Mr. Martin Doe
Deputy Secretary-General
Permanent Court of Arbitration

« 6 » December 2024

Re: PCA Case No 2019-28 – Ukraine v. the Russian Federation

Dear Mr. Doe,

With reference to your letter dated 5 November 2024, setting the timetable for the Parties' submissions concerning the constitution of the Arbitral Tribunal, and Ukraine's communication on that issue submitted on 22 November 2024, the Russian Federation wishes to convey the following.

According to the letter of 5 November 2024 signed by Judge Eiriksson, the Russian Federation's objections in relation to the fundamental flaws in the procedure for the appointment of replacement arbitrators following the removal of Professor McRae and Judge Wolfrum are being considered as 'a challenge to the constitution of the Arbitral Tribunal, and accordingly its jurisdiction' on which it is intended 'to issue a ruling or decision'.

The Russian Federation reiterates that it has suspended its participation in the present proceedings due to the illegitimate character of the purported 'reconstitution' of the Tribunal.[1] However, bearing in mind that the issues being now raised concern specifically the aforementioned illegitimacy and the manner in which it might be remedied, the Russian Federation is minded to provide certain additional commentary clarifying its position on this subject matter.

For the convenience of the Tribunal and to address the arguments made in Ukraine's letter of 22 November 2024, the Russian Federation will first make a number of preliminary observations (**1**) and then provide the procedural background concerning the Tribunal's constitution (**2**). It will then state its supplemental arguments as to why the appointments made by the ITLOS President were contrary to the applicable rules of

[1] Letter from the Agent of the Russian Federation dated 9 August 2024.

procedure (**3**). The Russian Federation will further address the flawed arbitrator selection mechanism employed by the ITLOS President which violated the Russian Federation's procedural rights (**4**). Finally, it will show that Ukraine's request for costs of this phase of the proceedings is unwarranted and should be dismissed (**5**).

1. PRELIMINARY OBSERVATIONS

Before turning to the substance of the matters in question, two preliminary observations are warranted.

i. Procedure for considering the Russian Federation's objections

First, the aforementioned letter of 5 November 2024 states that:

> It will be recalled that, in its letter to the Parties dated 13 August 2024, the Arbitral Tribunal, after referring to the letters of H.E. Judge Tomas Heidar, President of the International Tribunal for the Law of the Sea dated 8 August 2024 to the President of the Arbitral Tribunal and the Parties, informing them about *his appointment of Judge Eiriksson as President of the Arbitral Tribunal and of Judge James Kateka and Professor Joanna Mossop as members of the Arbitral Tribunal*…
>
> […]
>
> *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. [*Emphasis* added].

In this respect, it should be recalled that the Russian Federation's objections relate precisely to the material breaches of procedure in the appointment of Judge Kateka and Professor Mossop (who subsequently recused herself for reasons similar to those for which the previous arbitrators were removed) as arbitrators to this Tribunal by H.E. Tomas Heidar in his capacity as the President of ITLOS, as well as the designation of Judge Eiriksson as the President of the Tribunal. These objections apply equally to the appointment of Judge Brown.

The Russian Federation stresses that due to the aforementioned procedural breaches the purported current composition of five arbitrators (*i.e.* including Judges

Kateka and Brown) is not empowered to issue any rulings, including on the legitimacy of the reconstitution of the Arbitral Tribunal. In accordance with the well-established principle *nemo iudex in causa sua,* the improperly appointed arbitrators cannot decide on the validity of their own appointment.

ii. The Russian Federation's serious concerns as to impartiality of Judge Kateka

Second, by its letter of 6 September 2024, the Russian Federation separately communicated its observations concerning the existence of justifiable concerns about the impartiality of Judge Kateka. While the Registry's communication of 5 November 2024 does refer to that letter, it does not mention how the matter related to Judge Kateka will be addressed.

The letter from Judge Kateka of 9 September 2024, purporting to address the Russian Federation's concerns, fails to dispel the doubts indicated.

It is recalled that the arbitrator replacement process in this case was prompted by the disqualification of Professor McRae and Judge Wolfrum as a result of the Russian Federation's successful challenge, with reference to their adherence to the public declaration of the *Institut de Droit International* condemning the Russian Federation (the 'IDI Declaration'), which clearly tainted their impartiality as arbitrators.[2]

Judge Kateka states that his '*abstention on the Declaration cannot be understood as standing firmly in support of the document [the IDI Declaration]*.'[3] This observation regretfully misses the point. In his comments to the draft IDI Declaration Judge Kateka expressed his support for the essence of the Declaration, denouncing the Russian Federation's actions as 'illegitimate forcible action.'[4] It is thus immaterial whether he formally signed the Declaration or not, given that he had already expressed his views, which, similarly to the Declaration itself, give rise to justifiable doubts as to his impartiality.

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[2] Decision on Challenges dated 6 March 2024, ¶101 ('Professor McRae's and Judge Wolfrum's votes in favour of the IDI Declaration raise justifiable doubts as to their impartiality in this arbitration'.)

[3] Letter from Judge Kateka dated 9 September 2024, p. 2

[4] Letter from the Agent of the Russian Federation dated 6 September 2024, pp. 5-6.

It should also be noted that Judge Kateka had no reservations to most of the Declaration's text and, had his minor linguistic corrections been adopted, would have signed the Declaration as well.[5] His 'abstention' cannot therefore be equated to that of other arbitrators, who recused themselves from voting on the Declaration due to a perceived incompatibility with their roles.[6] Despite formally abstaining, in his accompanying statement Judge Kateka voiced support for the substance of the Declaration, his minor reservations being immaterial to the main substance of the Declaration. This categorical difference with the abstentions and refusals to participate in voting of other IDI members, who did not at the same time state their support for the substance of the Declaration, should not be overlooked.

Judge Kateka further acknowledged that he had reposted on the social media a post describing the Russian Federation's actions as '*Kremlin's acts of aggression*.'[7] He, however, states that he '*normally repost[s] or post[s] tweets which touch on African issues of interest*'[8] and that '*ostensible disagreement with the word 'aggression' in the Declaration is exemplified by the repost*.'[9] These explanations are, unfortunately, unsatisfactory.

Regardless of whether the Kenyan Ambassador's speech, contained in the repost, indeed touched upon African interests, it was devoted to the conflict between Russia and Ukraine – a fact that Judge Kateka does not deny. In the accompanying text of the post, there were accusations of 'aggression' made against the Russian Federation.[10] A reasonable person would understand that a repost, without any additional commentary of disapproval, would mean endorsement of that position.[11] In this respect, Judge Kateka's

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[5] *Ibid.*, pp. 6-8.

[6] Letter from the Agent of the Russian Federation dated 24 November 2023, ¶25: '*In particular, Judge Jin-Hyun Paik and Professor Vaughan Lowe specifically stated that voting on this matter would be incompatible with their position as arbitrators in a parallel ongoing arbitration under Annex VII to UNCLOS…*'

[7] Letter from Judge Kateka dated 9 September 2024, p. 2.

[8] *Ibid.*, p. 2

[9] *Ibid.*, p. 3.

[10] Letter from the Agent of the Russian Federation dated 6 September, p. 9.

[11] As the Delhi High Court has held, '*The retweeting* of the content in the present case which was originally created by some other person who did not have as much public following as the present petitioner, by virtue of the petitioner retweeting that content, *represented to the public at large that he believed the content created by another person to be true.* It has to be held so since the general public would ordinarily believe that the person retweeting such content on his own Twitter account, must have understood, verified and believed the content to be true.' [*Emphasis* added]. See *Arvind Kejriwal vs State & Anr*, Delhi High Court, 5 February 2024, available at: https://indiankanoon.org/doc/59702685/.

observations that he '*could not have proposed the deletion of the word 'aggression' in the Declaration and in the same breath support it in the social media*'[12] are puzzling. If he desired to make it clear that the original poster's use of the term 'aggression' was reprehensible, he should have made a comment to this effect to accompany the retweet. Otherwise, this cannot be read in any way other than endorsement.

His observation that he is '*puzzled by the imputing of issues of colonialism, which have never crossed [his] mind, to [his] position*'[13] also regrettably rings hollow. In the context of the repost, which explicitly mentions 'post-colonial world' and contrasts this term to the Russian Federation's actions in Ukraine, it is hard to believe that such thought could have escaped a reasonable reader's mind.

Finally, Judge Kateka suggests, in respect of his participation at the provisional measures stage of these proceedings, that it '*is in the public domain*', '*concerns provisional measures only*' and '*does not concern the merits of the case*.'[14] He, however, did not address the list of issues drawn by the Russian Federation in its letter of 6 September 2024 that were touched upon at the provisional measures stage of these proceedings and that directly concern the issues before this Tribunal, such as (i) jurisdiction over the dispute, (ii) the merits of Ukraine's claims under UNCLOS; and (iii) the existence of the rights claimed by Ukraine.[15]

The Russian Federation's concerns – that Judge Kateka's support of the order on provisional measures rendered on 25 May 2019 may influence his impartiality – therefore stand.

For the above reasons, without prejudice to the objections to the constitution of the Tribunal, the Russian Federation reiterates its serious concerns with regard to the impartiality of Judge Kateka that warrant his disqualification in these proceedings.

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[12] Letter from Judge Kateka dated 9 September 2024, p. 3.

[13] *Ibid.*

[14] *Ibid.*

[15] Letter from the Agent of the Russian Federation dated 6 September 2024, p. 12.

iii. Purported Tribunal's reconstitution – introductory observations

Turning now to the matter of the Tribunal's constitution, it is well settled that arbitrators in inter-State disputes must 'enjoy[] the highest reputation for fairness, competence and integrity'.[16] However, the widespread publication of the IDI Declaration and similarly-worded politically charged public statements has resulted in a considerable shrinkage of the pool of apposite candidates.

Ukraine's premature request for engagement of the ITLOS President in the appointment process has resulted in the appointment of two arbitrators that adhered to the same or similar statements condemning the Russian Federation. While doubts as to the impartiality of Judge Kateka have been elaborated at length in a separate letter of 6 September 2024 and further addressed above, the other original appointee, Professor Mossop, withdrew from this Arbitration in view of having supported the similarly-worded Statement of the Australian and New Zealand Society of International Law condemning the Russian Federation's military operations in a similar manner to the IDI Declaration.[17]

Therefore, in the circumstances of this case, the appointment of arbitrators by the ITLOS President has proved to be an inefficient method for ensuring due process and finding the right candidates for the Arbitral Tribunal that are free from any consideration of bias by the Parties. This further reinforces the Russian Federation's strife for establishing a proper *ad hoc* arbitrator appointment procedure.

As shown below and in the Russian Federation's earlier correspondence, the appointment of arbitrators through an *ad hoc* procedure determined by the Arbitral Tribunal is the only method that does not fall afoul of the applicable Rules of Procedure and Annex VII of the Convention.

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[16] Annex VII of UNCLOS, Article 2; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Reasoned Decision on Challenge dated 30 November 2011, ¶133.

[17] *See* Letter from the Agent of the Russian Federation dated 6 September 2024, pp. 4-5.

2. PROCEDURAL HISTORY

On 6 March 2024, the Tribunal, composed of three unchallenged members, upheld the Russian Federation's challenge to Professor McRae and Judge Wolfrum.[18] Both arbitrators initially objected to the challenge, but following the decision attempted to resign.[19] As will be explained below, these purported late resignations did not and could not have any legal effect because both arbitrators had already been unseated as a result of the successful challenge.

The Arbitral Tribunal of three unchallenged members then instructed the Parties to provide their views on possible form and timing of the further proceedings.[20] The Russian Federation requested the Tribunal to adopt an *ad hoc* procedure for replacement of the disqualified arbitrators.[21] It demonstrated that 'neither Annex VII to UNCLOS, nor the Rules of Procedure regulate the procedure for challenging arbitrators, including the outcome of this challenge.' Nor is arbitrator replacement procedure as a result of a successful challenge so regulated.

The Russian Federation further referred to Article 1(2) of the Rules of Procedure, which provides that if '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.'[22] Therefore, the Tribunal was to determine the procedure for the replacement of the disqualified arbitrators in this case. The Russian Federation proposed that, even if the 60-day period for the Parties' negotiations on the candidatures under Article 3 of Annex VII invoked by Ukraine were to apply, it should start running from the date of the Tribunal's notification regarding the adoption of the *ad hoc* procedure.[23]

Ukraine opposed these proposals, insisting that the procedure for arbitrator replacement is governed by Annex VII to UNCLOS. It argued that the vacancies should

[18] Decision on Challenges dated 6 March 2024, ¶103.

[19] *See* Professor McRae's email dated 6 March 2024; Judge Wolfrum's email dated 6 March 2024.

[20] Letter from PCA to the Parties dated 16 April 2024.

[21] Letter from the Agent of the Russian Federation dated 30 April 2024.

[22] Letter from the Agent of the Russian Federation's Letter dated 7 May 2024, p. 3.

[23] *Ibid*.

'be filled in the manner prescribed for the initial appointment'[24] pursuant to Article 3 of Annex VII. Furthermore, Ukraine claimed that the 60-day period for the Parties' negotiations had commenced on 6 March 2024, the date of the Tribunal's Decision on the Challenges.[25] However, as the Russian Federation has explained (and will further elaborate below), Ukraine's position is predicated on the erroneous equation of the terms 'removal' (*i.e.* disqualification following a challenge, which is left unregulated altogether) and 'withdrawal' (*i.e*. voluntary stepping down, which is used in Article 6 of the Rules of Procedure). It is well settled that these concepts are not to be confused and equated.[26] Ukraine essentially attempts to square the circle to conveniently make it fit the existing causes (death, resignation, etc.) and serve its interests. However, the situation in question in these proceedings (*i.e*. replacement procedure following the arbitrators' removal as a result of a challenge) is not regulated by Annex VII or the Rules of Procedure.

On 7 May 2024, the Russian Federation reiterated its request to the unchallenged members of the Tribunal 'to indicate to the Parties the appropriate procedure for arbitrator reappointment',[27] and opposed Ukraine's treatment of 6 March 2024 as the commencement date for the 60-day period for negotiations. In earlier letters to the Tribunal, Ukraine had not indicated that this period had started to run, and only reached out to Russia in May 2024, after the purported expiration of this period. Thus, the Russian Federation considered that this period could not have commenced prior to 6 May 2024 in any event.

In the Registry's letter dated 16 May 2024, the Tribunal did not express a position in respect of the proper interpretation of Article 3 of Annex VII, instead inviting the Parties to negotiate. In light of this, the Russian Federation once again requested the Tribunal to establish an *ad hoc* procedure for the appointment of new arbitrators.[28] This request, however, was not addressed by the Tribunal.

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[24] Letter from the Agent of Ukraine dated 6 May 2024.

[25] *Ibid*.

[26] Letter from the Agent of the Russian Federation dated 7 May 2024, p. 6.

[27] *Ibid*, pp. 4-5.

[28] Latter of the Agent of the Russian Federation dated 17 May 2024, p. 4.

Between May and July 2024, the Parties engaged in discussions concerning the procedure for selecting appropriate candidatures to fill the vacancies. Agreement was reached on the criteria applicable to the replacement arbitrators,[29] but not on the modalities of the selection process.[30] Accordingly, on 29 June 2024, the Russian Federation invited the Tribunal to 'assist the Parties in reaching agreement in this respect',[31] reiterating its request for the establishment of an *ad hoc* procedure for the selection of replacement arbitrators.[32]

Despite the numerous attempts of the Russian Federation to seek guidance from the Tribunal,[33] Ukraine unilaterally submitted, on 8 July 2024, a request to the ITLOS President, seeking the appointment of replacement arbitrators.[34]

On 10 July 2024, the Russian Federation opposed Ukraine's request. It argued that the Parties remained in disagreement in respect of the applicable procedure, and that requests to the Tribunal on that matter remained pending.[35]

In the letter of the same date, the ITLOS President invited the Parties for consultations in person to be held in Hamburg, Germany, on 30 July 2024.[36]

In a separate communication of the same date (10 July 2024) addressed to the Tribunal, the Russian Federation again requested the adoption of a proper procedure for the selection and appointment of replacement arbitrators and to inform the ITLOS

[29] Letters from the Agent of the Russian Federation dated 30 May 2024 and dated 29 June 2024; Letters from the Agent of Ukraine dated 30 May 2024 and dated 1 July 2024.

[30] Letter from the Agent of the Russian Federation dated 29 June 2024, p. 1; Letter from the Agent of Ukraine dated 1 July 2024, p. 1.

[31] Letter from the Agent of the Russian Federation dated 29 June 2024, p. 3.

[32] Letter from the Agent of the Russian Federation dated 3 July 2024, p. 3.

[33] Letter from the Agent of the Russian Federation dated 30 April 2024, p. 1; Letter from the Agent of the Russian Federation dated 7 May 2024, p. 6; Letter from the Agent of the Russian Federation dated 29 June 2024, p. 3; Letter from the Agent of the Russian Federation dated 3 July 2024, p. 2.

[34] Letter from the Agent of Ukraine to the ITLOS President dated 8 July 2024 (Exhibit A to the Letter from the Agent of Ukraine dated 22 November 2024).

[35] Letter from the Agent of the Russian Federation to the ITLOS President dated 10 July 2024, p. 7 (Exhibit B to the Letter from the Agent of Ukraine dated 22 November 2024).

[36] Letter from the ITLOS President to the Parties dated 10 July 2024 (Exhibit C to the Letter from the Agent of Ukraine dated 22 November 2024).

President that any appointment by him would be invalid due to the Russian Federation's pending request.[37]

On 18 July 2024, the Tribunal issued Procedural Order No. 9, by the majority of two votes to one.[38] The Tribunal accepted the Russian Federation's position that neither Annex VII nor the Rules of Procedure govern arbitrator challenges and subsequent procedural steps following a successful challenge.[39] However, it refused to rule upon the request of the Russian Federation as it 'ha[d] not identified any question of procedure, in terms of Article 1, paragraph 2, of the Rules of Procedure'.[40]

In his dissenting opinion, Professor Vylegzhanin disagreed with the majority's abstention from resolving the matter and stated that, 'in the absence of an agreement between the Parties on the procedure for the appointment of replacement arbitrators, and taking into account the relevant circumstances noted above, the Arbitral Tribunal is still under obligation to provide further guidance to the Parties'.[41]

On 22 July 2024, following the issuance of Procedural Order No. 9, the Russian Federation wrote to President Heidar opposing once more Ukraine's request for appointments and recalling that the Tribunal had not agreed with Ukraine's position; rather, it had confirmed that the procedure for the replacement of arbitrators after their successful challenge was not covered by Article 6 of the Rules of Procedure.[42] Since the Tribunal did not set a proper procedure for appointing replacement arbitrators, and in the absence of rules of procedure governing such replacement after a successful challenge, any decision taken by the ITLOS President would lack appropriate legal basis.[43] Further, the Russian Federation specifically highlighted the difficulties for the participation of its

[37] Letter from the Agent of the Russian Federation dated 10 July 2024, p. 4.

[38] Procedural Order No. 9 dated 18 July 2024, ¶50.

[39] *Ibid*., ¶44.

[40] *Ibid*., ¶48.

[41] *Ibid*., Dissenting Opinion of Professor Alexander N. Vylegzhanin dated 26 July 2024, ¶8.

[42] Letter from the Agent of the Russian Federation to the ITLOS President dated 22 July 2024, p. 2 (Exhibit E to the Letter from the Agent of Ukraine dated 22 November 2024).

[43] *Ibid*, p. 3.

Agent and counsel in consultations in Hamburg, Germany, on the proposed date (30 July 2024).[44]

The ITLOS President decided to forego any in-person consultations, stating that the issue would be resolved via correspondence and suggesting that both Parties provide a list of up to 10 potential arbitrators by 2 August 2024.[45] On 1 August 2024, the Russian Federation reiterated its position that Ukraine's request to the ITLOS President lacked legal merit.[46] At the same time, the Russian Federation highlighted its readiness to discuss the 'adoption of a procedure that conforms with the applicable rules for selecting and appointing arbitrators to reconstitute the Arbitral Tribunal.'[47] On 3 August 2024, the ITLOS President invited the Parties to provide 'an additional list of up to 10 individuals not included in the UN list who may serve as possible arbitrators' until 5 August 2024, in essence ignoring the Russian Federation's communication.[48]

On 8 August 2024, President Heidar appointed Judge Kateka and Professor Mossop as arbitrators and further designated Judge Eiriksson as the presiding arbitrator.[49]

On 13 August 2024, Professor Mossop withdrew from the arbitration due to 'a conflict of interest',[50] as she had signed the 'Statement of concern on the conflict in Ukraine' issued by the Australian and New Zealand Society of International Law (ANZIL). The said Statement, much like the IDI Declaration, 'condemn[ed] the devastating and unjustified Russian aggression in Ukraine' as 'a gross violation of international law', qualifying the conduct of the Russian Federation as 'pos[ing] a threat not only to peace and security within Europe, but also to the global rules-based order'; it also goes on to express 'solidarity with… the Ukrainian people' and invite 'all UN Member states to condemn the actions of the Russian government in Ukraine'.[51]

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[44] Letter from the Agent of the Russian Federation to the ITLOS President dated 27 July 2024, p. 5 (Exhibit H to the Letter from the Agent of Ukraine dated 22 November 2024).

[45] Letter from the ITLOS President to the Parties dated 27 July 2024 (Annex 4).

[46] Letter from the Agent of the Russian Federation to the ITLOS President dated 1 August 2024, p. 3 (Annex 1).

[47] *Ibid*.

[48] Letter from the ITLOS President to the Russian Federation dated 3 August 2024 (Annex 2).

[49] Letter from the ITLOS President dated 8 August 2024 (Annex 5).

[50] Letter from Professor Mossop dated 13 August 2024.

[51] ANZIL, Statement of concern on the conflict in Ukraine (4 March 2022), available at: https://anzsil.org.au/resources/Statement%20of%20Concern%20on%20the%20Conflict%20in%20Ukraine%20f

The next day, without any consultations with the Russian Federation, Ukraine reached the ITLOS President and requested him to appoint a new arbitrator.[52] On 20 August 2024, the ITLOS President refused to act on Ukraine's request until the expiry of the 60-day period for the Parties' negotiations, with reference to Article 3 of Annex VII.[53]

On 6 September 2024, the Russian Federation submitted a letter questioning Judge Kateka's impartiality, without prejudice to the validity of his appointment.[54]

On 14 October 2024, Ukraine reiterated its request to the ITLOS President, asserting that the 'Parties have been unable to reach agreement withing 60 days since Professor Mossop notified her withdrawal from the arbitral tribunal on 13 August 2024.' Ukraine further asked to appoint an arbitrator to replace Professor Mossop.[55] President Heidar again suggested having consultations via correspondence and invited the Parties to share a list of seven possible arbitrators from the UN list referred to in Article 2 of Annex VII to UNCLOS by 24 October 2024.[56]

On 25 October 2024, the Russian Federation expressed its position that the appointment of Judge Kateka and Professor Mossop suffers from 'serious procedural deficiencies', as Article 3 of Annex VII is not applicable in the present case.[57] The Russian Federation reiterated its position that in the absence of an agreement between the Parties or a decision of the Tribunal on the proper procedure for the appointment of replacement arbitrators in cases of successful challenges, any appointments made by the ITLOS President lack any legal basis.[58]

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[52] Letter from the Agent of Ukraine to the ITLOS President dated 14 August 2024 (Exhibit L to the Letter from the Agent of Ukraine dated 22 November 2024).

[53] Letter from the ITLOS President to Ukraine dated 20 August 2024 (Exhibit M to the Letter from the Agent of Ukraine dated 22 November 2024).

[54] Letter from the Agent of the Russian Federation's Letter dated 6 September 2024.

[55] Letter from the Agent of Ukraine to the ITLOS President dated 14 October 2024 (Exhibit N to the Letter from the Agent of Ukraine dated 22 November 2024).

[56] Letter from the ITLOS President to the Russian Federation dated 15 October 2024 (Annex 3).

[57] Letter from the Russian Federation to the ITLOS President dated 25 October 2024, p. 2 (Exhibit P to the Letter from the Agent of Ukraine dated 22 November 2024).

[58] *Ibid*.

Despite the disagreement of the Parties on the proper procedure for the appointment of replacement arbitrators, on 28 October 2024, the ITLOS President appointed Judge Brown.[59]

3. The Appointment of Judge Kateka and Judge Brown by the ITLOS President Conflicts with Fundamental Rules of Procedure

In its letter, Ukraine suggests that the ITLOS President was empowered to appoint replacement arbitrators because the substitution procedure is governed by Article 3 of Annex VII and Article 6 of the Rules of Procedure. Ukraine claims that these rules allegedly allow it to request the ITLOS President to make an appointment upon the alleged expiration of the 60-day time limit for negotiations under Article 3 of Annex VII.

The Russian Federation maintains its position that the provisions invoked by Ukraine are inapposite as they do not apply to the situation at hand. The proper procedure for the replacement of Professor McRae and Judge Wolfrum following their removal may only be established by the Arbitral Tribunal on an *ad hoc* basis under Article 1(2) of the Rules of Procedure, in the same fashion that the procedure for the challenge itself was specifically established and followed.[60]

Contrary to what Ukraine now claims, Procedural Order No. 9 did not 'conclusively establish[] that the appointment procedure […] is the procedure set forth in the Rules and Annex VII'. Nor did it legitimise the appointments made by the ITLOS President. Nor did it reject the Russian Federation's position on the inapplicability of Article 3 of Annex VII and Article 6 of the Rules of Procedure.

On the contrary, the Tribunal's rulings, including those in Procedural Order No. 9, reinforce the Russian Federation's case that these provisions do not govern the

[59] Letter from the ITLOS President to the Parties dated 28 October 2024 (Exhibit Q to the Letter from the Agent of Ukraine dated 22 November 2024).

[60] *See*, *e.g.*, the Letters from the Agent of the Russian Federation dated 30 April 2024; 7 May 2024; 13 May 2024; 17 May 2024; 3 July 2024; 10 July 2024; 22 July 2024; 9 August 2024; 6 September 2024 and others. It is recalled that the Tribunal, following consultation with the Parties, set forth and followed an *ad hoc* procedure for considering the Russian Federation's challenges to Professor McRae and Judge Wolfrum. *See* Procedural Order No. 8 dated 15 December 2023.

substitution of successfully challenged arbitrators, and that the appointments by President Heidar were unwarranted.

Article 1(1) of the Rules of Procedure recognises that the Rules constitute a non-exhaustive set of norms, allowing their 'modification or addition' by the Arbitral Tribunal. Further, Article 1(2) of the Rules vests the Arbitral Tribunal with the discretion to resolve all issues 'not expressly governed' by the applicable procedural regulations.

Article 6(1) of the Rules of Procedure only covers replacement of arbitrators in cases of their 'withdrawal, incapacity or death', not removal due to a successful challenge. This was confirmed by the Arbitral Tribunal in Procedural Order No. 9, which states explicitly that 'disqualification of an arbitrator upon a successful challenge by a Party' falls outside the scope of the procedural rules applicable in this Arbitration.[61]

Consequently, in accordance with Article 1(2) the Tribunal is vested with the power to decide on the procedure for substituting arbitrators following their disqualification.

As shown above, the Tribunal initially exercised its discretion by giving the Parties the opportunity to negotiate and agree upon the applicable criteria for candidates, as well as the procedure to be followed for their appointment.[62] Notably, the Tribunal indicated that its authorisation of the Parties' negotiations is not grounded in either Article 6 of the Rules of Procedure or Article 3 of Annex VII:

> 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*

[61] Procedural Order No. 9 dated 18 July 2024, ¶44.

[62] *See ibid*., ¶46 ('The Arbitral Tribunal notes especially its reference to the desirability of agreement between the Parties'.)

> *replace Professor McRae and Judge Wolfrum be appointed by agreement between the Parties*, if such agreement is possible.[63] [*Emphasis* added]

While the Arbitral Tribunal retained its discretion to issue a *suo moto* ruling on the interpretation of Article 6 of the Rules of Procedure or Article 3 of Annex VII, should it be necessary,[64] it did not do so. The 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'.[65] In fact, the Arbitral Tribunal's authorisation of the Parties' negotiations was rooted in its discretionary powers under Article 1(2) of the Rules of Procedure, without recourse to the provisions of Annex VII.

Ukraine argues that Article 3 of Annex VII and Article 6 of the Rules of Procedure apply to the replacement procedure in question because Article 6(1) refers to arbitrators' 'withdrawal[s]', while Professor McRae and Judge Wolfrum allegedly 'withdrew' from this Arbitration via their notifications by email of 6 March 2024.[66] This position is nonsensical and in contradiction with the Tribunal's prior determination.

In fact, it is common ground that the two challenged arbitrators recused themselves only *after* the Russian Federation's challenge had been upheld. Indeed, they both had expressly refused to withdraw in October 2023, when the challenge was asserted.[67] Accordingly, Professor McRae and Judge Wolfrum cannot be considered to have *withdrawn* from the proceedings, given that they had already been *removed* by the time they sent the respective emails, rendering their *subsequent* withdrawals void of legal effect.

Moreover, Ukraine's position contradicts with the Tribunal's prior determination. In Procedural Order No. 9, the Tribunal expressly ruled that Article 6 does not cover the

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[63] Letter from PCA to the Parties dated 16 May 2024, p. 2.

[64] Letter from PCA dated 16 May 2024, p. 2 ('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*…'). [*Emphasis* added]

[65] Procedural Order No. 9 dated18 July 2024, ¶45.

[66] Letter from the Agent of Ukraine dated 22 November 2024, p. 9.

[67] Statement of Professor Donald McRae dated 24 October 2023; Statement of Judge Rüdiger Wolfrum dated 24 October 2023.

disqualification of arbitrators as opposed to their withdrawal.[68] The Tribunal's approach is in line with extensive arbitral jurisprudence and doctrine that clearly distinguish between 'removal' and 'withdrawal',[69] while Ukraine's attempt to amalgamate those distinct concepts is wholly unsupported.

Ukraine further wrongly argues that the replacement appointments made by President Heidar were legitimate and justified due to the expiration of the negotiating period prescribed by Article 3(d) of Annex VII. It must be recalled, however, that the Parties' negotiations in question were not based on this provision but rather were allowed by the Arbitral Tribunal in line with its discretionary powers.

Nevertheless, as the Russian Federation explained in its earlier correspondence, the 60-day period for the Parties' negotiations under Article 3(d) is predicated upon the 'receipt of notification [of the dispute] referred to in article 1 of this Annex'. In this regard Procedural Order No. 9 states, supportive of the Russian Federation's position, that the notification of dispute as per Article 1 clearly cannot serve to trigger the 60-day period envisaged by Article 3(d).[70]

It is thus to be inferred that because a notification necessary to trigger the commencement of the negotiating period is absent, a gap exits in the rules. Such gap in Article 3 of Annex VII was partially filled by Article 6 of the Rules of Procedure, which stipulates a necessary type of notification triggering the replacement mechanism in cases of 'withdrawal, incapacity or death of an arbitrator'.[71] However, as Procedural Order No. 9 makes clear, this provision does not apply to filling an arbitrator vacancy resulting

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[68] Procedural Order No. 9 dated 18 July 2024, ¶44.

[69] *See* Letter from the Agent of the Russian Federation dated 7 May 2024, p. 2, citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* Rules of Procedure (29 March 2012), Article 7; K. Daele, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION (Vol. 24, Kluwer Law International, 2012), Chapter 4, ¶4-112: '[i]n the event that the challenge is upheld, the arbitrator in question is disqualified and must stop serving on the Tribunal'; D. Girsberger, N. Voser, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES (4th ed., Schulthess Juristische Medien AG, 2021), Chapter 3, ¶781; A. Meier, L. Gerhardt, *§2.03: The Arbitral Tribunal, Article 16: Early Termination of an Arbitrator's Mandate* in G. Flecke-Giammarco, C. Boog *et al*. (eds.), The DIS ARBITRATION RULES – AN ARTICLE-BY-ARTICLE COMMENTARY (Kluwer Law International, 2020), ¶31: '[s]everal other arbitration institutions have introduced a central provision that enumerates all circumstances of an early or premature termination of an arbitrator's mandate. Under these provisions, the typical situations for a termination of the arbitrator's mandate are the successful challenge of an arbitrator, the resignation, death or removal of an arbitrator or a mutual agreement of the parties to remove the arbitrator.'

[70] Procedural Order No. 9 dated 18 July 2024, ¶40.

[71] Letter from the Agent of the Russian Federation dated 10 July 2024, p. 3.

from a successful challenge.[72] It follows that Article 3 of Annex VII and Article 6 of the Rules of Procedure do not govern the replacement procedure in this situation and cannot trigger Ukraine's right to refer to the ITLOS President.

Even if, as Ukraine asserts, Article 3 of Annex VII were applicable to the substitution of challenged arbitrators without any further ruling of the Tribunal, it would not help its case. Article 3(f) merely states that replacement arbitrators shall be appointed in the 'manner prescribed for the initial appointment' and does not itself establish a specific event triggering the commencement of the 60-day time period upon which the Parties may petition the ITLOS President. In this respect, it is indicative that the rules of procedure in various other Annex VII Arbitrations stipulate detailed procedures to be followed in the circumstances warranting the replacement of arbitrators, such as their death or incapacity.[73] Such rules were also included in Article 6 of the Rules of Procedure – however, as already stated, these rules do not cover replacement of arbitrators who were removed due to a successful challenge.

Ukraine asserts that the Russian Federation's interpretation of Article 3 of Annex VII deprives it of practical effect and is contrary to the principle of *effet utile*.[74] This is wrong. In the case at hand, in line with the literal wording of Article 3(d), the right to petition the ITLOS President arises when 60 days lapse following one specific event – the receipt of a 'notification [of the dispute] referred to in article 1 of this Annex'. In Procedural Order No. 9, the Tribunal made it clear that this notification has nothing to do with the arbitrator replacement procedure.

In fact, it is Ukraine's interpretation of Annex VII that deprives Article 6 of the Rules of Procedure of its effect. If, as Ukraine suggests, Article 3 of Annex VII were to provide a comprehensive regulation of the replacement procedure, there would be no need for the Arbitral Tribunal to supplement the Rules of Procedure with Article 6(1), which deals with specific instances of filling the arbitrator vacancies and, in particular, provides

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[72] Procedural Order No. 9 dated 18 July 2024, ¶44.

[73] *See*, *e.g.*, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Rules of Procedure (29 March 2012), Article 7; *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Rules of Procedure (27 August 2013), Article 9; *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Rules of Procedure (17 March 2014), Article 9.

[74] Letter from the Agent of Ukraine dated 22 November 2024, p. 10

that in cases of withdrawal, incapacity or death of the arbitrator the Parties receive a respective notification that is intended to commence the replacement process, which is not the notification of the dispute referred to in Article 3(d) of Annex VII. Equally, should Article 3 of Annex VII be sufficient to regulate the substitution of challenged arbitrators, other Annex VII tribunals would not have had to include detailed provisions governing this procedure in their Rules of Procedure.[75]

Furthermore, Ukraine's interpretation also robs of *effet utile* the primary failsafe mechanism of the Rules of Procedure – namely Article 1(2), which authorizes the Tribunal to 'fill in the gaps' when such procedural gaps occur. This is precisely what the Tribunal has already done with respect to the challenge procedure itself, by establishing an *ad hoc* procedure to fill a procedural gap.

Therefore, Ukraine cannot claim that the 60-day period for negotiations envisaged by Article 3(d) of Annex VII expired and it had the right to petition the ITLOS President. The Russian Federation never agreed to the application of this provision to the Parties' negotiations, and, contrary to what Ukraine claims, never agreed upon a certain date for this time limit to start running.[76]

Contrary to what Ukraine alleges, the Russian Federation's interpretation of the applicable procedural rules does not leave 'the parties, the Arbitral Tribunal, and the ITLOS President forever in a legal loop […] that prevents the case from moving forward'. The Russian Federation has never disputed the powers of the Arbitral Tribunal to establish a replacement procedure in line with its mandate under Article 1(2) of the Rules of Procedure and has in fact repeatedly requested the Tribunal to do so. However, Ukraine tries to read into Annex VII and the Rules of Procedure provisions which are not there.

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[75] *See*, *e.g.*, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Rules of Procedure (29 March 2012), Article 7; *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Rules of Procedure (27 August 2013), Article 9; *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Rules of Procedure (17 March 2014), Article 9.

[76] In fact, the Russian Federation has always claimed that the period of negotiations envisaged by Article 3(d) of Annex VII could not have run from a date 'earlier than 6 May 2024', without consenting to 6 May 2024 as a starting date for such deadline and contesting the general applicability of Article 3(d) to the disputed situation. *See*, *e.g.*, Letter from the Agent of the Russian Federation dated 7 May 2024, p. 3.

Ukraine's allegations that 'Russia has persistently sought to obstruct the re-constitution of the Arbitral Tribunal'[77] are completely baseless. The Russian Federation has consistently defended its position that the replacement arbitrators must be appointed via an *ad hoc* procedure. Maintaining a well-grounded legal position cannot be considered dilatory. The Tribunal itself has confirmed the complexity of the issues at hand by highlighting that

> Without taking a position on this disagreement, they [the Tribunal] would preliminarily point out that, if requested by one or both Parties to rule on the dispute or should they feel that they should 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*. [*Emphasis* added]

On the contrary, it is Ukraine that has been trying to sabotage the reappointment process by its unilateral and unjustified requests to the ITLOS President.

To summarise, the Parties' negotiations regarding the procedure for the appointment of replacement arbitrators were not conducted under Article 3 of Annex VII or Article 6 of the Rules of Procedure, and Ukraine's attempts to claim otherwise must fail. These provisions do not govern the replacement of Professor McRae and Judge Wolfrum. The Parties' right to request the ITLOS President to make appointments was not triggered.[78] The appointments made by President Heidar are, therefore, invalid and render the Arbitral Tribunal in its present composition without jurisdiction over this matter. The proper substitution procedure may be established only by the Arbitral Tribunal in the composition of its three unchallenged members in pursuance of Article 1(2) of the Rules of Procedure and must be followed to ensure due process.

4. THE PROCEDURE FOLLOWED BY PRESIDENT HEIDAR WAS NOT CONSISTENT WITH THE APPLICABLE REGULATIONS

Ukraine submits that '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

[77] Letter from the Agent of Ukraine dated 22 November 2024, fn. 83.

[78] *See*, *e.g.*, Letter from the Agent of the Russian Federation dated 22 July 2024, p. 2.

VII.'[79] This argument attempts to artificially restrict the Tribunal's jurisdiction and cannot be upheld.

Indeed, by virtue of the *Kompetenz-Kompetenz* principle, the Tribunal has the power to determine its own jurisdiction. This, as the Tribunal has confirmed in the Decision on Challenges, includes the power to rule in respect of its own composition. Furthermore, Article 1(2) of the Rules of Procedure confirms that the Tribunal has the power to decide on all matters of procedure that are 'not expressly governed by these Rules or by Annex VII to the Convention or other provisions of the Convention'. As per Article 1(1), the Tribunal may also amend or supplement the Rules of Procedure 'after ascertaining the views of the Parties'.

The powers of the ITLOS President as an appointing authority under the Convention, in turn, are 'ministerial' by nature[80] and do not possess judicial character as such.[81] He or she does not have jurisdiction over any matters in dispute between the Parties under Annex VII. Whilst the ITLOS President does have the power to act within the strict confines of his or her mandate under the Convention, an Annex VII tribunal still retains full jurisdiction over all matters relating to the dispute, including its own composition. It is to be inferred that the decisions of the appointing authority are amenable to review by the tribunal while exercising its competence-competence jurisdiction.[82] The contrary approach would infringe upon the judicial independence of the Arbitral Tribunal and leave the Parties and the arbitrators unable to cure or rectify *any* manifest flaws in the formation of the Tribunal flowing from the conduct of the appointing authority.

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[79] Letter from the Agent of Ukraine dated 22 November 2024, p. 11.

[80] A. Robles, THE DEFAULTING STATE AND THE SOUTH CHINA SEA ARBITRATION (de La Salle University Publishing House, 2023), pp. 481-482.

[81] *Ibid*., p. 481: '*The ITLOS President's role is one of selection, and not of the decision itself. Following former ICJ President Muhammad Zafrullah Khan, one may describe the appointing authority's role as "ministerial," in the sense of "relating to or possessing delegated executive authority," "(of an office, duty, etc.) requiring the following of instructions, without power to exercise any personal discretion in doing so," or "acting as an agent or cause; instrumental." He/she is not asked to settle the dispute, but simply to choose the suitable person(s) to act as arbitrators. The fact that the appointing authority is a judge is irrelevant, as no more is expected of him/her than of the UN Secretary-General under Annexes V and VIII of the Convention*.' *See* also Rao, P., ITLOS: The First Six Years. *Max Planck Yearbook of United Nations Law*, 2002, Vol. 6, p. 285: '*The Convention requires the President of the Tribunal to assume an extra-judicial function (the function not being an exercise of jurisdiction) in connection with the constitution of an arbitral tribunal under Annex VII*.'

[82] Rao, P., ITLOS: The First Six Years. *Max Planck Yearbook of United Nations Law*, 2002, Vol. 6.

Furthermore, the Russian Federation maintains that, contrary to Ukraine's assertions, in making the arbitrator appointments in this case in replacement of Professor McRae and Judge Wolfrum, President Heidar did not follow the proper procedure, and disregarded the Russian Federation's objections in that respect.

President Heidar first addressed the Parties on 10 July, inviting them to in-person negotiations in Germany.[83] At that point in time, however, the Tribunal had already been seised with the Russian Federation's request to determine the proper procedure for appointment of the new arbitrators.[84] Naturally, pending this decision, any action aimed at appointing replacement arbitrators would have violated the integrity of the proceedings before the Tribunal. As the Russian Federation noted in its letter of 10 July 2024, 'the Russian Federation [would] continue to insist that the replacement arbitrator procedure sh[ould] be adopted by the Arbitral Tribunal and [would] pursue its request addressed to that Tribunal.'[85] Accordingly, the President of ITLOS should have at least deferred the process until the Tribunal's decision, with regard to the principles of deference and comity. Nevertheless, the Russian Federation's request to that effect was disregarded.

Likewise, Procedural Order No. 9 clearly established that the Tribunal had the competence to rule on the proper procedure for appointing replacement arbitrators, but declined to do so for the time being.[86] The contents of the Procedural Order were also communicated to President Heidar. In that communication, the Russian Federation reiterated that '[i]t is […] 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.'[87] On the same date, the Russian Federation restated the same request before the Arbitral Tribunal.[88] However, President Heidar disregarded these objections yet again and proceeded with the appointments.

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[83] Letter from the President of ITLOS to the Parties dated 10 July 2024 (Exhibit C to the Letter from the Agent of Ukraine dated 22 November 2024).

[84] *See* Procedural Order No. 9 dated 18 July 2024, ¶23.

[85] Letter from the Agent of the Russian Federation to President of ITLOS dated 10 July 2024 (Exhibit B to the Letter from the Agent of Ukraine dated 22 November 2024).

[86] Procedural Order No. 9 dated 18 July 2024, ¶48.

[87] Letter from the Agent of the Russian Federation to the President of ITLOS dated 22 July 2024, p. 3 (Exhibit E to the Letter from the Agent of Ukraine dated 22 November 2024).

[88] Letter from the Agent of the Russian Federation dated 22 July 2024.

Furthermore, even assuming that President Heidar could validly exercise any quasi-judicial competence in the instant case (which he could not, as explained above), he did not make a motivated decision to dismiss the Russian Federation's objections – Ukraine's request was simply acted upon. Ukraine's allegation that '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'[89] rings hollow, since there is no indication whatsoever in his correspondence that these circumstances were indeed taken into account. The content of his letters boils down to restating the provisions of the Convention without giving any analysis of the arguments advanced by the Parties.[90]

The appointment procedure itself, as adopted by President Heidar, was also riddled with substantial deficiencies prejudicing the Russian Federation's rights. In particular, the Russian Federation was deprived of the opportunity to participate in in-person consultations initially scheduled for 30 July 2024 in Hamburg, Germany.[91] It is common practice for ITLOS to arrange consultations in person where both parties take part in the arbitration.[92] The same was previously followed in the present case as well.[93] The Russian Federation, accordingly, had a reasonable legitimate expectation to be heard in person, yet the date and location of the consultations were unsuitable for its representatives.

Ukraine attempts to cast doubt on the Russian Federation's inability to take part in consultations scheduled for 30 July 2024.[94] This is unavailing. Arranging for attendance

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[89] Letter from the Agent of Ukraine dated 22 November 2024, p. 13.

[90] *See*, *e.g.*, Letter from the President of ITLOS to the Russian Federation dated 26 July 2024 (Exhibit G to the Letter from the Agent of Ukraine dated 22 November 2024).

[91] Letter from the President of ITLOS to the Parties dated 10 July 2024 (Exhibit C to the Letter from the Agent of Ukraine dated 22 November 2024).

[92] 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 2010 No. SPLOS/222, 4 April 2011, ¶¶22-24, available at: https://pca-cpa.org/en/cases/229/; 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 2011 No. SPLOS/241, 9 April 2012, ¶¶38-40, available at: https://www.itlos.org/fileadmin/itlos/documents/annual_reports/annualreport_2011.pdf; 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 2013 No. SPLOS/267, 28 March 2014, ¶¶68-69, available at: https://www.itlos.org/fileadmin/itlos/documents/annual_reports/annual_report_2013.pdf.

[93] 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 No. SPLOS/30/2, 31 March 2020, ¶¶85/86, available at: https://www.itlos.org/fileadmin/itlos/documents/annual_reports/Annual_Report_2019.pdf.

[94] Letter from the Agent of Ukraine dated 22 November 2024, p. 13.

of the Russian Federation's Agent and counsel is a lengthy matter, which could not have been done within the short time made available by the ITLOS President (mere 8 days following the distribution of the Tribunal's ruling in Procedural Order No. 9). It is further complicated by the necessity for the representatives to obtain a German entry visa.

Before the Tribunal rendered Procedural Order No. 9 on 18 July 2024, there were plainly no grounds for the Russian Federation to take part in any consultations. Afterwards, it was highly unlikely that the requisite formalities would be completed within the remaining timeframe. Still, the Russian Federation was prepared to take part in the process and requested that President Heidar accommodate the logistical complications.[95] It also repeated its request on 1 August 2024, suggesting dates for such consultations.[96] Yet again, the Russian Federation's request was disregarded.

This was apparently done with a view to complying with the 30-day period to appoint arbitrators as outlined in Article 3(e) of Annex VII, even though the relevant period, as the Russian Federation has made abundantly clear, did not even start to run on 8 July 2024. In any event, compliance with this period – which even in practice has been disregarded[97] – should not have overridden the Russian Federation's procedural right to take part in in-person consultations.

Ukraine's allegations that '[i]f 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' are groundless. The Russian Federation should not be blamed for not taking part in an obviously flawed and deficient procedure which has no underlying legal basis.

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[95] Letter from the Agent of the Russian Federation dated 22 July 2024, p. 4; Letter from the Agent of the Russian Federation dated 27 July 2024, pp. 3-5.

[96] Letter from the Agent of the Russian Federation dated 1 August 2024, pp. 3-4.

[97] *See* Letter from the Agent of the Russian Federation to the President of ITLOS dated 27 July 2024, fn. 6: 'For instance, in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, the request for appointment was made by Bangladesh on 13 December 2009, but the appointment of arbitrators was effected by the President of ITLOS some 8 weeks later, on 12 February 2010: *see* ITLOS, Press Release 143 (8 March 2010), available at: https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_143_E.pdf. Another example is the *Chagos Marine Protected Area Arbitration*, where the request was submitted by Mauritius on 21 February 2011, while the arbitrator appointment by the President of ITLOS followed on 25 March 2011: *see* ITLOS, Press Release 164 (25 March 2011), available at: https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/press_164_eng.pdf.' (Exhibit H to the Letter from the Agent of Ukraine dated 22 November 2024).

5. UKRAINE IS NOT ENTITLED TO COSTS OF THIS PART OF THE PROCEEDINGS

In its letter of 22 November 2024, Ukraine requests that it be awarded costs 'for the phase of these proceedings commencing since the resignations of Professor McRae and Judge Wolfrum.'[98] This request is baseless and should be dismissed.

First, such allocation would contradict the general rule of cost allocation in Annex VII arbitrations. In particular, Article 7 of Annex VII of the Convention provides that '[u]nless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares'. The same is echoed in the Rules of Procedure: Article 25 provides that '[t]he expenses of the Arbitral Tribunal, including the remuneration of its members, shall be borne by the Parties in equal shares', and Article 26 states that '[u]nless decided otherwise by the Arbitral Tribunal, each Party shall bear its own costs.'[99]

There are no grounds to deviate from this principle in the case at hand. As explained above, the Russian Federation's position as regards the reappointment procedure is well-grounded and it is in fact Ukraine that disrupts the determination of this issue by the Tribunal.

Furthermore, Ukraine's request is in any event premature. Notably, the Tribunal did not allocate costs incurred at the preliminary objections phase of these proceedings notwithstanding Ukraine's requests to award them.[100] The Tribunal held that 'the question of costs shall be ruled upon in conjunction with the merits.'[101] There are no grounds to reconsider this decision of the Tribunal and to award costs for an intermediate phase of the proceedings.

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[98] Letter from the Agent of Ukraine dated 22 November 2024, p. 14.

[99] The same approach has been followed by the tribunals operating under Annex VII: *see The Arctic Sunrise Arbitration (Kingdom of the Netherlands v. the Russian Federation)*, Award of 14 August 2015, ¶¶399-400 (**UAL-6**), *The 'Enrica Lexie' Incident (Italy v. India),* Final Award of 21 May 2020, ¶1093 (**UAL-41**), *The Duzgit Integrity Arbitration (Malta v. The Democratic Republic of São Tomé and Príncipe),* Award of 5 September 2016, ¶¶340-341 (**UAL-17**); *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ¶182 (**UAL-3**).

[100] Ukraine's Written Observations on Preliminary Objections, ¶139(c).

[101] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, Award on Preliminary Objections of 27 June 2022, p. 78.

Finally, if the Tribunal should decide to nevertheless entertain Ukraine's request for costs at this juncture, the Russian Federation reserves its rights to separately request allocation of costs for the challenges phase of these proceedings where Ukraine opposed the challenges of Judge Wolfrum and Professor McRae that were nevertheless sustained.[102]

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For the reasons described above and elsewhere in the Russian Federation's previous communications, the Russian Federation respectfully requests 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.

Respectfully submitted,

Gennady KUZMIN

Agent of the Russian Federation

[102] Letter from the Agent of Ukraine dated 19 January 2024.