

PCA Case No. 2019-28

IN THE MATTER OF AN ARBITRATION

- before -

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

- between -

UKRAINE

- and -

THE RUSSIAN FEDERATION

- in respect of a -

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

PROCEDURAL ORDER NO. 10

WHEREAS in its Decision of 6 March 2024 on the challenges raised by the Russian Federation against Professor Donald McRae, President, and Judge Rüdiger Wolfrum, Member of the Arbitral Tribunal, for lack of independence and impartiality as a result of their votes in support of the Institute of International Law Declaration of 1 March 2022, entitled “Declaration of the Institute of International Law on Aggression in Ukraine”, the three unchallenged Members of the Arbitral Tribunal, with Judge Gudmundur Eiriksson presiding, upheld the challenges by two votes to one, with Sir Christopher Greenwood dissenting;

WHEREAS on 8 August 2024, H.E. Judge Tomas Heidar, President of the International Tribunal for the Law of the Sea, appointed Judge Eiriksson as President of the Arbitral Tribunal and Judge James Kateka and Professor Joanna Mossop as Members of the Arbitral Tribunal;

WHEREAS Professor Mossop resigned from the Arbitral Tribunal on 13 August 2024;

WHEREAS in its letter dated 6 September 2024, the Russian Federation raised questions as to Judge Kateka’s qualifications to serve on the Arbitral Tribunal, stating, *inter alia*:

The Russian Federation is therefore compelled, without prejudice to its overarching principled position on the illegality of Mr Kateka’s appointment in the first place, to bring these considerations to the attention of the incumbent three members of the Arbitral Tribunal and Mr Kateka, and respectfully invites Mr Kateka to consider withdrawing from the case.

WHEREAS the Arbitral Tribunal invited Judge Kateka to comment on the letter of the Russian Federation dated 6 September 2024;

WHEREAS Judge Kateka submitted in a letter to the Arbitral Tribunal dated 9 September 2024 his comments on the circumstances outlined in the letter of the Russian Federation of 6 September 2024;

WHEREAS in a letter to the Parties dated 12 September 2024, the Arbitral Tribunal stated, *inter alia*:

The Arbitral Tribunal has discussed the considerations to which its attention was drawn in the letter of the Russian Federation of 6 September 2024. The Tribunal has also taken note of Judge Kateka’s letter dated 9 September 2024, annexed to [its] letter, which reads:

. . . I wish to conclude by stating that I have not expressed any opinion or view that could raise justifiable grounds for doubting my independence and impartiality. I therefore see no reason for withdrawal as arbitrator.

WHEREAS on 28 October 2024, Judge Heidar appointed Judge Kathy-Ann Brown as a Member of the Arbitral Tribunal in replacement of Professor Mossop;

WHEREAS in a letter dated 6 December 2024, in a section entitled “The Russian Federation’s serious concerns as to impartiality of Judge Kateka”, the Russian Federation stated:

[B]y 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.

[. . .]

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.

WHEREAS in its letter dated 6 December 2024, the Russian Federation requested, *inter alia*, as follows:

For the reasons described above and elsewhere in the Russian Federation’s previous communications, the Russian Federation respectfully requests that . . . the Russian Federation’s challenge to Judge Kateka be upheld

WHEREAS in its letter dated 20 December 2024, Ukraine stated:

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

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

4 See Letter from Judge Kateka of 9 September 2024.

5 In its Decision on Challenges of 6 March 2024, the Tribunal accepted that the 30-day time limit in the PCA Optional Rules is a relevant benchmark for assessing the timeliness of a challenge, even though what is a prompt and reasonable period of time must be appreciated in the circumstances of each case. Decision on Challenges, ¶ 98. Here, Russia knew of Judge Kateka’s comments on the [Institute of International Law’s resolution of 1 March 2022, “Declaration of the Institute of International Law on Aggression in Ukraine”] well before his appointment on 8 August 2024 (indeed, Russia cited Judge Kateka’s comments in its challenge to Prof. McRae and Judge Wolfrum dated 24 November 2023). Russia nevertheless waited four weeks following Judge Kateka’s appointment to first raise its concerns, and has failed to act on those purported concerns in the more than three months since.

WHEREAS Judge Kateka indicated to the other Members of the Arbitral Tribunal that he did not wish to participate in any deliberations of the Arbitral Tribunal with respect to the challenge or the procedure to be adopted for its resolution;

WHEREAS on 24 December 2024, the other Members of the Arbitral Tribunal decided, in accordance with Article 19, paragraph 1, of the Rules of Procedure of the Arbitral Tribunal, that Judge Kateka would not take part in any deliberations of the Arbitral Tribunal with respect to the challenge or the procedure to be adopted for its resolution, but that he would continue to receive copies of any

communications between the Arbitral Tribunal and the Parties so that he would be aware of the status of the proceedings;

WHEREAS in a letter of the same date, the Arbitral Tribunal communicated a proposal to the Parties in respect of the procedure to be followed for a decision on the challenge to Judge Kateka, inviting the Parties' comments thereon by 27 December 2024;

WHEREAS the Russian Federation, in its letter dated 26 December 2024, and Ukraine, in its letter dated 27 December 2024, submitted their comments on the proposed procedure;

WHEREAS the Arbitral Tribunal had set out amongst its proposals that the Arbitral Tribunal, constituted by the four Members of the Arbitral Tribunal other than Judge Kateka, would issue a decision on the challenge to Judge Kateka, made by a majority vote;

WHEREAS on 28 December 2024, Judge Brown, in a message to President Eiriksson copied to the other Members of the Arbitral Tribunal, stated that she was of the view that she should not take part in the proceedings on the challenge to Judge Kateka;

WHEREAS the Arbitral Tribunal, at earlier stages of its work, has suggested to the Parties and subsequently adopted certain procedures based on its views with respect to the interests of good order in the progression of the arbitration;

WHEREAS on 29 December 2024, the three other Members of the Arbitral Tribunal, guided by those same concerns, and in the absence of specific provisions on self-recusals in the Rules of Procedure of the Arbitral Tribunal and having studied the practice and procedures of, for example, the International Court of Justice, decided, in accordance with Article 19, paragraph 1, of the Rules of Procedure, that Judge Brown would not take part in the deliberations and decisions of the Arbitral Tribunal on the challenge to Judge Kateka;

WHEREAS in a letter to the Parties of the same date, the Arbitral Tribunal, now constituted for the purposes of the challenge to Judge Kateka by President Eiriksson, Sir Christopher Greenwood and Professor Alexander Vylegzhanin, communicated a revised proposal to the Parties in respect of the procedure to be followed for a decision on the challenge, inviting the Parties' comments thereon by 31 December 2024;

WHEREAS on 31 December 2024, Ukraine submitted that it had no objection to the proposed revised procedure;

WHEREAS no comments on the proposed revised procedure were received from the Russian Federation;

THE ARBITRAL TRIBUNAL, CONSTITUTED FOR THE PURPOSES OF THE CHALLENGE BY PRESIDENT GUDMUNDUR EIRIKSSON, SIR CHRISTOPHER GREENWOOD AND PROFESSOR ALEXANDER VYLEGZHANIN, HEREBY DECIDES:

The procedure for a decision on the challenge shall be as follows:

1. The Russian Federation's letter dated 6 September 2024 and the relevant part of its letter dated 6 December 2024 shall be taken as the principal statement of the grounds for its challenge to Judge Kateka.

2. The Russian Federation is invited to submit by **Monday, 13 January 2025** a supplementary statement in response to Ukraine's objection in its letter dated 20 December 2024 that "Russia's failure to assert a challenge to Judge Kateka in the more than three months since [its letter dated 6 December 2024 and Judge Kateka's letter dated 9 September 2024] indicates that it has waived its right to do so".
3. Ukraine shall submit by **Monday, 20 January 2025** a response to the challenge to Judge Kateka.
4. Judge Kateka is invited to submit by **Friday, 24 January 2025** any comments he might have on the challenge.
5. The Russian Federation shall submit by **Friday, 31 January 2025** a reply on the challenge.
6. Ukraine shall submit by **Friday, 7 February 2025** a rejoinder on the challenge.
7. The Arbitral Tribunal shall thereafter issue a decision on the challenge to Judge Kateka, made by a majority vote of the Arbitral Tribunal, constituted for the purposes of the challenge by President Gudmundur Eiriksson, Sir Christopher Greenwood and Professor Alexander Vylegzhanin.

Dated: 2 January 2025

ON BEHALF OF THE ARBITRAL TRIBUNAL



Judge Gudmundur Eiriksson
President