

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.

[REDACTED]

[REDACTED]

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) [REDACTED]

[REDACTED]

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

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 regrettably 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.

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

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.

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.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

* * *

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

i) [REDACTED]

[REDACTED]

[REDACTED]

ii) the Russian Federation's challenge to Judge Kateka be upheld;

iii) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Respectfully submitted,



Gennady KUZMIN

Agent of the Russian Federation

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