

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

1. I agree with the majority that the objection to the constitution of the Arbitral Tribunal was properly and timely asserted.
  2. To my regret, I cannot agree with the decision of the majority to reject the Respondent's objections to the constitution of the Arbitral Tribunal following the ITLOS President's appointments of 8 August and of 28 October 2024 of the two new members of the Arbitral Tribunal. In my opinion, the objections of the Respondent regarding the ITLOS President's appointments should have been upheld for the reasons outlined further below.
- I. THE SCOPE AND LIMITS OF THE ITLOS PRESIDENT'S FUNCTIONS AS APPOINTING AUTHORITY UNDER ARTICLE 3(E) OF ANNEX VII**
3. The role of the ITLOS President as an appointing authority under Article 3(e) of Annex VII to UNCLOS is a strictly limited one. As noted by a leading commentator on appointing authority mechanisms in international arbitration, the appointing authority "is not acting on behalf of the two parties [. . .] The *right* to appoint is with the parties; they have merely delegated the *task* of choosing or selecting the particular person to [the appointing authority]."<sup>1</sup>
  4. According to Article 3 of Annex VII to UNCLOS, the subsidiary role of the ITLOS President is *not an adjudicatory* role; it is a limited *administrative role*: to make a selection of a particular person (or persons) as an additional arbitrator (or arbitrators) according to Article 3 of Annex VII. Thus, this function is not a function of ITLOS; it is not an obligation of a judicial body – ITLOS. It is an obligation of *an officer* of a judicial body, that is an obligation of a *concrete natural person*. Though this person has this obligation because of his office (i.e., *ex officio*).
  5. So, when according to UNCLOS Annex VII this obligation is triggered, no question arises in respect of an *allocation or apportionment of competence as between ITLOS and the Annex VII Arbitral Tribunal*. It remains a simple question of whether a concrete person – in this case the current ITLOS President, Mr. T. Heidar – acted *as prescribed* for the appointing authority by Article 3(e) of Annex VII or *not*.
  6. The ITLOS President does not possess a monopoly over the function of appointing authority under Article 3 of Annex VII. Instead of the ITLOS President, the parties to the dispute may agree that another person (or a third State) chosen by them should make the appointment.

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<sup>1</sup> David D. Caron and Lee M. Caplan, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (Second ed. Oxford University Press, 2013), p. 153.

7. UNCLOS does not grant any right to the ITLOS President (or any other appointing authority) *to settle a dispute under UNCLOS*. It is only the Arbitral Tribunal which has a right to settle such a dispute. So, if there is *a dispute between the parties as to the applicability (or not) of Article 3(e) of Annex VII*, it is not for the appointing authority to rule on such a dispute.
8. The *only* discretion granted to the ITLOS President (or any other appointing authority acting under UNCLOS Annex VII) is *to choose* in specific circumstances (after consultations with the parties) *a name (or names) of an additional (new) arbitrator (arbitrators) from the list of arbitrators* which is maintained by the Secretary-General of the United Nations pursuant to Articles 2 and 3 of Annex VII).

## II. DID THE ITLOS PRESIDENT ACT WITH DUE DILIGENCE WHEN HE MADE APPOINTMENTS IN THIS CASE?

*The applicability of Article 3(e) of Annex VII: the existence of disagreements between the Parties in this case*

9. In this case, the Claimant and the Respondent hold opposite views as to the applicability of Article 3 of Annex VII. These disagreements are clearly reflected in the Parties' letters to ITLOS President Heidar.<sup>2</sup>
10. According to the Claimant, Article 3(e) of UNCLOS Annex VII *is applicable* and the ITLOS President *is to appoint* two new (additional) members of the Arbitral Tribunal.
11. According to the Respondent, Article 3 of UNCLOS Annex VII *is not applicable* to the appointment of new arbitrators after a successful challenge of the previous arbitrators and the right of any Party to request the ITLOS President to make appointments *does not arise*.
12. So, this is not a disagreement between the Parties regarding *the names of new arbitrators*. This is a dispute between the Parties regarding the interpretation and application of a particular provision of UNCLOS Annex VII.
13. As noted in Part I of this Dissenting Opinion, the ITLOS President (or any other appointing authority) *is not authorized by Annex VII to rule on any dispute* between the parties regarding the interpretation or application of UNCLOS. *The only discretion* of the appointing authority is to choose this or that person from the list of arbitrators mentioned in Article 2 of Annex VII.

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<sup>2</sup> See Decision, section (G).

14. However, in spite of the lack of any authorization in Annex VII to decide the dispute between the Parties, ITLOS President Heidar in his decisions of 8 August and 28 October 2024 adopted the legal position of the Claimant, while not providing any reasons to dismiss the objections of the Respondent.
15. In my opinion this is a manifestly ***ultra vires action by ITLOS President Heidar***. Consequently, **such an action cannot be qualified as acting “with due diligence” in the sense of the UNCLOS Commentary.**<sup>3</sup>

*The obligation of the ITLOS President to consult with the Parties under Article 3(e) of Annex VII: was it performed in good faith?*

16. The obligation of the ITLOS President as an appointing authority to consult with the Parties to the dispute before appointing a new (additional) arbitrator (or arbitrators) is clearly established by UNCLOS, though with no details. At the time of the Third United Nations Conference on the Law of the Sea, which resulted in the adoption of the text of UNCLOS, “consultations” were certainly understood as “consultations in person”.
17. The authors of the UNCLOS Commentary show the importance of the UNCLOS “consultations” clause even for a minor issue – when disputing parties have different views as to the prolongation of time limits provided in Article 3 of Annex VII, if one of the parties seems to be in default:

Given the fact that the President of [ITLOS] must consult the parties, he will obviously consult with the party in default. If that party *either objects* to the President’s appointment or remains *silent*, the President will be unable to proceed and the party instituting the proceedings will have to recommence the proceedings, strictly observing the time limits.

(emphasis added)<sup>4</sup>

18. So, according to the Commentary, it is the legal positions of *both* parties to the dispute that is of major legal significance for the appointing authority; the ITLOS President may even be unable to proceed if one of the disputing parties objects to the ITLOS President’s appointment; and the obligation of the President of ITLOS to take account of the positions of *both* Parties before appointing an additional arbitrator (or arbitrators) – and for that purpose to organize consultations

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<sup>3</sup> 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), p. 429.

<sup>4</sup> 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. 428-429.

– this obligation is *mandatory* (as provided by the UNCLOS Commentary, the ITLOS President “*must consult the parties*”).

19. In this case, as reflected in the correspondence between the Parties and the ITLOS President, the Parties hold *opposite legal positions* as to:

- a. whether the consultations noted in Annex VII are to be “*consultations in person*”, or can be *any* consultations, including “*consultations by correspondence*”; and
- b. whether the ITLOS President acted *with due diligence* or *not* – when disregarding the request of the Respondent to reschedule the suggested date of consultations in Hamburg, Germany, taking into account the short notice (considering strict visa regulations and travel restrictions for citizens of the Respondent and the absence of such strict regulations and restrictions for citizens of the Claimant).

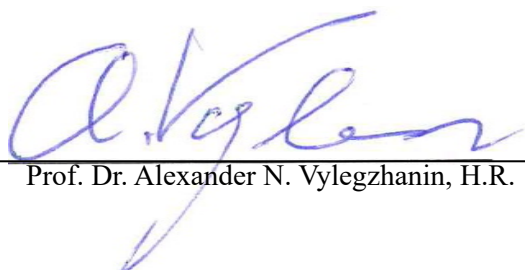
20. In spite of these differences, the ITLOS President again supported the position of the Claimant and as a result:

- a. the date of the consultations in person was not rescheduled;
- b. the consultations in person did not take place; and
- c. *the position of the Respondent was not taken into account* by the ITLOS President before appointing new members of the Arbitral Tribunal.

21. In this context – in my opinion – the actions of ITLOS President Heidar to appoint on 8 August and 28 October 2024 two new arbitrators *without consultations in person and without taking into account the positions of both Parties cannot be qualified as acting “with due diligence” under Article 3 of Annex VII.*

22. Consequently, for the foregoing reasons set forth in this Dissenting Opinion, the **objection of the Respondent to the constitution of the Arbitral Tribunal** (following the appointment by the ITLOS President of the two new arbitrators) **should be upheld.**

Date: 29 July 2025

  
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Prof. Dr. Alexander N. Vylegzhanin, H.R.