

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**İçkale İnşaat Limited Şirketi v. Turkmenistan
(ICSID Case No. ARB/10/24)**

**DECISION ON CLAIMANT'S PROPOSAL TO DISQUALIFY
PROFESSOR PHILIPPE SANDS**

Rendered by:

Dr. Veijo Heiskanen, President of the Tribunal
Ms. Carolyn B. Lamm, Arbitrator

Secretary of the Tribunal
Mr. James Claxton

Representing Claimant:

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Ms Mine Sakmar
Mr. Aycan Özcan
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Representing Respondent:

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Date: July 11, 2014

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I. Procedural Background

1. On November 10, 2010, İçkale İnşaat Limited Şirketi (“**Claimant**”) submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) against Turkmenistan (“**Turkmenistan**” or “**Respondent;**” collectively with Claimant the “**Parties**”).
2. On December 20, 2010, the Secretary-General of ICSID (“**Secretary-General**”) registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”).
3. By letter dated February 24, 2011, Claimant informed the Secretary-General that it elected that the Tribunal be constituted in accordance with Article 37(2)(b) of the ICSID Convention. Accordingly, the Tribunal was to consist of three arbitrators, one arbitrator appointed by each Party and the third, who would be President of the Tribunal, appointed by agreement of the Parties. In the letter, Claimant informed the Centre that it appointed Ms. Carolyn B. Lamm, a national of the United States of America, as an arbitrator.
4. On March 10, 2011, the Centre informed the Parties that Ms. Lamm had accepted her appointment and circulated her declaration and statement to the Parties.
5. By letter dated March 22, 2011, Claimant requested that the Chairman of the Administrative Council (“**Chairman**”) appoint the arbitrators not yet appointed pursuant to Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”) and Article 38 of the ICSID Convention.
6. By letter of the same date, the Centre informed the Parties that the Chairman would use his best efforts to comply with Claimant’s request within 30 days of its receipt, in accordance with Rule 4(4) of the ICSID Arbitration Rules and Article 38 of the ICSID Convention. The Centre also informed the Parties that before the Chairman proceeds to make an appointment, both Parties would be consulted as far as possible. The Parties were further reminded that, until completion of the appointment process under Article 38 of the ICSID Convention, it remained possible for Respondent to appoint an

arbitrator and for the Parties to agree on a President of the Tribunal in accordance with Article 37(2)(b) of the ICSID Convention.

7. By letter dated March 23, 2011, Respondent informed the Centre that it appointed Mr. Fali S. Nariman, a national of India, as an arbitrator in this case, and proposed that the Parties agree to discuss and appoint the President of the Tribunal by the agreement of the Parties within 30 days from Claimant's acceptance of its proposal. By a second letter of the same date, Respondent requested that Ms. Lamm provide additional information relating to her statement of March 10, 2011.
8. On March 25, 2011, the Centre informed the Parties that Mr. Nariman had accepted his appointment and circulated his declaration and personal profile on the same day.
9. On March 28, 2011, Ms. Lamm furnished additional information further to Respondent's request of March 23, 2011.
10. By letter dated March 29, 2011, Claimant reiterated its request that the Chairman appoint an arbitrator to serve as the President of the Tribunal.
11. By letter dated April 1, 2011, Respondent informed the Centre that it intended to propose, upon the constitution of the Tribunal, the disqualification of Ms. Lamm pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.
12. By letter dated April 11, 2011, the Parties were invited to consider and agree on any of three proposed candidates to serve as the President of the Tribunal and provide their response by completing a ballot form.
13. By letter dated April 19, 2011, upon receipt of the Parties' ballot forms, the Centre informed the Parties that there was no agreement between them on any of the candidates proposed by the Centre for the appointment of the President of the Tribunal. The Centre further informed the Parties that it would proceed with the appointment in accordance with Articles 38 and 40(1) of the ICSID Convention.
14. On April 29, 2011, the Centre indicated to the Parties its intention to propose to the Chairman the appointment of Dr. Veijo Heiskanen, a national of Finland, as the

President of the Tribunal, and that it would proceed with Dr. Heiskanen's appointment absent any compelling objection from either Party by May 6, 2011.

15. By letter dated May 11, 2011, the Secretary-General notified the Parties that Dr. Heiskanen had accepted his appointment as the President of the Tribunal, and that the Tribunal had been constituted pursuant to Rule 6 of the ICSID Arbitration Rules. Dr. Heiskanen's declaration was circulated to the Parties with the letter. By the same letter, Mr. Paul-Jean Le Cannu, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
16. On July 22, 2011, the Tribunal held a first session with the Parties at the World Bank's office in Paris. At the session, the Parties confirmed, *inter alia*, that the Tribunal had been properly constituted and the declarations of its Members had been distributed in accordance with the ICSID Convention and the ICSID Arbitration Rules. Respondent stated that it would not propose the disqualification of Ms. Lamm. The final Minutes of the First Session were circulated to the Parties on August 8, 2011.
17. In accordance with the Tribunal's directions, Respondent filed on August 5, 2011 a request to bifurcate the proceedings to address objections to jurisdiction as a preliminary question.
18. On August 19, 2011, Claimant filed its observations on Respondent's request of August 5, 2011.
19. By letter of August 31, 2011, the Tribunal informed the Parties of its decision to decline to order bifurcation of these proceedings. The Tribunal also advised the Parties that a reasoned decision would be circulated to them in due course.
20. On September 9, 2011, the Tribunal issued Procedural Order No. 1, which recorded its reasoned decision on Respondent's request to bifurcate the proceedings.
21. On November 1, 2011, the President of the Tribunal circulated a statement to the Parties concerning his appointment as arbitrator in another ICSID case.
22. On March 1, 2012, Claimant filed a Memorial on jurisdiction and the merits.

23. On March 7, 2012, Ms. Lamm circulated a statement to the Parties concerning her law firm's involvement in other ICSID cases.
24. On May 16, 2012, Respondent requested that the Tribunal suspend the current procedural calendar in this arbitration and consider as a preliminary matter the issue of the meaning and effect of Article VII(2) of the Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments ("**Turkey-Turkmenistan BIT**" or "**BIT**").
25. By letter of May 25, 2012, Claimant submitted comments on Respondent's request of May 16, 2012.
26. On June 28, 2012, the Tribunal issued Procedural Order No. 2 in which it rejected Respondent's request of May 16, 2012. The Tribunal noted that, while it was not persuaded that addressing the meaning and effect of Article VII(2) of the BIT would serve the interests of due process or procedural efficiency, it recognized the importance of the issue and directed the Parties to address "all aspects of the issue" in their upcoming memorials, including in particular the following:
 - a. *the various language versions of the BIT, including the existence of a Turkmen version of the BIT;*
 - b. *the authenticity of the various language versions of the BIT;*
 - c. *the accuracy of the English translations of each of the authentic versions of the BIT;*
 - d. *the negotiating history of the BIT, including travaux préparatoires, if any; the Parties are invited to produce witness testimony as appropriate;*
 - e. *the rules of treaty interpretation applicable to the BIT, including the issue of whether the fact that the treaty creates rights for third party beneficiaries (private investors) affects in any way the interpretation of the treaty; and*
 - f. *whether the objection put forward by Respondent on the basis of its interpretation of Article VII(2) of the BIT raises an issue of jurisdiction or an issue of admissibility.*¹

¹ Procedural Order No. 2, June 28, 2012, para. 11. The Tribunal also noted in the Order that Claimant had previously urged the Tribunal to reject Respondent's request for bifurcation of the proceedings on the basis of the *Kılıç* decision because in Claimant's view the decision of another ICSID tribunal in the *Kılıç* case would not bind this Tribunal and Respondent's request therefore was "deprived of any legal basis." Procedural Order No. 2, para. 9. As noted above, having reviewed both Parties' positions, the Tribunal declined to bifurcate the proceedings.

27. On November 3, 2012, Respondent filed Objections to jurisdiction and a Counter-Memorial on the merits dated November 2, 2012.
28. On December 18, 2012, Respondent wrote to the Tribunal to express concerns arising out of views expressed in an Amicus Brief filed before the US Supreme Court in *BG Group PLC v The Republic of Argentina* and to which Ms. Lamm subscribed. Respondent invited Ms. Lamm to respond to its letter. By letter of December 21, 2012, Ms. Lamm submitted comments on the concerns expressed by Respondent in its letter of December 18, 2012. By letter of January 9, 2013, Respondent submitted comments on Ms. Lamm's letter of December 21, 2012. Respondent stated, *inter alia*, that:

At this time, however, in reliance upon Ms. Lamm's assurances, Respondent seeks no further action from the Tribunal with regard to Ms. Lamm's continued participation as an arbitrator. Turkmenistan reserves all of its rights, remedies, defenses and objections in regard to this Arbitration, including with respect to the matters raised in its letter of December 18, 2012.

29. On February 7,² 2013, the Tribunal issued Procedural Order No. 3 in which it decided on the Parties' document requests as set out in the Redfern Schedules filed on January 23, 2013.
30. On April 22, 2013, Claimant filed a Reply on the merits and Counter-Memorial on jurisdiction.
31. On July 15, 2013, Respondent filed a Reply on jurisdiction.
32. On July 29, 2013, Respondent filed a Rejoinder on the merits.
33. By letter of August 15, 2013, Counsel for Respondent informed the Tribunal that they had been "in discussions with [their] client regarding the financial arrangements for the proceedings in this and other pending cases and [that they were] still awaiting decisions in that regard." Counsel further stated that "under the circumstances, [they would] not be able to proceed with the hearing on the dates presently scheduled" and requested a postponement of the hearing in this case.

² On February 8, 2013, the Tribunal issued a minor correction to the February 7 version of Procedural Order No. 3.

34. By letter of August 19, 2013, the Tribunal invited Respondent to further elaborate on the basis of its request by August 20, 2013. In particular, Respondent was requested to elaborate on the “financial arrangements” that it invoked in support of its request. Claimant was invited to comment on Respondent’s further and more detailed request by August 22, 2013.
35. On August 19, 2013, Claimant filed a Rejoinder on jurisdiction.
36. By letter of August 20, 2013, Respondent provided further information on the basis of its request for postponement of the hearing. By letter of August 21, 2013, Claimant submitted comments on Respondent’s request for postponement of the hearing. Claimant requested that the Tribunal “(i) apply the relevant rules of Article 42 of the Arbitration Rules, (ii) notify Respondent of its default and Claimant’s request on the continuance of the proceedings, [and] (iii) ask Respondent to determine its final position on the continuance of the proceedings and to suggest a new date for the hearings by 2 September 2013.”
37. By letter of August 23, 2013, Respondent submitted comments on Claimant’s request, arguing that it should be denied.
38. On August 26, 2013, the Tribunal issued Procedural Order No. 4 in which it stated that the situation did not fall within ICSID Arbitration Rule 42 and decided *inter alia* to grant Respondent’s request that the hearing on jurisdiction and the merits scheduled to be held in October 2013 be postponed to a later date.
39. By letter of August 30, 2013, the Tribunal proposed new hearing dates, and by letter of September 4, 2013, Claimant submitted comments on the Tribunal’s proposed hearing dates and requested earlier dates for the hearing. By letter of September 9, 2013, the Tribunal proposed additional hearing dates.
40. By letter of September 25, 2013, Respondent confirmed its intention to participate in the proceedings and hearing and to discharge the financial obligations connected therewith. Respondent communicated that it would confer with counsel for Claimant with respect to the new hearing dates proposed by the Tribunal.

41. In a further exchange of correspondence on August 30, September 9, 25, October 4, and 9, 2013, the Parties and the Tribunal agreed to hold the hearing from May 12 to 23, 2014 in Paris.
42. On January 14, 2014, Claimant wrote to the Tribunal “to seek [its] advice regarding the need to make available to Respondent certain potentially voluminous documentation related to the 13 construction projects at issue in this arbitration [the so-called “Vouched Documents”].” On January 27, 2013, Respondent submitted comments on Claimant’s letter of January 14, 2014. By letter of January 29, 2014, the Tribunal informed the Parties that, in the absence of a formal request for a ruling, it had taken note of Claimant’s letter and determined that no decision was required in the matter. By letter of February 2, 2014, Claimant submitted clarifications as to the nature of the advice it was seeking from the Tribunal. By email of February 4, 2014, the Tribunal took note of Claimant’s letter. By letter of the same date, Respondent requested that the Tribunal issue a ruling precluding Claimant from producing the “Vouched Documents” or any other documents at such an allegedly late stage. Alternatively, Respondent requested a ruling (i) affording Respondent adequate time and opportunity to review the newly submitted evidence and to respond in a written submission; (ii) adjourning the hearing; and (iii) ordering Claimant to pay the costs incurred by Respondent in undertaking this additional round of document review and filing. By letter of February 5, 2014, Claimant asked that the Tribunal reject Respondent’s requests of February 4. By letter of February 14, 2014, the Tribunal informed the Parties that:

[...] the Tribunal considers that it is not in a position to preclude the Claimant from offering the documents to the Respondent for review if it so wishes; however, it will be similarly for the Respondent to decide whether it wishes to review or indeed receive them.

The Tribunal’s ruling is without prejudice to its decision as to the legal consequences, if any, of the Claimant’s failure to produce the documents earlier and/or the Respondent’s decision as to how it chooses to deal with the documents. The Tribunal will take a view on these issues, as appropriate, if either Party offers to produce any of the documents in question as evidence at a later stage of the arbitration.

43. By letter dated March 4, 2014, the Secretary-General informed the Parties that Mr. James Claxton, ICSID Legal Counsel, would replace Mr. Le Cannu as Secretary of the Tribunal.

44. By letter of March 12, 2014, Respondent requested a ruling precluding Claimant from introducing documents produced on February 28, 2014 into evidence or, in the alternative, bifurcating the proceedings so that only the jurisdictional objections would be heard at the May 2014 hearing.
45. By letter of March 17, 2014, Claimant objected to Respondent's proposals in its letter of March 12, 2014. Claimant proposed that the hearing proceed as planned. Concerning the documents produced on February 28, 2014, Claimant proposed that Respondent have the option of filing a post-hearing brief addressing its issues with the documents to be followed by a reply by Claimant and a hearing if the Tribunal considered it advisable.
46. By letter of March 17, 2014, Respondent rejected Claimant's proposals in its letter of March 17, 2014 and repeated its request for bifurcation of the proceedings.
47. By letter of March 18, 2014, Claimant commented on Respondent's letter of March 17, 2014 and proposed that the proceedings be bifurcated so that jurisdictional objections and liability would be heard at the May 2014 hearing whereas quantum would be heard at a later hearing. Respondent accepted this proposal by email of the same day.
48. By letter of March 20, 2014, the Tribunal noted the agreement of the Parties that jurisdictional objections and liability would be heard at the May 2014 hearing whereas quantum would be heard at a later hearing. The Tribunal invited the Parties to attempt to reach agreement about the date and length of the hearing on quantum.
49. By letter dated March 26, 2014, the Centre informed the Parties that Mr. Nariman would not be able to attend in person the hearing scheduled to be held from May 14 through 24, 2014 due to a serious illness in his immediate family, and that the Centre was in the process of making arrangements for Mr. Nariman to join the scheduled hearing by videoconference, subject to any comments from the Parties.
50. By letter dated March 27, 2014, Respondent objected to the Centre's proposed arrangements to conduct the scheduled hearing with Mr. Nariman attending by videoconference. By letter dated March 28, 2014, Claimant indicated that it consented to the proposed arrangements, but objected to any further postponement of the hearing.

51. By letter dated April 2, 2014, the Centre informed the Parties that Mr. Nariman had resigned from his appointment as arbitrator in this case due to his wife's ill-health and his inability to travel abroad as a result. The Centre further informed the Parties that Dr. Veijo Heiskanen and Ms. Carolyn Lamm had consented to Mr. Nariman's resignation, in accordance with Arbitration Rule 8(2), and that the proceeding would remain suspended until the vacancy created by the resignation had been filled pursuant to ICSID Arbitration Rule 10(2). Respondent was invited to promptly appoint a new arbitrator.
52. On April 28, 2014, Respondent informed the Secretary-General that it appointed Professor Philippe Sands, a national of the United Kingdom and France, to replace Mr. Nariman.
53. By letter dated April 30, 2014, Claimant requested that Professor Sands decline to accept his appointment and provided the basis for its request. By letter of the same date, Respondent provided observations on Claimant's request.
54. On May 12, 2014, the Centre informed the Parties that Professor Sands had accepted his appointment, and circulated copies of Professor Sands' declaration, statement and curriculum vitae pursuant to ICSID Arbitration Rule 6(2). Professor Sands' statement indicated as follows:

To the best of my knowledge I am not aware of any past or present professional, business or other relationship with the Claimant.

The Respondent has appointed me as arbitrator in two other cases (Adem Dogan v. Turkmenistan (ICSID Case No. ARB/09/9), which is pending following the Tribunal's decision on jurisdiction, of 29 February 2012, and Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan (ICSID Case No. ARB/10/1)).

I also wish to declare that I have been appointed as arbitrator by Curtis, Mallet-Prevost on three other occasions (the two cases mentioned above, and Opic Karimum Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/14)). None of these appointments have come in the past three years.

I have been appointed as arbitrator by the Republic of Turkey in a case before the Arbitration Institute of the Swedish Chamber of Commerce, in which the Republic of Turkey is represented by the law firm of Lalive.

I do not consider that these circumstances should cause my reliability for independent judgment to be questioned by a party. In this regard, I have carefully considered the Claimant's letter of 30 April, requesting that I decline to accept this appointment, together with the Decision of 20 March 2014 in Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v Republic of Kazakhstan (ICSID Case No. ARB/13/13), to which the Claimant has drawn my attention. As far as I am aware, the facts in the present case are not the same or similar to those that pertained in any other case in which I have sat as arbitrator, so that the circumstances that led to the Decision of 20 March 2014 appear to be materially different. Further, I note the contents of paragraph 65 of that Decision, and the important distinction between "possible prior knowledge of facts relevant to the outcome of the dispute", on the one hand, and "the situation where an arbitrator has possible prior exposure to legal issues that would be equally relevant in that regard".

Since first accepting appointment as arbitrator in an ICSID case, in 2007, I have declined to accept any new instructions to act as counsel in any new investment treaty arbitration brought under the ICSID Convention.

55. The Centre confirmed that the vacancy created in the Tribunal following the resignation of Mr. Fali Nariman on April 2, 2014 had thus been filled and the Tribunal was reconstituted. In accordance with ICSID Arbitration Rule 12, the proceeding resumed on that date from the point it had reached at the time the vacancy occurred.
56. On May 16, 2014, Claimant filed a proposal for disqualification of Professor Sands ("**Claimant's Proposal**"). The proceeding was suspended in accordance with ICSID Arbitration Rule 9(6).
57. By letter of May 17, 2014, Respondent filed a proposal for disqualification of Ms. Lamm and communicated its understanding that the disqualification proposal of Professor Sands and the disqualification proposal of Ms. Lamm would be decided by the Chairman in accordance with Article 58 of the ICSID Convention.
58. By letter of May 19, 2014, the Secretariat invited the Parties to agree to treat the disqualification proposal of Professor Sands and the disqualification proposal of Ms. Lamm as a single proposal to disqualify the majority of the Tribunal, which would be decided by the Chairman in accordance with Article 58 of the ICSID Convention.
59. By email of May 20, 2014, Claimant informed the Secretariat that it did not agree to treat the disqualification proposal of Professor Sands and the disqualification proposal of Ms. Lamm as a single proposal to disqualify the majority of the Tribunal. The

Secretariat accordingly communicated to the Parties that Dr. Heiskanen and Ms. Lamm would accordingly decide the proposal for the disqualification of Professor Sands under Article 58 of the ICSID Convention and Arbitration Rule 9(2).

60. By letter dated May 22, 2014, the Secretariat communicated to the Parties on behalf of Dr. Heiskanen and Ms. Lamm the schedule for written submission on the proposal to disqualify Professor Sands.
61. By email of May 23, 2014, the Parties requested changes to the schedule of written submissions. The Secretariat confirmed the agreement of Dr. Heiskanen and Ms. Lamm to the changes to the schedule by email the same day.
62. On June 2, 2014, Respondent filed observations on Claimant's proposal for the disqualification of Professor Sands ("**Respondent's Observations**").
63. By letter dated June 4, 2014, Professor Sands provided a statement on the proposal for his disqualification pursuant to ICSID Arbitration Rule 9(3) ("**Professor Sands' Explanations**").
64. On June 11, 2014, Claimant filed observations on its proposal for the disqualification of Professor Sands ("**Claimant's Observations**"). By letter dated June 11, 2014, Respondent confirmed that it had no further comment on the proposal.

II. Submissions on the Proposal to Disqualify Professor Sands

A. Claimant's Proposal to Disqualify Professor Sands

65. Claimant's proposed disqualification of Professor Sands is based on his prior appointment by Respondent to the tribunal in the ICSID arbitration *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* ("**Kılıç**"),³ which raised, according to Claimant, "the same threshold jurisdictional question at issue in this arbitration, the interpretation and application of Article VII(2) of the [Turkey-Turkmenistan BIT]."⁴

³ *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1.

⁴ Claimant's Proposal, ¶ 1.

66. Claimant states that, pursuant to Articles 14 and 57 of the ICSID Convention, arbitrators must be both impartial and independent.⁵ Accordingly, Claimant submits that disqualification of an arbitrator does not require proof of actual dependence or bias; it is sufficient to establish the appearance of dependence or bias.⁶ Specifically, what must be shown is that “a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.”⁷
67. Claimant contends that, as a result of Professor Sands’ involvement as arbitrator in the *Kılıç* proceedings, he was exposed to information relevant to the determination of “the central and most important jurisdictional issue in the present arbitration,” specifically (i) whether Article VII(2) of the BIT required investors to first resort to Turkmen local courts, (ii) whether provisions clearly not requiring first resort to local courts contained in other Turkmen BITs could be imported by way of the Most Favored Nation (“MFN”) provision found in Article II(2) of the BIT, and (iii) whether it would have been “ineffective or futile” for Claimant to have first resorted to the Turkmen local courts.⁸
68. Claimant argues that the interpretation of Article VII(2) of the BIT is “primarily and ultimately a factual matter.”⁹ Claimant notes that the Tribunal will “make its interpretation of Article VII(2) within the *general dictates* of the Vienna Convention [on the Law of Treaties]” and, as part of this process, it will consider “supplementary means of interpretation, including the preparatory work of the treaty and the

⁵ Claimant’s Proposal, ¶¶ 12-14.

⁶ Claimant’s Proposal, ¶ 2 (citing *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013 (“*Blue Bank*”), ¶ 59; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal dated 4 February 2014, ¶ 76; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08.05, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna dated 13 December 2013, (“*Burlington*”)¶ 66; *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser dated 13 December 2013, ¶ 70 (Spanish); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014 (“*Caratube*”), ¶ 57.

⁷ Claimant’s Proposal, ¶ 2 (citing *Caratube*, ¶ 57).

⁸ Claimant’s Proposal, ¶ 4, ¶¶ 18-27.

⁹ Claimant’s Proposal, ¶ 19.

circumstances of its conclusion.”¹⁰ Claimant contends that “much of the same ‘supplementary’ factual evidence – such as the *travaux préparatoires* – used in *Kılıç* will be used here.”¹¹

69. Claimant points to the overlap in witness testimony and evidence regarding the background of the negotiations of the BIT, and notes that Claimant has submitted reports by two officials of the Turkish government who also submitted reports in *Kılıç*, that Respondent has submitted reports by two Turkish experts who also testified on behalf of Respondent in *Kılıç*, that an Official Explanation of the Turkish Government regarding the meaning of Article VII(2) has been submitted as evidence in the present proceedings as well as in *Kılıç*, and that Claimant has submitted a witness statement by a Turkish official who also provided evidence in the *Kılıç* proceedings.¹²
70. Claimant states that, like the tribunal in *Kılıç*, the Tribunal will have to consider conflicting translations of the two authentic versions of Article VII(2), one in English and one in Russian.¹³ According to Claimant, resolving this “factual dispute” will involve a “battle of experts,” with both Parties presenting witness statements from linguists and translators about the proper interpretation of Article VII(2) in both English and Russian.¹⁴ Claimant notes that Respondent is using the same translator of the Russian text of Article VII(2) into English as it used in *Kılıç*, and that Respondent is also using the same expert linguist it used in *Kılıç*.¹⁵
71. Finally, Claimant submits that this Tribunal will need to consider the same MFN arguments considered by the *Kılıç* tribunal, and that many of the same disputed facts related to the question about whether resort to Respondent’s local courts by Claimant would have been “ineffective or futile” will be revisited.¹⁶

¹⁰ Claimant’s Proposal, ¶¶ 19-20 (citing Article 32 of the Vienna Convention on the Law of Treaties; emphasis in original).

¹¹ Claimant’s Proposal, ¶ 20.

¹² Claimant’s Proposal, ¶¶ 21-23.

¹³ Claimant’s Proposal, ¶ 24.

¹⁴ Claimant’s Proposal, ¶ 25.

¹⁵ *Ibid.*

¹⁶ Claimant’s Proposal, ¶ 26.

72. Claimant concludes that there is an “overlap in facts and legal issues” in the present arbitration and *Kılıç*, facts about which Professor Sands “gained knowledge ... relevant for the determination of some of the legal issues in the present arbitration.”¹⁷ Claimant relies on the decision on disqualification in *Caratube*, which found that

*independently of [the challenged arbitrator’s] intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the [previous arbitration] and his exposure to the facts and legal arguments in that case, [the challenged arbitrator’s] objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted.*¹⁸

73. According to Claimant, this knowledge would result in a “manifest imbalance” within the Tribunal, as Professor Sands might have been exposed to relevant information in *Kılıç* which is not available to the unchallenged arbitrators.¹⁹

74. Claimant rejects as irrelevant the distinction drawn by Professor Sands between prior knowledge of facts relevant to the outcome of the dispute, and prior exposure to relevant legal issues.²⁰ According to Claimant, it is Professor Sands’ exposure in *Kılıç* to relevant factual information that is “at the heart of this disqualification proposal.”²¹ Claimant further argues that, in any event, disqualification can be appropriate when prior consideration of a pure legal issue gives rise to an appearance of pre-judgment.²² Claimant alleges that, since the present case involves exactly the same treaty provision as *Kılıç*, Professor Sands “has a position to defend,” which gives rise to the concern that he “will approach the Article VII.2 issues with ‘a desire to conform’ his decision here to his ‘previously expressed view’ in *Kılıç*.”²³

¹⁷ Claimant’s Proposal, ¶ 27 (citing *Caratube*, ¶ 88).

¹⁸ Claimant’s Proposal, ¶ 27 (citing *Caratube*, ¶ 90).

¹⁹ Claimant’s Proposal, ¶¶ 28-29.

²⁰ Claimant’s Proposal, ¶ 30.

²¹ Ibid.

²² Claimant’s Proposal, ¶ 31.

²³ Claimant’s Proposal, ¶ 32 (citing *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. The Republic of India*, PCA Case No, 2013-09, Decision on the Respondent’s Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof Francisco Orrego Vicuna as Co-Arbitrator dated 30 September 2013) (“*CC/Devas*”).

75. Claimant qualifies as “inadequate and disingenuous” Professor Sands’ purported failure to mention in his statement “his appointment by Respondent’s counsel to the *Kılıç* tribunal, without recognizing any of the obvious overlap of ‘the same or similar’ facts in the *Kılıç* and present arbitrations [sic].”²⁴ Claimant contends that this raises questions about Professor Sands’ ability to act as an impartial and independent arbitrator and to approach the issues raised in the present matter with objectivity and open-mindedness.²⁵
76. Claimant also points out that counsel for Respondent in this matter has appointed Professor Sands in three other arbitrations.²⁶ While Claimant does not believe that these other appointments on their own would justify disqualification, Claimant argues that, in light of Professor Sands’ involvement in the *Kılıç* arbitration, these other appointments “leave no doubt” about the appropriateness of Professor Sands’ disqualification.²⁷
77. Accordingly, Claimant proposes that Professor Sands be disqualified from the Tribunal.

B. Respondent’s Observations on the Proposal to Disqualify Professor Sands

78. Respondent opposes Claimant’s proposal on the basis that the mere fact that an arbitrator has previously been involved in a case in which the same or a similar legal issue was decided, does not constitute a valid ground for disqualification.
79. Respondent states that while the Parties appear to be in agreement on the standard for disqualifying an arbitrator in ICSID proceedings, there is wide divergence on the proper application of the standard in this case.²⁸
80. Respondent argues that Claimant’s proposal runs counter to a well-settled line of decisions uniformly holding that disqualification is not warranted by the mere fact that

²⁴ Claimant’s Proposal, ¶¶ 33-34.

²⁵ Claimant’s Proposal, ¶ 34.

²⁶ Claimant’s Proposal, ¶ 35.

²⁷ Claimant’s Proposal, ¶ 36.

²⁸ Respondent’s Observations, ¶¶ 8-11.

an arbitrator has been involved in a case deciding the same or similar legal issues.²⁹ Respondent contends that it is inherently unfair to presume what the individual views of an arbitrator are on the variety of issues decided in prior cases, given that decisions emerging from three-member tribunals represent an inevitable blending of views and analyses and are dependent on the submissions of the parties in each case.³⁰ Respondent concludes that Claimant's argument that "Professor Sands has a position to defend" by virtue of the *Kılıç* decision is misplaced.³¹

81. Respondent contends that, under Claimant's view, all three members of the *Kılıç* tribunal would have to be disqualified from any future case involving any of the issues they decided, creating a system of "one-off" arbitrator appointments.³²
82. Respondent notes that a similar attempt to disqualify an arbitrator because of her participation on multiple tribunals presented with precisely the same jurisdictional objection was rejected in *Tidewater v. Venezuela*.³³ Respondent points out that Professor Brigitte Stern was called upon in *Tidewater* to interpret the same provision of

²⁹ Respondent's Observations, ¶ 14 (citing *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator dated December 23, 2010 ("*Tidewater*"), ¶¶ 65-72 (denying proposal to disqualify Professor Stern because she served on two tribunals considering whether the same provision of Venezuelan law constituted the State's consent to ICSID arbitration); *CC/Devas*, ¶¶ 66-67 (denying proposal to disqualify Marc Lalonde due to his involvement in prior cases considering the essential security interests defense); *Participaciones Inversiones Portuarias*, ¶ 33 ("The fact that Professor Fadlallah may have been exposed as an arbitrator to legal questions similar to those raised in the *Transgabonais* case . . . does not constitute in this case a cause for disqualification under the Washington Convention."); *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators dated May 20, 2011, ¶¶ 80-85 (denying proposal to disqualify Professor Stern because she participated in three prior cases involving claims of expropriation by Venezuela); *Suez et al. v. The Argentine Republic*, ICSID Case No. ARB/03/17, *Suez et al. v. The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group Limited v. The Argentine Republic*, UNCITRAL, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal dated October 22, 2007, ¶ 36 ("[D]oes the fact that a judge or arbitrator had made a determination of law or a finding of fact in one case mean that such judge cannot decide the law and the facts impartially in another case? We believe that the answer . . . is no. A finding of an arbitrator's or a judge's lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system."); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator dated August 12, 2010 ("*Urbaser*"), ¶ 58 (denying proposal to disqualify Professor Campbell McLachlan due to views expressed in publication concerning the same MFN provision at issue in the case).

³⁰ Respondent's Observations, ¶ 15.

³¹ *Ibid.*

³² *Ibid.*

³³ Respondent's Observations, ¶ 19 (citing *Tidewater*, ¶ 18).

Venezuelan law that she had to interpret for *Brandes v. Venezuela*, and that the analysis and interpretation of the law at issue included factual evidence presented by the parties.³⁴ And yet, Respondent argues, this did not change the essential nature of the legal issue into a “factual” issue. Respondent quotes the decision on the claimant’s proposal to disqualify Professor Stern, which stated that

*“there is ‘neither bias [nor] partiality where the arbitrator is called upon to decide circumstances of fact close to those examined previously, but between different parties, and even less so when he is called upon to determine a question of law upon which he has previously made a decision.’”*³⁵

83. Respondent further notes that, in rejecting the *Tidewater* challenge, the co-arbitrators found that neither Professor Stern nor the tribunal as a whole would be bound by the findings of the *Brandes* tribunal, that they had no reason to doubt that Professor Stern would decide based on the intrinsic value of the legal arguments presented by the parties.³⁶ Respondent argues that Professor Sands is similarly not bound by the *Kılıç* tribunal’s decision on Article VII(2), and that nothing will prevent Professor Sands from taking into account Claimant’s evidence and arguments, or from approaching the interpretation of Article VII(2) of the Treaty with an open mind.³⁷
84. Respondent points out that Claimant has argued that “the *Kılıç* tribunal did not have a complete record before it,” and that it has submitted additional evidence in this case that could justify a different outcome, all of which is inconsistent with Claimant’s argument in the context of its disqualification proposal that Professor Sands was exposed to evidence in *Kılıç* “that will not be presented here” that would cause an “imbalance” in the Tribunal.³⁸ Respondent argues that the record “is broader here and not the reverse,” and that it “is perfectly willing to provide any evidence submitted in *Kılıç* that is not in the record of this case.”³⁹

³⁴ Respondent’s Observations, ¶¶ 19-20 (citing *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award dated August 2, 2011 (“*Brandes*”)).

³⁵ Respondent’s Observations, ¶ 20 (citing *Tidewater*, ¶ 67).

³⁶ Respondent’s Observations, ¶ 21 (citing *Tidewater*, ¶ 69).

³⁷ Respondent’s Observations, ¶¶ 22-23.

³⁸ Respondent’s Observations, ¶ 23 (citing Claimant’s Reply, ¶ 39; Claimant’s Rejoinder, ¶ 14; Claimant’s Proposal, ¶¶ 28-29).

³⁹ Respondent’s Observations, ¶ 23, fn 37.

85. Respondent distinguishes the disqualification of Professor Orrego Vicuña in *CC/Devas* from the present case, contending that it was Professor Orrego Vicuña’s subsequent defense in an article dealing with arbitral tribunals’ interpretation of the concept of “essential security interests” which led to his disqualification on the basis of “issue conflict.”⁴⁰ Peter Tomka, President of the International Court of Justice who ruled on the challenge, held that “a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality,” and that

*to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of prejudgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.*⁴¹

86. Respondent notes that President Tomka found that a reasonable observer would conclude that Professor Orrego Vicuña would not have an “open mind,” and that there was no chance to convince him to change his mind on the issue of “essential security interests” based on his defense of his position in his article.⁴² By contrast, President Tomka rejected the challenge of Mr. Lalonde – whose disqualification was proposed because he had been on two tribunals with Professor Orrego Vicuña that had ruled on the interpretation of “essential security interests” – on the basis that Mr. Lalonde had not subsequently taken a position on the legal concept at issue, that there was “no appearance of his prejudgment on the issue of ‘essential security interests,’” and that he had observed in his statement that he did not feel bound by the prior decisions and that it was his intention to approach the matter with an open mind and to give it full consideration.⁴³

87. Respondent also points to the decision on disqualification in *Urbaser v. Argentina*, in which the co-arbitrators rejected the challenge to Professor Campbell McLachlan despite his writings on critical issues in the case, stating that “the mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator.” Respondent further

⁴⁰ Respondent’s Observations, ¶¶ 24-29. All three awards were challenged before annulment committees, all of which found the decisions on this issue to be erroneous, and two of which annulled the awards.

⁴¹ Respondent’s Observations, ¶ 26 (citing *CC/Devas*, ¶ 58).

⁴² Respondent’s Observations, ¶ 27 (citing *CC/Devas*, ¶ 64).

⁴³ Respondent’s Observations, ¶ 28 (citing *CC/Devas*, ¶ 66).

overlap, and that there was therefore no bar to his accepting the appointment.⁵⁶ In Professor Sands' view, there is nothing in Claimant's Proposal to indicate that he fell into error in coming to that conclusion, and that after reviewing each of the authorities cited by both Parties, he is comfortable with the decision that he has taken and sees no basis on which to come to a different view.⁵⁷

95. As to the law, Professor Sands stresses that he approaches the issues and the arguments of the parties with an entirely open mind, and that he takes most seriously the responsibilities of independence and impartiality.⁵⁸ In Professor Sands' view, it is not permissible for an arbitrator to seek to expose co-arbitrators to information in respect of any other case in which they have sat, given the confidentiality of those proceedings, or to proceed on the basis that an arbitrator might ever have any "position to defend."⁵⁹ Professor Sands notes that the essence of independence and impartiality is to decide each case on the basis of its facts and the applicable law, having regard to the arguments and evidence put forward by the parties, and that such openness of mind is of the essence of the arbitral function.⁶⁰
96. Professor Sands further notes that while Claimant does not appear to push the issue of prior appointments, he currently sits as arbitrator in thirteen cases (eight investment disputes, five sports disputes), and that he has been appointed by Respondent's counsel in only one of these cases.⁶¹
97. Accordingly, Professor Sands does not consider that the present circumstance can properly cause his reliability for independent judgment to be questioned.⁶²

D. Claimant's Further Observations

98. Claimant in its further observations filed on June 11, 2014 notes that, while there are situations in which an overlap of "the same or similar legal issues" between two

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Professor Sands' Explanations, ¶ 3.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Professor Sands' Explanations, ¶ 4.

⁶² Professor Sands' Explanations, ¶ 5.

notes that disqualification due to prior opinions on issues arising in investment treaty arbitrations would lead “to the paralysis of the ICSID arbitral process.”⁴⁴

88. Respondent contends that Claimant’s reliance on the decision on disqualification in *Caratube* is misplaced. According to Respondent, Mr. Bruno Boesch was disqualified from the *Caratube* tribunal, in light of his prior service on the tribunal in *Ruby Roz v. Kazakhstan*, because the claimants in *Ruby Roz* were “closely related” to the claimants in *Caratube*, and because the dispute at issue in *Caratube* arose out of the “same factual context” as *Ruby Roz*.⁴⁵ By contrast, Respondent contends, there is no connection between Claimant and the claimant in *Kılıç*, nor is there any connection between the disputes at issue in these two cases.⁴⁶ Furthermore, the *Caratube* decision expressly distinguished between the facts particular to the claimants and the disputes arising out of the alleged State conduct of harassment towards them, and the facts of “general and impersonal character” or “expert-witness testimony” on legal issues.⁴⁷
89. Respondent states that the two “factual disputes” which Claimant alleges are implicated in respect of Article VII(2) – the “background of the BIT negotiations” and the linguistics experts’ translations of the Russian text of the Treaty – have no personal connection to the claimants in *Kılıç* or *İçkale*, and are precisely the type of facts of a “general and impersonal character” that the *Caratube* decision distinguished as being outside the specific factual matrix pertaining to the parties’ claims, which do not give rise to grounds for disqualification.⁴⁸
90. Finally, Respondent rejects Claimant’s contention that the prior appointments of Professor Sands by Respondent’s counsel constitutes an additional factor in case there is “any doubt about disqualification due to his involvement in *Kılıç*.”⁴⁹ Respondent first notes that Claimant does not believe the fact of these other appointments on their own

⁴⁴ Respondent’s Observations, ¶ 30 (citing *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator dated August 12, 2010, ¶¶ 45, 54).

⁴⁵ Respondent’s Observations, ¶¶ 31-32 (citing *Caratube*, ¶ 84).

⁴⁶ Respondent’s Observations, ¶ 33.

⁴⁷ Respondent’s Observations, ¶ 34 (citing *Caratube*, ¶ 65).

⁴⁸ Respondent’s Observations, ¶ 35 (citing Claimant’s Proposal, ¶¶ 19-25).

⁴⁹ Respondent’s Observations, ¶¶ 36-41.

would justify disqualification.”⁵⁰ Respondent then contends that if there is any doubt as to Professor Sands’ alleged lack of impartiality due to his involvement in *Kılıç*, the proposal must be denied because, by definition, the alleged lack of impartiality would not be “manifest.”⁵¹ Respondent states that attempts to disqualify arbitrators based on prior appointments by counsel or a party have been roundly rejected.⁵²

91. Respondent notes that Professor Sands disclosed that he has been appointed by Respondent’s counsel in three prior cases, even though all three appointments occurred more than three years ago, and the IBA Guidelines on Conflicts of Interest only consider appointments within three years of the present appointment relevant for purposes of conflicts of interest.⁵³ Respondent further notes that Claimant makes no allegations, such as financial dependence or other relationship of influence stemming from those appointments.
92. Accordingly, Respondent requests that (i) Claimant’s Proposal for Disqualification of Professor Philippe Sands be denied; and (ii) Claimant be ordered to pay Respondent all legal fees and expenses incurred in opposing this disqualification Proposal.

C. Professor Sands’ Explanations

93. Professor Sands states in his further statement that he has read Claimant’s Proposal and Respondent’s Observations with care and attention.⁵⁴
94. Professor Sands notes that he has already given careful attention to the question of whether the facts in the present case are the same or similar to those that pertained in any other case in which he has sat as arbitrator.⁵⁵ Professor Sands states that he proceeded on the basis that the facts were not the same, or that there was any material

⁵⁰ Respondent’s Observations, ¶ 36.

⁵¹ Respondent’s Observations, ¶ 37.

⁵² Respondent’s Observations, ¶¶ 38-39 (citing *Tidewater*, ¶¶ 58-64 (rejecting disqualification on the ground that Professor Stern had appointments by the same party in three other cases); *Universal*, ¶¶ 86-88 (rejecting disqualification on the ground that Professor Stern had prior appointments by the same counsel in two prior cases); *Caratube* (finding that the fact that Mr. Bruno Boesch had prior appointments by the same counsel in three prior cases was not a ground for disqualification), ¶¶ 100-109).

⁵³ Respondent’s Observations, ¶ 40 (citing IBA Guidelines on Conflicts of Interest in International Arbitration (2004), Guideline 3.3.7 (“The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.”)).

⁵⁴ Professor Sands’ Explanations, ¶ 1.

⁵⁵ Professor Sands’ Explanations, ¶ 2.

arbitrations would not give rise to grounds for disqualification, in the present situation there is “an absolute, non-speculative overlap” of factual and legal issues related to the key threshold jurisdictional issues posed by Article VII(2) of the BIT.⁶³

99. Claimant argues that these questions of law and fact were resolved in Respondent’s favor in the decisions Professor Sands joined in *Kılıç*, resulting in that arbitration’s termination.⁶⁴ According to Claimant, these decisions were wrongly decided as a matter of both fact and law, and that it has the right to have the issues related to Article VII(2) decided by a tribunal which to “a reasonable and informed third party” will approach these issues “objectively” and with “open mindedness.”⁶⁵
100. Claimant contends that Professor Sands, in his Explanations, does little to dispel concerns about his impartiality and independence.⁶⁶ Claimant notes that Professor Sands fails to even mention Article VII(2) of the BIT and continues to maintain that there is no “material overlap” of factual and legal issues in the *Kılıç* and *İçkale* arbitrations.⁶⁷ Claimant contends that the absence of discussion in Professor Sands’ Explanations concerning the lack of “material overlap” is “extremely troublesome.”⁶⁸
101. Claimant contrasts Professor Sands’ Explanations with letters he recently submitted in another arbitration, *Victor Pay Casado v. Chile*, from which he resigned in order to “avoid the distraction” posed by his involvement and “to avoid adding to the burdens of the unchallenged arbitrators.”⁶⁹ Claimant notes that in these letters Professor Sands engaged in a discussion of why he believed that his previous engagement (which was as counsel for an NGO in an extradition proceeding in the national courts of the United Kingdom) and the *Victor Pay Casado* arbitration “do not appear to raise any matters that are in issue in the present proceedings: they involve different parties, different facts, and different applicable law.”⁷⁰ Claimant contends that by failing to engage in a

⁶³ Claimant’s Observations, ¶ 1.

⁶⁴ Claimant’s Observations, ¶ 3.

⁶⁵ Claimant’s Observations, ¶ 3 (citing *Caratube*, ¶ 90).

⁶⁶ Claimant’s Observations, ¶ 5.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Claimant’s Observations, ¶ 6.

⁷⁰ *Ibid.*

similar discussion in his Explanations, Professor Sands has failed to act as an impartial trier of fact and law.⁷¹

102. Claimant argues that in order for Professor Sands to be disqualified, it need only show that “a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.”⁷² Claimant argues that given the almost absolute overlap of factual and legal questions related to Article VII(2), the appearance of a lack of these qualities is manifest.⁷³
103. Claimant rejects Respondent’s allegations that the disqualification of Professor Sands would create a system of “one-off” arbitrator appointments, as disqualification in this case would be based on unique, case-specific circumstances and thus on narrow grounds which would not deprive Respondent of its freedom to choose an arbitrator.⁷⁴
104. Regarding the legal standard for disqualification, Claimant states that it is only partially in agreement with Respondent.⁷⁵ Claimant agrees with Respondent that Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias, but rather it is sufficient to establish the appearance of dependence or bias.⁷⁶ Claimant also agrees with Respondent that what must be shown when seeking disqualification is that “a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.”⁷⁷
105. However, Claimant disagrees with Respondent’s argument that the requirement of “manifest” lack of independence or impartiality in Articles 14(1) and 57 of the ICSID

⁷¹ Ibid.

⁷² Claimant’s Observations, ¶ 7 (citing *Caratube*, ¶ 57).

⁷³ Claimant’s Observations, ¶ 7.

⁷⁴ Claimant’s Observations, ¶¶ 8-9.

⁷⁵ Claimant’s Observations, ¶ 10.

⁷⁶ Claimant’s Observations, ¶ 11 (citing *Blue Bank*, ¶ 59; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal dated 4 February 2014, ¶ 76; *Burlington*, ¶ 66; *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser dated 13 December 2013, ¶ 70 (Spanish)).

⁷⁷ Claimant’s Observations, ¶ 12 (citing *Caratube*, ¶ 57, fn. 42).

Convention imposes a stringent burden on the party seeking disqualification.⁷⁸ Claimant argues that this interpretation is now discredited and has been called into serious question, pointing to the lack of reference to any imposition of a “stringent burden” in the *Blue Bank* decision.⁷⁹ Claimant contends that the significance of the word “manifest” in Article 57 relates not to the seriousness of the allegation, but to the ease with which it may be perceived, as confirmed by the recent *Blue Bank* decision on disqualification.⁸⁰

106. Claimant reiterates that there is an absolute, non-speculative “overlap in facts and legal issues” in *Kılıç* and the present case related to the key threshold jurisdictional issues regarding Article VII(2) of the BIT and notes that a problem arises when “an arbitrator has obtained documents or information in one arbitration that are relevant to the dispute to be determined in another arbitration.”⁸¹ Claimant alleges that Respondent has invented a category of overlapping facts that falls “outside the specific factual matrix” to be considered in a disqualification proceeding, i.e. facts that “have no personal connection to the claimants in *Kılıç* and *İçkale*.”⁸² Claimant alleges that the decision in *Urbaser* made reference to the very type of facts that Respondent asserts are “outside” consideration.⁸³
107. Claimant contends that, as observed in *CC/Devas*, although a challenged arbitrator “is certainly entitled to his views,” more importantly a party “is entitled to have its argument heard and ruled upon by arbitrators with an open mind.”⁸⁴ Claimant once again raises the concern that Professor Sands will not approach issues impartially, but rather with a desire to conform to his own previously expressed view, noting that unlike in *CC/Devas*, the *Kılıç* arbitration and the present arbitration involve exactly the same provision in exactly the same BIT.⁸⁵

⁷⁸ Claimant’s Observations, ¶ 13.

⁷⁹ Claimant’s Observations, ¶ 13 (citing *Blue Bank*, ¶¶ 58-62).

⁸⁰ Claimant’s Observations, ¶¶ 14-15.

⁸¹ Claimant’s Observations, ¶ 19 (citing *Caratube*, ¶ 75).

⁸² Claimant’s Observations, ¶ 20 (citing Respondent’s Observations, ¶ 35).

⁸³ Claimant’s Observations, ¶ 20 (citing *Urbaser*, ¶ 57).

⁸⁴ Claimant’s Observations, ¶ 21 (citing *CC/Devas*, ¶ 64).

⁸⁵ Claimant’s Observations, ¶ 21 (citing *CC/Devas*, ¶ 58).

108. Claimant challenges Respondent’s reliance on the *Tidewater* disqualification decision, contending that this decision actually supports Claimant’s position, despite having been decided pursuant to the older, stricter disqualification standard.⁸⁶ Claimant distinguishes *Tidewater*, noting that the unchallenged arbitrators merely observed that there “may” be related legal issues in the two subject arbitrations, but concluded that “it would be premature to make any judgment as to what issues of law may be pleaded by the parties ... since no pleadings other than the Request for Arbitration have yet been filed.”⁸⁷ Furthermore, the *Tidewater* decision noted that the challenging party did not allege an overlap in the underlying facts between the two arbitrations, and that the absence of allegations of any overlap of underlying facts was crucial to the unchallenged *Tidewater* arbitrators’ decision not to disqualify.⁸⁸ Claimant contends that no such absence exists here.
109. Claimant alleges that *CC/Devas* also does not support Respondent’s position.⁸⁹ Claimant first notes that the “overlapping” legal issue considered in *CC/Devas* related to similar provisions in two different investment treaties.⁹⁰ Moreover, Claimant contends that the legal issue in *CC/Devas* was subject to resolution without reference to any overlapping underlying facts.⁹¹ Claimant draws a parallel between the disqualification of Professor Orrego Vicuña in *CC/Devas* – due to his publication of an article which suggested that his views remained unchanged despite having reviewed the analyses of three different annulment committees – and the present case, which involves “overlapping and mixed legal and factual issues.”⁹² Claimant observes that one of the arbitrators in *Kılıç I*, Professor William W. Park, filed a separate opinion in *Kılıç II* in which he expressed serious doubts about the *Kılıç I* decision, and that, despite Professor Park’s observations about the results that would follow from the application of *Kılıç I*, Professor Sands remained unmoved.⁹³

⁸⁶ Claimant’s Observations, ¶ 22 (citing *Tidewater*, ¶ 39).

⁸⁷ Claimant’s Observations, ¶ 23 (citing *Tidewater*, ¶¶ 65, 69).

⁸⁸ Claimant’s Observations, ¶ 24.

⁸⁹ Claimant’s Observations, ¶ 25.

⁹⁰ Claimant’s Observations, ¶ 25 (citing *CC/Devas*, ¶¶ 53-54).

⁹¹ Claimant’s Observations, ¶ 25.

⁹² Claimant’s Observations, ¶¶ 26-27.

⁹³ Claimant’s Observations, ¶¶ 28.

110. As to the allegation of “manifest imbalance” within the Tribunal, Claimant contends that Respondent improperly focuses on the imbalance between the Parties when it discusses the alleged “high degree of cooperation” among certain claimants who have initiated arbitrations against Turkmenistan, whereas the proper focus should be on the imbalance that would exist within the Tribunal were Professor Sands allowed to join it.⁹⁴

111. Accordingly, Claimant requests that Professor Sands be disqualified from the Tribunal.

E. Respondent’s Further Observations

112. Respondent in its letter of June 11, 2014 states that Professor Sands’ submission had confirmed that there was no merit to Claimant’s proposal, and that it had no further comments on the proposal. Respondent submits that, for the reasons set out in its submission of June 2, 2014 and Professor Sands’ statement, Claimant’s proposed disqualification of Professor Sands should be denied.

III. Reasons

113. The legal framework governing a proposed disqualification of a member of an ICSID tribunal is set out in Articles 57 and 14(1) of the ICSID Convention. Article 57 provides:

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

114. Article 14(1) of the ICSID Convention provides:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

115. While the English version of Article 14(1) of the ICSID Convention refers to “independent judgment,” the Spanish version requires “*imparcialidad de juicio*”

⁹⁴ Claimant’s Observations, ¶¶ 29.

(impartiality of judgment). Since pursuant to the final clause of the ICSID Convention both the English and the Spanish (as well as the French)⁹⁵ versions are equally authentic, it is apparent that the term “independent judgment” in Article 14(1) has been used in a broad sense to cover both independence and impartiality. This is a generally accepted interpretation of the provision.⁹⁶

116. It is also generally accepted in ICSID practice that “impartiality” refers to the absence of bias or predisposition towards a party, whereas “independence” is defined as the absence of external control.⁹⁷ We note that Claimant in the present case has proposed the disqualification of Professor Sands on the basis of both of lack of impartiality and independence, due to his involvement in the *Kılıç* arbitration as well as his appointment as arbitrator by Counsel for Respondent in three other arbitrations. While Claimant states that it does not believe that these other appointments on their own would justify disqualification, it does argue that “if there were any doubt about disqualification due to Professor Sands’ involvement in *Kılıç*, that involvement coupled with Professor Sands’ other appointments by counsel for Respondent would leave no doubt about the appropriateness of his disqualification here.”⁹⁸ Claimant has thus challenged the “impartiality” of Professor Sands, rather than his “independence.”

117. According to Article 57 of the ICSID Convention a proposal to disqualify must be based on “any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14,” that is, *inter alia*, independence or impartiality. Thus, while a party seeking disqualification must establish facts that indicate a “manifest” lack of independence or impartiality, recent ICSID decisions concerning disqualification have taken the view that the ICSID Convention “do[es] not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.”⁹⁹ This implies that, while a decision to disqualify must be based on facts, it is sufficient that such facts, once established, indicate a “manifest” lack of independence

⁹⁵ The French version refers to “*indépendance dans l’exercice de leurs fonctions*.”

⁹⁶ See, e.g., *Caratube*, ¶ 52; *Blue Bank*, ¶ 58; *Burlington*, ¶ 65.

⁹⁷ See, e.g., *Caratube*, ¶ 53; *Blue Bank*, ¶ 59; *Burlington*, ¶ 66.

⁹⁸ Claimant’s Proposal, ¶ 5.

⁹⁹ *Blue Bank*, ¶ 59.

or impartiality in the sense that such lack can be perceived on the face of the evidence submitted.¹⁰⁰

118. Claimant’s proposal to disqualify is primarily based on the fact that Professor Sands served as member of the *Kılıç* tribunal which addressed the issue of interpretation of Article VII(2) of the Turkey-Turkmenistan BIT, a provision that is also at issue in the present arbitration. The *Kılıç* tribunal resolved the issue in favor of Turkmenistan, Respondent in the present arbitration. According to Claimant, since the interpretation of Article VII(2) of the BIT is “primarily and ultimately a factual matter” and requires the review of the same evidence, including the *travaux préparatoires* and other evidence, including expert evidence, that was also reviewed by the *Kılıç* tribunal, Professor Sands “would have been exposed to information relevant for the determination of the central and most important jurisdictional issue in the present arbitration.”¹⁰¹ There is therefore, in Claimant’s view, an “evident and obvious appearance of a lack of [impartiality and independence].”¹⁰²
119. We note that, unlike in *Caratube*, which Claimant relies upon in support of its position, in the present case there is no overlap of facts relevant to the merits of the earlier (*Kılıç*) arbitration and those relevant to the merits of the present case; the overlap merely concerns facts relevant to the interpretation of Article VII(2) of the BIT and related legal issues such as the scope of application of the MFN clause. In this case, when analyzing the contentions of the Parties and the facts relevant to the interpretation of Article VII(2), all of the facts recited by Claimant and/or Respondent have been submitted to the Tribunal at the Tribunal’s request in Procedural Order No. 2.¹⁰³ If any facts are missing, the Tribunal can identify and request the Parties to address them. Indeed, Respondent has offered to submit any evidence from *Kılıç* not submitted here. Neither Party however has identified any missing facts that are not available to this Tribunal.¹⁰⁴

¹⁰⁰ See, e.g., *Caratube*, ¶ 57; *Blue Bank*, ¶ 69; *Burlington*, ¶¶ 68, 80; C.Schreuer, *The ICSID Convention*, Second Edition (2009), pp. 938-943, ¶¶ 134-154.

¹⁰¹ Claimant’s Proposal, ¶ 4.

¹⁰² Claimant’s Observations, ¶ 7.

¹⁰³ Procedural Order No. 2, June 28, 2012, ¶¶ 11, 12.

¹⁰⁴ See Claimant’s Proposal, ¶¶ 21-29; Respondent’s Observations, ¶¶ 23, 33-35.

120. Moreover, even if the interpretation of Article VII(2) of the BIT in the present case will involve review of relevant supporting evidence, the task of the Tribunal will be fundamentally a legal one of interpreting the Treaty; this is the case even when it requires review of the relevant supporting evidence. In the words of the *Caratube* decision, such a task involves the determination of facts that are “of a general and impersonal character” and not specific to the Parties to this particular case,¹⁰⁵ and is therefore unrelated to facts relevant to the merits. Consequently, Professor Sands’ exposure to evidence relevant to the interpretation of Article VII(2) of the BIT cannot constitute a fact indicating a manifest lack of impartiality. This is in particular the situation here, since as noted by Respondent, the record in the present case is already broader than in *Kılıç*,¹⁰⁶ and the Tribunal has recognized the importance of the issue, directing the Parties to address “all aspects of the issue” in their submissions.¹⁰⁷
121. Similarly, unlike *CC/Devas*, another case relied upon by Claimant in support of its submissions, there is no appearance in the present case “of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.”¹⁰⁸ In *CC/Devas*, the appointing authority upheld one of the challenges brought against two arbitrators on the basis that the arbitrator had expressed views subsequent to the relevant decision which “raised doubts for an objective observer as to [his] ability to approach the question with an open mind,”¹⁰⁹ while dismissing the challenge brought against his co-arbitrator as the latter “had not taken a position on the legal concept in issue subsequent to the decisions of the three annulment committees” that had dealt with it.¹¹⁰ The appointing authority thus accepted the arbitrator’s statement that his intention was to approach the issue with an open mind and to give it full consideration, and concluded that there was no appearance of pre-judgment.¹¹¹

¹⁰⁵ *Caratube*, ¶ 65.

¹⁰⁶ Respondent’s Observations, note 37.

¹⁰⁷ See ¶ 26 above.

¹⁰⁸ *CC/Devas*, ¶ 59.

¹⁰⁹ *Id.*, ¶ 64.

¹¹⁰ *Id.*, ¶ 66.

¹¹¹ See also *Tidewater*, where one of the arbitrators was challenged, inter alia, on the basis that she might be required, as a member of an arbitral tribunal in another case involving the same party, to decide certain issues of law which might overlap with issues of law she might be called upon to decide in the *Tidewater* case. The

122. This is also the case here. Professor Sands has not been shown to have expressed any views subsequent to the *Kılıç* decision that would raise doubts as to his ability to approach the interpretation of Article VII(2) of the BIT, and the related legal issues, with an open mind. On the contrary, Professor Sands confirmed in his Explanations of 4 June 2014 that he would “approach the issues and the arguments of the parties with an entirely open mind,” and that “[s]uch openness of mind is of the essence of the arbitral function.”
123. As noted above, while Claimant has also challenged Professor Sands’ independence on the basis of his prior appointments as arbitrator by Counsel for Respondent, it acknowledges that the three prior appointments disclosed by Professor Sands on their own do not justify disqualification. We agree, and also note that, even if considered together with the evidence submitted by Claimant in support of its challenge based on the alleged lack of impartiality, such evidence is not sufficient to indicate a manifest lack of impartiality.
124. In view of the above, we conclude that Claimant has not demonstrated that Professor Sands manifestly lacks independence or impartiality.

IV. Decision

125. For the forgoing reasons, we decide as follows:
- (a) Claimant’s proposal to disqualify Professor Sands is dismissed;
 - (b) The determination and attribution of costs incurred in connection with this decision are reserved for further proceedings; and
 - (c) As from the date of this decision, the suspension of the proceedings pursuant to Arbitration Rule 9(6) is terminated.

remaining members of the tribunal decided that the situation did not involve prejudgment of the liability of one of the parties “in the context of a specific factual matrix.” *Tidewater*, ¶ 67.

Date: July 11, 2014



Dr. Veijo Heiskanen
President of the Tribunal



Ms. Carolyn B. Lamm
Arbitrator