



22 November 2024

**By Electronic Mail**

Mr. Martin Doe  
Deputy Secretary-General  
The Permanent Court of Arbitration  
Peace Palace, Carnegieplein 2  
2517 KJ The Hague  
The Netherlands

**Re: PCA Case No. 2019-28 (*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*)**

Dear Mr. Doe:

Further to your letter of 5 November 2024, Ukraine hereby presents its comments on the challenge of the Russian Federation to the constitution of the Arbitral Tribunal (the “Tribunal”), as set out in its letter of 9 August 2024 and at pages 1–2 of its letter of 6 September 2024.

Russia’s objections to President Heidar’s appointments in this arbitration, and any challenge to the constitution of the Tribunal that flows from these objections, should be dismissed as inconsistent with the Tribunal’s decision in Procedural Order No. 9. That order confirmed that it was within the jurisdiction of President Heidar to determine the appropriateness of appointing replacement arbitrators in response to Ukraine’s request. Regardless, Russia’s objections to President Heidar’s appointments lack merit and are contrary to a proper interpretation of Annex VII. Ukraine respectfully requests that the Tribunal dismiss Russia’s challenge to the constitution of the Tribunal.

**Background to President Heidar’s Appointments**

On 6 March 2024, the Tribunal (Judge Gudmundur Eiriksson presiding, Sir Christopher Greenwood, and Professor Alexander N. Vylegzhanin), by two votes to one, upheld Russia’s challenges to Professor McRae and Judge Wolfrum.<sup>1</sup> Professor McRae and Judge Wolfrum resigned from the Tribunal the same day, and also on 6 March 2024, the PCA transmitted the Decision and Dissenting Opinion on the Challenges, as well as Professor McRae’s and Judge Wolfrum’s resignation letters, to the Parties and their counsel.<sup>2</sup>

On 30 April 2024, the Russian Federation requested that the Tribunal adopt an *ad hoc* procedure for the replacement of Professor McRae and Judge Wolfrum, on the basis that

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<sup>1</sup> Procedural Order No. 9, dated 18 July 2024 (“PO No. 9”), ¶¶ 2–3; *see* Decision on Challenges (6 March 2024); Dissenting Opinion by Sir Christopher Greenwood.

<sup>2</sup> PO No. 9, ¶¶ 4–5.

neither Annex VII nor the Rules of Procedure regulate the procedure for replacement of disqualified arbitrators.<sup>3</sup> Ukraine opposed Russia's request on the basis that both the Rules of Procedure of the arbitration and Annex VII provide for arbitrator vacancies to be filled "in the manner prescribed for the initial appointment."<sup>4</sup> Professor McRae and Judge Wolfrum were initially appointed by ITLOS President Jin-Hyun Paik pursuant to Article 3(e) of Annex VII, following the Parties' inability to reach agreement under Article 3(d).<sup>5</sup>

For their replacement, Ukraine was of the view that the 60-day period for the Parties to attempt to reach agreement under Article 3(d) of Annex VII had begun to run from 6 March, the date of notification of Professor McRae's and Judge Wolfrum's resignations.<sup>6</sup> Russia did not oppose, in principle, "the application of the rules set in Article 3(d) of Annex VII *mutatis mutandis*,"<sup>7</sup> but submitted that if the provisions of Article 3(d) should apply, "the 60-day period for negotiations, as envisaged by this provision, should run from . . . not earlier than 6 May 2024," which was the date that Ukraine's counsel reached out to Russia's counsel to confer pursuant to Article 3(d) of Annex VII.<sup>8</sup>

Following the Tribunal's suggestion that it would be beneficial for the Parties to engage in further efforts to reach agreement, Ukraine agreed to a temporary suspension of the time-limiting deadlines of Article 3(d) to enable the Parties to engage in further efforts to attempt to reach agreement.<sup>9</sup> Through counsel-to-counsel discussions, the Parties reached agreement on selection criteria, but were unable to reach agreement on the modalities of the selection procedure.<sup>10</sup>

The Parties remained unable to reach agreement through 5 July 2024, *i.e.*, 60 days after 6 May 2024, the date from which Russia argued that the 60-day period of Article 3(d) of Annex VII should run.<sup>11</sup> Following the expiry of this second 60-day period, Ukraine sent a request to the President of ITLOS on 8 July 2024 for the appointment of two replacement arbitrators pursuant to Article 3(e) of Annex VII.<sup>12</sup>

Russia maintained its request that the Tribunal rule on an *ad hoc* procedure for the replacement appointments pursuant to Article 1(2) of the Rules of Procedure, asked the Tribunal to inform President Heidar of the pending ruling, and contended that proceeding

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<sup>3</sup> Russia's letter of 30 April 2024; PO No. 9, ¶ 9.

<sup>4</sup> Ukraine's letter of 6 May 2024; PO No. 9, ¶ 11.

<sup>5</sup> PO No. 9, ¶ 39; Award on Preliminary Objections (27 June 2022), ¶ 16.

<sup>6</sup> Ukraine's letter of 6 May 2024; Ukraine's letter of 9 May 2024.

<sup>7</sup> Russia's letter of 7 May 2024, p. 3.

<sup>8</sup> *Id.*; see also Russia's letter of 30 April 2024, p. 2.

<sup>9</sup> See Tribunal's letter of 16 May 2024; Ukraine's letter of 18 May 2024; Ukraine's letter of 30 May 2024; Ukraine's letter of 1 July 2024; PO No. 9, ¶ 17.

<sup>10</sup> Ukraine's letter of 1 July 2024; see also Ukraine's letter of 30 May 2024; PO No. 9, ¶¶ 19–22.

<sup>11</sup> Ukraine's letter of 8 July 2024; PO No. 9, ¶¶ 21–24.

<sup>12</sup> Ukraine's letter to ITLOS of 8 July 2024 (Ex. A); see PO No. 9, ¶ 24.

with Ukraine's requested appointments would be inappropriate.<sup>13</sup> Russia also asked President Heidar to dismiss Ukraine's request due to its pending request before the Tribunal regarding the determination of the arbitrator appointment procedure.<sup>14</sup>

On 12 July 2024, the Tribunal advised the Parties that absent an agreement by the Parties on the procedure for the appointment of replacement arbitrators, "the Arbitral Tribunal will not seek to provide any further guidance to the Parties on the further procedure."<sup>15</sup> However, in light of the Russian Federation's open request for a ruling, the Tribunal proceeded to issue Procedural Order No. 9 one week later, rejecting Russia's request that the Tribunal rule on the procedure for the appointment of replacement arbitrators.<sup>16</sup>

In Procedural Order No. 9, the Tribunal expressly concluded:

- i. "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"<sup>17</sup>;
- ii. "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)"<sup>18</sup>
- iii. "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"<sup>19</sup>; and
- iv. "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."<sup>20</sup>

Following receipt of Ukraine's request on 9 July, President Heidar wrote to the Parties on 10 July, inviting them to consultations on 30 July 2024 in Hamburg.<sup>21</sup> President Heidar noted that under Article 3(e) of Annex VII, he was required to make the appointments within 30 days of the receipt of the request and in consultation with the

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<sup>13</sup> PO No. 9, ¶ 25; Russia's letter of 10 July 2024.

<sup>14</sup> Russia's letter to ITLOS of 10 July 2024 (Ex. B).

<sup>15</sup> Tribunal's letter of 12 July 2024, p. 2; PO No. 9, ¶ 26.

<sup>16</sup> PO No. 9, ¶ 50.

<sup>17</sup> PO No. 9, ¶ 38.

<sup>18</sup> PO No. 9, ¶ 39.

<sup>19</sup> PO No. 9, ¶ 48.

<sup>20</sup> PO No. 9, ¶ 49.

<sup>21</sup> See ITLOS letter to Ukraine of 10 July 2024 (Ex. C) (attaching ITLOS letter to Russia of 10 July 2024).

Parties.<sup>22</sup> Ukraine confirmed its availability for consultations and told President Heidar of the Tribunal's decision in Procedural Order No. 9 to reject Russia's request for a ruling on the arbitrator appointment procedure.<sup>23</sup>

By letter dated 22 July 2024, Russia reiterated to President Heidar its objections to Ukraine's requested appointments as lacking an appropriate legal basis under the Rules of Procedure and Annex VII.<sup>24</sup> Russia nevertheless said it "remains open to discussions on the issue," but "use[d] th[e] 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."<sup>25</sup> In response, Ukraine replied to President Heidar and explained why the requested appointments were required under the Rules of Procedure and Annex VII, and were also consistent with the Tribunal's ruling in Procedural Order No. 9.<sup>26</sup>

On 26 July 2024, President Heidar informed Russia's Agent that he had received a copy of the Tribunal's Procedural Order No. 9 and noted the arbitral tribunal's statement that "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)."<sup>27</sup> President Heidar further explained to Russia that under Article 3 of Annex VII, the ITLOS President is designated as appointing authority unless the Parties agree otherwise, and 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."<sup>28</sup> President Heidar concluded by reiterating his invitation to participate in consultations in Hamburg.<sup>29</sup>

On 27 July, the Russian Federation replied to President Heidar, refusing to agree to take part in consultations on the basis that the consultations would have no legal basis.<sup>30</sup> At the same time, Russia expressed willingness to take part in a meeting on the issue, but stated that an in-person meeting on 30 July would be "infeasible" for its delegation.<sup>31</sup>

President Heidar wrote to the Parties on 27 July, taking note of all their correspondence, and noting that "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

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<sup>22</sup> ITLOS letter to Ukraine of 10 July 2024 (Ex. C) (attaching ITLOS letter to Russia of 10 July 2024).

<sup>23</sup> Ukraine's letter to ITLOS of 19 July 2024 (Ex. D).

<sup>24</sup> Russia's letter to ITLOS of 22 July 2024 (Ex. E).

<sup>25</sup> *Id.*, p. 5 (Ex. E).

<sup>26</sup> *See* Ukraine's letter to ITLOS of 23 July 2024 (Ex. F).

<sup>27</sup> ITLOS letter to Russia of 26 July 2024, p. 1 (Ex. G).

<sup>28</sup> *Id.*

<sup>29</sup> *See* ITLOS letter to Russia of 26 July 2024 (Ex. G).

<sup>30</sup> Russia's letter to ITLOS of 27 July 2024 (Ex. H).

<sup>31</sup> *Id.*, p. 5 (Ex. H).

feasible.”<sup>32</sup> President Heidar wrote that he “therefore intend[s] 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.”<sup>33</sup> For the purpose of those consultations, President Heidar transmitted an attached list of arbitrators referred to in article 2 of Annex VII and invited the Parties to submit a list of up to ten names and any other comments by 2 August 2024, to be conveyed on a confidential basis and not to be communicated to the other Party.<sup>34</sup>

President Heidar also invited the Parties to suggest by 5 August 2024 an additional list of up to 10 individuals not included in the UN list who could serve as possible arbitrators.<sup>35</sup>

On 8 August 2024, President Heidar notified the Parties that further to the consultations held by correspondence, he had appointed Judge James Kateka and Professor Joanna Mossop as arbitrators, and Judge Gudmundur Eiriksson as President.<sup>36</sup>

Following Professor Mossop’s withdrawal on 13 August, Ukraine submitted a further request to President Heidar on 14 August.<sup>37</sup> On 20 August 2024, President Heidar wrote to Ukraine informing it that he would only be in a position to entertain a request to appoint an arbitrator following Professor Mossop’s withdrawal if the Parties were first unable to reach agreement within the 60-day period of Article 3(d).<sup>38</sup>

Ukraine’s counsel initiated outreach to Russia’s counsel promptly after President Heidar’s correspondence of 20 August 2024 and received confirmation of receipt from Russia’s counsel on 28 August 2024, but never received a further response. As the Parties were unable to reach agreement on a replacement arbitrator within the 60 days following Professor Mossop’s withdrawal, Ukraine submitted a request for an appointment to President Heidar on 14 October 2024.<sup>39</sup> On 15 October 2024, President Heidar informed the Parties that he would pursue consultations by correspondence on the matter, and invited the Parties’ proposed names or comments on the UN list by 24 October 2024, to be conveyed on a confidential basis and not to be communicated to the other Party.<sup>40</sup>

On 25 October 2024, the Russian Federation sent a letter to President Heidar, which he shared with Ukraine, reiterating Russia’s position on the inapplicability of Article 3 of Annex VII and the illegitimacy of any appointment by the ITLOS President, and stating its refusal to engage in the proposed consultations.<sup>41</sup>

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<sup>32</sup> ITLOS letter of 27 July 2024, p. 1 (Ex. I).

<sup>33</sup> *Id.*

<sup>34</sup> ITLOS letter of 27 July 2024 (Ex. I).

<sup>35</sup> ITLOS email communication of 3 August 2024 (Ex. J).

<sup>36</sup> ITLOS letter of 8 August 2024 (Ex. K).

<sup>37</sup> Ukraine’s letter to ITLOS of 14 August 2024 (Ex. L).

<sup>38</sup> ITLOS letter of 20 August 2024 (Ex. M).

<sup>39</sup> Ukraine’s letter to ITLOS of 14 October 2024 (Ex. N).

<sup>40</sup> ITLOS letter of 15 October 2024 (Ex. O).

<sup>41</sup> Russia’s letter to ITLOS of 25 October 2024 (Ex. P).

On 28 October 2024, President Heidar notified the Parties that he had decided to appoint Judge Kathy-Ann Brown as arbitrator.<sup>42</sup>

**Russia's Objections to President Heidar's Appointments Should Be Dismissed Pursuant to the Terms of Procedural Order No. 9.**

Russia's challenge to the constitution of the Tribunal is rooted in its position that the appointment of replacement arbitrators following a challenge is not governed by the Rules of Procedure or Annex VII, and therefore no appointment is possible absent a ruling by the Arbitral Tribunal on the appropriate procedure.<sup>43</sup> This position has already been rejected in the Tribunal's ruling in Procedural Order No. 9, in which the Tribunal declined to make the type of ruling Russia requested then and seeks now. Russia's objections are accordingly moot and not a valid basis for challenging the constitution of the Tribunal. Following the Tribunal's determination that the matter was governed by the Rules and Annex VII to the Convention, and that it was for President Heidar to decide how he would respond to any request for appointments, there remained no further role for the sitting members of the Tribunal in the appointment of replacement arbitrators under Annex VII. That remains the case today.

In Procedural Order No. 9, the Tribunal determined that Russia's request for a ruling on the procedure for the appointment of replacement arbitrators *did not identify* "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."<sup>44</sup>

The Tribunal further noted that "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" and "[t]hus, 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).*"<sup>45</sup>

The Tribunal accordingly rejected Russia's request for a ruling on the procedure for the appointment of replacement arbitrators, and noted that "[i]t is not for this Arbitral Tribunal to comment on how the ITLOS President should respond to [Ukraine's] request" for appointments.<sup>46</sup>

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]

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<sup>42</sup> ITLOS letter of 28 October 2024 (Ex. Q).

<sup>43</sup> Russia's letter of 9 August 2024, pp. 1–2.

<sup>44</sup> PO No. 9, ¶ 48.

<sup>45</sup> PO No. 9, ¶¶ 38–39 (emphasis added).

<sup>46</sup> PO No. 9, ¶¶ 49–50.

initial appointment.” As the Tribunal noted in Procedural Order No. 9, the manner prescribed for their initial appointment was that outlined in Article 3(e).

Russia continued to dispute the question of the commencement of the 60-day time period provided for in Article 3(d) of Annex VII, but the Tribunal expressly noted that this question “has become moot.”<sup>47</sup> By the time that Ukraine made its request to President Heidar, it no longer mattered whether the 60-day period began on 6 March, as Ukraine maintained, or instead on 6 May, as Russia had previously suggested. It was undisputed that the Parties, through their counsel, had engaged in attempts to reach agreement for more than 60 days and had been unable to reach agreement.<sup>48</sup>

By confirming that Article 3(e) of Annex VII applies to fill the vacancies resulting from the successful challenges to Professor McRae and Judge Wolfrum, and that it is for the President of ITLOS to decide how to respond to a request made of him to make appointments, the Tribunal confirmed the limits of its mandate on the procedure for replacing Professor McRae and Judge Wolfrum.

Thus, after Ukraine proceeded to request the appointments from ITLOS pursuant to Article 3(e), it was for the President of ITLOS to interpret and apply the terms of Annex VII and the Rules of Procedure in the exercise of his mandate under Article 3(e). The Tribunal recognized this in Procedural Order No. 9 in finding that “[i]t is not for this Arbitral Tribunal to comment on how the ITLOS President should respond to [Ukraine’s] request.”<sup>49</sup> President Heidar also confirmed this in his explanation to the Agent of Russia that under Article 3 of Annex VII, “the President of the Tribunal is designated as appointing authority, unless the Parties to the dispute agree [otherwise].”<sup>50</sup> President Heidar thus stated 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.”<sup>51</sup>

In any event, Russia raised the same objections regarding the appointment procedure to President Heidar, which President Heidar was able to consider and rejected.<sup>52</sup> Ultimately, President Heidar determined that he was required to make the requested appointments pursuant to Article 3(e) of Annex VII, held consultations with the Parties on the matter, and appointed Judge Kateka and Professor Mossop to the Tribunal, and Judge Eiriksson as President (and then, following Professor Mossop’s withdrawal and the expiration of an additional 60-day period, appointed Judge Brown).

As noted in Procedural Order No. 9, it was not for the Arbitral Tribunal to comment on how President Heidar should respond to Ukraine’s request. That remains the case.

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<sup>47</sup> PO No. 9, ¶¶ 47–48.

<sup>48</sup> More than 120 days had elapsed since Professor McRae and Judge Wolfrum notified their resignation from the Arbitral Tribunal on 6 March 2024, and more than 60 days had elapsed since 6 May 2024, when Ukraine’s counsel commenced consultations with Russia’s counsel to attempt to reach agreement on replacement arbitrator candidates. *See* Ukraine’s letter of 8 July 2024.

<sup>49</sup> PO No. 9, ¶ 49.

<sup>50</sup> ITLOS letter to Russia of 26 July 2024, p. 1 (Ex. G).

<sup>51</sup> *Id.*

<sup>52</sup> *See* ITLOS letter to Russia of 26 July 2024 (Ex. G).

International organizations, including international courts and tribunals, exercise conferred powers, or *compétences d'attribution*.<sup>53</sup> These include the explicit powers conferred in their constituent instruments, as well as implied, or inherent, powers that come with their explicit powers or with the functions given to the organization.<sup>54</sup> The notion of inherent powers is used by international courts and tribunals when defining their own jurisdiction – *compétence de la compétence* – which does not need to be expressly provided for in the constitutive documents of those tribunals.<sup>55</sup>

Here, under Article 3 of Annex VII, the President of ITLOS is conferred with the power to act as appointing authority in Annex VII arbitrations. This includes the power to interpret and apply Annex VII and other provisions of the Convention in the exercise of this mandate, as well as the inherent power to determine the scope of his authority in executing this mandate (*compétence de la compétence*). The Arbitral Tribunal has no jurisdiction to reach an independent determination of whether President Heidar acted properly in exercising the appointing authority conferred on him by the Convention, in making the appointments requested by Ukraine. That question was already resolved by President Heidar in the exercise of his mandate under Article 3 of Annex VII.

Because Russia's objections concern the same matters the Tribunal already addressed in its ruling in Procedural Order No. 9, its objections to the legality of President Heidar's appointments must be rejected. Ukraine requests that the Tribunal dismiss Russia's objections and confirm that it is properly constituted.

### **In Any Event, Russia's Objections to the Tribunal's Constitution Are Meritless.**

Even if the Tribunal were to issue a further ruling on the substance of Russia's challenge to the Tribunal's constitution, Russia's objections remain meritless. The

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<sup>53</sup> See Niels M Blokker, *International Organizations or Institutions, Implied Powers*, in Max Planck Encyclopedia of International Law (December 2021), ¶ 1 ("International organizations may only exercise those powers that have been given to them . . . This fundamental rule of the law of international organizations is called the principle of attributed powers, the principle of conferred powers, or the principle of speciality; often also the French expression *compétences d'attribution* is used.").

<sup>54</sup> See *id.*, ¶¶ 2–3 ("Powers of international organizations are, first and foremost, laid down in explicit provisions included in their constituent instruments. . . . It is generally accepted that international organizations also dispose of implied powers. These are powers that are not mentioned explicitly in constituent instruments, but that are considered to come with explicit powers or, in a broader definition, with the functions given to the organization.").

<sup>55</sup> See *id.*, ¶ 4 ("The notion of inherent powers is used in particular by international courts and tribunals when defining their own jurisdiction."); see, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Judgment of 18 November 2008, ¶ 86 ("The Court always possesses the *compétence de la compétence*"); *ICTY Appeals Chamber (Prosecutor v. Tadic)*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, ¶ 18 ("[T]he principle of 'Kompetenz-Kompetenz' in German or 'la compétence de la compétence' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction.' It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals.").



replacement of Professor McRae and Judge Wolfrum took place in accordance with the Rules of Procedure and Annex VII, as reflected by the decisions of the Tribunal and the President of ITLOS.

*Ukraine's Request to President Heidar Was Consistent with the Rules of Procedure and Annex VII.*

The Rules of Procedure for this arbitration, 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:

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.

The Tribunal observed in Procedural Order No. 9 that Article 6.1 of the Rules of Procedure “does not refer to the event of disqualification of an arbitrator upon a successful challenge by a Party.”<sup>56</sup> But Article 6.1 does refer to “withdrawals,” which reasonably can be interpreted as applying to the resignation of Professor McRae and Judge Wolfrum — both of whom resigned (or “withdrew”) from the Tribunal after the Challenge Decision. Under the terms of Article 6.1, those withdrawals created “vacanc[ies]” that required application of the agreed procedure for “replacement of an arbitrator.”

Even if the resignations of Professor McRae and Judge Wolfrum were not treated as “withdrawals” under Article 6 of the Rules of Procedure, such that one might argue that Article 6 is inapplicable, the question of selecting replacement arbitrators would be governed by Article 1(1) of the Rules of Procedure. Article 1(1) provides that the arbitration “*shall* be conducted in accordance with these Rules and the relevant provisions of the [Convention], including Annex VII to the Convention.”<sup>57</sup> And Article 3(f) of Annex VII provides that “*any* vacancy shall be filled in the manner prescribed for the initial appointment.”<sup>58</sup> Article 3(f) could not be clearer – *any* vacancy *shall be filled* in the manner prescribed for the initial appointment.<sup>59</sup>

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<sup>56</sup> PO No. 9, ¶ 44.

<sup>57</sup> Rules of Procedure, Art. 1(1) (emphasis added).

<sup>58</sup> See Ukraine’s letter of 9 May 2024, p. 1.

<sup>59</sup> Russia’s argument that Annex VII is inapplicable because it does not provide for a challenge procedure is similarly baseless. Article 3(f) applies to “any vacancy” in the Arbitral Tribunal. See Ukraine’s letter of 8 July 2024, p. 1 (citing UNCLOS, Art. 3(f) (emphasis added)); see also Ukraine’s letter of 9 May 2024.

Russia's position that the replacement of Professor McRae and Judge Wolfrum necessitated a ruling by the Arbitral Tribunal ignores Article 1(1) and relies instead on Article 1(2) of the Rules of Procedure, which concerns only procedural questions that are "not expressly governed by these Rules or by Annex VII to the Convention."<sup>60</sup> As noted above, the Tribunal has already rejected this understanding when finding that the procedure is expressly governed by the Rules of Procedure and Annex VII. Because Article 3(f) of Annex VII expressly governs, there was no question of procedure for the Tribunal to decide under Article 1(2) of the Rules.

Russia also has argued that Article 3(f) cannot apply because it does not specify the starting point for the 60-day period of consultations under Article 3(d).<sup>61</sup> Article 3(d) requires appointments to be made in accordance with Article 3(e) *if* the parties are unable to reach agreement "within 60 days of receipt of the notification referred to in article 1 of this Annex." As the Tribunal noted in Procedural Order No. 9, "the manner prescribed" for an arbitrator's initial appointment cannot incorporate time periods commencing on the receipt of the notification referred to in article 1.<sup>62</sup> According to Russia, this means that Article 3(f) "had never been properly triggered."<sup>63</sup>

Russia's interpretation is unreasonable and would deny purpose and effect to Article 3(f) for most vacancies on Annex VII tribunals. By Russia's logic, Article 3(f) would *never* apply to a vacancy where an appointment was originally made pursuant to Article 3(d). Similarly, on Russia's logic, Article 3(f) could not apply to a vacancy where the appointment was originally made by the respondent pursuant to Article 3(c), as that provision likewise refers to a time period beginning with the "receipt of the notification referred to in article 1." In other words, on Russia's view, a provision governing how "any vacancy shall be filled" would not govern the filling of most vacancies under Annex VII.

Such an interpretation is contrary to the maxim *ut res magis valeat quam pereat*, which requires interpreting a treaty's terms in a manner that gives them meaning and effect, and in a manner that enables the treaty to have appropriate effects.<sup>64</sup> Russia's interpretation 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. Russia's interpretation also would frustrate the aims of Annex VII by impeding the constitution of Annex VII tribunals pursuant to Article 3 when

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<sup>60</sup> See Russia's letter of 3 July 2024, p. 2; Rules of Procedure, Art. 1(2) (emphasis added).

<sup>61</sup> Russia's letter of 10 July 2024, pp. 3–4.

<sup>62</sup> PO No. 9, ¶ 40.

<sup>63</sup> Russia's letter of 6 September 2024, p. 1.

<sup>64</sup> See Commentaries to the Draft Articles on the Law of Treaties in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1966, Vol. II, U.N. Doc. A/CN.4/SER.A/1966/Add.1, p. 219 (1967) ("When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."); Richard Gardiner, Treaty Interpretation (Oxford International Law Library, 2nd Edition 2015), p. 179 ("[*Ut res magis valeat quam pereat*], requiring preference for an interpretation which gives a term some meaning rather than none, is the more specific limb of the principle of effectiveness. The other limb guides the interpreter towards an interpretation which realizes the aims of the treaty.").

vacancies arise. It is entirely inconsistent with the object and purpose of Annex VII dispute settlement to have the parties, the Arbitral Tribunal, and the ITLOS President forever in a legal loop requiring repetitive procedural decision-making that prevents the case from moving forward. Interpreted in good faith, and in view of the object and purpose of the treaty, the time-limits prescribed in Article 3(d) must be capable of being applied to the filling of “any vacancy” under Article 3(f).

Russia accepted as much in its earlier correspondence. In its letter to the Tribunal of 30 April, the Russian Federation wrote that it “believes that the appropriate timeframe for this process [the Parties seeking to reach agreement on replacement arbitrators], *in line with the general principle set in Article 3(d) of Annex VII*, would be 60 days.”<sup>65</sup> Similarly, in its letter of 7 May, the Russian Federation stated 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.”<sup>66</sup> Russia further submitted that if the provisions of Article 3(d) should apply, “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.”<sup>67</sup>

The Tribunal already declined to provide a ruling on Russia’s request to indicate a particular start date, and by the time Ukraine made its request to President Heidar, 60 days had run from 6 May 2024. In other words, there was no remaining dispute that the requirement of Article 3(d) of a 60-day period of attempting to reach agreement was fulfilled. Regardless of whether the 60-day period began when the Parties were notified of the resignations of Professor McRae and Judge Wolfrum (as Ukraine argued), or whether it began when the Parties in fact initiated consultations to attempt to reach agreement (as Russia argued), the Article 3(d) requirement of a 60-day period of attempting to reach agreement had been completed. As noted by the Tribunal in Procedural Order No. 9, the question of whether the Parties fulfilled the requirement of Article 3(d) prior to Ukraine’s request to the ITLOS President was “moot.”<sup>68</sup> The fact that the 60-day period could not have started from “receipt of the notification referred to in article 1” is irrelevant.

Thus, Ukraine’s request to President Heidar was consistent with the applicable provisions of Annex VII and the Rules of Procedure. The Tribunal acknowledged this when it rejected Russia’s request for an *ad hoc* procedure and allowed President Heidar to make the appointments. Russia’s challenge to the Tribunal’s constitution must be rejected.

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

As described above, the President of ITLOS has *compétence de la compétence* in the exercise of his mandate under Article 3 of Annex VII, and the Arbitral Tribunal has no jurisdiction on the question of the legality of President Heidar’s actions under Annex VII.

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<sup>65</sup> Russia’s letter of 30 April 2024, p. 2 (emphasis added).

<sup>66</sup> Russia’s letter of 7 May 2024, p. 3.

<sup>67</sup> *Id.*

<sup>68</sup> PO No. 9, ¶ 48.

Regardless, Russia's objections concerning the procedure before ITLOS are meritless. President Heidar acted consistently with the terms of Article 3(e) of Annex VII, and treated both Parties with all due process.

President Heidar communicated to the Parties on 10 July that he received Ukraine's request on 9 July, and noted in that letter that he is "required", "pursuant to article 3(e) of Annex VII to the Convention 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."<sup>69</sup> He invited the Parties to participate in consultations at the premises of ITLOS in Hamburg, Germany.<sup>70</sup>

Russia wrote to President Heidar on 10 July and objected to Ukraine's request, making the same arguments to President Heidar that it made before the Tribunal that the Rules of Procedure and Annex VII do not govern the replacement of arbitrators after a challenge.<sup>71</sup> Russia also asked President Heidar to disregard Ukraine's request in light of Russia's pending request to the Arbitral Tribunal to rule on the appropriate replacement procedure.<sup>72</sup> Following the Tribunal's issuance of Procedural Order No. 9, Russia still objected to Ukraine's request on the basis that there existed no legal basis to proceed with the appointment of arbitrators under Article 3 of Annex VII.<sup>73</sup> Russia also said it remained opened to discussions, while cautioning that in-person meetings "in countries which have introduced 'sanctions' against the Russian Federation will be severely complicated by logistical difficulties."<sup>74</sup> Russia reiterated in its letter to President Heidar of 27 July that its "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."<sup>75</sup>

Russia alleges that the appointments made by President Heidar did not satisfy "the requisite consultation with the parties under Article 3(e),"<sup>76</sup> but that is false. Following Russia's firm refusal to participate in in-person consultations in Hamburg, President Heidar proceeded to hold consultations with the Parties by correspondence.<sup>77</sup> That was consistent with President Heidar's earliest communication to the Parties that he was required, under

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<sup>69</sup> ITLOS letter to Ukraine of 10 July 2024, p. 1 (Ex. C) (attaching ITLOS letter to Russia of 10 July 2024).

<sup>70</sup> ITLOS letter to Ukraine of 10 July 2024 (Ex. C) (attaching ITLOS letter to Russia of 10 July 2024).

<sup>71</sup> Russia's letter to ITLOS of 10 July 2024 (Ex. B).

<sup>72</sup> *Id.*

<sup>73</sup> Russia's letter to ITLOS of 22 July 2024 (Ex. E).

<sup>74</sup> *Id.*, p. 4.

<sup>75</sup> Russia's letter to ITLOS of 27 July 2024, p. 5 (Ex. H).

<sup>76</sup> Russia's letter of 9 August 2024, p. 2.

<sup>77</sup> See ITLOS letter of 27 July 2024 (Ex. H); ITLOS email communication of 3 August 2024 (Ex. J).

Article 3(e), to make the appointment under subparagraph (d) “within a period of 30 days of the receipt of the request” *and* “in consultations with the Parties.”<sup>78</sup>

Russia accuses President Heidar of “refus[ing] to adjust his proposed timing of the in-person consultations, despite the known difficulties with flights from Russia to Germany and issuance of entry visas by German authorities to Russian travellers,”<sup>79</sup> but this is disingenuous. In order to make the appointments pursuant to the requirements of Article 3(e), and even taking account of Russia’s stated inability to travel to Germany for consultations under the auspices of ITLOS (which is false), President Heidar was required to conduct the consultations by correspondence. President Heidar’s choice to conduct the consultations via correspondence was to accommodate the Russian Federation (as Ukraine had already indicated it could make its representatives available in Hamburg on 30 July). In any event, Article 3(e) does not mandate in-person consultations with the Parties, nor does it mandate any particular procedure for those consultations. If Russia refused to engage with President Heidar’s invitation for candidate names and comments via correspondence, that is the result of Russia’s choices, not the procedure employed by President Heidar. Because the President of ITLOS consulted with the Parties and made the appointments within 30 days of receiving the request, the appointments were made consistent with the requirements of Article 3 of Annex VII.

Russia’s allegations that President Heidar “summarily rejected” Russia’s offer of an in-person meeting and that he “took for granted the ill-grounded position of Ukraine without allowing any discussion on the matter”<sup>80</sup> similarly ignores the record correspondence showing that both Parties had the opportunity to present to President Heidar their positions on the issue of the replacement procedure, and on the relevance of the Tribunal’s decision in Procedural Order No. 9. President Heidar was able to consider the Parties’ submissions, the Tribunal’s 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.

When President Heidar did *not* believe he was required or permitted to act pursuant to Article 3 of Annex VII, he did not do so. In the case of Ukraine’s first request for an appointment to replace Professor Mossop, President Heidar invited Russia to submit comments on the request (which Russia did not submit), and nevertheless 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 of Article 3(d).<sup>81</sup> There is thus no support for Russia’s allegations that President Heidar “took for granted” the position of Ukraine.<sup>82</sup>

In sum, the Parties were treated with due process and had equal opportunity to present their views to President Heidar on both the replacement procedure and specific potential candidates. The procedure before President Heidar fulfilled the requirements of Article 3, and Russia has failed to identify any relevant procedural defect that calls into

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<sup>78</sup> ITLOS letter to Ukraine of 10 July 2024, p. 1 (Ex. C) (attaching ITLOS letter to Russia of 10 July 2024).

<sup>79</sup> Russia’s letter of 6 September 2024, p. 2.

<sup>80</sup> *Id.*

<sup>81</sup> See ITLOS letter to Ukraine of 20 August 2024 (Ex. M).

<sup>82</sup> Russia’s letter of 6 September 2024, p. 2.

question the legality of the appointments. Russia's substantive disagreement with the outcome of the procedure does not undermine the legitimacy of the procedure under Annex VII to the Convention and the Rules of Procedure of the arbitration.

**The Tribunal Should Reject Russia's Objections.**

For the reasons described above and in Ukraine's prior correspondence on this matter, Ukraine respectfully requests that the 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.<sup>83</sup>

Respectfully submitted,



Ms. Oksana Zolotaryova  
Agent for Ukraine

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<sup>83</sup> Article 7 of Annex VII confirms the Tribunal's authority to order costs, which is merited in the particular circumstances here. *See* Ukraine's Memorial, Chapter 6, Part IV. Following its successful disqualification of Professor McRae and Judge Wolfrum, Russia has persistently sought to obstruct the re-constitution of the Arbitral Tribunal, generating countless rounds of procedural briefing before this Tribunal and before ITLOS, and needlessly inflating costs and prolonging this proceeding. Ukraine respectfully requests that Russia's bad-faith procedural conduct be taken into consideration and that it be ordered to pay Ukraine's costs of defending its application of the Rules of Procedure and Annex VII to ensure the replacement of Professor McRae and Judge Wolfrum.