expiration of the aforementioned 60-day period.
- (e) Unless the parties agree that any appointment under subparagraphs (c) and (d) be made by a person or a third State chosen by the parties, the President of the International Tribunal for the Law of the Sea shall make the necessary appointments. If the President is unable to act under this subparagraph or is a national of one of the parties to the dispute, the appointment shall be made by the next senior member of the International Tribunal for the Law of the Sea who is available and is not a national of one of the parties. The appointments referred to in this subparagraph shall be made from the list referred to in article 2 of this

Annex within a period of 30 days of the receipt of the request and in consultation with the parties. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.

- (f) Any vacancy shall be filled in the manner prescribed for the initial appointment.
 - (g) Parties in the same interest shall appoint one member of the tribunal jointly by agreement. Where there are several parties having separate interests or where there is disagreement as to whether they are of the same interest, each of them shall appoint one member of the tribunal. The number of members of the tribunal appointed separately by the parties shall always be smaller by one than the number of members of the tribunal to be appointed jointly by the parties.
 - (h) In disputes involving more than two parties, the provisions of subparagraphs (a) to (f) shall apply to the maximum extent possible.
39. Professor McRae and Judge Wolfrum were appointed as members of the Arbitral Tribunal, and Professor McRae as its President, by the ITLOS President. Thus, in accordance with Article 3, subparagraph (e), of Annex VII, “the manner prescribed for [their] initial appointment” under subparagraph (f) for filling the vacancies resulting from the successful challenges to Professor McRae and Judge Wolfrum is that outlined in Article 3, subparagraph (e).
40. The “notification referred to in article 1 of this Annex”, is the written notification addressed by Ukraine to the Russian Federation by which it submitted the dispute between them to the arbitral procedure provided for in Annex VII. The notification dated 1 April 2019 was received by the Russian Federation on the same date. Clearly, then, the term “the manner prescribed” cannot incorporate time periods commencing on the receipt of such notification. The Parties have differed on how, instead, the time period referred to in subparagraph (d), “within 60 days of receipt of the notification referred to in article 1 of this Annex”, is to be read.
41. The relationship between the provisions of Annex VII and the Rules of Procedure of the Arbitral Tribunal is set out in Articles 4 and 5 of Annex VII, which read as follows:

Article 4

Functions of arbitral tribunal

An arbitral tribunal constituted under article 3 of this Annex shall function in accordance with this Annex and the other provisions of this Convention.

Article 5

Procedure

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case.

42. The Arbitral Tribunal has implemented this latter provision in Article 1 of its Rules of Procedure, which reads:

SECTION I. INTRODUCTORY RULES

Scope of Application

Article 1

1. The arbitration shall be conducted in accordance with these Rules and the relevant provisions of the 1982 United Nations Convention on the Law of the Sea (the “Convention”), including Annex VII to the Convention. These Rules are subject to such modification or additions as the Arbitral Tribunal may determine after ascertaining the views of the Parties.
2. To the extent that any question of procedure is not expressly governed by these Rules or by Annex VII to the Convention or other provisions of the Convention, the question shall be decided by the Arbitral Tribunal after ascertaining the views of the Parties.

[...]

43. In Article 6 of its Rules of Procedure, the Arbitral Tribunal chose to deal with the application of the term in Article 3, subparagraph (e), of Annex VII to the Convention, “the manner prescribed for [their] initial appointment”, in the case of filling a vacancy in the event of withdrawal, incapacity or death of an arbitrator. Article 6 reads:

Replacement of an Arbitrator

Article 6

1. In the event of withdrawal, incapacity or death of an arbitrator during the course of the proceedings, the vacancy shall be filled in the manner prescribed for the initial appointment of the arbitrator in question in Article 3 of Annex VII to the Convention, with the understanding that the time periods stipulated in that Article should be calculated from the date of notification to the Parties of the withdrawal, incapacity or death of the arbitrator.
 2. In the event that an arbitrator is replaced in accordance with paragraph 1, the proceedings shall resume at the stage where the replaced arbitrator ceased to perform his or her functions, unless the Arbitral Tribunal decides otherwise.
44. Notably, 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.
 45. In its correspondence with the Parties, the Arbitral Tribunal has been careful not to make rulings on what would be a proper interpretation of the provisions of Annex VII. It set out its position in its letter dated 16 May 2024, which reads, in relevant part, as follows:

It will be recalled that, in its letter to the Parties of 9 May 2023, to which the Russian Federation has made reference in its letter of 30 April 2024, the Arbitral Tribunal expressed its view that a variance in the terms of Article 3 of Annex VII to the Convention and the Rules of Procedure to allow a replacement arbitrator to be appointed by the Russian Federation would be “in the interests of good order in the progression of th[e] arbitration”. In a similar vein, the Acting President and the other members of the Arbitral Tribunal are of the view that it is in the interests of good order in the progression of this

arbitration that the arbitrators to replace Professor McRae and Judge Wolfrum be appointed by agreement between the Parties, if such agreement is possible.

Accordingly, since it is clear that the efforts to reach agreement have only recently commenced, the Acting President and the other members of the Arbitral Tribunal express the view that it would be beneficial for the Parties to engage in further efforts to achieve such agreement.

However, the Acting President and the other members of the Tribunal note that the Parties disagree on the proper interpretation and application of Article 3 of Annex VII to the Convention and the Rules of Procedure. Without taking a position on this disagreement, they would preliminarily point out that, if requested by one or both Parties to rule on the dispute or should they feel that they should 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. This reinforces their view that it would be beneficial for the Parties to engage in further efforts to achieve agreement, at least until, in the first instance, 30 May 2024, at which time a re-evaluation could take place. If the Parties were to agree to engage in these efforts, they should explicitly agree on a suspension of the possible limiting deadline of “two weeks” set in the final sentence of Article 3(d) of Annex VII, pending their further efforts.

The Acting President and the other members of the Arbitral Tribunal remain prepared to consider any further views or proposals which the Parties may choose to submit.

46. The Arbitral Tribunal notes especially its reference to the desirability of agreement between the Parties. It recalls its decision setting out this aspect of its position, quoted in its letter to the Parties dated 12 July 2024, as follows:

The Acting President and the other members of the Arbitral Tribunal, by a majority of two to one (In favour: Judge Gudmundur Eiriksson (Acting President) and Sir Christopher Greenwood; Opposed: Professor Alexander N. Vylegzhanin), take the following position on the appointment of replacement arbitrators:

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.

47. The Russian Federation, in its letter dated 3 July 2024, refers to a possible *suo moto* ruling of the Arbitral Tribunal. In this connection, it is important to point out that, in its letter dated 16 May 2024, the Arbitral Tribunal was addressing the question of the beginning point of the “60-day period” referred to in Article 3 of Annex VII to the Convention, a question on which, as noted above, the Parties were not agreed at that time. However, since that time, this question has become moot.
48. In its request for a ruling, the Russian Federation 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 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.
49. Ukraine has now applied to the ITLOS President to appoint replacements for Professor McRae and Judge Wolfrum. It is not for this Arbitral Tribunal to comment on how the ITLOS President should respond to that request.

V. RULING OF THE ARBITRAL TRIBUNAL ON THE REQUEST OF THE RUSSIAN FEDERATION

50. Accordingly, for the reasons set out above, the Acting President and the other members of the Arbitral Tribunal, by a majority of two to one, *reject* the request of the Russian Federation that the Arbitral Tribunal rule on the procedure for the appointment of replacement arbitrators.

IN FAVOUR: Judge Gudmundur Eiriksson, Sir Christopher Greenwood

AGAINST: Professor Alexander N. Vylegzhanin

Professor Vylegzhanin appends a Dissenting Opinion to this Order.

46. On 19 July 2024, Ukraine informed the President of ITLOS of the Arbitral Tribunal's issuance of Procedural Order No. 9 and reaffirmed its request of 8 July 2024 for the appointment of replacement arbitrators pursuant to Article 3(e) of Annex VII to the Convention.
47. On 22 July 2024, the Russian Federation wrote to the Arbitral Tribunal (i) reiterating its position that neither the Rules of Procedure nor Annex VII regulate the appointment of arbitrators following a successful challenge; (ii) requesting that the Arbitral Tribunal impose a suitable *ad hoc* procedure; (iii) objecting to "Ukraine's unilateral referral of the matter to the President of ITLOS" and stating that "the Russian Federation will not consider itself bound by any decision stemming from this referral and will not recognize the authority of any arbitrators thus 'appointed'"; and (iv) noting that it "remains open to discussions on the issue, including possible consultations with the Arbitral Tribunal and the President of ITLOS".

G. APPOINTMENT OF ARBITRATORS BY THE PRESIDENT OF ITLOS

48. As stated, on 8 July 2024, Ukraine sent a request to the President of ITLOS, H.E. Judge Tomas Heidar, set out in full as follows:

Dear President Heidar:

On behalf of Ukraine, I write concerning the above-captioned arbitration taking place before an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"), to request your assistance in filling two vacancies on the arbitral tribunal. As I explain further below, the Parties have been unable to reach agreement on the appointment of arbitrators, and Ukraine now requests that you fill these vacancies in accordance with Article 3 of Annex VII.

On 24 November 2023, the Russian Federation asserted a challenge to two members of the arbitral tribunal: Professor Donald McRae, President of the tribunal, and Judge Rudiger Wolfrum. On 6 March 2024, the three unchallenged arbitrators (Judge Gudmundur Eiriksson presiding, Sir Christopher Greenwood, and Professor Alexander N. Vylegzhanin), by two votes to one, upheld Russia's challenges. Professor McRae and Judge Wolfrum notified the remaining arbitrators and the Parties of their resignation from the tribunal the same day.

Article 6 of the Rules of Procedure governing the arbitration – entitled “Replacement of an Arbitrator” – requires that arbitrator vacancies arising from the “withdrawal, incapacity or death of an arbitrator during the course of the proceedings” be filled in the manner prescribed for the initial appointment of the arbitrator in question in Article 3 of Annex VII. The Rules of Procedure further provide that the arbitration shall be conducted in accordance with the relevant provisions of Annex VII. Article 3(f) of Annex VII provides that “[a]ny vacancy shall be filled in the manner prescribed for the initial appointment.”

At the time of the constitution of the arbitral tribunal in 2019, Professor McRae and Judge Wolfrum (as well as Judge Eiriksson) were appointed by President of ITLOS Jin-Hyun Paik pursuant to Article 3(d) of Annex VII, following the Parties’ inability to reach agreement on the appointment of the remaining three members of the arbitral tribunal. Accordingly, the vacancies are to be filled pursuant to the procedures set forth in Articles 3(d) and 3(e) of Annex VII.

In exchanges of letters before the arbitral tribunal, Ukraine and the Russian Federation expressed different views on the application of the Rules of Procedure and Annex VII to the present circumstances, in particular on the relevant start date for counting the 60-day period for attempting to reach agreement pursuant to under Article 3(d). The Russian Federation indicated its view that the time period for calculating the 60-day period commenced on 6 May 2024, which would mean that it concluded on 5 July 2024. Ukraine has maintained that the 60-day period for attempting to reach agreement under Article 3(d) began to run when Professor McRae and Judge Wolfrum notified their resignation from the Tribunal on 6 March 2024. By that calculation, the 60-day period concluded on 5 May 2024.

On 16 May 2024, the arbitral tribunal communicated to the Parties their view that “it would be beneficial for the Parties to engage in further efforts to achieve agreement, at least until, in the first instance, 30 May 2024.” Consistent with this suggestion, the Parties agreed to temporarily suspend the possible time-limiting deadlines of Article 3(d) to engage in further efforts to attempt to reach agreement. While counsel for the Parties have engaged in consultations on the matter and reached agreement on the criteria for arbitrator candidates, the Parties have been unable to reach agreement on the appointment of arbitrators.

Accordingly, Ukraine respectfully requests that you appoint two new arbitrators within 30 days of the receipt of this request, pursuant to Article 3 of Annex VII.

In exercising your functions under Article 3(e) of Annex VII, Ukraine requests that you take account of the following criteria for replacement arbitrators that both Parties have accepted in the course of consultations between their counsel:

- (i) The replacement arbitrators need not be chosen from the list referred to in Article 2 of Annex VII;
- (ii) the replacement arbitrators shall be nationals of a third State other than Ukraine and the Russian Federation;
- (iii) the replacement arbitrators shall not be in the service of, or ordinarily resident in, the territory of either of the Parties;
- (iv) the replacement arbitrators shall not share a nationality with each other or any of the incumbent members of the Tribunal; and
- (v) the replacement arbitrators shall not be members of the Institut de Droit International (“IDI”) that voted in favor of the IDI Declaration dated 1 March 2022.

Ukraine further requests that you designate as President of the arbitral tribunal one of the two members that you appoint.

I avail myself of this opportunity to thank you for your assistance in this matter.

49. On 10 July 2024, the Russian Federation informed the President of ITLOS that Ukraine's letter of 8 July 2024 "present[s] a truncated account of events [. . .] completely exclud[ing] the fact that a request for the Arbitral Tribunal to rule on the crux of the disagreement has yet to be decided". The Russian Federation then detailed its position, arguing that: (i) the Rules of Procedure and Annex VII to the Convention do not govern the procedure of challenging arbitrators or appointment of replacement arbitrators after a successful challenge; and (ii) the Arbitral Tribunal has the authority to establish the necessary procedure for arbitrator reappointment after a successful challenge, which it has been already requested to do. Referencing its pending request before the Arbitral Tribunal, the Russian Federation concluded by stating:

Notwithstanding the pending request, Ukraine regrettably sought your engagement regarding the arbitrators' appointment. As indicated at the beginning of this letter, it did so without informing you of the actual state of the arbitration proceedings, particularly about the Arbitral Tribunal being seised of the Russian Federation's request to determine the procedure for the appointment of replacement arbitrators. Notably, Ukraine's action came with no regard for the possibility to delay its request to the President of ITLOS by up to two weeks in accordance with Ukraine's own interpretation of the procedure.

Hoping the above suffice to clarify the procedural steps and current state of affairs in the pending arbitration between Ukraine and the Russian Federation, I wish to underline that the Russian Federation will continue to insist that the replacement arbitrator procedure shall be adopted by the Arbitral Tribunal and will pursue its request addressed to that Tribunal. The Russian Federation also believes there is no need to underscore the autonomy and non-subordination of an Annex VII Arbitral Tribunal or the principles of deference and comity that must be upheld among international courts and tribunals.

Consequently, the Russian Federation respectfully requests that you dismiss Ukraine's request, whilst bearing in mind the Arbitral Tribunal's consideration of the Russian Federation's request for establishing the arbitrator appointment procedure. To facilitate that outcome, the Russian Federation has requested that the Tribunal inform you of their decision accordingly.

50. On the same day, 10 July 2024, the President of ITLOS wrote to Ukraine and the Russian Federation as follows:

Excellency,

I have the honour to write to you concerning the arbitral proceedings between Ukraine and the Russian Federation under Annex VII to the United Nations Convention on the Law of the Sea in the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen.

In a letter addressed to me by the Agent for Ukraine, Ms Oksana Zolotaryova, dated 8 July 2024 and received on 9 July 2024, reference is made to the resignation, from the arbitral tribunal, of two arbitrators. It is stated in that letter that "the vacancies are to be filled pursuant to the procedures set forth in Articles 3(d) and 3(e) of Annex VII." It is also stated in the letter that Ukraine and Russia "have been unable to reach agreement on the appointment of arbitrators" and that Ukraine "requests that [I] appoint two new arbitrators ... pursuant to Article 3 of Annex VII".

In the same letter, Ukraine further requests me to “designate as President of the arbitral tribunal one of the two members that [I] appoint.”

Pursuant to article 3(e) of Annex VII to the Convention, I am required to make the appointment of two arbitrators under subparagraph (d) within a period of 30 days of the receipt of the request and in consultations with the Parties.

I would therefore like to undertake consultations with both Parties on the matter of the appointment of the two arbitrators and the President of the arbitral tribunal. As this appointment is to be made within a 30-day period of the receipt of the request of Ukraine dated 8 July 2024, I would like to suggest that consultations take place on 30 July 2024, at 10 a.m., at the premises of the Tribunal in Hamburg, Germany. I would appreciate it very much if you could confirm your participation and indicate your availability on the proposed date as well as the names and position of the representatives of your Government who will attend the consultations.

Please find attached the text of article 3 of Annex VII to the Convention.

Accept, Excellency, the assurances of my highest consideration.

51. On 11 July 2024, Ukraine confirmed to the President of ITLOS its availability to participate in consultations on 30 July 2024 at the ITLOS premises in Hamburg.
52. On 19 July 2024, Ukraine wrote to the President of ITLOS responding to the Russian Federation’s letter of 10 July 2024 and informing the President of ITLOS that, on 18 July 2024, the Arbitral Tribunal issued Procedural Order No. 9 wherein it, by two votes to one, rejected the request of the Russian Federation for a ruling on the procedure for the appointment of replacement arbitrators. Ukraine reaffirmed its request of 8 July 2024 and reiterated its availability for in-person consultations on 30 July 2024.
53. On 22 July 2024, the Russian Federation wrote to the President of ITLOS to communicate its views on Procedural Order No. 9, arguing that (i) the Arbitral Tribunal did not agree with Ukraine’s interpretation of the Rules of Procedure and Article 3 of Annex VII, nor did it assert the legitimacy of Ukraine’s request to the ITLOS President; (ii) the Arbitral Tribunal confirmed that the notification referred to in Article 1 of Annex VII refers to the written notification addressed by Ukraine to the Russian Federation, such that the 60-day period in Article 3(d) could not have applied and said period for negotiations could neither have commenced nor expired; and (iii) the Arbitral Tribunal confirmed that Article 6(1) of the Rules of Procedure does not refer to the event of disqualification of an arbitrator following a successful challenge. Since, according to the Russian Federation, neither the Rules of Procedure nor Annex VII applied, and since the Arbitral Tribunal declined to rule on the proper procedure, the Russian Federation concluded that:

As a consequence, presently there exists no legal basis to proceed with the appointment of arbitrators through application of Article 3 of Annex VII. Any arbitrators thus ‘appointed’ cannot be considered legitimate. Pending the Arbitral Tribunal’s legitimate reconstitution, no decision taken by any new composition of the Tribunal formed without the necessary

legal basis can be considered lawfully adopted, even more so any decision on jurisdiction, admissibility of claims or on the merits of the case.

In view of the above the Russian Federation maintains its position that:

1. Neither the Rules of Procedure, nor Article 3 of Annex VII to UNCLOS govern the issue of replacement of arbitrators removed due to a successful challenge.
2. It is, therefore, 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, as was the case with the arbitrator challenge procedure.
3. As the issue of arbitrator replacement procedure remains unresolved, Ukraine's unilateral referral of the matter to the President of ITLOS lacks the appropriate legal basis. Thus, the Russian Federation will not consider itself bound by any decision stemming from this referral and will not recognize the authority of any arbitrators thus 'appointed'.

While reserving its above-mentioned principal position, as a matter of good will the Russian Federation remains open to discussions on the issue, including possible consultations with the Arbitral Tribunal and the President of ITLOS. The Russian Federation uses this opportunity to draw attention to the location and timing of such consultations: participation in any in-person meetings in countries which have introduced 'sanctions' against the Russian Federation will be severely complicated by logistical difficulties and lengthy visa processes, and cannot be arranged on short notice.

54. On 23 July 2024, Ukraine set out its own views on Procedural Order No. 9, arguing that the Arbitral Tribunal declined to adopt an *ad hoc* procedure "precisely because it did not agree with Russia's position that the issue of appointing replacement arbitrators is not governed by the Rules of Procedure and Annex VII". Ukraine asserted that, in expressly rejecting the Russian Federation's request, the Arbitral Tribunal "clearly concluded that Article 3 of Annex VII applies, and that the manner for filling the vacancies 'is that outlined in Article 3, subparagraph (e)' of Annex VII". Ukraine reiterated its availability for consultations on 30 July 2024 and observed that the Russian Federation "has been in receipt of this invitation since 10 July, and thus it cannot credibly complain that the consultations have been scheduled on 'short notice'".
55. On 26 July 2024, the President of ITLOS wrote to the Russian Federation, as follows:

Excellency,

Reference is made to my letter dated 10 July 2024, inviting the representatives of the Russian Federation to participate in consultations to take place on 30 July 2024 at the premises of the Tribunal, on the matter of the appointment of two arbitrators and the President of the Arbitral Tribunal in PCA Case No. 2019-28, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Ukraine v. the Russian Federation*). I addressed a similar letter to the Agent of Ukraine on the same date.

Reference is also made to your letters dated 10 July and 22 July 2024, as well as the letters from the Agent of Ukraine dated 11 July, 19 July and 23 July 2024. Copies of the respective letters were communicated to the other Party.

In relation to this matter, I have been informed today by the Arbitral Tribunal in the abovementioned case that it has issued a procedural order (Procedural Order No. 9 of 18 July 2024), a copy of which was conveyed to me. I take note that, in [paragraph 39 of] the said procedural order, the Arbitral Tribunal states that “Professor McRae and Judge Wolfrum were appointed as members of the Arbitral Tribunal, and Professor McRae as its President, by the ITLOS President. Thus, in accordance with Article 3, subparagraph (e), of Annex VII, ‘the manner prescribed for [their] initial appointment’ under subparagraph (f) for filling the vacancies resulting from the successful challenges to Professor McRae and Judge Wolfrum is that outlined in Article 3, subparagraph (e).”

Under article 3 of Annex VII to the Convention, the President of the Tribunal is designated as appointing authority, unless the Parties to the dispute agree that the appointment of arbitrators should be made by another person or a third State chosen by the Parties. I would like to state, in this regard, that the President is therefore obliged to act in accordance with the provisions contained in article 3(e) and (f) of Annex VII to the Convention.

I would therefore like to take this opportunity to reiterate my invitation addressed to you on 10 July 2024 to participate in the consultations I intend to hold with the representatives of both Parties on 30 July 2024 at the premises of the Tribunal. I would appreciate it very much if you could transmit your response by Saturday, 27 July 2024, 10 a.m. (Hamburg time).

I wish to inform you that the Agent of Ukraine has already confirmed her participation in the said consultations.

Accept, Excellency, the assurances of my highest consideration.

56. On 27 July 2024, the Russian Federation reiterated that “it does not consider Ukraine’s application dated 8 July 2024 seeking appointment of replacement arbitrators to have any legal basis” and disagreed with the statement of the President of ITLOS made on the basis of paragraph 39 of Procedural Order No. 9. According to the Russian Federation, its arguments, as set out in its letter dated 22 July 2024, also find support in the Dissenting Opinion on Procedural Order No. 9 of Professor Vylegzhanin. The Russian Federation’s letter concludes:

In light of this, with all due respect, the Russian Federation cannot agree to take part in consultations ‘on the matter of the appointment of the two arbitrators and the President of the arbitral tribunal’ since such consultations would likewise have no legal basis as the originating request by Ukraine.

That said, in the spirit of good faith, the Russian Federation is prepared to convene with ITLOS and Ukraine in order to seek potential avenues to proceed. For avoidance of doubt, this should not be interpreted as the Russian Federation’s agreement to participate in, or acceptance of legitimacy of, any appointment procedure to be carried out without the Tribunal’s explicit ruling. The Russian Federation requests that this position be clearly reflected in the forthcoming correspondence or any public statements from ITLOS.

While the Russian Federation is minded to discuss the ways of resolving this situation and is prepared to take part in a meeting for these purposes, the currently standing date for such meeting – 30 July 2024 – is, however, not feasible. As the Russian Federation explained in its letter of 22 July 2024, arranging the visit of the Russian delegation to Hamburg at such short notice is impossible due to logistical and visa difficulties. The Russian Federation will be in a position to arrange for such visit no earlier than the week starting from 5 August 2024, subject to the availability of visas to the members of its delegation by that time.

With regard to the 30-day period for appointment of arbitrators envisaged by Article 3(e) of Annex VII, as explained in the Russian Federation's earlier correspondence and reiterated above, it is the Russian Federation's principled position that there is no legal basis for Ukraine's application in the first place, which renders Article 3(e) inapposite. However, even if it were applicable, the relevant rule ought not override a Party's right to participate and be represented in the process, nor should it defy the principle of due process in the selection and appointment of appropriate arbitrators. In this respect, it is recalled that there are well-known previous cases where the 30-day period under Article 3(e) was not complied with. In light of this, the 30-day period even if it were deemed applicable, ought not to be applied so as to infringe the Russian Federation's fundamental procedural rights.

The Russian Federation also rejects Ukraine's allegations that 'Russia has been in receipt of this invitation since 10 July, and thus it cannot credibly complain that the consultations have been scheduled on "short notice."' To recall, Ukraine unilaterally decided to send its application even though the Tribunal at the time was seized with the Russian Federation's request to establish the proper procedure for replacing the challenged arbitrators. Notably, Ukraine sent the application at the very beginning of what Ukraine perceived to be the two-week period specified in Article 3(d) allocated to the Parties for addressing the President of ITLOS after the 60-day period for *inter-partes* negotiations had expired (again, according to Ukraine's own perception). This two-week period, even if it had been indeed applicable, was more than enough for Ukraine to await the decision of the Tribunal, which was already awaited at the time; yet Ukraine elected to send its application immediately, thus truncating severely the time available for arranging consultations after the issuance of the Tribunal's decision. The Russian Federation, in turn, awaited the Tribunal's decision on the matter. Accordingly, Ukraine cannot now try to shift the burden of uncertainty that it created itself onto the Russian Federation.

In conclusion, the Russian Federation respectfully requests that the above considerations be taken into account when dealing with Ukraine's request dated 8 July 2024 for the appointment of replacement arbitrators. First and foremost, the request has no legal basis, which is now confirmed by the findings of the Tribunal concerning the (non-)applicability of Article 3 of Annex VII to this situation. Furthermore, the Russian Federation's ability to participate in any in-person meetings to discuss the situation is severely restricted due to the existing logistical and visa complications, making the date notified (30 July 2024) infeasible for that purpose.

The Russian Federation sincerely hopes that the present situation is adequately resolved in line with the applicable rules, in the interests of all Parties and the success of the Arbitration.

57. On 27 July 2024, the President of ITLOS informed the Parties that, in light of the Parties' communications, he would pursue consultations by correspondence and invited the Parties to communicate their comments by 2 August 2024. The letter reads in full:

Excellency,

I have the honour to refer to the matter of the appointment of two arbitrators and the President of the Arbitral Tribunal in PCA Case No. 2019-28, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Ukraine v. the Russian Federation*) and the letter I addressed to each Party on 10 July 2024.

I have also the honour to refer to the letters of the Agent of Ukraine dated 8 July (received on 9 July), 11 July, 19 July and 23 July 2024, as well as the letters of the Agent of the Russian Federation dated 10 July, 22 July and 27 July 2024. Copies of the respective letters were communicated to the other Party.

In light of the above communications, the holding of a meeting with the representatives of the Parties on the matter of the appointment of two arbitrators does not appear to be feasible.

I therefore intend to pursue consultations by correspondence with the Parties on the matter of the appointment of two arbitrators, in accordance with article 3 of Annex VII to the Convention.

For the purpose of these consultations, I transmit to you attached the list of arbitrators referred to in article 2 of Annex VII to the Convention, as posted on the website of the United Nations Treaty Section of the Office of Legal Affairs (status as at 27 July 2024). You may wish to suggest, by Friday, 2 August 2024, 5 p.m. (Hamburg time), a list of up to 10 names of persons included in the UN list who may serve as possible arbitrators. In addition, you may wish to communicate your comments, if any, on the names included in the UN list by Friday, 2 August 2024, 5 p.m. (Hamburg time). I would like to indicate that your suggestions and comments would be conveyed to me on a confidential basis and will not be communicated to the other Party.

Accept, Excellency, the assurances of my highest consideration.

58. On 1 August 2024, the Russian Federation wrote to the President of ITLOS as follows:

Mr. President,

Concerning your letter dated 27 June 2024, the Russian Federation is compelled to reiterate its principled position, as articulated in its previous communications dated 10 July, 22 July, and 27 July 2024, which may be summarised as follows:

1. The procedure set out in Article 3 of Annex VII cannot be applied to replacement of arbitrators as a result of successful challenge, due to the lack of necessary conditions for its initiation. Specifically, a Party can only request the President of ITLOS to appoint arbitrators once the 60-day period allocated for the Parties' negotiations on the matter of appointment has commenced and expired. However, according to Article 3, this 60-day period can only be triggered by a 'notification referred to in article 1 of this Annex', i.e. the written notification on submission of the dispute to arbitration. The Arbitral Tribunal has ruled that this notification is 'the written notification addressed by Ukraine to the Russian Federation by which it submitted the dispute between them to the arbitral procedure' on 1 April 2019, and consequently the [sic] 'the manner prescribed for the initial appointment' of arbitrators as per Article 3(f) of Annex VII 'cannot incorporate time periods commencing on the receipt of such notification'. The Arbitral Tribunal has also found that Article 6(1) of the Rules of Procedure, which by agreement of the Parties set another date as the inception point for the 60-day period in cases of incapacity, withdrawal or death of arbitrators, 'does not refer to the event of disqualification of an arbitrator upon a successful challenge by a Party'.
2. As a result, since the arbitrator appointment procedure in the present situation is not regulated by either Annex VII or the Rules of Procedure, it can only be set by agreement of the Parties (in accordance with Article 1 of Annex VII) or a ruling by the Arbitral Tribunal (in accordance with Article 1(2) of the Rules of Procedure). The Parties have not reached such an agreement, and the Arbitral Tribunal has declined to issue such a ruling.
3. Consequently, Ukraine's request to you dated 8 July 2024 should be disregarded as it was submitted in contravention of the applicable norms, thereby lacking legal merit. Any appointment resulting from this request would inherently be vitiated and without legitimacy.

The Russian Federation's position is further corroborated by other provisions of the Arbitral Tribunal's Procedural Order No. 9: in particular, paragraph 45 quotes a letter from the Arbitral Tribunal dated 16 May 2024 indicating the following:

However, the Acting President and the other members of the Tribunal note that the Parties disagree on the proper interpretation and application of Article 3 of Annex VII to the Convention and the Rules of Procedure. Without taking a position on this disagreement, they would preliminarily point out that, if requested by one or both Parties to rule on the dispute or should they feel that they should 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. This reinforces their view that it would be beneficial for the Parties to engage in further efforts to achieve agreement... [Emphasis added].

In the same quote, the Arbitral Tribunal further stated that:

...the Acting President and the other members of the Arbitral Tribunal are of the view that it is in the interests of good order in the progression of this arbitration that the arbitrators to replace Professor McRae and Judge Wolfrum be appointed by agreement between the Parties, if such agreement is possible. [Emphasis added].

Paragraph 46 of the said Procedural Order added the following:

The Arbitral Tribunal notes especially its reference to the desirability of agreement between the parties.

In light of the above, the Russian Federation cannot concede to your request for the submission of a list of candidates who may serve as potential arbitrators, or comments on the persons included in the UN list. The Russian Federation also recalls that certain criteria for the selection of arbitrators have been previously agreed upon by the Parties as part of their discussions (as indicated by Ukraine in its letter dated 8 July 2024), in particular that 'candidates need not be chosen from the list referred to in Annex VII Article 2'.

Nevertheless, as a gesture of good faith and in pursuit of constructive dialogue to resolve the challenging situation at hand, in line with the Arbitral Tribunal's clear message, the Russian Federation reiterates its willingness to engage in discussions regarding the adoption of a procedure that conforms with the applicable rules for selecting and appointing arbitrators to reconstitute the Arbitral Tribunal. The Russian Federation believes that in-person discussions between the President and the Agents and Counsel of both Parties would be conducive to finding a mutually acceptable solution. As stated in the 27 July letter, the 30-day period specified in Article 3(e) of Annex VII, even if it were applicable, *quod non*, should not be viewed as a bar to constructive discussions in this case.

The Russian Federation therefore repeats its suggestion made earlier that such discussions be organised during the week of 5 August 2024. Considering the logistics and visa requirements for in-person participation, the Russian Federation could possibly attend such a meeting in Hamburg on 8, 9 or 10 August 2024, provided the meeting is confirmed not later than 2 August, 2024, and subject to the availability of connecting flights and timely issuance of visas by German authorities. For the above to materialise, timely assistance from ITLOS in the obtainment of visas is paramount.

Should the discussions prove to be fruitful and lead to a mutually acceptable solution, for example through the adoption of an *ad hoc* procedure by agreement of both Parties, the Russian Federation will be prepared to immediately submit a list of candidates to be used in such a procedure, which would hopefully result in the opportune and legitimate reconstitution of the Arbitral Tribunal.

In conclusion, the Russian Federation would like to underscore that, by agreeing to participate in the aforementioned discussions, it has not agreed to the application (nor the applicability) of the procedure outlined in Article 3 of Annex VII in the instant case for the appointment of arbitrators to replace Professor McRae and Judge Wolfrum following their removal. As it was unequivocally stated in the Russian Federation's letter of 27 July 2024, any discussions held with you on this matter – whether in person or by correspondence – have been and might continue to be conducted without prejudice to the aforementioned principled position.

59. On 3 August 2024, the President of ITLOS, by e-mail to the Parties, invited further comments by 5 August 2024, thus:

Excellency,

I have the honour to refer to my letter dated 27 July 2024 addressed to each Party on the matter of the appointment of two arbitrators and the President of the Arbitral Tribunal in PCA Case No. 2019-28 (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Ukraine v. the Russian Federation*).

In view of the responses received, it seems appropriate to give each Party the opportunity to provide additional names of individuals who may serve as possible arbitrators.

In this regard, I note that the Parties have referred, in their respective communications, to certain criteria previously agreed between them, in particular, that “the replacement of the two arbitrators need not to be chosen from the list referred to in article 2 of Annex VII to the Convention”.

On this basis, I wish to invite each Party to suggest, by Monday, 5 August 2024, 5 p.m. (Hamburg time), an additional list of up to 10 individuals not included in the UN list who may serve as possible arbitrators.

I would like to reiterate that your suggestions would be conveyed to me on a confidential basis and will not be communicated to the other Party.

Accept, Excellency, the assurances of my highest consideration.

60. On 8 August 2024, the President of ITLOS informed the Acting President of the Arbitral Tribunal and the Parties of his decision to appoint Judge Eiriksson as President of the Arbitral Tribunal and Judge James Kateka and Professor Joanna Mossop as members of the Arbitral Tribunal. The letters from the President of ITLOS to the Parties read:

Excellency,

I have the honour to refer to the arbitral proceedings in PCA Case No. 2019-28 (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Ukraine v. the Russian Federation*).

I have also the honour to refer to the letter of the Agent for Ukraine dated 8 July 2024 and received on 9 July 2024, informing me of the resignation, from the arbitral tribunal, of two arbitrators and containing a request for me to make the appointment of two new arbitrators, pursuant to article 3 of Annex VII to the United Nations Convention on the Law of the Sea. The same letter contained a request for me to appoint the president of the arbitral tribunal.

Pursuant to article 3, subparagraph (f), of Annex VII to the Convention, any vacancy in the arbitral tribunal should be filled “in the manner prescribed for the initial appointment.” Accordingly, pursuant to subparagraph (e) of the same article, the President of the Tribunal is required to make the appointment of the two vacant seats “from the list referred to in article 2 of [Annex VII] within a period of 30 days of the receipt of the request and in consultations with the parties.”

Further to an exchange of communications with the Parties, by letter dated 27 July 2024, I informed the Parties that I would pursue consultations with them on the matter by correspondence, in accordance with article 3 of Annex VII to the Convention, and invited them to communicate their comments by Friday, 2 August 2024. By a communication dated 3 August 2024, I invited the Parties to communicate further comments by 5 August 2024.

Further to these consultations, I wish to inform you that I made the following decision:

1. To appoint Mr James Kateka (United Republic of Tanzania) and Ms Joanna Mossop (New Zealand) as arbitrators in PCA Case No. 2019-28 (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Ukraine v. the Russian Federation*);
2. To appoint Mr Gudmundur Eiriksson (Iceland) as president of the same arbitral tribunal.

Accept, Excellency, the assurances of my highest consideration.

H. THE RUSSIAN FEDERATION’S OBJECTIONS TO THE RECONSTITUTION OF THE ARBITRAL TRIBUNAL

61. On 9 August 2024, the Russian Federation (i) reiterated its objections regarding the appointment procedure; (ii) further objected that the requisite consultation with the Parties under Article 3(e) of Annex VII to the Convention was not undertaken by the President of ITLOS; and (iii) rejected the appointments made by the President of ITLOS. The Russian Federation concluded as follows:

The Russian Federation firmly submits that the purported appointments are inconsistent with the applicable rules and were made without the Russian Federation’s participation in consultations, or consent. Therefore, the Russian Federation cannot consider itself bound by the President’s decision, and rejects the appointments. If acted upon this decision, the Arbitral Tribunal will not be properly constituted.

In light of the above, the Russian Federation hereby suspends its participation in this Arbitration until further notice.

62. On 13 August 2024, Professor Mossop informed the President of ITLOS of her decision to withdraw from the proceedings.
63. On 13 August 2024, the Arbitral Tribunal transmitted Professor Mossop’s letter to the Parties and invited them to attend consultations with the President of the Arbitral Tribunal on 15 August 2024. The Arbitral Tribunal also declared as follows with respect to the matters raised by the Russian Federation in its letter dated 9 August 2024:

At this stage, then, the concerns of the Russian Federation set out in its letter dated 9 August 2024 could be characterized as a challenge to the constitution of the Arbitral Tribunal, and accordingly its jurisdiction, on which the Arbitral Tribunal could issue a ruling or decision.

64. On 14 August 2024, Ukraine informed the Arbitral Tribunal that it had sent a request for appointment of a replacement arbitrator to the President of ITLOS, pursuant to Article 3 of Annex VII to the Convention, and that its preferred course of action was to await until the Arbitral Tribunal had been fully re-constituted before engaging in further consultations. Nevertheless, Ukraine confirmed that it would be available to attend the proposed consultations on 15 August 2024.
65. On the same date, the Russian Federation indicated that it maintained its overarching position stated in its letter dated 9 August 2024, but nevertheless confirmed its availability to participate in the consultations proposed by the President of the Arbitral Tribunal.
66. On 15 August 2024, consultations with the Parties and the President of the Arbitral Tribunal were held without prejudice to the Parties' respective positions on the constitution of the Arbitral Tribunal.
67. On 16 August 2024, the Registrar transmitted to the Parties Judge Kateka's signed Declaration of Acceptance and Statement of Impartiality and Independence and his Disclosure Statement dated 15 August 2024.
68. On 20 August 2024, in response to Ukraine's request for the appointment of a replacement arbitrator following Professor Mossop's withdrawal, the President of ITLOS informed Ukraine that he would only be able to entertain such a request following the expiry of the 60-day period outlined in Article 3(d) of Annex VII. The letter from the President of ITLOS reads:

Excellency,

I have the honour to write to you concerning the arbitral proceedings in PCA Case No. 2019-28 (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Ukraine v. the Russian Federation*).

I have also the honour to refer to my letter to the Agent of the Russian Federation of 14 August 2024, a copy of which was sent to you. In that letter, I invited the Agent of the Russian Federation to communicate any comments he may have concerning your letter to me dated 14 August 2024, by Monday 19 August 2024, 5 p.m. (Hamburg time). In this regard, I would like to inform you that no response was received from the Russian Federation.

With reference to Ukraine's request that I appoint an arbitrator pursuant to article 3 of Annex VII to the United Nations Convention on the Law of the Sea, as formulated in your letter to me dated 14 August 2024, I wish to draw your attention to article 3, subparagraph (f), of Annex VII to the Convention, which states that "[a]ny vacancy shall be filled in the manner prescribed for the initial appointment." I further wish to draw your attention to article 3, subparagraphs (d) and (e), of Annex VII to the Convention. Subparagraph (d) provides that "[i]f, within 60 days of receipt of the notification referred to in article 1 of this Annex, the parties are unable to reach agreement on the appointment of one or more of the members of the tribunal to be appointed by agreement, ... the remaining appointment or appointments

shall be made in accordance with subparagraph (e), at the request of a party to the dispute” and that “[s]uch request shall be made within two weeks of the expiration of the aforementioned 60-day period.” According to article 3, subparagraph (e), of Annex VII to the Convention, the necessary appointments shall be made “within a period of 30 days of the receipt of the request and in consultation with the parties.”

I wish to inform you that, on the basis of article 3, subparagraphs (d), (e) and (f), of Annex VII to the Convention, I would only be in a position to entertain a request to appoint an arbitrator if the parties are unable to reach agreement on the appointment of a member of the arbitral tribunal within the aforementioned 60-day period and such request is made to me within two weeks of the expiration of the aforementioned 60-day period. I wish to further inform you that an appointment would be made within a period of 30 days of the receipt of the request and in consultation with the parties.

Accept, Excellency, the assurances of my highest consideration.

69. On 6 September 2024, the Russian Federation wrote to the Arbitral Tribunal, drawing attention to Judge Kateka (i) having participated in the drafting and voting process of the IDI Declaration as a member of the Institute of International Law; (ii) having reposted a tweet on social media that could “give rise to justifiable doubts regarding his impartiality”; and (iii) having been a member of ITLOS participating when the latter rendered the Provisional Measures Order for this arbitration on 25 May 2019. The Russian Federation therefore invited Judge Kateka to consider withdrawing from the case.
70. This challenge against Judge Kateka for lack of independence and impartiality is the subject of a separate Decision on Challenge dated 11 April 2025. The Arbitral Tribunal was constituted for the purposes of the challenge by President Eiriksson, Sir Christopher Greenwood and Professor Vylegzhanin. The dispositive portion of the Decision on Challenge reads as follows:

For the reasons set out above, the Arbitral Tribunal, constituted for the purposes of this challenge by President Gudmundur Eiriksson, Sir Christopher Greenwood and Professor Alexander Vylegzhanin:

- (a) *decides*, unanimously, that the challenge to Judge Kateka was properly and timely asserted;
- (b) *rejects* the challenge to Judge James Kateka, having decided with respect to the individual grounds, as follows:
 - (i) *dismisses*, by two votes to one, the challenge grounded on Judge Kateka’s involvement in the Declaration of the Institute of International Law of 1 March 2022:

IN FAVOUR: Judge Gudmundur Eiriksson, Sir Christopher Greenwood

AGAINST: Professor Alexander Vylegzhanin

- (ii) *dismisses*, by two votes to one, the challenge grounded on Judge Kateka’s social media activity:

IN FAVOUR: Judge Gudmundur Eiriksson, Sir Christopher Greenwood

AGAINST: Professor Alexander Vylegzhanin

(iii) *dismisses*, unanimously, the challenge grounded on Judge Kateka's participation in the Provisional Measures stage of this dispute before the International Tribunal for the Law of the Sea;

(c) *decides*, unanimously, that the question of costs shall be ruled upon in conjunction with the merits.

71. Professor Vylegzhanin appended a dissenting opinion to the Decision.

72. At the outset of its letter dated 6 September 2024, the Russian Federation also reiterated its objections "that the appointment of Mr Kateka and Ms Mossop as replacement arbitrators took place against the background of – and in plain disregard for – the firm and well-substantiated objections raised by the Russian Federation with respect to the procedure applied to replace the disqualified arbitrators" and that "those appointments were eventually made in disregard of the requirements to hold consultations with the Parties as per Article 3(e) of Annex VII". The letter concluded as follows:

For the sake of clarity, I must stress that this letter is without prejudice to the Russian Federation's position, as expressed in its notification of 9 August 2024, concerning the suspension of its formal participation in this arbitration, until further notice.

73. On 12 September 2024, the Arbitral Tribunal wrote to the Parties and informed them as follows:

[T]he Arbitral Tribunal has discussed the matters raised by the Russian Federation in its letter dated 9 August 2024, also addressed at the outset (pp. 1-2) of its letter dated 6 September 2024. In keeping with the considerations set forth in my letter on behalf of the Arbitral Tribunal of 13 August 2024 and discussed during the consultations held between the Parties and Judge Eiriksson on 15 August 2024, the Arbitral Tribunal wishes to remain careful not to make rulings on what would be a proper interpretation of the provisions of Annex VII to the Convention on the appointment of replacement arbitrators until it has been fully re-constituted and can consider these questions in exercise of its mandate under the Convention and Annex VII thereto.

74. On 14 October 2024, Ukraine again submitted a request to the President of ITLOS for the appointment of an arbitrator following Professor Mossop's resignation, noting that the Parties had been unable to reach an agreement within the 60-day period outlined in Article 3(d) of Annex VII.

75. On 15 October 2024, the President of ITLOS responded to Ukraine's 14 October 2024 request as follows:

Excellency,

I have the honour to refer to the arbitral proceedings between Ukraine and the Russian Federation under Annex VII to the United Nations Convention on the Law of the Sea in the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen.

I also have the honour to refer to your letter dated 14 October 2024 containing a request for me to make the appointment of an arbitrator under article 3 of Annex VII to the Convention.

Regarding this matter, I wish to inform you that I have transmitted today a letter to the Russian Federation addressed to H.E. Mr Gennady Kuzmin, Agent of the Russian Federation. A copy of this letter is attached.

Further to your letter dated 14 October 2024, I am required, pursuant to article 3 (e) of Annex VII to the Convention, to make the appointment of one arbitrator under subparagraph (d) within a period of 30 days of the receipt of the request and in consultation with the Parties.

I therefore intend to pursue consultations by correspondence with the Parties on the matter of the appointment of an arbitrator, in accordance with article 3 of Annex VII to Convention.

For the purpose of these consultations, I transmit to you attached the list of arbitrators referred to in article 2 of Annex VII to the Convention, as posted on the website of the United Nations Treaty Section of the Office of Legal Affairs (status as at 14 October 2024). To that end, you may wish to suggest, by Thursday, 24 October 2024, 5 p.m. (Hamburg time), a list of up to seven names of persons included in the UN list who may serve as a possible arbitrator. I also would like to invite you to communicate your comments, if any, on the names included in the UN list by Thursday, 24 October 2024, 5 p.m. (Hamburg time). I would like to indicate that your comments and suggestions would be conveyed to me on a confidential basis and will not be communicated to the other Party.

Accept, Excellency, the assurances of my highest consideration.

76. The 15 October 2024 letter of the President of ITLOS to the Russian Federation, in turn, reads:

Excellency,

I have the honour to refer to the arbitral proceedings between Ukraine and the Russian Federation under Annex VII to the United Nations Convention on the Law of the Sea in the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen.

In a letter addressed to me by the Agent for Ukraine, Ms Oksana Zolotaryova, dated 14 October 2024, reference is made to the withdrawal from the arbitral tribunal, on 13 August 2024, of one arbitrator. It is stated in that letter that Ukraine and the Russian Federation have been unable to reach agreement within 60 days since the notification of the withdrawal on 13 August 2024 and that Ukraine “requests that [I] appoint an arbitrator within 30 days of receipt of this request, pursuant to Article 3 of Annex VII” to the United Nations Convention on the Law of the Sea.

Pursuant to article 3 (e) of Annex VII to the Convention, I am required to make the appointment of one arbitrator under subparagraph (d) within a period of 30 days of the receipt of the request and in consultation with the Parties.

I therefore intend to pursue consultations by correspondence with the Parties on the matter of the appointment of an arbitrator, in accordance with article 3 of Annex VII to Convention.

For the purpose of these consultations, I transmit to you attached the list of arbitrators referred to in article 2 of Annex VII to the Convention, as posted on the website of the United Nations Treaty Section of the Office of Legal Affairs (status as at 14 October 2024). To that end, you may wish to suggest, by Thursday, 24 October 2024, 5 p.m. (Hamburg time), a list of up to seven names of persons included in the UN list who may serve as a possible arbitrator. I also would like to invite you to communicate your comments, if any, on the names included in the UN list by Thursday, 24 October 2024, 5 p.m. (Hamburg time). I

would like to indicate that your comments and suggestions would be conveyed to me on a confidential basis and will not be communicated to the other Party.

Accept, Excellency, the assurances of my highest consideration.

77. On 25 October 2024, the Russian Federation sent a letter to the President of ITLOS in which it (i) noted Ukraine's request for the appointment of an arbitrator to replace Professor Mossop; (ii) reiterated its position regarding the alleged inapplicability of the procedure set out in Article 3 of Annex VII, as expressed in its previous communications dated 10 July, 22 July, 27 July and 1 August 2024, which according to the Russian Federation rendered the appointments of Judge Kateka and Professor Mossop, as well as the designation of Judge Eiriksson as President of the Arbitral Tribunal, illegitimate. The Russian Federation concluded that, in light of these circumstances it "is not in a position to engage in the proposed consultations and will not be able to accept any resulting appointment".
78. On 28 October 2024, the President of ITLOS informed the President of the Arbitral Tribunal and the Parties of his decision to appoint Judge Kathy-Ann Brown as member of the Arbitral Tribunal, as follows:

Excellency,

I have the honour to refer to the arbitral proceedings in PCA Case No. 2019-28 (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Ukraine v. the Russian Federation*).

I have also the honour to refer to the letter of the Agent for Ukraine dated 14 October 2024, referring to the withdrawal from the arbitral tribunal, on 13 August 2024, of one arbitrator and containing a request for me to make the appointment of one new arbitrator, pursuant to article 3 of Annex VII to the United Nations Convention on the Law of the Sea.

Pursuant to article 3, subparagraph (f), of Annex VII to the Convention, any vacancy in the arbitral tribunal should be filled "in the manner prescribed for the initial appointment." Accordingly, pursuant to subparagraph (e) of the same article, the President of the Tribunal is required to make the appointment of the vacant seat "from the list referred to in article 2 of [Annex VII] within a period of 30 days of the receipt of the request and in consultations with the parties."

By separate letters dated 15 October 2024, I informed the Parties that I would pursue consultations with them on the matter of the appointment of an arbitrator by correspondence, in accordance with article 3 of Annex VII to the Convention, and invited them to communicate their comments by Thursday, 24 October 2024, 5 p.m. (Hamburg time).

Further to these consultations, I wish to inform you that I made the following decision:

- To appoint Ms Kathy-Ann Brown (Jamaica) as arbitrator in PCA Case No. 2019-28 (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Ukraine v. the Russian Federation*);

Accept, Excellency, the assurances of my highest consideration.

79. On 30 October 2024, the Registrar transmitted to the Parties Judge Brown's signed Declaration of Acceptance and Statement of Impartiality and Independence.
80. On 5 November 2024, the Arbitral Tribunal indicated to the Parties that, following the appointment of Judge Brown, it was now in a position to consider the objections to the constitution of the Arbitral Tribunal raised by the Russian Federation in its letters dated 9 August and 6 September 2024. The Arbitral Tribunal thus invited the Parties to submit further written submissions on the objections of the Russian Federation, and reserved its decision on the subsequent procedure.
81. On 22 November 2024, Ukraine submitted its comments on the Russian Federation's objections to the constitution of the Arbitral Tribunal. In its letter, Ukraine specifically requested that the Arbitral Tribunal:
1. Dismiss Russia's challenge to the constitution of the Tribunal as stated in its letters of 9 August 2024 and 6 September 2024;
 2. Adjudge and declare that it is properly constituted to hear and decide the claims and Submissions filed by Ukraine in this case; and
 3. Award Ukraine its costs for the phase of these proceedings commencing since the resignations of Professor McRae and Judge Wolfrum.
82. On 6 December 2024, the Russian Federation made its supplementary submission on its objections to the constitution of the Arbitral Tribunal and at the same time formally asserted a challenge against Judge Kateka for lack of independence and impartiality. In its letter, the Russian Federation specifically requested that:
- i) the Russian Federation's objections to the constitution of the Tribunal and its challenge to Judge Kateka be resolved by those three members of the Tribunal whose standing as arbitrators is unchallenged;
 - ii) the Russian Federation's challenge to Judge Kateka be upheld;
 - iii) the Russian Federation's challenge to the constitution of the Tribunal be upheld and the appointments of Judge Kateka and Judge Brown be held invalid *ab initio*;
 - iv) Ukraine's request to award it the costs of this part of the proceedings be dismissed.
83. On 20 December 2024, Ukraine made its supplementary submission on the Russian Federation's objections to the constitution of the Arbitral Tribunal. In its letter, Ukraine specifically requested that the Arbitral 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.

84. As stated, on 11 April 2025, the Arbitral Tribunal dismissed the Russian Federation's challenge against Judge Kateka.

85. On 18 April 2025, following the dismissal of the challenge against Judge Kateka, the Arbitral Tribunal invited further submissions on the challenge of the Russian Federation to the constitution of the Arbitral Tribunal, as follows:

Upon the dismissal of the challenge of the Russian Federation to Judge Kateka, the Arbitral Tribunal has turned its attention to the challenge of the Russian Federation to the constitution of the Arbitral Tribunal and will soon commence its deliberations. In this vein, the Arbitral Tribunal invites the Parties, should either of them wish to make any further submissions before the Arbitral Tribunal commences its deliberations, to make these by **Monday, 28 April 2025**. Should either Party make a further written submission, the other Party would then be invited to respond by **Friday, 2 May 2025**.

86. On 28 April 2025, Ukraine informed the Arbitral Tribunal that it had no further submissions to make. No further submission was received from the Russian Federation.

III. REQUESTED RELIEF

A. THE REQUEST OF THE RUSSIAN FEDERATION

87. In its letter dated 6 December 2024, the Russian Federation requests, in relevant part, that:

- (a) the Russian Federation's objections to the constitution of the Tribunal [. . .] be resolved by those three members of the Tribunal whose standing as arbitrators is unchallenged;
- (b) The Russian Federation's challenge to the constitution of the Tribunal be upheld and the appointments of Judge Kateka and Judge Brown be held invalid *ab initio*; and
- (c) Ukraine's request to award the costs of this part of the proceedings be dismissed.

B. THE REQUEST OF UKRAINE

88. In its letter dated 20 December 2024, Ukraine requests, in relevant part, that the Arbitral Tribunal:

- (a) Decide Russia's challenge to the constitution of the Tribunal as the fully-constituted, five-member Tribunal;
- (b) Dismiss Russia's challenge to the constitution of the Tribunal;
- (c) Adjudge and declare that the Tribunal is properly constituted to hear and decide the claims and Submissions filed by Ukraine in this case; and
- (d) Award Ukraine its costs for the phase of these proceedings commencing since the resignations of Professor McRae and Judge Wolfrum.

IV. POSITIONS OF THE PARTIES

A. APPLICABLE PROCEDURE FOR THE APPOINTMENT OF REPLACEMENT ARBITRATORS

1. Position of the Russian Federation

89. The Russian Federation's position is that the appointment procedure following a successful challenge is not governed by Annex VII to the Convention or Article 6 of the Rules of Procedure.¹ Accordingly, in the Russian Federation's view, the purported appointments of Judge Kateka and Judge Brown, as well as the appointment of Judge Eiriksson as President of the Arbitral Tribunal, by the President of ITLOS pursuant to Ukraine's requests under Article 3 of Annex VII were without legal basis and without the Russian Federation's consent.² Thus, the Russian Federation contends that the Arbitral Tribunal was improperly reconstituted.³
90. *First*, the Russian Federation submits that, contrary to Ukraine's position, the Arbitral Tribunal's Procedural Order No. 9 did not confirm the applicability of Article 3 of Annex VII and Article 6 of the Rules of Procedure to the appointment procedure, nor did it "legitimise the appointments made by the ITLOS President".⁴ Rather, the Arbitral Tribunal expressly indicated that it "has been careful not to make rulings on what would be a proper interpretation of the provisions of Annex VII".⁵ Accordingly, the Russian Federation contends that the Arbitral Tribunal did not

¹ Letter of the Russian Federation dated 17 May 2024, pp. 1-2.

² Letter of the Russian Federation dated 9 August 2024, p. 1; Letter of the Russian Federation dated 6 September 2024, p. 1.

³ Letter of the Russian Federation dated 9 August 2024, pp. 1-2; Letter of the Russian Federation dated 6 December 2024, p. 19.

⁴ Letter of the Russian Federation dated 6 December 2024, p. 13.

⁵ Letter of the Russian Federation dated 6 December 2024, p. 15.

reject its position on the inapplicability of Article 3 of Annex VII and Article 6 of the Rules of Procedure.⁶

91. *Second*, the Russian Federation contends that the Parties' right to request the ITLOS President to make appointments under Article 3(d) of Annex VII was not triggered in the present case.⁷ Specifically, the Russian Federation argues that the necessary 60-day period for the Parties' negotiations under Article 3(d) of Annex VII is predicated upon "receipt of the notification [of the dispute] referred to in article 1 of [Annex VII]".⁸ Accordingly, without the notification necessary to trigger the commencement of the negotiating period under Article 3(d), Article 3 of Annex VII could not have applied to the present case.⁹ The Russian Federation further argues that Article 3(f) of Annex VII is similarly inapplicable,¹⁰ because Article 3(f) does not itself establish a specific event triggering the commencement of the 60-day period upon which a Party may petition the ITLOS President to make appointments.¹¹
92. *Third*, the Russian Federation argues that, because a notification necessary to trigger the commencement of the negotiating period under Article 3(d) is absent, a gap exists in the rules.¹² However, in its view, this gap is only partially filled by Article 6 of the Rules of Procedure, which stipulates a notification triggering the replacement mechanism only in cases of "withdrawal, incapacity or death of an arbitrator", not in case of a vacancy resulting from a successful challenge.¹³ In this regard, the Russian Federation states that Professor McRae and Judge Wolfrum did not "withdraw" from these proceedings, as they only purported to do so after the Russian Federation's challenges were upheld.¹⁴ The Russian Federation underscores that the differences between "withdrawal" and "removal" of an arbitrator is recognized in both doctrine

⁶ Letter of the Russian Federation dated 6 December 2024, p. 13.

⁷ Letter of the Russian Federation dated 9 August 2024, p. 1; Letter of the Russian Federation dated 6 September 2024, p. 1; Letter of the Russian Federation dated 6 December 2024, p. 19.

⁸ Letter of the Russian Federation dated 10 July 2024, p. 3; Letter of the Russian Federation dated 6 December 2024, p. 16.

⁹ Letter of the Russian Federation dated 6 December 2024, p. 17; Letter of the Russian Federation dated 10 July 2024, p. 3.

¹⁰ Letter of the Russian Federation dated 6 December 2024, p. 16.

¹¹ Letter of the Russian Federation dated 6 December 2024, p. 16.

¹² Letter of the Russian Federation dated 6 December 2024, p. 16.

¹³ Letter of the Russian Federation dated 6 December 2024, pp. 16–17; Letter of the Russian Federation dated 10 July 2024, p. 3.

¹⁴ Letter of the Russian Federation dated 6 December 2024, p. 15.

and arbitral practice, and thus the mechanism under Article 6 of the Rules of Procedure cannot supplant the absence of an appointment procedure in this particular instance.¹⁵

93. Accordingly, the Russian Federation concludes that the proper substitution procedure may only be established by the Arbitral Tribunal exercising its discretionary power to devise an *ad hoc* procedure for such appointments under Article 1(2) of the Rules of Procedure.¹⁶ The Russian Federation notes that the Arbitral Tribunal already exercised this discretion in giving the Parties an opportunity to agree on the applicable criteria for candidates, and the procedure to be followed for their appointment.¹⁷ It was under the Arbitral Tribunal's discretionary powers, and not under Article 6 of the Rules of Procedure or Article 3 of Annex VII, that the Parties were authorized to negotiate on these issues.¹⁸

2. Position of Ukraine

94. Ukraine's position is that the Russian Federation's arguments regarding the applicable appointment procedure—and by extension, its objections to the constitution of the Arbitral Tribunal—have already been considered and rejected by the Arbitral Tribunal in its Procedural Order No. 9 and should therefore be dismissed.¹⁹ Ukraine states that the Arbitral Tribunal, in its Procedural Order No. 9, observed that it is for the President of ITLOS to decide how to respond to a request made of him under Article 3(e) of Annex VII to the Convention.²⁰ In any event, Ukraine contends that the Russian Federation's objections are without merit, as the appointments were made in accordance with the applicable procedure under Article 6 of the Rules of Procedure and Article 3 of Annex VII to the Convention.
95. *First*, Ukraine argues that the Arbitral Tribunal already considered and rejected the Russian Federation's request for the Arbitral Tribunal to determine an appropriate appointment procedure on the basis of the Russian Federation's argument that the appointments in this case are not governed by the Rules of Procedure or Annex VII.²¹ In Ukraine's view, Procedural Order No. 9

¹⁵ Letter of the Russian Federation dated 3 July 2024, pp. 2-3; Letter of the Russian Federation dated 10 July 2024, p. 3.

¹⁶ Letter of the Russian Federation dated 6 December 2024, pp. 13-15; Letter of the Russian Federation dated 10 July 2024, p. 4.

¹⁷ Letter of the Russian Federation dated 6 December 2024, p. 14.

¹⁸ Letter of the Russian Federation dated 6 December 2024, pp. 14-15.

¹⁹ Letter of Ukraine dated 22 November 2024, pp. 1, 6; Letter of Ukraine dated 20 December 2024, p. 3.

²⁰ Letter of Ukraine dated 22 November 2024, pp. 1, 7.

²¹ Letter of Ukraine dated 22 November 2024, p. 6; Letter of Ukraine dated 20 December 2024, pp. 3-4.

confirmed that the Russian Federation did not identify any question of procedure which, in the terms of Article 1(2) of the Rules of Procedure, “is not expressly governed by these Rules or by Annex VII to the Convention”.²²

96. According to Ukraine, Procedural Order No. 9 “conclusively establishes that the appointment procedure to replace Professor McRae and Judge Wolfrum is the procedure set forth in the Rules and Annex VII, both of which require vacancies to be filled ‘in the manner prescribed for [their] initial appointment’”, that is, the procedure outlined in Article 3(e) of Annex VII.²³ Further, Ukraine points out that in Procedural Order No. 9, the Arbitral Tribunal noted that disagreements over the 60-day period under Article 3(d), required to trigger a request under Article 3(e), had “become moot” as it is undisputed that, by the time Ukraine made its request to the ITLOS President, the Parties “had engaged in attempts to reach an agreement for more than 60 days and had been unable to reach agreement”.²⁴
97. *Second*, Ukraine submits that, in any event, the Russian Federation’s objections to the reconstitution of the Arbitral Tribunal are without merit, as the replacement of Professor McRae and Judge Wolfrum took place in accordance with the Rules of Procedure and Annex VII.²⁵ In Ukraine’s view, Article 6 of the Rules of Procedure is applicable, as Article 6 contemplates the replacement of arbitrators in a manner that is consistent with Article 3 of Annex VII.²⁶ Even though Article 6 refers to “withdrawal, incapacity or death of an arbitrator”, and not to disqualification as a result of a successful challenge, Ukraine submits that the resignations of Professor McRae and Judge Wolfrum may reasonably be interpreted as falling within the category of “withdrawal[s]”.²⁷
98. Even if the resignations of Professor McRae and Judge Wolfrum do not fall within “withdrawals” and Article 6 is inapplicable, Ukraine submits that Article 1(1) of the Rules of Procedure would apply.²⁸ Under Article 1(1) the arbitration “*shall* be conducted in accordance with these rules and the relevant provisions of the [Convention], including Annex VII to the Convention”.²⁹

²² Letter of Ukraine dated 22 November 2024, p. 6.

²³ Letter of Ukraine dated 22 November 2024, pp. 6-7; Letter of Ukraine dated 20 December 2024, p. 4.

²⁴ Letter of Ukraine dated 22 November 2024, p. 7.

²⁵ Letter of Ukraine dated 22 November 2024, pp. 8-9; Letter of Ukraine dated 20 December 2024, pp. 5-8.

²⁶ Letter of Ukraine dated 22 November 2024, p. 9.

²⁷ Letter of Ukraine dated 22 November 2024, p. 9; Letter of Ukraine dated 20 December 2024, p. 4.

²⁸ Letter of Ukraine dated 22 November 2024, p. 9; Letter of Ukraine dated 20 December 2024, p. 5.

²⁹ Letter of Ukraine dated 22 November 2024, p. 9 (emphasis added by Ukraine); Letter of Ukraine dated 20 December 2024, p. 5.

Article 3(f) of Annex VII states, in turn, that “*any* vacancy shall be filled in the manner prescribed for the initial appointment”.³⁰ As the procedure for appointing a replacement arbitrator is already outlined in Article 3(f) of Annex VII, Ukraine submits that, contrary to the Russian Federation’s position, Article 1(2) of the Rules of Procedure does not apply.³¹ In this regard, Ukraine argues that the Russian Federation’s interpretation of Article 3 would “rob Article 3(f) and Article 3(d) of *effet utile* by making them inapplicable to arbitrator vacancies at essentially any stage of an arbitration other than the initial constitution of the tribunal”.³² Ukraine submits that such an interpretation is contrary to the maxim *ut res magis valeat quam pereat* and is “entirely inconsistent with the object and purpose of Annex VII dispute settlement”.³³

99. Ukraine further argues that the Russian Federation itself had accepted the possibility that Article 3(d) could be applied to the filling of “any vacancy” under Article 3(f).³⁴ According to Ukraine, in prior correspondence, the Russian Federation had stated that it considered the appropriate timeframe for consultations concerning replacement arbitrators to be, “in line with the general principle set in Article 3(d) of Annex VII, [. . .] 60 days”.³⁵ While there had been disagreement between the Parties over the exact starting point of this 60-day period, Ukraine submits that such disagreement is now “moot” because the period lapsed following either approach, referring to the Arbitral Tribunal’s statement in Procedural Order No. 9.³⁶

B. PROPER OBSERVANCE OF ARTICLE 3 OF ANNEX VII TO THE CONVENTION

1. Position of the Russian Federation

100. The Russian Federation contends that, even assuming Article 3 of Annex VII to the Convention is applicable, the appointments are nevertheless invalid because the procedure adopted by the President of ITLOS was inconsistent with the applicable rules and prejudicial to the rights of the Russian Federation.³⁷

³⁰ Letter of Ukraine dated 22 November 2024, p. 9 (emphasis added by Ukraine); Letter of Ukraine dated 20 December 2024, p. 4.

³¹ Letter of Ukraine dated 22 November 2024, p. 10.

³² Letter of Ukraine dated 22 November 2024, p. 10.

³³ Letter of Ukraine dated 22 November 2024, p. 11.

³⁴ Letter of Ukraine dated 22 November 2024, p. 11; Letter of Ukraine dated 20 December 2024, p. 4.

³⁵ Letter of Ukraine dated 22 November 2024, p. 11, *citing* Letter of the Russian Federation dated 30 April 2024, p. 2.

³⁶ Letter of Ukraine dated 22 November 2024, p. 11, *citing* Procedural Order No. 9, para. 48.

³⁷ Letter of the Russian Federation dated 6 December 2024, p. 21.

101. *First*, the Russian Federation argues that it was beyond the President of ITLOS’ mandate to determine the applicable procedure for the appointment of replacement arbitrators in light of the Russian Federation’s objections.³⁸ In this regard, the Russian Federation submits that the powers of the President of ITLOS as appointing authority under the Convention are “ministerial” rather than judicial in character, and do not extend to determining any matters in dispute between the Parties under Annex VII, including the interpretation and application of Article 3.³⁹ By contrast, the Russian Federation argues that the Arbitral Tribunal retains full jurisdiction over all matters relating to the dispute, including its own composition.⁴⁰ Accordingly, the Russian Federation argues that, contrary to Ukraine’s position, any decision of the appointing authority is amenable to review by the Arbitral Tribunal in the exercise of its *compétence-compétence* power, as confirmed in Articles 1(1) and 1(2) of the Rules of Procedure.⁴¹
102. In the Russian Federation’s view, the objections it raised regarding the appointment of arbitrators necessitated a ruling by the Arbitral Tribunal on the appropriate procedure for such appointments.⁴² Accordingly, given that the Arbitral Tribunal was already seised of this issue, the President of ITLOS was required to at least defer the appointment process pending a decision by the Arbitral Tribunal to ensure the integrity of the proceedings.⁴³ However, the Russian Federation contends that, by fully endorsing Ukraine’s submission on the interpretation of Article 3, and proceeding with the appointments in disregard of the position of the Russian Federation, the President of ITLOS acted outside the scope of his mandate.⁴⁴
103. *Second*, the Russian Federation argues that, even if the appointing authority could validly exercise any “quasi-judicial competence”, the President of ITLOS nevertheless did not issue a decision dismissing the Russian Federation’s objections.⁴⁵ The Russian Federation states that the President of ITLOS failed to make a reasoned decision to dismiss the Russian Federation’s

³⁸ Letter of the Russian Federation dated 6 December 2024, p. 20; Letter of the Russian Federation dated 9 August 2024, p. 2; *see also* Letter of the Russian Federation dated 6 September 2024, p. 2.

³⁹ Letter of the Russian Federation dated 6 December 2024, p. 20, *citing* A. Robles, *The Defaulting State and the South China Sea Arbitration* (De La Salle University Publishing House, 2023), pp. 481-482; Letter of the Russian Federation dated 9 August 2024, p. 2.

⁴⁰ Letter of the Russian Federation dated 6 December 2024, p. 20.

⁴¹ Letter of the Russian Federation dated 6 December 2024, p. 20.

⁴² Letter of the Russian Federation dated 9 August 2024, pp. 1-2.

⁴³ Letter of the Russian Federation dated 6 December 2024, p. 21.

⁴⁴ Letter of the Russian Federation dated 9 August 2024, p. 2; *see also* Letter of the Russian Federation dated 6 September 2024, p. 1.

⁴⁵ Letter of the Russian Federation dated 6 December 2024, p. 22.

objections and gave “no indication [. . .] in his correspondence” that he did in fact take into account the Russian Federation’s objections.⁴⁶ Instead, the President of ITLOS “fully endorsed Ukraine’s submission on the interpretation of Article 3” in disregard of the position of the Russian Federation, and proceeded to act on Ukraine’s request and make the appointments.⁴⁷

104. *Third*, the Russian Federation argues that it was deprived of the opportunity to participate in in-person consultations and that the President of ITLOS instead presented the composition of the Arbitral Tribunal as a “*fait accompli*”.⁴⁸ Specifically, the Russian Federation states that “it is common practice for ITLOS to arrange consultations in person where both parties take part in the arbitration”—which was the practice previously adopted in these proceedings.⁴⁹ Accordingly, following the Arbitral Tribunal issuing its Procedural Order No. 9, the Russian Federation states that it was prepared to take part in the appointment process and had a legitimate expectation to be heard in person.⁵⁰ Yet, despite its requests that the President of ITLOS accommodate the logistical complications in arranging flights and visas for Russian travellers to the seat of ITLOS in Hamburg, the President of ITLOS refused to adjust the proposed timing of the in-person consultations.⁵¹ The Russian Federation argues that, to the extent that the President of ITLOS disregarded its requests for in-person consultations in order to comply with the 30-day period to appoint arbitrators as outlined in Article 3(e) of Annex VII, compliance with this period has been disregarded in past practice and should not therefore have overridden the Russian Federation’s procedural right to take part in in-person consultations mandated by Article 3 of Annex VII.⁵²
105. The Russian Federation further argues that it proposed to submit a list of candidates, as requested by the President of ITLOS, and provide its comments at an in-person meeting in Hamburg, but that this offer was “summarily rejected [. . .] without any explanation or follow-up”.⁵³ Accordingly, the Russian Federation asserts that “no such list was submitted, no comment

⁴⁶ Letter of the Russian Federation dated 6 December 2024, p. 22.

⁴⁷ Letter of the Russian Federation dated 9 August 2024, p. 2; *see also* Letter of the Russian Federation dated 6 September 2024, p. 2.

⁴⁸ Letter of the Russian Federation dated 9 August 2024, p. 2; Letter of the Russian Federation dated 6 December 2024, p. 22; Letter of the Russian Federation dated 6 September 2024, pp. 1-2.

⁴⁹ Letter of the Russian Federation dated 6 December 2024, p. 22, *citing United Nations Convention on the Law of the Sea: Meeting of States Parties*, Annual Report of the International Tribunal for the Law of the Sea for 2019, Document No. SPLOS/30/2, 31 March 2020, paras. 85–86.

⁵⁰ Letter of the Russian Federation dated 6 December 2024, pp. 22-23.

⁵¹ Letter of the Russian Federation dated 9 August 2024, p. 2; Letter of the Russian Federation dated 6 December 2024, pp. 22-23; Letter of the Russian Federation dated 6 September 2024, p. 2.

⁵² Letter of the Russian Federation dated 6 December 2024, p. 23.

⁵³ Letter of the Russian Federation dated 6 September 2024, p. 2.

provided, and no material discussion on any matter of relevance to the resolution of the issues was held”.⁵⁴

2. Position of Ukraine

106. Contrary to the Russian Federation’s position, Ukraine asserts that the appointment procedure before the President of ITLOS was consistent with the applicable rules of procedure and Annex VII.⁵⁵
107. *First*, Ukraine submits that, by confirming that Article 3(e) of Annex VII applies to fill the vacancies resulting from the successful challenges, the Arbitral Tribunal correctly confirmed the limits of its mandate by ruling that it is for the President of ITLOS to decide how to respond to a request made of him under Article 3(e), pursuant to the doctrine of *compétence-compétence*.⁵⁶
108. According to Ukraine, the power to act as appointing authority in Annex VII arbitrations is expressly conferred upon the President of ITLOS.⁵⁷ Ukraine argues that such conferral includes the grant of implied or inherent powers, including the power to interpret and apply Annex VII in the exercise of this mandate, as well as the inherent power to determine the scope of his authority in executing his mandate as appointing authority.⁵⁸ Furthermore, Ukraine submits that under the principle of *compétence-compétence*, the Arbitral Tribunal is without jurisdiction to reach an independent determination of whether the President of ITLOS, in making the appointments requested by Ukraine, acted properly in exercising the appointing authority conferred on him by the Convention. Ukraine contends that this question was already resolved by the President of ITLOS when he made the contested appointments in the exercise of his mandate under Article 3 of Annex VII.⁵⁹ In this respect, Ukraine submits that the Arbitral Tribunal’s jurisdiction on matters relating to its constitution is “subject to the applicable rules of the Convention, which assign to the ITLOS President the mandate of appointing authority”.⁶⁰

⁵⁴ Letter of the Russian Federation dated 6 September 2024, p. 2.

⁵⁵ Letter of Ukraine dated 22 November 2024, pp. 11-14; Letter of Ukraine dated 20 December 2024, pp. 5-8.

⁵⁶ Letter of Ukraine dated 22 November 2024, pp. 7-8; Letter of Ukraine dated 20 December 2024, p. 6.

⁵⁷ Letter of Ukraine dated 22 November 2024, p. 8; Letter of Ukraine dated 20 December 2024, p. 6.

⁵⁸ Letter of Ukraine dated 20 December 2024, p. 6.

⁵⁹ Letter of Ukraine dated 22 November 2024, p. 8.

⁶⁰ Letter of Ukraine dated 20 December 2024, p. 6.

109. *Second*, Ukraine rejects the Russian Federation’s claim that the President of ITLOS has improperly adopted Ukraine’s position regarding the interpretation of Article 3 of Annex VII.⁶¹ According to Ukraine, both Parties had an opportunity to present their positions regarding the replacement procedure and the relevance of Procedural Order No. 9 to the proceedings.⁶² Furthermore, Ukraine submits that, in previous circumstances where the President of ITLOS did not believe he was required or permitted to act pursuant to Article 3 of Annex VII, he did not do so, including when he concluded that he would only be able to entertain the request if the parties were first unable to reach agreement within the 60-day period provided under Article 3(d) of Annex VII.⁶³
110. *Third*, Ukraine submits that both Parties in fact had the opportunity to present to the President of ITLOS their positions on the issue of the replacement procedure, and on the relevance of the Arbitral Tribunal’s decision in Procedural Order No. 9.⁶⁴ Ukraine argues that the President of ITLOS was able to consider the Parties’ submissions, Procedural Order No. 9 and the requirements of Annex VII in reaching his determination to hold consultations via correspondence and to make the appointments within 30 days of receiving Ukraine’s request.⁶⁵
111. Ukraine submits that, in any event, Article 3(e) of Annex VII does not mandate in-person consultations with the Parties, nor does it mandate any particular procedure for those consultations.⁶⁶ Ukraine argues that the President of ITLOS was constrained to conduct the consultations by correspondence in order to make the appointments “within a period of 30 days of the receipt of the request” as required under Article 3(e), and to accommodate the Russian Federation’s stated inability to travel to Germany for the consultations.⁶⁷ According to Ukraine, although the President of ITLOS invited the Parties to participate in in-person consultations at the premises of ITLOS in Hamburg, the Russian Federation declined, citing its inability to participate due to severe travel restrictions and existing logistical and visa complications.⁶⁸

⁶¹ Letter of Ukraine dated 22 November 2024, p. 13; Letter of Ukraine dated 20 December 2024, p. 7.

⁶² Letter of Ukraine dated 22 November 2024, p. 13.

⁶³ Letter of Ukraine dated 22 November 2024, p. 13.

⁶⁴ Letter of Ukraine dated 22 November 2024, p. 13.

⁶⁵ Letter of Ukraine dated 22 November 2024, p. 13; Letter of Ukraine dated 20 December 2024, p. 7.

⁶⁶ Letter of Ukraine dated 22 November 2024, p. 13; Letter of Ukraine dated 20 December 2024, p. 8.

⁶⁷ Letter of Ukraine dated 22 November 2024, p. 13.

⁶⁸ Letter of Ukraine dated 22 November 2024, p. 12, *citing* Letter of the Russian Federation to ITLOS dated 27 July 2024.

Nevertheless, the President of ITLOS proceeded to hold consultations by correspondence⁶⁹ which, in Ukraine's view, "accommodate[s] the Russian Federation" and satisfies the requirement of consultations under Article 3(e) of Annex VII.⁷⁰

C. COSTS

1. Position of Ukraine

112. Ukraine requests that the Arbitral Tribunal award Ukraine its costs for the phase of the proceedings commencing since the resignations of Professor McRae and Judge Wolfrum. According to Ukraine, Article 7 of Annex VII to the Convention confirms the Arbitral Tribunal's authority to award costs.⁷¹ Ukraine submits that the Arbitral Tribunal should exercise that authority, given that the Russian Federation has "persistently sought to obstruct the re-constitution of the Arbitral Tribunal", and in doing so has engaged in "bad-faith procedural conduct".⁷²

2. Position of the Russian Federation

113. The Russian Federation states that Ukraine's request for costs should be dismissed.⁷³ According to the Russian Federation, Ukraine's request stands in opposition to the general rule of cost allocation in Annex VII arbitrations, according to which the Parties equally bear the cost of proceedings "[u]nless the [A]rbitral [T]ribunal decides otherwise because of the particular circumstances of the case".⁷⁴ The Russian Federation states that there is no reason to deviate from this general principle given that its objections are "well-grounded".⁷⁵
114. In any event, the Russian Federation states that Ukraine's request is premature, in light of the Arbitral Tribunal's previous ruling in the Preliminary Objections phase that the question of costs would be determined in conjunction with the merits.⁷⁶

⁶⁹ Letter of Ukraine dated 22 November 2024, p. 13.

⁷⁰ Letter of Ukraine dated 22 November 2024, p. 13; Letter of Ukraine dated 20 December 2024, p. 8.

⁷¹ Letter of Ukraine dated 22 November 2024, p. 14; Letter of Ukraine dated 20 December 2024, p. 8.

⁷² Letter of Ukraine dated 22 November 2024, p. 14; Letter of Ukraine dated 20 December 2024, p. 3.

⁷³ Letter of the Russian Federation dated 6 December 2024, p. 24.

⁷⁴ Letter of the Russian Federation dated 6 December 2024, p. 24.

⁷⁵ Letter of the Russian Federation dated 6 December 2024, p. 24.

⁷⁶ Letter of the Russian Federation dated 6 December 2024, p. 24, *citing* Award on Preliminary Objections, p. 78.

V. ANALYSIS OF THE ARBITRAL TRIBUNAL

115. The Arbitral Tribunal is called upon to address the objections raised by the Russian Federation relating to the reconstitution of the Arbitral Tribunal. Specifically, this concerns the validity of the appointments of Judge Kateka and, subsequently, Judge Brown, as well as the appointment of Judge Eiriksson as President of the Arbitral Tribunal, by the President of ITLOS pursuant to requests made by Ukraine under Article 3 of Annex VII to the Convention. To recall, following the successful challenges against Professor McRae and Judge Wolfrum, a dispute arose between the Parties on the proper procedure for the appointment of replacement arbitrators. Ukraine took the position that the appointments should be governed by either Article 6 of the Arbitral Tribunal's Rules of Procedure or Article 3 of Annex VII to the Convention⁷⁷ while the Russian Federation took the position that the vacancies are not covered by Article 3 of Annex VII or by the Arbitral Tribunal's Rules of Procedure, and that therefore the Arbitral Tribunal should adopt an *ad hoc* procedure for the selection of replacement arbitrators following the successful challenges.⁷⁸
116. In addressing the objections of the Russian Federation, the Arbitral Tribunal is mindful of the effects of the Parties' ability to communicate with each other and with the Arbitral Tribunal (and with ITLOS President Heidar) and to take part in proceedings, this being an important element in the assessment of the Russian Federation's objections. Moreover, the Russian Federation has indicated in its letter of 9 August 2024, and reiterated on a number of occasions,⁷⁹ that it has "suspended" its participation in this case.⁸⁰ The Arbitral Tribunal has refrained from commenting on this situation. This position, while inchoate, has had an effect on the progress of the proceedings, as set out further below.

⁷⁷ Letter of Ukraine dated 6 May 2024.

⁷⁸ Letter of the Russian Federation dated 30 April 2024; Letter of the Russian Federation dated 7 May 2024.

⁷⁹ *See, e.g.*, E-mail of the Russian Federation dated 14 August 2024; Letter of the Russian Federation dated 6 September 2024; Letter of the Russian Federation dated 6 December 2024; Letter of the Russian Federation dated 26 December 2024; Letter of the Russian Federation dated 23 May 2025.

⁸⁰ Ukraine, for its part, stated in its letter dated 31 December 2024:

Russia's statement that it 'maintains the suspension of its participation in the present proceedings' is false. Russia's actions and requests of the Tribunal make clear that it is a participant in these proceedings. It has challenged Judge Kateka, asked the Tribunal to modify the proposed briefing schedule to avoid having to prepare its supplementary statement over the holiday season, and presumably intends to participate in the briefing on its challenge to Judge Kateka, as it participated in the briefing on its challenge to the Tribunal's constitution. As noted in Ukraine's submission of 20 December 2024, Russia's purported non-participation is inaccurate, self-serving, and does not excuse or justify any rights it has waived in this proceeding.

117. It is in light of this background that the Arbitral Tribunal sets out its Decision. It goes without saying that nothing in this Decision prejudices the position of the Arbitral Tribunal on the merits of the present case, or on any remaining issues of jurisdiction and admissibility.

A. THE OBJECTIONS OF THE RUSSIAN FEDERATION

118. The Arbitral Tribunal will address the objections of the Russian Federation under two headings:

- (a) that the process set out in Article 3 of Annex VII does not apply to the selection of replacement arbitrators following a successful challenge; and
- (b) that President Heidar erred in his implementation of Article 3 by not having engaged in “consultations” as laid out in Article 3(e) of Annex VII.

B. THE POWER OF THE ARBITRAL TRIBUNAL TO RULE ON ITS COMPOSITION

119. It will be recalled that, in its letter to the Parties dated 13 August 2024, the Arbitral Tribunal noted:

At this stage, then, the concerns of the Russian Federation set out in its letter dated 9 August 2024 could be characterized as a challenge to the constitution of the Arbitral Tribunal, and accordingly its jurisdiction, on which the Arbitral Tribunal could issue a ruling or decision.

120. Subsequently, in its letter to the Parties dated 5 November 2024, the Arbitral Tribunal further noted:

Upon the appointment by H.E. Judge Tomas Heidar, President of the International Tribunal for the Law of the Sea, of Judge Kathy-Ann Brown in replacement of Professor Mossop following her resignation as member of the Arbitral Tribunal, the Arbitral Tribunal is now in a position to consider the matters raised by the Russian Federation in its letter dated 9 August 2024 as also addressed at the outset (pp. 1-2) of its letter dated 6 September 2024.

121. The Arbitral Tribunal then laid out the procedure to be followed for consideration of the Russian Federation’s objections.

122. This power of the Arbitral Tribunal to rule on its constitution is set out in Article 288(4) of the Convention, which reads:

In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

123. This provision is derived from the doctrine of “*la compétence de la compétence*” or “*compétence-compétence*”, which has been recognized as a general principle applicable to inter-State dispute settlement as far back as Article 48 of the 1899 Hague Convention for the Pacific Settlement of

International Disputes,⁸¹ and provides that an international court or tribunal has the power to consider and decide challenges concerning its own competence.⁸² Professor F.F. Martens, who had a crucial role at the 1899 Hague Peace Conference where the Hague Convention was adopted, identified among the “basic principles of international arbitration” the power of an arbitral tribunal to “determine its own jurisdiction based on its interpretation of the *compromis*”.⁸³

124. Professor Shabtai Rosenne, a leading authority on the procedure of international courts (and a delegate to the Third United Nations Conference on the Law of the Sea intimately involved in the negotiations on the dispute settlement procedures under the Convention), likewise wrote:

It is now a generally accepted principle that an international court or tribunal has the power to determine its own jurisdiction. This power is commonly interpreted and applied as referring also to the admissibility of the case as a whole or of an individual claim in the case. As put in Art. 36 (6) ICJ Statute and in the corresponding Art. 288 (4) UN Convention on the Law of the Sea, in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal. A provision to this effect is commonly found in the constituent instrument of a standing international tribunal, but the rule is also applicable in an ad hoc tribunal should a question on jurisdiction arise there. This particular form of jurisdiction, incidental to the jurisdiction over the merits or substance of a case, is commonly known as *Kompetenz-Kompetenz*, *compétence de la compétence* or *competence-competence*. It is essential to prevent the frustration of any agreement to refer a particular dispute to the named court or tribunal.⁸⁴

125. Opinions differ on the scope of such power, and the relevance of decisions and practice in non-inter-State cases.⁸⁵ It is generally agreed that a tribunal can assess compliance with the conditions

⁸¹ Convention for the Pacific Settlement of International Disputes, 29 July 1899. Article 48 reads:

The Tribunal is authorized to declare its competence in interpreting the ‘Compromis’ as well as the other Treaties which may be invoked in the case, and in applying the principles of international law.

⁸² Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp. 275-279; *ICS Inspection and Control Services Limited v. The Argentine Republic*, PCA Case No. 2010-09, Award on Jurisdiction, 10 February 2012, para. 255 (Dupuy, Lalonde, Torres-Bernárdez). See also Stefan M. Kröll and Elian Keller, “The Competence-Competence Principle’s Positive Effect”, in Stefan M. Kröll, Andrea Kay Bjorklund, et al. (eds.), *Cambridge Compendium of International Commercial and Investment Arbitration* (2023), § 26.2.1.

⁸³ F.F. Martens, *Современное международное право цивилизованных народов / Том 2. [Contemporary International Law of Civilized Peoples, Vol. 2]* (Зерцало, 2007 reprint of the 1904-1905 5th edition), pp. 317-319 (translation by the Arbitral Tribunal). Prof. Martens also observed that the power of the arbitral tribunal to determine its own competence is “the best way out of the predicament that the parties may get into by raising various issues not provided for in the *compromis*”. (*Id.*)

⁸⁴ Shabtai Rosenne, “International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications”, in *Max Planck Encyclopedia of Public International Law* (March 2006).

⁸⁵ The Arbitral Tribunal, in its Decision on Challenges dated 6 March 2024, stated in relevant parts:

[T]he Arbitral Tribunal does not take any overriding position on what distinct sources [of law] are relevant or not relevant. The Arbitral Tribunal agrees with the *Chagos* tribunal’s exhortation to adhere to ‘the standards applicable to inter-State cases’. The standards

for its own competence, such as whether a treaty exists, whether time-limits are abided by, *et cetera*. On the other hand, the question arises to what extent this Arbitral Tribunal can assess, and in effect review, the manner in which the appointment of its members is made, in cases where discretion is afforded to the appointing authority—in essence, whether the Arbitral Tribunal can substitute its discretion for that delegated to the appointing authority.

126. It is clear that the first objection of the Russian Federation falls into the first category. The Arbitral Tribunal's analysis of that objection is set out in sub-section C below.
127. The second objection is less straightforward, insofar as the objection might be characterized as, on the one hand, concerning the existence of consultations which meet the mandatory minimum requirements in Annex VII and, on the other hand, the manner in which such consultations were carried out at the discretion of the ITLOS President.
128. The Arbitral Tribunal, in light of the circumstances of the case, has decided that, even in the latter characterization above, it would be within its power to assess that objection insofar as it concerns an allegation of manifest error or non-compliance with the mandatory requirements of Article 3 of Annex VII. The Arbitral Tribunal is nonetheless careful to note that, as a general matter, it has no power to substitute its discretion for that of the appointing authority. In addition, the Arbitral Tribunal finds it relevant that it has before it a fulsome view of the process adopted by President Heidar and the factors which contemporaneously informed his decisions, allowing the Arbitral Tribunal to undertake its analysis as set out in sub-section D below without engaging in undue speculation or hindsight.

C. OBJECTION 1: THE INTERPRETATION AND APPLICATION OF ARTICLE 3 OF ANNEX VII

129. The Russian Federation has made repeated references to the practice of the Arbitral Tribunal in its prior orders to substantiate its view that the procedure laid down in Article 3 of Annex VII was inapplicable and that another system should have been devised.⁸⁶ Accordingly, the Arbitral Tribunal considers it useful to detail the relevant steps undertaken.

applicable to inter-State cases may differ in various respects from those applicable in other types of arbitration and the Arbitral Tribunal should therefore derive its guidance principally from decisions and practice in inter-State cases. However, this does not imply that a wholly distinct standard is applicable to inter-State arbitrations. Rather, it is a question of taking special care in the application of the standard to the particular context of inter-State disputes.

⁸⁶ See, e.g., Letter of the Russian Federation dated 30 April 2024; Letter of the Russian Federation dated 7 May 2024; Letter of the Russian Federation dated 13 May 2024; Letter of the Russian Federation dated 17 May 2024; Letter of the Russian Federation dated 10 July 2024.

130. By way of introduction, the Arbitral Tribunal recalls that it has on two occasions (i.e., (i) on the extension of the deadline to replace the late Judge Vladimir Golitsyn and (ii) on its appeal to the Parties to continue consultations to agree on replacement arbitrators) referred to the desideratum that the appointment of its members should, for good order, be made with the greatest degree of agreement possible. In its letter dated 9 May 2023, the Arbitral Tribunal stated:

Taking account of both the provisions of Article 3 of Annex VII [to] the Convention and the Rules of Procedure for the arbitration, the President and the other members of the Arbitral Tribunal consider that it is in the interests of good order in the progression of this arbitration that the replacement arbitrator for the late Judge Golitsyn be appointed by the Russian Federation and thus they have no objection to the time limit for the appointment of the replacement arbitrator being extended until 31 May 2023.⁸⁷

131. Similarly, in its letter dated 16 May 2024, the Arbitral Tribunal stated:

It will be recalled that, in its letter to the Parties of 9 May 2023, to which the Russian Federation has made reference in its letter of 30 April 2024, the Arbitral Tribunal expressed its view that a variance in the terms of Article 3 of Annex VII to the Convention and the Rules of Procedure to allow a replacement arbitrator to be appointed by the Russian Federation would be “in the interests of good order in the progression of th[e] arbitration”. In a similar vein, the Acting President and the other members of the Arbitral Tribunal are of the view that it is in the interests of good order in the progression of this arbitration that the arbitrators to replace Professor McRae and Judge Wolfrum be appointed by agreement between the Parties, if such agreement is possible.

Accordingly, since it is clear that the efforts to reach agreement have only recently commenced, the Acting President and the other members of the Arbitral Tribunal express the view that it would be beneficial for the Parties to engage in further efforts to achieve such agreement.⁸⁸

132. On the occasion of this appeal to the Parties to continue their efforts to arrive at an agreement, Ukraine requested, and the Russian Federation agreed, that it receive assurances that it would not be debarred by the two-week deadline set in the final sentence of Article 3(d) of Annex VII from seeking the assistance of the President of ITLOS under Article 3(e).⁸⁹
133. It must be noted that the Arbitral Tribunal also expressed the view on at least two occasions that, while the Parties were attempting to reach agreement, it did not wish to take a position on the correct interpretation of Article 3 of Annex VII.⁹⁰ Thus, in its letter dated 13 August 2024, the Arbitral Tribunal stated:

The Arbitral Tribunal would emphasize that, as indicated in paragraph 45 of Procedural Order No. 9, the Acting President and the other members of the Arbitral Tribunal had, in

⁸⁷ Letter of the Arbitral Tribunal dated 9 May 2023.

⁸⁸ Letter of the Arbitral Tribunal dated 16 May 2024.

⁸⁹ *See* Letter of the Russian Federation dated 17 May 2024; Letter of Ukraine dated 18 May 2024.

⁹⁰ *See* Letters of the Arbitral Tribunal dated 13 and 16 May 2024.

their correspondence with the Parties, been careful not to make rulings on what would be a proper interpretation of the provisions of Annex VII to the Convention on the appointment of replacement arbitrators. Their suggestions had been based on their views with respect to the interests of good order in the progression of the arbitration and consequently on the desirability of agreement between the Parties.⁹¹

134. The Arbitral Tribunal thus does not accept the Russian Federation's inference from the above practice that the provisions of Article 3 of Annex VII are wholly inapplicable. The Arbitral Tribunal found it necessary to respond specifically to one assertion of the Russian Federation's to this effect. In its letter dated 16 May 2024, the Arbitral Tribunal stated:

[T]he Acting President and the other members of the Tribunal note that the Parties disagree on the proper interpretation and application of Article 3 of Annex VII to the Convention and the Rules of Procedure. Without taking a position on this disagreement, they would preliminarily point out that, if requested by one or both Parties to rule on the dispute or should they feel that they should 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. This reinforces their view that it would be beneficial for the Parties to engage in further efforts to achieve agreement, at least until, in the first instance, 30 May 2024, at which time a re-evaluation could take place. If the Parties were to agree to engage in these efforts, they should explicitly agree on a suspension of the possible limiting deadline of "two weeks" set in the final sentence of Article 3(d) of Annex VII, pending their further efforts.⁹²

135. In its letter dated 3 July 2024, the Russian Federation had inferred from this as follows:

As indicated in your letter of 16 May 2024, it is the belief of the Tribunal that, in the interests of good order in the progression of this arbitration, the arbitrators to replace Professor McRae and Judge Wolfrum should be appointed by agreement of the Parties, if such agreement is possible. The Russian Federation, in turn, believes that thoughtful advice from the Tribunal may assist the Parties in reaching such agreement. Substantial progress has been made already, and the difficulties currently faced by the Parties do not appear insurmountable.

Furthermore, as Ukraine intends to act on its belief that the provisions of Article 3, Annex VII, are directly applicable to the present circumstances – a position that the Russian Federation is in strong disagreement with – the Russian Federation recalls that, as indicated in your letter of 16 May 2024, the Tribunal is able to rule, upon either Party's request or *suo moto*, on the proper application of the Rules of Procedure and Article 3 of Annex VII of the Convention in respect of the appointment of replacement arbitrators. In the view of the Russian Federation, the Tribunal may, without fundamentally prejudicing either Party's position, rule on a prolongation of the negotiations sufficient for the Tribunal to issue its proposals and for the Parties to consider them.

Alternatively, the Tribunal may, in the opinion of the Russian Federation, directly rule on the applicable procedure.⁹³

136. The Arbitral Tribunal's response to this in its letter dated 12 July 2024 was as follows:

⁹¹ Letter of the Arbitral Tribunal dated 13 August 2024.

⁹² Letter of the Arbitral Tribunal dated 16 May 2024.

⁹³ Letter of the Russian Federation dated 3 July 2024.

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.⁹⁴

137. The initial objections raised by the Russian Federation on the application of Annex VII related to the starting point of the 60-day period set out in Article 3(d) of Annex VII for the Parties to attempt to reach agreement on the appointments.⁹⁵ This question, however, later became moot. The final position of the Arbitral Tribunal was, then, set out in Procedural Order No. 9, as follows:

47. The Russian Federation, in its letter dated 3 July 2024, refers to a possible *suo moto* ruling of the Arbitral Tribunal. In this connection, it is important to point out that, in its letter dated 16 May 2024, the Arbitral Tribunal was addressing the question of the beginning point of the “60-day period” referred to in Article 3 of Annex VII to the Convention, a question on which, as noted above, the Parties were not agreed at that time. However, since that time, this question has become moot.

48. In its request for a ruling, the Russian Federation 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 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.

49. Ukraine has now applied to the ITLOS President to appoint replacements for Professor McRae and Judge Wolfrum. It is not for this Arbitral Tribunal to comment on how the ITLOS President should respond to that request.

V. RULING OF THE ARBITRAL TRIBUNAL ON THE REQUEST OF THE RUSSIAN FEDERATION

50. Accordingly, for the reasons set out above, the Acting President and the other members of the Arbitral Tribunal, by a majority of two to one, *reject* the request of the Russian Federation that the Arbitral Tribunal rule on the procedure for the appointment of replacement arbitrators.⁹⁶

138. It is clear from the foregoing that the Arbitral Tribunal did not purport to rule on the interpretation or application of Annex VII in Procedural Order No. 9.
139. In determining whether Article 3 of Annex VII applies to the appointment of replacement arbitrators following a successful challenge, the Arbitral Tribunal recalls the principle of *effet utile*, consistent with the rule that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to [its terms] in their context and in the light of its object and

⁹⁴ Letter of the Arbitral Tribunal dated 12 July 2024.

⁹⁵ See Letter of the Russian Federation dated 30 April 2024; Letter of the Russian Federation dated 7 May 2024; Letter of the Russian Federation dated 13 May 2024.

⁹⁶ Procedural Order No. 9 dated 18 July 2024. Judge Eiriksson and Sir Christopher Greenwood voted in favour of the Order. Professor Vylegzhanin voted against the Order and appended a Dissenting Opinion.

purpose”.⁹⁷ In *Competence of the General Assembly for the Admission of a State to the United Nations*, the International Court of Justice (“ICJ”) had the occasion to state:

[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.⁹⁸

140. As stated in paragraph 137 above, initially, the dispute between the Parties concerned the interpretation of the phrase “within 60 days of receipt of the notification referred to in article 1 of this Annex” in Article 3(d),⁹⁹ the expiration of which triggers the right of a party to request that the President of ITLOS act as appointing authority under Article 3(e). However, regardless of how this phrase is interpreted, past a certain point, the dispute on when to reckon the 60 days became moot.¹⁰⁰ Hence, the Arbitral Tribunal declined to rule on this question.
141. The Arbitral Tribunal is now being asked to rule that Article 3(d), and by extension, Article 3(e), never came into operation since the “notification referred to in article 1 of this Annex” referred to in Article 3(d) is Ukraine’s original notification and statement of claim dated 31 March 2019, and that therefore “a gap exi[s]ts in the rules” insofar as replacement of arbitrators following a

⁹⁷ Vienna Convention on the Law of Treaties, Article 31(1).

⁹⁸ *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 8.

⁹⁹ In its 7 May 2024 letter, for example, the Russian Federation expressed its position:

The Russian Federation has already indicated that it is not in principle opposed to the application of the rules set in Article 3(d) of Annex VII *mutatis mutandis*, properly taking into consideration the specific circumstances of the present case. If the Tribunal decides that the provisions of Article 3(d) of Annex VII of the Convention should apply, the Russian Federation submits that the 60-day period for negotiations, as envisaged by this provision, should run from such time as to be indicated by the Tribunal, but not earlier than 6 May 2024.

(Letter of the Russian Federation dated 7 May 2024, p. 3)

Ukraine, however, took the position that the 60-day period started to run on 6 March 2024, and that “under the mandatory provisions of Article 3(d) of Annex VII, Ukraine ‘shall’ make its request to the President of ITLOS no later than 19 May 2024, *i.e.*, ‘within two weeks of the expiration of the aforementioned 60-day period’” (Letter of Ukraine dated 9 May 2024, pp. 2-3).

¹⁰⁰ In its letter dated 8 July 2024, Ukraine noted that “[s]ixty days have elapsed since 6 May 2024, when Ukraine’s counsel contacted Russia’s counsel regarding efforts to reach agreement (and which is the date Russia has argued the 60-day period under Article 3(d) should begin to run)”. In Procedural Order No. 9, the Arbitral Tribunal noted that “[t]he Parties have differed on how, instead, the time period referred to in subparagraph (d), ‘within 60 days of receipt of the notification referred to in article 1 of this Annex’, is to be read”, but that “[t]he question [of the beginning point of the ‘60-day period’] has become moot” (Procedural Order No. 9, paras. 40, 47).

successful challenge is concerned.¹⁰¹ The Arbitral Tribunal cannot subscribe to this interpretation without going against the principle of *effet utile* and its associated interpretative maxim *ut res magis valeat quam pereat*, which dictates that the Arbitral Tribunal choose an interpretation that gives practical effect to the provisions of the Convention, ensuring that they achieve their intended purpose, rather than an interpretation that deprives them of any purpose or effect.

142. Article 3(f) of Annex VII states that “[a]ny vacancy shall be filled in the manner prescribed for the initial appointment.” The Russian Federation does not claim—nor could it—that its successful challenge against Professor McRae and Judge Wolfrum did not create a “vacancy” on the Arbitral Tribunal. Accordingly, it is clear that Article 3(f) applies and expressly governs the situation at hand. The only remaining question is one of interpretation of Article 3(f), and in particular the phrase “in the manner prescribed for the initial appointment”, which for the vacancies resulting from the successful challenges to Professor McRae and Judge Wolfrum is that outlined in Article 3(e). The fact that the analogous application of Article 3(e) is not straightforward, as the Arbitral Tribunal said in its letter dated 16 May 2024, does not, however, create a gap in Annex VII—it remains a question of interpretation of Article 3(f) of Annex VII in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

143. That the object and purpose of Annex VII is to create an effective residual mechanism with no gaps that could frustrate the dispute resolution process is confirmed in the Virginia Commentary:

Under the latter circumstances, arbitration, being compulsory for the parties to the dispute, does not require a special agreement (*compromis*) (no mention is made of such an instrument) and it is put into effect without any loopholes by precise rules concerning the structure, appointment and organization of the tribunal. There are, in essence, three fundamental rules: (1) the tribunal is to consist of five members, of whom two are nationals (one of each party) and three others (of whom one presides) who are not; (2) a list of potential arbitrators is to be drawn up and maintained by the Secretary-General of the United Nations, similar to the list used by the Permanent Court of Arbitration; and (3) the refusal or negligence of the other party in appointing its member of the tribunal, as well as any difficulty over the appointment of the other three members, can be overcome by their appointment *ex officio* by the President of the International Tribunal for the Law of the Sea. Inspired by the precedent of the First Hague Convention of 1907 and later instruments, the Convention has established a somewhat complicated system of arbitration which is designed to prevent deliberate frustration of the arbitral process.

The procedure is flexible, however, and follows classic lines. At the same time, several dispositions have been included in order to ensure the systematic effectiveness of the process. In particular, provision has been made for the possibility that in case one party does not appear before the arbitral tribunal, the other party may request that the proceedings be continued (Annex VII, article 9). The organization thus set in place was seen to be

¹⁰¹ See Letter of the Russian Federation dated 9 December 2024, p. 16, in relation to Letter of the Russian Federation to the ITLOS President dated 1 August 2024, p. 1.

sufficiently effective for the Convention to open the possibility that the arbitral tribunal could participate in proceedings for provisional measures under article 290, and for the prompt release of vessels and crews under article 292.¹⁰²

144. The Russian Federation’s interpretation would, contrary to the objective of the Convention, render Article 3(d) applicable only to a very narrow set of circumstances—i.e., in the initial constitution of an arbitral tribunal—leading to an unintended outcome where a vacancy under Article 3(d) can only ever be filled by the appointing authority if it occurs within 60 days of the initiation of the arbitration. Except in such narrow circumstances, the Russian Federation’s interpretation is that, notwithstanding the terms of Article 3(f), the vacancies resulting from the successful challenges to Professor McRae and Judge Wolfrum cannot “be filled in the manner prescribed for [their] initial appointment”. Such a reading would render Article 3(f) ineffective, negating the Convention’s objective of creating an effective dispute settlement process under Annex VII.
145. In light of the above, the Arbitral Tribunal concludes, by a majority of four votes to one, with Judge Eiriksson, Sir Christopher Greenwood, Judge Kateka and Judge Brown voting in favour and Professor Vylegzhanin dissenting, that there are no irregularities in President Heidar having applied Article 3(f) of Annex VII to the appointment process. It thus rejects this objection of the Russian Federation.

D. OBJECTION 2: COMPLIANCE WITH THE REQUIREMENT OF CONSULTATION

146. The Arbitral Tribunal now turns to the second of the two objections of the Russian Federation, asserting that President Heidar has not properly applied the provisions of Article 3 of Annex VII, specifically as regards the requirement of “consultation with the parties” in making his appointments under Article 3(e) of Annex VII.
147. As noted in paragraph 128 above, the review of the Arbitral Tribunal is restricted to assessing whether President Heidar committed a manifest error or failed to comply with a mandatory requirement of Article 3 of Annex VII. In applying this standard of review, the Arbitral Tribunal has carefully reviewed the record of the proceedings before President Heidar as made available by the Parties.¹⁰³

¹⁰² Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Martinus Nijhoff Publishers, 1989), pp. 422-423.

¹⁰³ The Arbitral Tribunal notes that, save for communications to the ITLOS President that were intended to remain confidential (i.e., concerning comments on the list of arbitrators under Article 2 of Annex VII), the

148. At the outset, the Arbitral Tribunal reaffirms that consultation is indeed a mandatory requirement under Article 3(e) of Annex VII, as stated *inter alia* by the Russian Federation.¹⁰⁴ The Virginia Commentary, commenting on Article 3 of Annex VII, reads:

The President [of ITLOS] has 30 days from the date of receipt of the request to appoint the members. He must consult with the parties and make his choice from the list. The members so appointed “may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute” (subparagraph (e)).

Parties have made available all of their relevant correspondence to and from President Heidar concerning Ukraine’s requests under Article 3(e). These letters are:

1. Letter of Ukraine to the ITLOS President dated 8 July 2024;
2. Letter of the Russian Federation to the ITLOS President dated 10 July 2024;
3. Letter of the ITLOS President to Ukraine dated 10 July 2024;
4. Letter of the ITLOS President to the Russian Federation dated 10 July 2024;
5. Letter of Ukraine to the ITLOS President dated 11 July 2024;
6. Letter of Ukraine to the ITLOS President dated 19 July 2024;
7. Letter of the Russian Federation to the ITLOS President dated 22 July 2024;
8. Letter of Ukraine to the ITLOS President dated 23 July 2024;
9. Letter of the ITLOS President to the Russian Federation dated 26 July 2024;
10. Letter of the Russian Federation to the ITLOS President dated 27 July 2024;
11. Letter of the ITLOS President to Ukraine dated 27 July 2024;
12. Letter of the ITLOS President to the Russian Federation dated 27 July 2024;
13. Letter of the Russian Federation to the ITLOS President dated 1 August 2024;
14. E-mail of the ITLOS President to Ukraine dated 3 August 2024;
15. E-mail of the ITLOS President to the Russian Federation dated 3 August 2024;
16. Letter of the ITLOS President to Ukraine dated 8 August 2024;
17. Letter of the ITLOS President to the Russian Federation dated 8 August 2024;
18. Letter of Ukraine to the ITLOS President dated 14 August 2024;
19. Letter of the ITLOS President to Ukraine dated 20 August 2024;
20. Letter of Ukraine to the ITLOS President dated 14 October 2024;
21. Letter of the ITLOS President to Ukraine dated 15 October 2024;
22. Letter of the ITLOS President to the Russian Federation dated 15 October 2024;
23. Letter of the Russian Federation to the ITLOS President dated 25 October 2024;
24. Letter of the ITLOS President to Ukraine dated 28 October 2024; and
25. Letter of the ITLOS President to the Russian Federation dated 28 October 2024.

¹⁰⁴ See Letters of the Russian Federation dated 9 August, 6 September and 6 December 2024.

The appointment of the three remaining members of the tribunal is the subject of subparagraph (d). Normally, those members will be chosen by agreement of the parties to the dispute, preferably from the preestablished list, and will be nationals of third States, unless otherwise agreed by the parties concerned. In addition, the parties will choose from among those three the member who will act as president. Failing those nominations the three members and the president – after a period of 60 days from the date of initial notification of the institution of proceedings, and unless the parties agree that the nomination be made by a person or a third State chosen by them, recourse will be had to the President of the International Tribunal for the Law of the Sea by the more diligent party, within a further period of two weeks. The rules for the appointment by the President of the Tribunal are the same as those given above for the appointment of the national arbitrators – that is, a period of 30 days, consultation with the parties involved, selection from the list and designation of persons of nationalities other than those of the parties to the dispute. In addition, these three members must not be in the service of either of the parties to the dispute, nor habitually resident in the territory of either one of them, nor be a national of either party.

The same rules apply to filling any vacancy in the tribunal, whether of a member or of the President (subparagraph (f)).¹⁰⁵

149. As set out in sub-section C above, the desirability of the Parties reaching an agreement motivated the Arbitral Tribunal to pursue the various efforts it made to facilitate agreement between the Parties. It acknowledges that, although no eventual agreement was reached, the Parties engaged in a series of consultations further to the Arbitral Tribunal's entreaties.¹⁰⁶
150. As for the interpretation and application of the "consultation" requirement under Article 3(f) of Annex VII, there is no guidance in Article 3(e) of Annex VII itself, nor elsewhere in Annex VII, on the scope and manner of such consultations.¹⁰⁷
151. It is, however, relevant to note the extensive communications between President Heidar and the Parties.¹⁰⁸ These communications are set out *in extenso* in Part II(G) above.¹⁰⁹ They include at

¹⁰⁵ Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Martinus Nijhoff Publishers, 1989), pp. 427-428.

¹⁰⁶ See Letters of the Russian Federation dated 17 and 30 May and 29 June 2024; Letters of Ukraine dated 18 May and 1 July 2024.

¹⁰⁷ Professor Jianjun Gao writes:

In the view of the *Virginia Commentary*, the provisions on appointment of arbitrators by the third party must be applied 'to attain the highest level of agreement between the parties'. This may explain the requirement for the President of the ITLOS to make an appointment 'in consultation with the parties'. Nevertheless, article 3 does not say how the consultation should be held, and therefore the President of the ITLOS possesses some discretion on the issue.

(Jianjun Gao, "Appointment of Arbitrators by the President of the ITLOS Pursuant to Article 3 of Annex VII to the LOS Convention: Some Tentative Observations", *Chinese Journal of International Law*, Vol. 16 (2017), para. 33, p. 745 (citations omitted))

¹⁰⁸ See fn. 103 *supra*, listing the record of communications in the proceedings before President Heidar.

¹⁰⁹ See paras. 48 to 78 *supra*.

least 13 communications between President Heidar and Ukraine and at least 12 communications between the Russian Federation and President Heidar, which communications were shared with or made available to the other Party.

152. In its analysis, the Arbitral Tribunal attaches particular importance to:

- (a) the letters of the Russian Federation to President Heidar dated 22 and 27 July, 1 August and 25 October 2024;
- (b) the timeliness of the response of the Russian Federation to President Heidar's letters to the Parties dated 10 July 2024 inviting them for consultations; and
- (c) President Heidar's decision to conduct consultations by correspondence in both instances.

These elements will be dealt with in turn.

153. It will be recalled that, one day after receiving Ukraine's request of 8 July 2024,¹¹⁰ President Heidar immediately wrote to the Parties (i) stating that he is "required to make the appointment of two arbitrators under subparagraph (d) [of Article 3] within a period of 30 days of the receipt of the request and in consultation with the Parties" and (ii) inviting the Parties to in-person consultations at the premises of ITLOS in Hamburg on 30 July 2024.¹¹¹

154. On 22 July 2024, or 12 days later, the Russian Federation responded to President Heidar's 10 July 2024 letter, setting out its views on Procedural Order No. 9 and maintaining its position in its own letter of 10 July 2024, i.e., that neither the Rules of Procedure nor Annex VII apply to the vacancies in question and that President Heidar should therefore dismiss Ukraine's request. Relevantly, the Russian Federation stated:

As a consequence, presently there exists no legal basis to proceed with the appointment of arbitrators through application of Article 3 of Annex VII. Any arbitrators thus 'appointed' cannot be considered legitimate. Pending the Arbitral Tribunal's legitimate reconstitution, no decision taken by any new composition of the Tribunal formed without the necessary legal basis can be considered lawfully adopted, even more so any decision on jurisdiction, admissibility of claims or on the merits of the case.

In view of the above the Russian Federation maintains its position that:

1. Neither the Rules of Procedure, nor Article 3 of Annex VII to UNCLOS govern the issue of replacement of arbitrators removed due to a successful challenge.

¹¹⁰ Received on 9 July 2024, as per the letters of the ITLOS President dated 10 July 2024.

¹¹¹ See Letters of the ITLOS President to the Parties dated 10 July 2024, quoted in para. 50 *supra*.

2. It is, therefore, 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, as was the case with the arbitrator challenge procedure.

3. As the issue of arbitrator replacement procedure remains unresolved, Ukraine's unilateral referral of the matter to the President of ITLOS lacks the appropriate legal basis. Thus, the Russian Federation will not consider itself bound by any decision stemming from this referral and will not recognize the authority of any arbitrators thus 'appointed'.

While reserving its above-mentioned principal position, as a matter of good will the Russian Federation remains open to discussions on the issue, including possible consultations with the Arbitral Tribunal and the President of ITLOS. The Russian Federation uses this opportunity to draw attention to the location and timing of such consultations: participation in any in-person meetings in countries which have introduced 'sanctions' against the Russian Federation will be severely complicated by logistical difficulties and lengthy visa processes, and cannot be arranged on short notice.¹¹²

155. The following day, on 23 July 2024, Ukraine responded to the letter of the Russian Federation dated 22 July 2024, countering with its own views on the Arbitral Tribunal's Procedural Order No. 9 and stating that the Russian Federation's "threats" not to respect President Heidar's authority to make appointments "are unfortunate, but cannot be accepted as a basis to obstruct the procedures laid out in Annex VII". Ukraine also reiterated its availability to participate in in-person consultations on 30 July 2024 and observed that the Russian Federation "has been in receipt of this invitation [for in-person consultations] since 10 July, and thus it cannot credibly complain that the consultations have been scheduled on 'short notice'".¹¹³

156. On 26 July 2024, or four days after the Russian Federation letter dated 22 July 2024, President Heidar wrote to the Russian Federation referencing its letters dated 10 and 22 July 2024 and Ukraine's letters dated 11, 19 and 23 July 2024. Quoting paragraph 39 of the Arbitral Tribunal's Procedural Order No. 9,¹¹⁴ President Heidar stated his view that "[u]nder article 3 of Annex VII to the Convention, the President of [ITLOS] is designated as appointing authority, unless the Parties to the dispute agree that the appointment of arbitrators should be made by another person or a third State chosen by the Parties" and, in this regard, he is "therefore obliged to act in accordance with the provisions contained in article 3(e) and (f) of Annex VII to the Convention".

¹¹² See para. 53 *supra*.

¹¹³ See para. 54 *supra*.

¹¹⁴ Paragraph 39 of Procedural Order No. 9 reads:

Professor McRae and Judge Wolfrum were appointed as members of the Arbitral Tribunal, and Professor McRae as its President, by the ITLOS President. Thus, in accordance with Article 3, subparagraph (e), of Annex VII, "the manner prescribed for [their] initial appointment" under subparagraph (f) for filling the vacancies resulting from the successful challenges to Professor McRae and Judge Wolfrum is that outlined in Article 3, subparagraph (e).

President Heidar reiterated his invitation for the Russian Federation to participate in in-person consultations in Hamburg on 30 July 2024, and requested a response by 27 July 2024.¹¹⁵

157. On 27 July 2024, the Russian Federation reiterated its position as set out in its letter dated 22 July 2024 that “it does not consider Ukraine’s application [. . .] to have any legal basis”. The Russian Federation declined to engage in consultations under Article 3 of Annex VII, stating:

In light of this, with all due respect, the Russian Federation cannot agree to take part in consultations ‘on the matter of the appointment of the two arbitrators and the President of the arbitral tribunal’ since such consultations would likewise have no legal basis as the originating request by Ukraine.

That said, in the spirit of good faith, the Russian Federation is prepared to convene with ITLOS and Ukraine in order to seek potential avenues to proceed. For avoidance of doubt, this should not be interpreted as the Russian Federation’s agreement to participate in, or acceptance of legitimacy of, any appointment procedure to be carried out without the Tribunal’s explicit ruling. The Russian Federation requests that this position be clearly reflected in the forthcoming correspondence or any public statements from ITLOS.

While the Russian Federation is minded to discuss the ways of resolving this situation and is prepared to take part in a meeting for these purposes, the currently standing date for such meeting – 30 July 2024 – is, however, not feasible. As the Russian Federation explained in its letter of 22 July 2024, arranging the visit of the Russian delegation to Hamburg at such short notice is impossible due to logistical and visa difficulties. The Russian Federation will be in a position to arrange for such visit no earlier than the week starting from 5 August 2024, subject to the availability of visas to the members of its delegation by that time.¹¹⁶

158. On the same day, and acknowledging the Russian Federation’s letter of 27 July 2024, President Heidar informed the Parties that he would pursue consultations by correspondence and transmitted to the Parties the list of arbitrators referred to in Article 2 of Annex VII, inviting them to communicate their comments on the list by 2 August 2024.¹¹⁷

159. In response, the Russian Federation wrote to President Heidar on 1 August 2024, reiterating its position that (i) Article 3 of Annex VII is inapplicable; (ii) the arbitrator appointment procedure can only be set by agreement of the Parties; and (iii) Ukraine’s request of 8 July 2024 should be disregarded for lack of merit. The Russian Federation again concluded by turning down consultations under Article 3 of Annex VII, stating:

In light of the above, the Russian Federation cannot concede to your request for the submission of a list of candidates who may serve as potential arbitrators, or comments on the persons included in the UN list. The Russian Federation also recalls that certain criteria for the selection of arbitrators have been previously agreed upon by the Parties as part of

¹¹⁵ See para. 55 *supra*.

¹¹⁶ See para. 56 *supra*.

¹¹⁷ See para. 57 *supra*.

their discussions (as indicated by Ukraine in its letter dated 8 July 2024), in particular that ‘candidates need not be chosen from the list referred to in Annex VII Article 2’.

Nevertheless, as a gesture of good faith and in pursuit of constructive dialogue to resolve the challenging situation at hand, in line with the Arbitral Tribunal’s clear message, the Russian Federation reiterates its willingness to engage in discussions regarding the adoption of a procedure that conforms with the applicable rules for selecting and appointing arbitrators to reconstitute the Arbitral Tribunal. The Russian Federation believes that in-person discussions between the President and the Agents and Counsel of both Parties would be conducive to finding a mutually acceptable solution. As stated in the 27 July letter, the 30-day period specified in Article 3(e) of Annex VII, even if it were applicable, *quod non*, should not be viewed as a bar to constructive discussions in this case.

The Russian Federation therefore repeats its suggestion made earlier that such discussions be organised during the week of 5 August 2024. Considering the logistics and visa requirements for in-person participation, the Russian Federation could possibly attend such a meeting in Hamburg on 8, 9 or 10 August 2024, provided the meeting is confirmed not later than 2 August, 2024, and subject to the availability of connecting flights and timely issuance of visas by German authorities. For the above to materialise, timely assistance from ITLOS in the obtainment of visas is paramount.

Should the discussions prove to be fruitful and lead to a mutually acceptable solution, for example through the adoption of an *ad hoc* procedure by agreement of both Parties, the Russian Federation will be prepared to immediately submit a list of candidates to be used in such a procedure, which would hopefully result in the opportune and legitimate reconstitution of the Arbitral Tribunal.

In conclusion, the Russian Federation would like to underscore that, by agreeing to participate in the aforementioned discussions, it has not agreed to the application (nor the applicability) of the procedure outlined in Article 3 of Annex VII in the instant case for the appointment of arbitrators to replace Professor McRae and Judge Wolfrum following their removal. As it was unequivocally stated in the Russian Federation’s letter of 27 July 2024, any discussions held with you on this matter – whether in person or by correspondence – have been and might continue to be conducted without prejudice to the aforementioned principled position.¹¹⁸

160. On 3 August 2024, President Heidar referenced the Parties’ prior agreement that “the replacement of the two arbitrators need not to be chosen from the list referred to in article 2 of Annex VII to the Convention”, and thus invited each Party to suggest by 5 August 2024 “an additional list of up to 10 individuals not included in the UN list who may serve as possible arbitrators”.¹¹⁹ Five days later, or on 8 August 2024—and within 30 days from Ukraine’s 8 July 2024 request—President Heidar communicated his decision to appoint Judge Eiriksson as President of the Arbitral Tribunal and Judge Kateka and Professor Mossop (who later withdrew) as members of the Arbitral Tribunal.¹²⁰

¹¹⁸ See para. 58 *supra*.

¹¹⁹ See para. 59 *supra*.

¹²⁰ See para. 60 *supra*.

161. As regards Ukraine's second request for the appointment of a replacement of Professor Mossop, in its letter dated 14 October 2024, President Heidar chose from the outset to hold consultations by correspondence.¹²¹ Thus, in his letters dated 15 October 2024, President Heidar already transmitted to the Parties the list of arbitrators under Article 2 of Annex VII and invited them to suggest a list of up to seven names included in the UN list, as well as to communicate its comments on the names in this list by 24 October 2024.¹²²
162. In its letter dated 25 October 2024 to President Heidar, the Russian Federation (i) noted Ukraine's request for the appointment of an arbitrator to replace Professor Mossop; (ii) reiterated its position regarding the alleged inapplicability of the procedure set out in Article 3 of Annex VII, as expressed in its previous communications dated 10 July, 22 July, 27 July and 1 August 2024; and (iii) asserted that the purported appointments of Judge Kateka and Professor Mossop, as well as the designation of Judge Eiriksson as President of the Arbitral Tribunal, took place without adequately assessing the considerations it raised. As such, the Russian Federation again refused President Heidar's invitation, stating that it "is not in a position to engage in the proposed consultations and will not be able to accept any resulting appointment".¹²³ On 28 October 2024, or three days later, President Heidar communicated his decision to appoint Judge Brown as member of the Arbitral Tribunal.¹²⁴
163. At this point, the Arbitral Tribunal makes the following observations: (i) in both instances, President Heidar, within one day from receipt of Ukraine's requests, invited the Parties for consultations, in the first instance proposing in-person consultations and then consultations by correspondence, and in the second instance from the outset proposing consultations by correspondence (seemingly presuming that there was little reason to assume that the Russian Federation's position would have changed); (ii) the Russian Federation repeatedly communicated that, due to its legal position, it "is not in a position to engage in the proposed consultations and will not be able to accept any resulting appointment"; (iii) instead of consultations under Article 3(d), the Russian Federation has repeatedly referenced its willingness to meet with Ukraine and the ITLOS President to "seek potential avenues to proceed"; (iv) there is no indication from Ukraine of any willingness to engage in such alternative process, or any intent to waive the 30-day time limit under Article 3(e) of Annex VII; and (v) absent a mutual agreement by the Parties,

¹²¹ See Letter of the ITLOS President dated 15 October 2024.

¹²² See paras. 75 to 76 *supra*.

¹²³ See para. 77 *supra*.

¹²⁴ See para. 78 *supra*.

under Article 3(e) of Annex VII, President Heidar is required to make the requested appointments within a period of 30 days of the receipt of Ukraine's request.

164. The Russian Federation's conduct was undoubtedly consistent with its position that Article 3 of Annex VII did not apply. However, that position being incorrect, as the Arbitral Tribunal has found above, it cannot serve as justification for a refusal to participate in timely consultations.
165. The Arbitral Tribunal further observes that, under Article 3(e) of Annex VII, the only formal requirements for the exercise of appointing authority powers are: (i) that the appointments be made from the list referred to in Article 2 of Annex VII; (ii) that the appointments be made within 30 days from the receipt of the request; (iii) that the appointments be made "in consultation with the parties"; and (iv) that the members of the tribunal so appointment be of different nationalities and not in the service of, ordinarily residents of, or nationals of, any of the parties to the dispute.
166. Here, the only question is whether President Heidar's correspondence with the Parties meets the requirement of holding "consultations" under Article 3(e) of Annex VII. As mentioned, Article 3(e) neither prescribes a particular manner of consultation nor provides guidelines on its scope, leaving such details to the sound exercise of discretion of the President of ITLOS as appointing authority.
167. In this regard, the Arbitral Tribunal observes that the established practice of ITLOS Presidents, when exercising their appointing authority functions under Annex VII, reflects the use of two modes of consultation: in-person meetings and by correspondence. The latter—consultation by correspondence—has been consistently recognized as a legitimate and sufficient method, particularly in circumstances where one party declines to participate in the arbitral proceedings or otherwise refuses to engage in the appointment process.¹²⁵

¹²⁵ Professor Jianjun Gao provides an account of the relevant practice:

From the brief descriptions given by the ITLOS, it appears that there are two modes of consultation adopted by the President in practice. One is to conduct consultations "by correspondence with the Parties", and this mode was used in the *South China Sea Arbitration*, *Arctic Sunrise Arbitration*, and *Duzgit Integrity Arbitration* (for the first appointment). The other is to hold "consultations with the parties on the premises of the Tribunal", and this mode was used in the *Bay of Bengal Maritime Boundary Arbitration*, *Chagos Marine Protected Area Arbitration*, and *ARA Libertad Arbitration*. In addition, according to the arbitral tribunal in the "*Enrica Lexie*" Incident, the President of the ITLOS used the same mode and "consulted the Parties during a meeting in Hamburg" before appointment was made.

(Jianjun Gao, "Appointment of Arbitrators by the President of the ITLOS Pursuant to Article 3 of Annex VII to the LOS Convention: Some Tentative Observations", *Chinese Journal of International Law*, Vol. 16 (2017), paras. 34-35, pp. 745-747 (citations omitted))

168. It is thus within President Heidar's discretion, as appointing authority, to choose to hold consultations by correspondence in view of the circumstances of the case. It is not amiss to note that President Heidar did discharge his obligation under Article 3(e) by inviting consultations, and the Parties have had ample opportunities to make known, by correspondence, their respective legal positions.
169. On this analysis and on its reading of the communications between President Heidar and the Parties, the Arbitral Tribunal concludes, by a majority of four votes to one, with Judge Eiriksson, Sir Christopher Greenwood, Judge Kateka and Judge Brown voting in favour and Professor Vylegzhanin dissenting, that there are no errors, let alone manifest errors, in President Heidar's implementation of Article 3 as regards the requirement of "consultations" under Article 3(e) of Annex VII. It thus rejects this objection of the Russian Federation.

E. COSTS

170. As it decided in its Award on the Preliminary Objections of the Russian Federation dated 27 June 2022 and its Decision on Challenge dated 11 April 2025, the Arbitral Tribunal decides, unanimously, that it will rule on the question of costs in conjunction with the merits.

VI. DECISION

171. For the reasons set out above, the Arbitral Tribunal:

- (a) *Rejects*, by four votes to one, the Russian Federation's objections to the constitution of the Arbitral Tribunal, as set out in its letters dated 9 August, 6 September and 6 December 2024:

IN FAVOUR: Judge Gudmundur Eiriksson, Sir Christopher Greenwood, Judge James Kateka, Judge Kathy-Ann Brown

AGAINST: Professor Alexander Vylegzhanin

- (b) *Decides*, by four votes to one, that it is properly constituted in accordance with the provisions of Article 3 of Annex VII to the Convention:

IN FAVOUR: Judge Gudmundur Eiriksson, Sir Christopher Greenwood, Judge James Kateka, Judge Kathy-Ann Brown

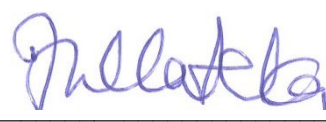
AGAINST: Professor Alexander Vylegzhanin

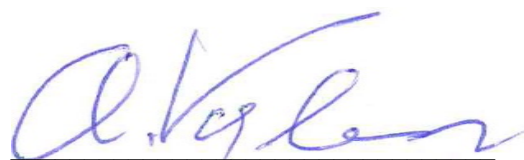
- (c) *Decides* that the question of costs shall be ruled upon in conjunction with the merits.

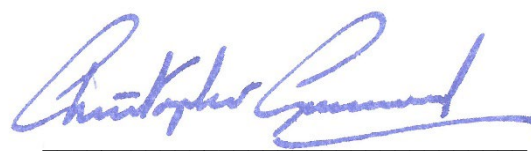
Done at the Peace Palace, The Hague, the Netherlands, this 29th day of July 2025,

For the Arbitral Tribunal:



Judge Kathy-Ann Brown


Judge James Kateka


Professor Alexander Vylegzhanin


Sir Christopher Greenwood KC

Subject to the attached dissenting opinion


Judge Gudmundur Eiriksson
President

For the Registry:


Mr. Martin Doe
Registrar