INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the proceeding between

İMEKS İNŞAAT MAKINA ELEKTRIK KONSTRÜKSIYON SANAYI LIMITED ŞIRKETI

and

TURKMENISTAN

ICSID Case No. ARB/21/23

DECISION ON THE CLAIMANT'S PROPOSAL FOR THE DISQUALIFICATION OF PROF. DR. ROLF KNIEPER

Unchallenged Arbitrators
Sir Christopher Greenwood GBE, CMG, KC
Prof. Dr. Stephan Schill

Secretary of the Tribunal
Ms. Elisa Méndez Bräutigam

Date: 31 October 2023

TABLE OF CONTENTS

I. INTRODUCTION

1. This Decision rules on the proposal of İmeks İnşaat Makina Elektrik Konstrüksiyon Sanayi Limited Şirketi (the "Claimant") to disqualify Prof. Dr. Rolf Knieper dated 8 August 2023 (the "Disqualification Proposal"). Turkmenistan (the "Respondent") opposes the Disqualification Proposal.

2. In accordance with Article 58 of the ICSID Convention and Rule 9(4) of the 2006 ICSID Arbitration Rules, this Decision has been made by the remaining members of the Tribunal (the "Unchallenged Arbitrators").

II. PROCEDURAL HISTORY

3. On 16 April 2021, the Centre received a request for arbitration from the Claimant (the "Request"). On 5 May 2021, in accordance with Article 36 of the ICSID Convention and Rules 6 and 7 of the ICSID Institution Rules, the Secretary-General of ICSID registered the Request.

4. By letters of 26 July 2021, 11 August 2021, 20 August 2021, 2 September 2021, 9 September 2021 and 15 September 2021, the Parties agreed that the Tribunal would consist of three arbitrators, one appointed by each party and the presiding arbitrator appointed by agreement of the Parties.

5. On 16 September 2021, the Claimant appointed Prof. Dr. Stephan Schill, a national of Germany, as an arbitrator in this case. On 17 September 2021, Prof. Schill accepted his appointment and provided a signed declaration and a statement pursuant to ICSID Arbitration Rule 6(2).

6. On 21 October 2021, the Respondent appointed Mr. Gabriel Bottini, a national of Argentina, as an arbitrator in this case. On 25 October 2021, Mr. Bottini accepted his appointment and provided a signed declaration and a statement pursuant to ICSID Arbitration Rule 6(2).

7. On 13 December 2021, the Claimant requested that the Chairman of the ICSID Administrative Council appoint the presiding arbitrator pursuant to Article 38 of the ICSID Convention.

8. On 18 March 2022, the Chairman appointed Sir Christopher Greenwood GBE, CMG, KC, a national of the United Kingdom, as presiding arbitrator. On 20 March 2022, Sir Christopher Greenwood accepted his appointment and provided a signed declaration pursuant to ICSID Arbitration Rule 6(2).

9. On 21 March 2022, the Secretary of the Tribunal informed the Parties that all three arbitrators had accepted their appointments and that, as a result, on that date the Tribunal was deemed to have been constituted pursuant to ICSID Arbitration Rule 6.

10. On 19 May 2022, the Tribunal and the Parties held a first session via videoconference. Following the first session, on 25 May 2022, the Tribunal issued Procedural Order No. 1 on procedural matters.

11. On 15 August 2022, the Respondent filed an application for security for costs and a request for the Claimant to disclose certain information regarding its financing arrangements (the "Request for Disclosures").

12. On 19 September 2022, the Tribunal invited the Claimant to comment on the Request for Disclosures by 30 September 2022.

13. On 30 September 2022, the Claimant responded to the Request for Disclosures.

14. On 20 October 2022, the Tribunal ruled on the Respondent's Request for Disclosures.

15. On 11 November 2022, the Tribunal set a briefing schedule for the Respondent's application for security for costs.

16. On 9 December 2022, the Claimant filed a memorial on the merits together with supporting documents.

17. On 9 January 2023, the Claimant filed its response to the application for security for costs.

18. On 30 January 2023, the Respondent filed a reply to the application for security for costs.

19. On 20 February 2023, the Claimant filed its rejoinder to the application for security for costs.

20. On 21 March 2023, the Tribunal issued its decision on the Respondent's application for security for costs.

21. On 7 June 2023, the Secretary-General of ICSID informed the Parties that Mr. Bottini had notified his co-arbitrators and ICSID on 5 June 2023 of his resignation as arbitrator in this case pursuant to ICSID Arbitration Rule 8(2), and that the co-arbitrators had consented to his resignation. The Secretary-General informed the Parties that the proceeding was suspended as of 7 June 2023 pursuant to ICSID Arbitration Rule 10(2). The Secretary-General further invited the Respondent to fill the vacancy left by Mr. Bottini as soon as possible pursuant to ICSID Arbitration Rule 11(1).

22. On 21 July 2023, the Respondent appointed Prof. Dr. Rolf Knieper, a national of Germany, as arbitrator.

23. On 22 July 2023, Prof. Knieper accepted his appointment and provided a signed declaration and a statement in accordance with ICSID Arbitration Rule 6(2). The statement read in full:

> *From 1993 to 2005 I was head of a programme of cooperation between Caucasian and Central Asian States and Germany to implement legal and judicial reform in newly independent post-soviet States. The programme was wholly financed by the German government and I reported exclusively to the German Ministry of Cooperation and Development and its "Office of International Cooperation (GIZ)".*
>
> *In that context, I was involved in drafting a new Civil Code of Turkmenistan as member of the working group set up by the Turkmen parliament (Mejlis), in force since 1 March 1999, breaking*

> *completely with the Soviet tradition. In recognition for my contribution, I was awarded the medal of "Gairat" in 1999.*
>
> *After my retirement, I continued to advise Caucasian and Central Asian States, including Turkmenistan, under the on-going GIZ programme, on questions of codification and application of law. In that role, I was member of the working group, set up by the Mejlis, to draft the Civil Procedure Code and the Law on International Commercial Arbitration (the latter based on the UNCITRAL Model Law). They both entered into force in 2016. Further, I served as advisor to a working group, set up by the Minister of Justice, to write a five-volume Commentary on the Civil Code. The work was completed in 2020.*
>
> *I have never received any financial compensation from Turkmen authorities nor any instructions, guidance or recommendation for my work.*
>
> *In addition to my work as an advisor, I act as an arbitrator in international arbitration, and occasionally as legal expert on the law of the States where I have accompanied the codification (cf. my attached CV). So far, I have not acted as arbitrator in a case involving Turkmenistan but as legal expert. Two of the cases where I gave expert opinions are pending, one under the auspices of SCC Arbitration Rules (Turkmenhimiya v. Belgorkhimprom, two State enterprises), and one before the courts of the Netherlands (Chemix v. Republic of Turkmenistan). In both cases, I was appointed by the Turkmen side, and in both cases SquirePattonBoggs serves as counsel.*

24. On 24 July 2023, the Tribunal was reconstituted. On the same day, the proceedings were resumed in accordance with ICSID Arbitration Rule 12.

25. On 27 July 2023, the Claimant sent a letter stating that 'Dr. Knieper's disclosures give rise to an objective appearance of lack of independence and impartiality.' Invoking Prof. Knieper's long history of association with Turkmenistan, his assistance in drafting Turkmenistan's Civil Code, the interpretation of which would be at issue in this arbitration, and his serving as an expert witness for Turkmenistan or Turkmen state enterprises in two pending proceedings involving the same counsel as in the present arbitration, the Claimant

requested that Prof. Knieper resign from the Tribunal, failing which the Claimant announced that it would seek his disqualification.

26. On 1 August 2023, the Tribunal invited the Respondent to comment on the Claimant's letter.

27. On 4 August 2023, the Respondent sent its comments on the Claimant's letter, concluding that none of the circumstances addressed in Prof. Knieper's statement gave rise to a manifest lack of independence and impartiality that would prevent Prof. Knieper from serving as a member of the Tribunal.

28. On 5 August 2023, Prof. Knieper provided an additional statement in response to the Parties' letters of 1 and 4 August 2023, which was sent to the Parties on 7 August 2023. That statement read in relevant parts:

> *After pondering the arguments, I have decided not to resign, as requested by Claimant. I understand its concern but sincerely believe that neither my activities as an independent expert on Turkmen law in two commercial disputes nor my work for the legal and judicial reform of Turkmenistan, mandated by the German Ministry of Cooperation and Development and its "Office of International Cooperation" compromise my independence and impartiality. I solemnly confirm my declaration and statement of 22 July 2023.*

29. On 8 August 2023, the Claimant notified the Tribunal that it proposed the disqualification of Prof. Knieper in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9. The Centre acknowledged receipt of the Disqualification Proposal on the same day and informed the Parties that the proceeding was suspended as of 8 August 2023 pursuant to ICSID Arbitration Rule 9(6). The Parties were further informed that the Disqualification Proposal would be decided by the other Members of the Tribunal (the Unchallenged Arbitrators) in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

30. On 14 August 2023, after consulting the Parties, the Unchallenged Arbitrators adopted a briefing schedule for the Disqualification Proposal.

31. On 23 August 2023, the Claimant filed its submission in support of its Disqualification Proposal together with Exhibits C-0210 to C-0237 and Legal Authorities CL-0128 to CL-0144.

32. On 8 September 2023, the Respondent submitted its response to the Disqualification Proposal together with Exhibits R-0030 to R-0033 and Legal Authorities RL-0041 to RL-0067.

33. On 15 September 2023, in accordance with the briefing schedule, Prof. Knieper provided his observations on the Disqualification Proposal.

34. On 20 September 2023, the Claimant filed its further submission on the Disqualification Proposal together with Exhibit C-0238 and Legal Authorities CL-0145 to CL-0150.

35. On 25 September 2023, the Respondent filed its further submission on the Disqualification Proposal together with Exhibit R-0034 and Legal Authorities RL-0068 to RL-0074.

III. THE PARTIES' POSITIONS

A. THE CLAIMANT'S POSITION

36. The Claimant bases its proposal for disqualification of Prof. Knieper pursuant to Article 57 of the ICSID Convention on an alleged appearance of a manifest lack of independence and impartiality, which are among the qualities required of arbitrators under Article 14(1) of the ICSID Convention. Under Article 57 of the ICSID Convention, and relying on the challenge decision in the ICSID arbitration in *Caratube v Kazakhstan*, the Claimant contends that 'Dr. Knieper should be disqualified if 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."'[1]

37. The Claimant invokes three grounds in support of its Disqualification Proposal: *first*, that Prof. Knieper is acting as an expert witness for Turkmenistan in two pending disputes; *second*, that Prof. Knieper has personal connections to key Turkmen officials whose actions will be subject to scrutiny in this arbitration; and *third*, that Prof. Knieper has made public comments praising the Turkmen government and key officials, in particular its former President Berdimuhamedov, in a way that shows that he is predisposed to view Turkmenistan and its conduct favourably. In the Claimant's view, these three grounds, whether taken individually or collectively, warrant Prof. Knieper's disqualification.[2]

(1) Prof. Knieper's Appointment as Expert

38. In respect of the first ground—acting in parallel to the appointment as arbitrator in the present proceeding as a party-appointed expert for Turkmenistan in two other pending proceedings, which Prof. Knieper disclosed when accepting his appointment as arbitrator—the Claimant contends that '[f]rom the perspective of a reasonable third party, this situation creates an evident or obvious appearance of lack of impartiality or independence.'[3] The Claimant argues that even though Prof. Knieper insists that he acts as an independent expert witness in both other disputes, this involvement 'directly engages his independence and impartiality – not because Dr. Knieper will consciously choose to favor Turkmenistan in this arbitration, but because acting as a paid expert for, and taking instruction from, Turkmenistan in one case while serving as arbitrator in a concurrent case

[1] The Claimant's Submission in Support of Proposal to Disqualify Dr. Rolf Knieper (23 August 2023) (Claimant's Submission), para 18 (relying on *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan (II)*, ICSID Case No ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (20 March 2014), para 57 (Exhibit CL-0130); The Claimant's Additional Submission in Support of Proposal to Disqualify Dr. Rolf Knieper (20 September 2023) (Claimant's Additional Submission), para 8.

[2] Claimant's Submission, para 23.

[3] Ibid, para 24. See further Claimant's Additional Submission, paras 10-67.

involving the same party creates an evident and obvious appearance of dependence and bias.'[4]

39. The Claimant points to the fact that, even as an independent expert, Prof. Knieper is being paid and instructed by Turkmenistan, which in itself creates an evident and obvious appearance of dependence or bias.[5] In the Claimant's view, '[t]o a reasonable bystander, Dr. Knieper would appear to be influenced by external factors – *i.e.*, his obligations to Turkmenistan in two concurrent disputes – and not just the merits of this arbitration. This is a textbook case of the appearance of a conflict of interest, notwithstanding Dr. Knieper's subjective belief that his activities would not compromise his independence and impartiality.'[6]

40. To support its position in respect of this first ground, the Claimant points to other similar situations in which challenges have been upheld. In particular, it invokes two challenges decided by the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) in which ongoing expert work under the instruction of counsel acting in an arbitration led to the disqualification of an arbitrator because this raised reasonable doubts as to his independence and impartiality as an arbitrator.[7] The Claimant also relies on the decision by the *ad hoc* Committee in *Eiser v Spain* to support the proposition that 'an arbitrator's simultaneous participation in two concurrent cases in a different role called into question his independence and impartiality.'[8]

41. In addition, the Claimant points to the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, which was adopted in July 2023. Its Article 4(1) states in part that 'an Arbitrator shall not act concurrently as a legal representative or

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4 Claimant's Submission, para 44.

5 Ibid, para 27.

6 Ibid, para 30.

7 Ibid, paras 31-32 (relying on SCC Arbitration 2017/201, cited in SCC Practice Note 2016-2018, p 24 (August 2019) (Exhibit CL-0141) and SCC Arbitration 2013/192, cited in SCC Practice Note 2013-2015, p 8 (2016) (Exhibit CL-0140)).

8 Claimant's Additional Submission, para 47 (relying on *Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment (11 June 2020) (Exhibit CL-0131)).

an expert witness in any other proceeding involving … [t]he same or related party (parties)' without the consent of the disputing parties.[9] This confirms, the Claimant states, that 'an arbitrator serving as an expert in these circumstances has an objective conflict of interest or the appearance thereof.'[10]

42. Similarly, the Claimant contends that also the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), which the Respondent has pointed to as suggesting that parallel appointments as arbitrator and expert were innocent, exclude an arbitrator from serving on a tribunal because of a conflict of interest under General Standard 2 if he or she is 'influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision,' even though parallel appointments as arbitrator and expert are not mentioned as examples in any of the lists that form part of the IBA Guidelines.[11] The Claimant adds, however, that in the context of an ongoing update of the IBA Guidelines, the IBA Guidelines and Rules Subcommittee has proposed an addition to the Guidelines' Orange List that would cover specifically the situation that '[t]he arbitrator currently serves, or has acted within the past three years, as an expert for one of the parties, or an affiliate of one of the parties in an unrelated matter.'[12]

43. The Claimant argues that its case for proposing the disqualification of Prof. Knieper due to his appointment as expert is particularly strong for three reasons:[13]

44. *First*, Prof. Knieper's expert work is relatively recent and his obligations as an expert to Turkmenistan have not concluded. This is particularly true of the dispute in *Chemix v Turkmenistan* where the Amsterdam Court of Appeals has confirmed a hearing to address Prof. Knieper's expert report, indicating that further questions for him may be raised as the

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9 Claimant's Submission, para 34 (quoting from Draft Code of Conduct for Arbitrators in International Investment Dispute Resolution and Commentary (28 April 2023) (Exhibit CL-0143). See also Claimant's Additional Submission, paras 29-37.

10 Claimant's Submission, para 37.

11 Claimant's Additional Submission, para 40 (quoting the IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2 (Exhibit CL-0144)).

12 Ibid, para 43 (relying on the IBA Guidelines on Conflicts of Interest in International Arbitration Proposed Amendments for Public Consultation (September 2023) (Exhibit CL-0150)).

13 Ibid, paras 54-67.

case proceeds, and stating that the parties would have further opportunities to debate the expert opinion.[14] The Claimant further points to the risk of *ex parte* communications between Prof. Knieper and the Respondent because of his continued responsibilities as an expert witness for Turkmenistan in the other two disputes.[15]

45. *Second*, the Claimant points out that Prof. Knieper's expert opinions in the two other proceedings relate to issues that are relevant in the present arbitration. In *Chemix v Turkmenistan*, Prof. Knieper's expert opinion addresses, the Claimant contends, the issue of whether certain contracts needed to be registered with a Turkmen authority to be operative, which 'will be an important issue for this Tribunal to consider.'[16] Similarly, the Claimant argues, Prof. Knieper's expert opinion in *Turkmenhimiya v Belgorkhimprom* may overlap with issues that are relevant in the present arbitration, as both proceedings involve issues of interpretation of a construction contract governed by Turkmen law and the determination of whether breach of such contract has occurred.[17]

46. *Third*, the Claimant stresses that counsel representing the Respondent in the present arbitration are the same counsel as those representing Turkmenistan, respectively a Turkmen state enterprise, in the disputes in which Prof. Knieper has been appointed as expert. For the Claimant, 'this compounds the concerns created by Dr. Knieper's appointment … Just as Dr. Knieper has obligations to Turkmenistan as the party that instructs him as an expert witness in the pending disputes, he has obligations to the counsel that instructs him – the same counsel representing Turkmenistan in this case. Dr. Knieper's obligations to Turkmenistan's counsel are inherently inconsistent with his duties as an arbitrator.'[18]

14 Claimant's Submission, paras 39-42.
15 Ibid, para 45.
16 Ibid, para 47.
17 Ibid, paras 48-50.
18 Ibid, para 51.

(2) Prof. Knieper's Personal Connections

47. In respect of the second ground—Prof. Knieper's personal connections to Turkmen officials whose actions will be subject to scrutiny in this arbitration—the Claimant points out that Prof. Knieper, as part of his advisory work for the German government when implementing legal and judicial reform projects in Turkmenistan, in particular his work on the country's Civil Code from 1993 onwards, 'developed personal connections to individual Turkmen officials who played a role in destroying İmeks's investment in Turkmenistan, which is at the core of this arbitration. These personal connections raise objective questions regarding Dr. Knieper's ability to judge Turkmenistan's actions with the requisite independence and impartiality.'[19]

48. The Claimant invokes in particular connections developed to Mr. Rasit Meredov, who was the Minister of Foreign Affairs and Deputy Chairman of the Cabinet of Ministers during the 2009-2010 period when Turkmenistan, the Claimant alleges, destroyed İmeks's investment. Based on Prof. Knieper's observations, the Claimant contends, 'it is clear that Dr. Knieper had a series of interactions with Mr. Meredov stretching over 15 years, particularly during a four-year period when they were counterparts in a legal reform project headed by Dr. Meredov. This personal connection creates an appearance of a lack of independence and impartiality for Dr. Knieper, given that it is undisputed that Mr. Meredov participated in the May 2009 Cabinet of Ministers meeting in which İmeks alleges the decision was made to target and destroy İmeks's investments in Turkmenistan.'[20] The connections with Mr. Meredov, the Claimant adds, likely also resulted in Prof. Knieper receiving the 'Gairat' medal for his work on the Civil Code.[21]

49. In addition, the Claimant alleges that Prof. Knieper has personal connections to other Turkmen officials, namely Mr. Hallyýew, a former Deputy Minister of Justice and Director of the National Institute for Democracy and Human Rights, who likely attended the May 2009 meeting or otherwise participated in making or implementing decisions that allegedly

19 Ibid, para 53. See further Claimant's Additional Submission, paras 68-78.

20 Claimant's Additional Submission, para 69.

21 Ibid, para 72.

destroyed İmeks's investment. Prof. Knieper, the Claimant contends, had worked personally with Mr. Hallyýew in the preparation of a commentary on the Turkmen Civil Code and likely met with Mr. Hallyýew on numerous other occasions, including at the occasion of signing a memorandum of understanding between the National Institute for Democracy and Human Rights and Prof. Knieper's program in 2008. The Claimant concludes that these 'are likely only a small fraction of Dr. Knieper's connections to Turkmen officials involved in events relating to this arbitration.'[22]

50. In the Claimant's view, these circumstances resemble those that led to Prof. Knieper's disqualification in *Big Sky Energy Corporation v Kazakhstan*, where the unchallenged arbitrator upheld a challenge because of Prof. Knieper's 'past professional relationship with two members of the Kazakh Supreme Court who took part in a 2008 judgment that is at the centre of Big Sky's ICSID claim for judicial expropriation.'[23]

(3) Prof. Knieper's Public Statements

51. In respect of the third ground—Prof. Knieper's favourable public statements about the Turkmen government and its officials—the Claimant alleges that Prof. Knieper 'has made a multitude of statements over many years showing that he is predisposed to view the Turkmen government and its officials favorably.'[24] The Claimant points specifically to statements Prof. Knieper made in a 2008 interview to a Turkmen newspaper, in which he praised then President Berdimuhamedov, inter alia, for his leadership in 'making great efforts to improve national legislation, bringing it into line with generally accepted international norms and standards', and his 'unswerving adherence to the universally recognized norms of international law, strengthening democratic traditions in the Turkmen society…'[25]

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22 Claimant's Submission, para 57.

23 Ibid, para 58 (quoting from Global Arbitration Review, 'Arbitrator Disqualified over Ties to Kazakh Judges' (8 May 2018), p 1 (Exhibit C-0226)).

24 Ibid, para 59. See further Claimant's Additional Submission, paras 79-85.

25 Ibid, para 60 (quoting Neutral Turkmenistan, No. 27 (31 January 2008) (Exhibit C-0216)).

52. For the Claimant, these statements of Prof. Knieper, as well as similar ones made in another interview in 2007, 'are troubling because İmeks alleges that President Berdimuhamedov was personally behind the targeting of Turkish contractors, including İmeks, when economic conditions in Turkmenistan deteriorated in 2009-2010.'[26] The Claimant contends that President Berdimuhamedov also presided over the May 2009 Cabinet of Ministers meeting in which decisions to take action against İmeks were allegedly taken. For the Claimant, '[i]t is difficult to see how Dr. Knieper can independently and impartially evaluate President Berdimuhamedov's conduct in light of Dr. Knieper's prior characterization of the President as a distinguished reformer and scholar. At minimum, Dr. Knieper's comments create an objective appearance of dependence and bias, which is grounds to disqualify him from this Tribunal.'[27] In addition, the Claimant points to a variety of other statements by Prof. Knieper that it qualifies as 'glowing comments regarding the Turkmen government and its officials.'[28]

53. The Claimant concludes from these statements that they 'would lead a reasonable observer to conclude that Dr. Knieper has an evident or obvious appearance of a lack of independence and impartiality. Even if this is not the only interpretation of Dr. Knieper's comments, it is a reasonable interpretation. This is sufficient to warrant his disqualification.'[29] In support of its position, the Claimant points to a challenge in *Perenco Ecuador Limited v Ecuador* against Judge Brower, where it was found that comments made by Judge Brower in an interview about the respondent State had 'the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to Judge Brower's impartiality.'[30]

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26 Ibid, para 61.

27 Ibid, para 62.

28 Ibid, para 66.

29 Ibid.

30 Ibid, para 65 (quoting *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Decision on Challenge of Charles N. Brower (8 December 2009), para 48 (Exhibit CL-0134)).

B. THE RESPONDENT'S POSITION

54. The Respondent opposes the Claimant's Disqualification Proposal. While agreeing with the Claimant on the legal standard that must be met in the present situation for the disqualification of an arbitrator, namely 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,'[31] the Respondent disagrees that the circumstances brought forward by the Claimant meet that threshold. In its view, the Claimant's proposal relies on 'mere "speculation, presumption or the subjective belief of the requesting party" and assumptions about purported "predispositions".'[32] In the Respondent's view, neither of the grounds on which the Claimant based its Disqualification Proposal meets the legal standard applicable under Article 57 of the ICSID Convention.

(1) Prof. Knieper's Appointment as Expert

55. The Respondent submits that concurrent appointments as expert and arbitrator are not per se a source of conflict of interest requiring disqualification. Further, the Respondent points out that *Chemix* and *Turkmenhimiya*, the cases in which Prof. Knieper serves as expert, are wholly unrelated to the present case, do not involve questions on Turkmen law that are disputed in the present arbitration, and concern expert appointments that occurred over four years ago, with Prof. Knieper's work being now substantially completed.[33] In the Respondent's view, '[t]he mere fact that Dr. Knieper is involved as an independent legal expert in two unrelated cases involving Turkmenistan, which do not involve the same legal issues as the present case, does not give rise to the appearance of a conflict of interest, nor call into question Dr. Knieper's independence or impartiality, let alone manifestly.'[34]

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[31] The Respondent's Opposition to Claimant's Proposal to Disqualify Dr. Knieper (8 September 2023) (Respondent's Opposition), para 10 (quoting Claimant's Submission, para 18); The Respondent's Reply Submission in Further Opposition to Claimant's Proposal to Disqualify Dr. Rolf Knieper (25 September 2023) (Respondent's Reply Opposition), para 5 (relying on Claimant's Additional Submission, para 9).

[32] Respondent's Opposition, para 11 (quoting *Eugene Kazmin v Republic of Latvia*, ICSID Case No ARB/17/5, Decision on the Proposal to Disqualify All Members of the Tribunal (14 October 2020), para 72 (Exhibit RL-0044).

[33] Ibid, para 2.

[34] Respondent's Opposition, para 4. See further Respondent's Reply Opposition, paras 6-49.

56. The Respondent further points out that one needs to take into account the fact that Prof. Knieper has been appointed as arbitrator in more than 40 cases, including 28 at ICSID; the two appointments as experts in *Chemix* and *Turkmenhimiya* can therefore 'not give rise to a relationship of dependence on Turkmenistan or its counsel.'[35] This, the Respondent argues, is supported by the practice on repeat appointments, such as in *Merck v Ecuador* or *Highbury v Venezuela*, where the unchallenged arbitrators had rejected challenges to Judge Schwebel (*Merck*) and Professor Stern (*Highbury*), concluding that the previous appointments at stake (two appointments as arbitrator and two as expert by the same counsel in *Merck*; nine appointments as arbitrator by the same firm and in some cases for the same respondent in *Highbury*) would not affect the challenged arbitrator's independence or impartiality.[36] Personal acquaintance between the arbitrator and the appointing party appointing, the Respondent adds, are not sufficient to question the arbitrator's impartiality.[37]

57. The Respondent further points out specifically that Prof. Knieper has been engaged as an independent expert in the two other proceedings. This independence, the Respondent suggests, guards against any interference by, or dependence on, the parties in the other disputes and hence cannot negatively affect the duties of independence and impartiality of Prof. Knieper in his role as an arbitrator in the present proceedings.[38] In this context, the Respondent invokes the IBA Guidelines on Conflicts of Interest, which do not mention concurrent appointments as expert and arbitrator in unrelated proceedings as creating an appearance of conflict of interest, nor would the IBA Guidelines even require disclosure of this fact.[39] In the Respondent's view, the cases cited by the Claimant—*Eiser*, as well the

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35 Respondent's Opposition, para 32.

36 Ibid, paras 33-38 (discussing *Merck Sharpe & Dohme (I.A.) Corporation v Republic of Ecuador*, PCA Case No 2012-10, Decision on Challenge to Arbitrator Judge Stephen M Schwebel II (8 August 2012) (Exhibit CL-0133) and *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v Bolivarian Republic of Venezuela (II)*, ICSID Case No ARB/14/10, Decision on the Proposal for Disqualification of the Professor Brigitte Stern (9 June 2015) (Exhibit RL-0058)). See further Respondent's Reply Opposition, paras 17-19.

37 Respondent's Opposition, para 32 (relying on *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Decision on Respondent's Proposal to Disqualify Dr. Yoram Turbowicz (19 March 2010), para 69 (Exhibit RL-0053).

38 See ibid, paras 17-38. See also Respondent's Reply Opposition, paras 14-16.

39 Respondent's Opposition, para 19. See also Respondent's Reply Opposition, paras 31-32.

two challenges decided by the SCC Board—are not comparable to the present situation: *Eiser* involved a 'longstanding, 15-year relationship with 10 engagements as expert and counsel and a half dozen joint appointments as arbitrator and expert by the same party;'[40] the SCC cases involved the lack of disclosure of ongoing appointments as expert by the same law firm as that in the arbitration, respectively multiple appointments from which the individual in question 'received significant fees'.[41] The UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, the Respondent adds, is only binding by consent of the disputing parties, which is not the case here; besides, the ban on double-hatting contained in the Code, including concurrently serving as arbitrator and expert, is not uniformly accepted.[42]

58. The Respondent further argues that receiving a fee for an expert opinion would not interfere with the expert's independence, neither would receiving instructions by counsel.[43] Moreover, Prof. Knieper's work as expert, while ongoing,[44] is 'essentially concluded,' with the claimant in *Chemix* being merely given an opportunity to rebut Prof. Knieper's opinions and the court possibly deciding in the future on further questions for the experts on opinions given in the past.[45] The Respondent also points out that the prohibition of *ex parte* communications only relates to the arbitration proceedings, but not other matters, such as Prof. Knieper's engagement as expert.[46] Furthermore, the Respondent contends that the Claimant's arguments about the overlap of issues addressed in Prof. Knieper's expert opinions in *Chemix* and *Turkmenhimiya* and in the present arbitration are 'fabricate[d],' 'far-fetched,' and 'simply absurd.'[47] The involvement of the same counsel, finally, is not

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40 Respondent's Opposition, para 25. See also Respondent's Reply Opposition, para 36.

41 Respondent's Opposition, para 27. See also Respondent's Reply Opposition, paras 27, 37.

42 Respondent's Opposition, paras 28-29. See also Respondent's Reply Opposition, paras 29-30, 33-34.

43 Respondent's Opposition, paras 40-42. See also Respondent's Reply Opposition, para 20.

44 See Respondent's Reply Opposition, para 41.

45 Respondent's Opposition, para 43.

46 Ibid, paras 44-46 (relying on a challenge decision in *Saipem v Bangladesh*, as reported Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer Law International 2012) para 6-49 (Exhibit RL-0063)). See also Respondent's Reply Opposition, paras 22-28.

47 Respondent's Opposition, paras 47-51 (quotes at paras 48, 49 and 51). See also Respondent's Reply Opposition, paras 42-47.

'an objective fact[] from which a reasonable interference of partiality or dependence can be drawn.'[48]

(2) Prof. Knieper's Personal Connections

59. In respect of the Claimant's allegations on Prof. Knieper's personal connections to Turkmen officials whose conduct is alleged to be subject to review in the present arbitration, the Respondent contends that no evidence exists that supports any personal connections between Prof. Knieper and the two named Turkmen officials; in addition, neither of the two individuals have any relationship to the Claimant's case and have not been mentioned in the Claimant's submissions.[49] Distinguishing the present situation from that in *Big Sky v Kazakhstan*, where the unchallenged arbitrators found Prof. Knieper's relationship with two Kazakh judges, who participated in measures challenged in the arbitration, to be 'more than casual in nature,'[50] the Respondent contends that no such personal connections existed with the individuals the Claimant had named in its Disqualification Proposal.

60. With respect to Mr. Meredov, the Respondent argues, connections were of a purely professional nature and included attendance at working group meetings relating to legal reform projects in Turkmenistan between 1994 and 1998, a conference on international arbitration in Turkmenistan in 2005, a conference on Turkmenistan's accession to multilateral conventions in 2008, and a formal introductory meeting for which Prof. Knieper accompanied the GIZ's new head of programme in 2009.[51] With respect to Mr. Hallyýew, the Respondent points out, there is no evidence that Prof. Knieper ever met him, except once in 2016.[52] Mr. Hallyýew only became Deputy Minister of Justice and Director of the National Institute for Democracy and Human Rights in 2014 and 2015

48 Respondent's Opposition, para 52.

49 Ibid, para 5. See also Respondent's Reply Opposition, paras 50-62.

50 Respondent's Opposition, paras 55-69 (quoting at para 57, Global Arbitration Review, 'Arbitrator Disqualified over Ties to Kazakh Judges' (8 May 2018), p 1 (Exhibit C-0226)). See also Respondent's Reply Opposition, para 60.

51 Respondent's Opposition, paras 59, 62-64. See also Respondent's Reply Opposition, paras 52-55.

52 Respondent's Opposition, para 64.

respectively, and can thus not have attended meetings and seminars from 2008 to 2010 in that function, as alleged by the Claimant.[53] Similarly, there is no evidence that Prof. Knieper worked with Mr. Hallyýew after the 2016 meeting.[54]

61. Any connections with Turkmen officials, the Respondent concludes, thus remained within the limits of what tribunals routinely reject as the basis for challenges to arbitrators.[55] In addition, the Respondent points out that, even if Prof. Knieper had had personal connections to Mr. Meredov and Mr. Hallyýew, which he had not, there is no evidence that either of the two individuals were involved in the May 2009 Cabinet of Ministers meeting, or any other measures, that the Claimant relies on as giving rise to the destruction of its investment.[56]

(3) Prof. Knieper's Public Statements

62. In respect of the last ground on which the Claimant basis its Disqualification Proposal—Prof. Knieper's public statements about Turkmenistan's government and key officials—the Respondent argues that there is no merit in the suggestion that 'generic comments dating approximately a decade ago about the Turkmen government's efforts to reform its Civil Code point to "an evident or obvious appearance of a lack of independence or impartiality."'[57] Moreover, unlike in *Perenco v Ecuador* and *Canfor v United States*, the Respondent contends, Prof. Knieper has not commented on the merits of the claims, which was at the origin of the challenge against Judge Brower in *Perenco* and that of Mr. Harper in *Canfor*.[58]

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53 Ibid, para 60.

54 Ibid, para 61.

55 Ibid, para 65 (relying on *Suez, Sociedad General de Aguas de Barcelona S.A. and others v The Argentine Republic*, ICSID Cases Nos ARB/03/17 and ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008), paras 32-33 (Exhibit RL-0064)).

56 Ibid, paras 66-68. See also Respondent's Reply Opposition, paras 56-57.

57 Respondent's Opposition, para 6. See also Respondent's Reply Opposition, paras 63-69.

58 Respondent's Opposition, para 72 (relying on *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Decision on Challenge of Charles N Brower (8 December 2009) (Exhibit CL-0134)). See also Respondent's Reply Opposition, para 65.

63. The Respondent points out that Prof. Knieper's comments are not only eight years old, but relate to legal reform in national legislation which are not at issue in this arbitration, and were made in his capacity as a member of European and German programs for the modernization of Turkmenistan's legal framework.[59] In Respondent's view, '[r]elaying the opinion of the organization Dr. Knieper worked for, in relation to the particular, unrelated measures adopted in the context of the reform of Turkmenistan's legal framework, cannot remotely give rise to an appearance that Dr. Knieper holds "predisposed" views of the specific actions of Turkmenistan at issue in this case.'[60] Besides, Prof. Knieper also made statements about Turkmenistan's legal reforms that were not positive.[61]

64. Finally, as regards comments on former President Berdimuhamedov, the Respondent points out, the Claimant's Disqualification Proposal fails to show any nexus between the former President and the alleged destruction of the Claimant's investment; the record of the 2009 Cabinet of Ministers meeting rather shows that 'in the midst of receiving information on a wide range of developments in the country, the President was given only a superficial, high-level overview of multiple construction projects in Ashgabat, and did not demonstrate any familiarity with İmeks or any other specific projects.'[62]

C. OBSERVATIONS OF PROF. KNIEPER

65. Prof. Knieper submitted observations on the Claimant's Disqualification Proposal and the Respondent's opposition. In these observations, Prof. Knieper addressed three sets of issues: 1) the scope, nature, and general context of his work as an advisor in the legal reform process in Turkmenistan; 2) the nature of his contacts to Mr. Meredov, Mr. Hallyýew, and former President Berdimuhamedov; and 3) the nature of his role as an expert in the disputes in *Chemix* and *Turkmenhimiya*.

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59 Respondent's Opposition, paras 74-75.

60 Ibid, para 77.

61 Respondent's Reply Opposition, para 64.

62 Ibid, para 68.

66. *First*, Prof. Knieper stresses his independence from Turkmenistan when performing advisory work on legal reforms, including in respect of the drafting of the country's new Civil Code. As Prof. Knieper points out, what was required for a Western advisor on legal reform in Turkmenistan, as well as in other former Soviet republics, 'besides solid knowledge of substantive and of comparative law, intellectual independence, mental integrity, honesty, and the capacity of both empathy and objectivity to listen to and learn from many interested actors in different positions.'[63] Prof. Knieper adds that he performed advisory work as part of a German government-funded program. He further affirms that he currently does not advise Turkmenistan. His last visit, Prof. Knieper states, dates back to 2019, when he was asked to comment on efforts in the country to amend the Civil Code; his last written advisory work dates back to 2021, when he commented, at the request of a German-government-funded program, on draft legislation.[64] To describe his involvement in Turkmenistan, Prof. Knieper concludes, as 'decades of work for Turkmenistan' creates the wrong impression.[65]

67. *Second*, Prof. Knieper explains the nature of his connections to Turkmen officials. As regards Mr. Meredov, who was, during the 1990s, a member of parliament and the lead of the legislative reform commission, and only later became a member of government, meetings with him were limited to the following: 1) working group meetings concerning the reform of Turkmenistan's Civil Code until 1998; 2) an encounter in 2005 at a conference on international arbitration in Turkmenistan in 2005; 3) an encounter at a conference in Turkmenistan in 2008 where Prof. Knieper presented a paper; and 4) a meeting in 2009 when Prof. Knieper accompanied the new head of GIZ for an introductory meeting in Mr. Meredov's office.[66] In respect of Mr. Hallyýew, Prof. Knieper states that he 'barely know[s] him.'[67] While not wanting to rule out that he may have met him in the context of work on a commentary on Turkmenistan's Civil Code in 2016, Prof. Knieper

63 Observations on Claimant's and Respondent's Submissions on My Disqualification (15 September 2023), para 4.

64 Ibid, para 16.

65 Ibid, para 6 (quoting Claimant's Submission, para 7).

66 Ibid, para 19.

67 Ibid, para 12.

denies that he has assisted Mr. Hallyýew in his contributions to the Commentary.[68] Finally, Prof. Knieper states that he met former President Berdimuhamedov only once around 2008, when he was Minister of Health, and prepared a mission to Germany to meet health officials; their conversation was limited to life in Germany, through an interpreter.[69] In sum, Prof. Knieper concludes, he 'can assure [the Claimant] with certainty that no such personal connections exist, neither with these two persons or with other Turkmen officials.'[70]

68. *Third*, Prof. Knieper explains his understanding of the role of an expert, generally and specifically in the two disputes in *Chemix* and *Turkmenhimiya*. Prof. Knieper states that he only assumes expert work on the basis of the understanding that his role as an expert is not that of supporting the party appointing him, but that of an independent expert. In that context, the appointing party 'defines the issues of the testimony by asking the expert to answer questions that it formulates, and it has discretion to use or not to use the answers in the proceedings; it may also give instructions as to the assumptions of facts that are disputed. However, it must not give instructions on the substance of the witness statement.'[71]

69. Prof. Knieper continues that

> *Each time I accepted to act as an expert witness, I made this clear to the party that proposed to appoint me, and counsel for Turkmenistan will confirm this if asked. Each time I insisted that I am free to answer the questions on law and to interpret the law as if I were writing a scientific work for publication, where I am also not guided by an objective to support one or the other view or interest or outcome of a dispute. I strongly believe that an expert witness has no obligation of a specific result to accommodate the appointing party.*
>
> *Contrary to what Claimant writes in paragraphs 27 and 24 of its Disqualification Submission, I was not 'paid and instructed by*

[68] Ibid, para 20.
[69] Ibid, para 21.
[70] Ibid, para 18.
[71] Ibid, para 23.

> *Turkmenistan' to fulfil 'ongoing obligations' in the sense of support to its case. On the contrary, I would breach my duties as an independent expert if I gave an opinion not because I am convinced of its correctness but because it supports the appointing party. I do not feel pressure on my independence, as Claimant suggests, because I created the very environment by making it very clear that I take independence as a legal obligation seriously.*[72]

70. Finally, Prof. Knieper points out that any risk of *ex parte* communications was not specific to situations where the arbitrator had an ongoing relationship with counsel and adds that he 'can point to [his] record and can represent that [he] will not engage in *ex parte* communications on Turkmen law, applicable in this case.'[73]

IV. ANALYSIS

(1) Applicable Legal Standard

71. The legal framework applicable to the present Disqualification Proposal is set out in the ICSID Convention, namely its Articles 57, 58, and 14(1), and in Rule 9 of the Arbitration Rules (2006). Article 58 of the ICSID Convention confers authority for deciding on the Disqualification Proposal to the Unchallenged Arbitrators. Rule 9(1) of the Arbitration Rules (2006) requires proposals for disqualification to be made 'promptly'. Article 57 in conjunction with Article 14(1) of the ICSID Convention sets out the reasons for which the disqualification of arbitrators can be sought, including for lack of 'high moral character', lack of 'competence in the fields of law, commerce, industry or finance', as well as lack of independence or impartiality.

72. In the present case, there is no doubt that the Claimant has submitted the Disqualification Proposal promptly, as required by Rule 9(1) of the Arbitration Rules (2006). Merely three days after the Claimant has been informed of Prof. Knieper's appointment, it requested his resignation based on the appearance of a lack of independence and impartiality, and

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72 Ibid, paras 24-25.

73 Ibid, para 28.

followed up, shortly after Prof. Knieper declined to resign, with a formal proposal for disqualification.

73. In respect of the apparent lack of independence and impartiality, the applicable framework is well-settled in ICSID practice. In *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, the contours of the legal framework have been set out as follows:

> *Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both* "protect parties against arbitrators being influenced by factors other than those related to the merits of the case". *Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.*
>
> *The applicable legal standard is an* "objective standard based on a reasonable evaluation of the evidence by a third party". *As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.*
>
> *Finally, regarding the meaning of the word "manifest" in Article 57 of the Convention, a number of decisions have concluded that it means "evident" or "obvious," and that it relates to the ease with which the alleged lack of the qualities can be perceived.*[74]

74. In short, as formulated in *Caratube v Kazakhstan*, for a proposal for disqualification for lack of independence and impartiality of an arbitrator to be upheld, the party bringing the challenge, 'must 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.'[75]

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[74] *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal (12 November 2013), paras 59-61 (internal references omitted) (Exhibit CL-0128).

[75] *Caratube International Oil Company LLP and Mr. 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), para 57 (Exhibit CL-0130).

75. The Parties agree with the formulation of the test set out in *Blue Bank* and *Caratube*.[76] They disagree, however, on how that test applies in respect of the three grounds on which the Claimant bases its Disqualification Proposal and whether the grounds reach the threshold of resulting in the appearance of a manifest lack of independence and impartiality, as required under Article 57 of the ICSID Convention. The Parties also disagree on the relevance and import of certain soft-law instruments, namely the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and the IBA Guidelines.

76. The Unchallenged Arbitrators endorse the test set out in *Blue Bank* and *Caratube*. They only wish to note that, in their view, the requirement in Article 57 of the ICSID Convention that the lack of qualities required by Article 14(1) of the Convention must be 'manifest' should not be mistaken to mean that that lack must be capable of being 'discerned with little effort and without deeper analysis,' as stated in *EDF v. Argentina*, which the Respondent referred to.[77] A conclusion that the lack of independence and impartiality is 'manifest' can, as with the same element in Article 52(1)(b) of the ICSID Convention, also be the result of 'extensive argumentation and analysis … as long as it is sufficiently clear and serious.'[78] 'Manifest' in Article 57 of the ICSID Convention simply means that the result of the analysis as to the lack of independence and impartiality, or the appearance thereof, is 'evident' or 'obvious' from the perspective of a reasonable observer, not that the process of analysis must necessarily be easy or simple, or that little reasoning or argumentation is needed to justify a disqualification.

77. In substance, the applicable test under Article 57 of the ICSID Convention, as set out in *Blue Bank* and *Caratube*, is unlikely to differ from related tests applicable in other international arbitration texts, such as the 'justifiable doubts' standard under Article 12(1)

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[76] See Claimant's Submission, para 18; Claimant's Additional Submission, para 8; Respondent's Opposition, para 13.

[77] See Respondent's Reply Opposition, para 58 (quoting *EDF International SA and others v Argentine Republic*, ICSID Case No ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (25 June 2008), para 68 (Exhibit RL-0042)).

[78] Cf *Victor Pey Casado and Foundation "Presidente Allende" v Republic of Chile*, ICSID Case No ARB/98/2, Decision on Annulment (18 December 2012), para 70.

of the UNCITRAL Arbitration Rules (2013) or under General Standard 2(b) in the IBA Guidelines. These instruments, accordingly, provide useful guidance in concretizing when an appearance of a manifest lack of independence and impartiality exists.[79] The same holds true in respect of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, although care must be taken to verify to which extent the Code codifies existing standards or introduces new ones. In any event, none of these instruments are binding in the present arbitration. The decision of the Unchallenged Arbitrators on the three grounds brought forward by the Claimant in the Disqualification Proposal is therefore solely made in accordance with Article 57 of the ICSID Convention.

(2) Prof. Knieper's Appointment as Expert

78. What is at stake in respect of the Claimant's first ground for proposing the disqualification of Prof. Knieper is a specific form of double-hatting. Considering the Parties' submissions, as well as Prof. Knieper's observations, it is uncontested that Prof. Knieper is acting as an expert witness on Turkmen law for the Respondent in one dispute (*Chemix*) that was pending before the Dutch courts at the time of his appointment as arbitrator in the present proceedings. While his expert opinion in the case has been rendered several years ago, his involvement was ongoing at the time and appears to continue today. In a second proceeding, also pending, under the SCC Arbitration Rules (*Turkmenhimiya*), Prof. Knieper was acting as an expert witness on Turkmen law for one of the Respondent's state-owned companies when he was appointed as arbitrator in the present proceedings. This engagement was equally ongoing at the time and appears to continue today. In addition to Prof. Knieper's double-hatting, in both disputes, counsel for the Respondent in this arbitration was acting as counsel for Turkmenistan and Turkmenistan's state-owned company, and appears to continue acting as such today.

[79] This approach is confirmed in ICSID practice as well. See eg *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal (12 November 2013), para 62 (Exhibit CL-0128); *Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC v United States of America*, ICSID Case No ARB/21/11, Decision on the Claimants' Proposal to Disqualify Mr. M. as Arbitrator (20 December 2022), para 69 (Exhibit CL-0146).

79. To start with, the Unchallenged Arbitrators wish to state that they find no reason to impugn Prof. Knieper's professional integrity, nor have they found any proof of actual bias or an actual lack of independence and impartiality. But the issue is not whether the arbitrator whose disqualification is sought subjectively feels capable of adjudicating between the parties with full independence and impartiality. What is necessary as well under Article 57 of the ICSID Convention is that, from the perspective of a reasonable third party, there is not, as stated in *Caratube*, 'an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.'[80] The rationale for this high standard for the independence and impartiality of ICSID arbitrators can be gleaned from the famous dictum by the then Lord Chief Justice of England: 'Justice must not only be done, but must also be seen to be done.'[81] This dictum holds true not only for the administration of justice in the English courts, but in any system of adjudication, whether domestic or international, including in ICSID arbitration. It implies that not only an actual lack of independence and impartiality but an apparent lack compromises the proper administration of international justice. Such appearance, consequently, must result in the disqualification of any arbitrator who is at the origin of an appearance of dependence or bias, even if he or she were subjectively fully capable of adjudicating the case before them with full independence and impartiality.

80. Against the background of these considerations, in the view of the Unchallenged Arbitrators, Prof. Knieper's concurrent appointment as expert witness in a pending dispute for one of the parties to the present arbitration, in and of itself, constitutes a circumstance that gives rise to an appearance of a lack of independence and impartiality that requires upholding the Claimant's Disqualification Proposal. This appearance is compounded by the fact that counsel to the Respondent in the present arbitration also instructs Prof. Knieper as an expert witness in the two other pending disputes. The appearance of a lack of independence and impartiality is evident, as an objective third-party observer would

[80] *Caratube International Oil Company LLP and Mr. 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), para 57 (Exhibit CL-0130).

[81] *Rex v Sussex Justices*, ex parte *McCarthy* [1924] 1 KB 256.

conclude, based on a reasonable evaluation of the facts at hand, that there is the tangible appearance that factors other than those related to the merits of the case may influence the decision-making of Prof. Knieper as an arbitrator, even if this were in fact not the case.

81. In the view of the Unchallenged Arbitrators, the type of double-hatting at stake in the present case creates the obvious appearance that the arbitrator in question could be influenced by ongoing obligations he has in his role as an expert vis-à-vis the disputing party and its counsel that have appointed him as arbitrator.[82] Moreover, the risk of *ex parte* communications between the arbitrator and the appointing party, while they can take place in other contexts as well, are already pre-programmed and part of ongoing contractual relations. All of this compromises the appearance of independence and impartiality that reasonable third-party observers would expect to see in a proper system for the administration of international justice.

82. In this context, the Unchallenged Arbitrators note that the reasonableness of concluding that an appearance of a lack of independence and impartiality is evident is in line with Article 4(1) of the Code of Conduct for Arbitrators in International Investment Dispute Resolution, which, even though it is not binding in the present arbitration, indicates the growing perception that double-hatting as expert and arbitrator, certainly for the same party, compromises the independent and impartial administration of justice. This is so even though not all UN members active at UNCITRAL may have supported the inclusion of the ban on double-hatting that was incorporated into Article 4(1) of the Code.

83. The appearance of a lack of independence and impartiality is also not countered by the fact that Prof. Knieper is, as he has credibly stated in his observations, acting as an independent expert and not as a shadow-advocate for his appointing party who is merely disguised as an expert. In fact, the Unchallenged Arbitrators have no reason to doubt Prof. Knieper's approach to how he takes on and performs his expert appointments and that he insists on

[82] For a similar conclusion on the appearance of a lack of independence and impartiality in case of an ongoing relationship of an arbitrator in providing advice to a party on unrelated matters, cf *Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC v United States of America*, ICSID Case No ARB/21/11, Decision on the Claimants' Proposal to Disqualify Mr. M. as Arbitrator (20 December 2022), paras 85-86 (Exhibit CL-0146).

the highest professional standards, in particular in respect of his independence as an expert. There is also no concern that the two prior expert appointments of Prof. Knieper create any form of actual dependence on the Respondent or its counsel.

84. Yet, in the view of the Unchallenged Arbitrators, neither the nature of Prof. Knieper's expert appointments, nor whether the expert appointments are of such importance that they in fact create dependence, financial or otherwise, of the arbitrator/expert on the appointing party or its counsel is the issue. What counts is solely the appearance ongoing expert work for one of the parties creates from the perspective of a reasonable third-party observer. That observer will not differentiate between different types of expert appointments, but observe principally that there are ongoing contractual relations between an arbitrator and one of the disputing parties that can reasonably be perceived as influencing the decision-making as arbitrator. It is also not relevant how substantial compensation for the expert work may be. Again, what counts is the appearance of a lack of independence and impartiality that the ongoing involvement as expert for one of the parties creates for a reasonable third-party observer. Such an appearance is sufficient to meet the standard under Article 57 of the ICSID Convention, and, the Unchallenged Arbitrators conclude, such appearance is present in the case at hand.

85. Consequently, in application of Article 57 of the ICSID Convention, the Claimant's Disqualification Proposal of Prof. Knieper based on his concurrent appointment as expert for the Respondent, respectively an enterprise owned by the Respondent, in two other disputes is upheld.

(3) Prof. Knieper's Personal Connections

86. As regards the Claimant's second ground for disqualification, the Unchallenged Arbitrators have concluded that Prof. Knieper's personal connections to Turkmen officials have not been sufficiently substantiated so as to rise to the level to sustain a proposal for disqualification for the appearance of a manifest lack of independence and impartiality. As a matter of law, the Unchallenged Arbitrators agree that contacts between an arbitrator and representatives of a disputing party whose conduct is at issue in an investment arbitration

can give rise to the appearance of a manifest lack of impartiality, if those contacts were more than casual and involved a degree of familiarity or proximity between the arbitrator and the individual(s) in question that create the appearance that the individual's conduct, and the parties' connected claims, cannot anymore be judged objectively and impartially by the arbitrator, but become to be seen as being influenced by the personal relationship between the arbitrator and the concerned individual(s). This was the case, as reported, in *Big Sky Energy Corporation v Kazakhstan*, where the personal connections between Prof. Knieper and two Kazakh Supreme Court judges was more than casual and where the conduct under scrutiny in the arbitration concerned a decision of the court in which the two judges had participated.[83]

87. In the present proceedings, by contrast, the Claimant has not provided a sufficient factual basis for concluding that Prof. Knieper has personal connections that were more than casual with either Mr. Meredov or Mr. Hallyýew and that exhibited a degree of familiarity and proximity that creates the appearance of a manifest lack of impartiality in respect of Prof. Knieper's assessment of the Claimant's claim that Respondent's conduct was contrary to international law. Furthermore, it has not been sufficiently substantiated, in the view of the Unchallenged Arbitrators, that Mr. Meredov and Mr. Hallyýew were involved in the measures that allegedly interfered with the Claimant's investment.

88. As regards Mr. Meredov, the connections Prof. Knieper had with him appear to have been limited. Some of them were purely ephemeral, such as meetings during conferences in 2005 and 2008; other meetings, namely those relating to the reform of Turkmenistan's Civil Code, were certainly more frequent and structured, but equally have not been substantiated to reach the level where an objective observer would conclude that there is an appearance that the arbitrator lacks the capacity to adjudicate the disputing parties' submissions and assess evidence with full impartiality because he or she is too close to and familiar with the individual in question. In addition, unlike in *Big Sky*, the extent to which Mr. Meredov was involved in conduct that may fall to be considered in the present

[83] See Global Arbitration Review, 'Arbitrator Disqualified over Ties to Kazakh Judges' (8 May 2018), p 1 (Exhibit C-0226).

arbitration has not been established. While the Claimant claims that he may have been present during a meeting of a collective body, the May 2009 Cabinet of Ministers meeting, there is no allegation that Mr. Meredov was actually involved in conduct that the Claimant alleges to have resulted in an interference with its investment.

89. Similarly, in respect of Mr. Hallyýew, there is no factual basis for concluding that Prof. Knieper had personal connections that would create an appearance of a lack of impartiality. All that the Claimant could substantiate was one brief meeting between Prof. Knieper and Mr. Hallyýew in 2016 in a professional context, which does not, for a reasonable observer, rise to the level of Prof. Knieper's ability to assess the parties' conduct under the law applicable in this arbitration with full impartiality appearing to be compromised. Apart from that, no involvement of Mr. Hallyýew in any measures that allegedly interfered with the Claimant's investment has been substantiated.

90. Consequently, the Claimant's proposal for disqualification of Prof. Knieper based on the allegation of personal connections to Turkmen officials whose conduct may be subject to scrutiny in the present arbitration must be rejected.

(4) Prof. Knieper's Public Statements

91. As regards the Claimant's third ground for disqualification, the Unchallenged Arbitrators have concluded that the public statements made by Prof. Knieper about Turkmenistan's government and its key officials, in particular former President Berdimuhamedov, do not rise to the level to sustain a proposal for disqualification for the appearance of a manifest lack of independence and impartiality.

92. The Unchallenged Arbitrators agree that public statements by an arbitrator in principle are capable of resulting in the appearance of a manifest lack of independence and impartiality, even if they do not concern the specificities of the case and its merits, but more generally express bias, or the appearance thereof, in relation to one of the parties. This was the case in *Perenco v Ecuador*, where the Secretary-General of the Permanent Court of Arbitration found that the arbitrator in question, in a published interview, could reasonably be understood to have referred to the respondent State as 'recalcitrant,' which 'has negative

connotations beyond the mere recounting of a party's actions and would contribute to a reasonable person forming a justifiable doubt.'[84] It was the arbitrator's public statement alone, independently of any risk of prejudging the dispute on the merits, that the Secretary-General of the Permanent Court of Arbitration found to give rise to justifiable doubts about the arbitrator's impartiality.[85]

93. In the case at hand, however, the positive statements Prof. Knieper made about Turkmenistan's government generally, its compliance with international law, and the efforts it has made in legal and judicial reform, his commending former President Berdimuhamedov for his leadership and wisdom, and his expression of general friendship for the country cannot be equated with the type of comments at stake in *Perenco*. Prof. Knieper's statements about Turkmenistan were of a very general nature and did not refer to the approach of the State to arbitration, or other forms of international adjudication, or the treatment of foreign investors. They cannot reasonably be understood as expressing bias vis-à-vis one of the Parties or be understood as affecting the assessment by Prof. Knieper of the Claimant's allegations that the Respondent violated international law based on the merits of these allegations alone. Prof. Knieper's statements do not suggest that he would approach the Respondent's submissions on law and facts generally in a more favorable fashion than those of the Claimant. He merely commended Turkmenistan and former President for past achievements, including in respect of the implementation of, and compliance with, international law generally. This cannot be understood as expressing bias towards the Respondent, or creating the appearance thereof, in respect of assessing the specific conduct at stake in this arbitration, either of the former President himself, or of other Turkmen officials, in terms of their compliance with international law. Having expressed, in the past, a generally positive attitude towards a respondent State cannot reasonably be understood as an expression of bias towards a claimant investor and his or her claims.

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84 *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Decision on Challenge of Charles N. Brower (8 December 2009), para 49 (Exhibit CL-0134).

85 Ibid, para 53.

94. Consequently, the Claimant's proposal for disqualification of Prof. Knieper based on his public statements about Turkmenistan's government and key officials, specifically former President Berdimuhamedov, must be rejected.

V. COSTS

95. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

96. While this provision requires that a decision on costs forms part of the (final) award, it does not prevent a tribunal from making a determination on the allocation of costs during the course of the arbitration proceeding and in the form of an order. In fact, Rule 28(1) of the Arbitration Rules (2006) provides in relevant part:

> *(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:*
>
> *[…]*
>
> *(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.*

97. In the view of the Unchallenged Arbitrators, there is some uncertainty whether a decision on costs can be made in a decision on a proposal for disqualification pursuant to Articles 57 and 58 of the ICSID Convention. On the one hand, one could consider that the Unchallenged Arbitrators take a decision for the Tribunal, and hence Rule 28(1) of the Arbitration Rules (2006) confers power to take a decision on costs when deciding on a proposal for disqualification. This is supported by the wording of Rules 8(2) and 10(1) of

the Arbitration Rules (2006), which speak of the Tribunal's consent to a resignation of one of the members of the Tribunal, respectively the need to consider it, when clearly only two members of the Tribunal are involved. On the other hand, one could understand Article 58 of the ICSID Convention as only giving the power to decide on the merits of a proposal for disqualification to the unchallenged arbitrators, or alternatively the Chairman of the Administrative Council, and nothing more.

98. This uncertainty does not, however, require resolution in the present circumstances, as the Unchallenged Arbitrators consider it appropriate to reserve the question of costs for decision at a later stage. At the same time, the Unchallenged Arbitrators consider it appropriate that the Parties keep a record of the costs incurred arising out of the Claimant's Disqualification Proposal and direct them to do so accordingly.

VI. DECISION

99. For the reasons given above, the Unchallenged Arbitrators decide as follows:

(a) The Proposal to Disqualify Prof. Dr. Rolf Knieper is upheld on the basis that his concurrent relationship with the Respondent as an expert in two pending disputes and his service as an arbitrator in the present proceedings create the appearance of a manifest lack of independence and impartiality.

(b) All other grounds proposed as grounds for the disqualification of Prof. Dr. Rolf Knieper are rejected.

(c) The Parties are directed to keep a record of the costs incurred arising out of the Proposal. A decision on those costs is reserved for a later stage.

Sir Christopher Greenwood GBE, CMG, KC
Arbitrator

Prof. Dr. Stephan Schill
Arbitrator