

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the proceeding between
BURIED HILL SERDAR LIMITED
Claimant

and
TURKMENISTAN

Respondent

(ICSID Case No. ARB/25/40)

**DECISION ON THE CLAIMANT'S PROPOSAL TO DISQUALIFY PROF. PHILIPPE
SANDS**

Unchallenged Arbitrators
Mr. Eduardo Siqueiros
Mr. Michael Goldberg

Secretary of the Tribunal
Ms. Anna Holloway

Date: February 11, 2026

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I. INTRODUCTION

1. This Decision rules on the proposal (the “**Claimant’s Proposal**”) of Buried Hill Serdar Limited (“**Buried Hill**” or the “**Claimant**”) dated December 23, 2025, to disqualify Prof. Philippe Sands, KC (“**Prof. Sands**”), the arbitrator appointed by Turkmenistan (the “**Respondent**”) in these proceedings. The Respondent opposes the Claimant’s Proposal.
2. In accordance with Article 58 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which entered into force on October 14, 1966 (the “**ICSID Convention**”) and Rule 23(1) of the 2022 ICSID Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”), this Decision is made by the remaining members of the Tribunal.

II. PROCEDURAL HISTORY

3. On August 5, 2025, the Claimant, a limited liability company incorporated in and operating under the laws of the Bailiwick of Jersey, filed with the International Centre for Settlement of Investment Disputes (“**ICSID**”) a Request for Arbitration dated July 31, 2025, against the Respondent (the “**Request for Arbitration**”).
4. The Claimant and the Respondent are referred to together as the “**Parties**”.
5. On August 12, 2025, the ICSID Acting Secretary-General registered the Request for Arbitration pursuant to Article 36 of the ICSID Convention and Rules 6 and 7 of the ICSID Rules of Procedure for the Institution on Conciliation and Arbitration Proceedings.
6. In the absence of an agreement between the Parties regarding the number of arbitrators and the method of their appointment, by letter of September 29, 2025, ICSID informed the Parties that, further to Rule 15(2) of the ICSID Arbitration Rules, the Tribunal in this case was to be constituted pursuant to Article 37(2)(b) of the ICSID Convention. In accordance with that provision and ICSID Arbitration Rule 16, the Tribunal shall consist of three arbitrators: each Party shall appoint an arbitrator, and the Parties shall jointly appoint the President of the Tribunal. Also in its letter, ICSID noted that the Claimant had informed ICSID in its Request for Arbitration that it appointed Dr. Stanimir A. Alexandrov as arbitrator; ICSID confirmed that it would proceed to seek Dr. Alexandrov’s acceptance of his appointment in accordance with ICSID Arbitration Rule 19(2).
7. Later, on September 29, 2025, the Respondent appointed Prof. Philippe Sands KC, a national of the French Republic, the Republic of Mauritius, and the United Kingdom, as its arbitrator. On that same date, ICSID confirmed that it would proceed to seek Prof. Sands’ acceptance of his appointment in accordance with ICSID Arbitration Rule 19(2).

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8. By letter of October 10, 2025, the Claimant *inter alia* requested that “Professor Sands ... decline Turkmenistan’s nomination”. The Respondent responded by letter of October 14, 2025. Later, on October 14, 2025, ICSID (i) confirmed that the Claimant’s request that “Professor Sands ... decline Turkmenistan’s nomination” would be conveyed to Professor Sands; and (ii) inquired as to whether the Parties would be amenable to ICSID conducting a list procedure to assist them in finding a mutually agreeable presiding arbitrator. The Parties subsequently agreed to a list procedure by separate communications of October 20, 2025.
9. On October 17, 2025, ICSID informed the Parties that Dr. Alexandrov would not be accepting his appointment and invited the Claimant to appoint another arbitrator.
10. By letter of October 20, 2025, the Claimant *inter alia* confirmed that, should Prof. Sands accept his appointment, the Claimant would “submit a challenge against his appointment at the appropriate time”. Later on October 20, 2025, ICSID acknowledged receipt of the Claimant’s correspondence and informed the Parties that Prof. Sands had accepted his appointment on October 18, 2025 (a Saturday). ICSID further confirmed that it would transmit the Claimant’s letter of October 20, 2025, to Prof. Sands.
11. On November 10, 2025, the Claimant appointed Mr. Michael S. Goldberg, a national of the United States of America, as its arbitrator. On that same date, ICSID confirmed that it would proceed to seek Mr. Goldberg’s acceptance of his appointment in accordance with ICSID Arbitration Rule 19(2).
12. On November 12, 2025, ICSID informed the Parties that Mr. Goldberg had accepted his appointment.
13. Following the agreed list procedure, on December 18, 2025, ICSID informed the Parties that they had agreed to appoint Mr. Eduardo Siqueiros, a national of the United Mexican States, as President of the Tribunal and confirmed that it would proceed to seek Mr. Siqueiros’ acceptance of his appointment in accordance with ICSID Arbitration Rule 19(2).
14. On December 19, 2025, the ICSID Secretary-General informed the Parties that all three arbitrators had accepted their appointments, and the Tribunal was therefore deemed to have been constituted as of that date pursuant to ICSID Arbitration Rule 21(1).
15. On December 23, 2025, the Claimant filed its Proposal for the Disqualification of Prof. Sands (the “**Claimant’s Proposal**”), together with Exhibits C-0071 through C-0075 and Legal Authorities CLA-0015 through CLA-0030. Later on December 23, 2025, ICSID acknowledged receipt of the Proposal and confirmed that the proceeding was suspended as

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of that date, in accordance with ICSID Arbitration Rule 22(2).

16. Pursuant to the procedure and timelines prescribed by ICSID Arbitration Rule 22, the following subsequent filings were made in relation to the Proposal:
- On January 13, 2026, the Respondent filed its Observations to the Claimant's Proposal (the "**Respondent's Observations**"), together with Exhibit R-0001 and Legal Authorities RLA-0001 through RLA-0009;¹
 - On January 18, 2026, Prof. Sands submitted a Statement ("**Prof. Sands' Statement**");² and
 - On January 26, 2025, the Claimant filed its Further Observations in Support of its Proposal (the "**Claimant's Further Observations**"), together with Exhibit C-0076.³

No further submission was received from the Respondent.

III. POSITIONS OF THE PARTIES AND PROF. SANDS

17. In this Section, Mr. Siqueiros and Mr. Goldberg (the "**Unchallenged Arbitrators**") summarize the arguments advanced by the Claimant, as well as the observations made by the Respondent, and Prof. Sands' Statement.

A. THE CLAIMANT'S PROPOSAL

18. The Claimant submits that Professor Sands' appointment as arbitrator in a related commercial arbitration brought by Buried Hill against the State Concern Turkmennebit ("**Turkmennebit**") that is administered by the International Court of Arbitration of the International Chamber of Commerce (the "**ICC Arbitration**") raises serious doubts about Prof. Sands's ability to approach the present proceedings impartially based solely on the record in the present ICSID proceeding, and also presents an inevitable risk of compromising the Tribunal and its deliberations.⁴
19. The Claimant acknowledges that, although the ICC Arbitration is of a "fundamentally different nature to the present case (in that the central allegations are of contractual breach

¹ Respondent's Observations to Claimant's Proposal for the Disqualification of Professor Philippe Sands KC, dated January 13, 2026.

² Statement of Professor Philippe Sands KC in relation to the Claimant's Disqualification Application in Buried Hill Serdar Limited v Turkmenistan, ICSID Case No. ARB/25/40, dated January 18, 2026.

³ Claimant's Reply Submissions in Support of its Proposal for the Disqualification of Professor Philippe Sands KC, dated 26 January 2026.

⁴ Claimant's Proposal, ¶ 3.

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and breach of the contractually chosen applicable laws by Turkmennebit, as opposed to the breaches of the Energy Charter Treaty ('ECT') and international law by Turkmenistan pursued in this case), it unavoidably overlaps in witness and expert evidence, as well as some issues of fact".⁵ The Claimant confirms, without any waiver of privilege or prejudice to its rights, that "all three of its witnesses who have submitted factual witness statements in the ICC Arbitration will submit witness statements in the present case, and that the authors of two of the three expert reports it has adduced thus far in the ICC Arbitration will also provide expert reports in the present case".⁶

20. According to the Claimant, it will consequently be "impossible for Professor Sands to consider the evidence in the ICC Arbitration without forming certain views, which he will unavoidably carry over to his adjudication of and deliberations in the present case were he to remain on the Tribunal" and moreover, he "will be privy to evidence and arguments formed in the course of the ICC Arbitration that will not be available to his co-arbitrators in the present ICSID arbitration", which result "is unacceptable".⁷ The Claimant contends that it has a "due process right for its claims in the present proceeding to be judged purely on the evidence and arguments on the record in this case".^{8 9}
21. The Claimant further contends that, should Prof. Sands be allowed to serve in these proceedings, "a third party's reasonable evaluation of all the evidence would unarguably be that circumstances exist that give rise to an appearance of partiality on Professor Sands' part and a risk that [he] would decide issues in dispute based on matters outside of the record of the present proceedings". It concludes that Prof. Sands "cannot be relied upon to impartially exercise judgment in the circumstances of this particular case, nor can the Tribunal deliberate fairly and in accordance with each arbitrator's applicable duties if one of its members is inevitably fixed with relevant knowledge and impressions arising from evidence and arguments not on the record and available to the entire Tribunal".¹⁰
22. The Claimant's position shall be summarized in five sections: (a) background of the investment; (b) the ICC Arbitration; (c) the fact that both disputes concern the same underlying asset; (d) applicable standard for the disqualification; and (e) the grounds for

⁵ Claimant's Proposal, ¶ 4.

⁶ Claimant's Proposal, ¶ 4.

⁷ Claimant's Proposal, ¶ 5.

⁸ Claimant's Proposal, ¶ 5.

⁹ The Claimant argues in support that this principle was rightly confirmed as recently as November 18, 2025, by the decision of the ICSID annulment committee in *Lone Star v. Korea*, which annulled an ICSID award on the basis that the tribunal in that case had relied on a related ICC award to which the Republic of Korea was not a party: Claimant's Proposal, fn. 3, referring to Global Arbitration Review, "Lone Star tribunal's reliance on ICC award leads to annulment", November 19, 2025, C-0074.

¹⁰ Claimant's Proposal, ¶ 7.

disqualification.

a. Background of the Investment

23. The Claimant states that for “nearly two decades, Buried Hill partnered with Turkmenistan and invested in its oil and gas sector based on explicit representations from three successive Presidents and high-ranking government officials that it would have the opportunity to develop the valuable Serdar (known today as Dostluk) oil field in the Caspian Sea”,¹¹ and that Buried Hill “invested over \$168 million in reliance on those assurances”, including signing two Production Sharing Agreements in 2007 and 2013 with the State Agency for Management and Use of Hydrocarbon Resources at the President of Turkmenistan.¹²
24. According to the Claimant, as of November 2024 it was “clear that Turkmenistan is not willing to honour the commitments it made to Buried Hill, and that it has no intention of allowing Buried Hill to participate in any eventual development of the Serdar field”, and the Claimant was “left with no option but to commence the present arbitration”, adding that the “claims made in the present proceedings concern Turkmenistan’s breaches of its obligations under the ECT through the actions of its highest officials, who by various promises and commitments created legitimate expectations for Buried Hill, encouraged its continued investment in Turkmenistan, and then opportunistically abandoned these commitments”.¹³

b. The ICC Arbitration

25. The Claimant states that on September 24, 2025, it submitted its Statement of Claim in the ICC Arbitration (the “**Statement of Claim**”). The Statement of Claim was accompanied by the witness statements of: (i) Mr. Hugh Leonard; (ii) Mr. Peter Kallos; and (iii) Mr. Jeff Collins. All three are officers and/or directors of Buried Hill or its ultimate parent, Buried Hill Energy (Cyprus) Public Company Limited. The Statement of Claim was also accompanied by expert reports from: (i) Dr. Umid Aripdjanov, on the scope and interpretation of the Hydrocarbon Law and of the 2013 Production Sharing Agreement; (ii) Messrs. Howard Rosen and Alexandre Riviere of Secretariat on damages; and (iii) Drs. Andrew Foakes and Neville Jones of Rockflow Resources Ltd on the geological assessment of the Serdar field.¹⁴
26. The Claimant asserts that the individuals named in the preceding paragraph, except for

¹¹ Claimant’s Proposal, ¶ 12.

¹² Claimant’s Proposal, ¶ 13.

¹³ Claimant’s Proposal, ¶¶ 14-15.

¹⁴ Claimant’s Proposal, ¶ 22.

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Dr. Aripdjanov – whose evidence is limited to legal issues not presently relevant to the claims under the ICSID Convention – will provide factual statements or expert reports in the present case.¹⁵

c. Both Disputes Concern the Same Underlying Asset

27. According to the Claimant, the ICC Arbitration and these proceedings “bear obvious similarities, particularly with respect to the evidence that will be relevant to and adduced in each, as well as their subject matter. By way of example: (i) importantly, both arbitrations will involve some of the same witnesses; (ii) Buried Hill is the claimant in each arbitration; (iii) both arbitrations concern the same underlying asset – the Serdar field and associated rights of exploration and development; and (iv) both arbitrations share in part a similar factual matrix, albeit with material points of difference”.¹⁶
28. The Claimant further contends that it “has every right to a separate determination in each of the ICC Arbitration and the present case, judged solely by reference to a case record that is available to all members of the arbitral tribunal”, which right would be infringed if Prof. Sands is not disqualified in the present arbitration, “particularly given the commonality of witnesses between the two cases”.¹⁷

d. Applicable Standard for Disqualification

29. The Claimant contends that arbitrators must exercise both “independent judgment” and “impartiality of judgment”, which are essential to “protect parties against arbitrators being influenced by factors other than those related to the merits of the case”, adding that impartiality has been interpreted as “refer[ring] to the absence of bias or predisposition”.¹⁸
30. The Claimant further submits that “it is well established that: (i) the test for determining whether an arbitrator lacks impartiality and/or independence is an objective one based on a third party’s reasonable evaluation of the evidence; (ii) the ICSID Convention does “*not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias*”; and (iii) the lack of impartiality and/or independence must be “*manifest*” namely “‘*evident*’ or ‘*obvious*,’ and that it relates to the ease with which the alleged lack of the qualities can be perceived”¹⁹ (emphasis by the Claimant).

¹⁵ Claimant’s Proposal, ¶ 23.

¹⁶ Claimant’s Proposal, ¶ 24.

¹⁷ Claimant’s Proposal, ¶ 25.

¹⁸ Claimant’s Proposal, ¶ 27

¹⁹ Claimant’s Proposal, ¶ 28, citing, among others, *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

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31. Claimant adds that, when establishing the appearance of dependence or bias, “all relevant facts and circumstances must be considered”,²⁰ and that “jurisprudence makes clear that an arbitrator’s independence or impartiality may be affected by his or her knowledge of factors that are outside the record of that case, including knowledge derived from another case where the arbitrator is also sitting”.²¹ It cites as example *Caratube v. Kazakhstan*,²² where the claimant challenged the appointment of Mr. Bruno Boesch by Kazakhstan on the basis of, *inter alia*, Mr. Boesch’s appointment by Kazakhstan in another parallel ICSID case, *Ruby Roz v. Kazakhstan*. In *Caratube v. Kazakhstan*, the claimant argued that several individuals who submitted witness statements in the *Ruby Roz* case were likely also to submit witness statements in the *Caratube v. Kazakhstan* arbitration; that there was shared ownership between both claimants, *Caratube v. Kazakhstan* and *Ruby Roz*; and that it was replying on essentially the same factual allegations as *Ruby Roz* with respect to Kazakhstan’s acts, omissions and patterns of conduct against the ultimate owners of both claimant entities.²³
32. The Claimant then examines the decision in *Caratube v. Kazakhstan* and notes that the unchallenged arbitrators in that case concluded that one of the arbitrators would be privy to information that “would possibly permit a judgment based on elements not in the record in the [*Caratube*] arbitration and hence there is an evident or obvious appearance of lack of impartiality”, and further that the appointment of said arbitrator in both cases would result in “an appearance of imbalance within the tribunal”.²⁴ The Claimant adopts the same reasoning in this case.²⁵
33. Also cited by the Claimant is a decision of the ICC Court of Arbitration (the “**ICC Court**”)

the Tribunal, November 12, 2013 (“*Blue Bank v. Venezuela*”), CLA-0017, ¶¶ 58-59 and fn. 37. See also *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, December 28, 2016 (“*BSG v. Guinea*”), CLA-0022, ¶ 57; *İmeks İnsaat Makina Elektrik Konstrüksiyon Sanayi Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/21/23, Decision on the Claimant’s Proposal for the Disqualification of Prof. Dr. Rolf Knieper, October 31, 2023 (“*İmeks İnsaat v. Turkmenistan*”), CLA-0023, ¶ 73; *Mobil Exploration and Development Argentina Inc., Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, June 4, 2015 (“*Mobil v. Argentina*”), CLA-0024, ¶¶ 36-37.

²⁰ Claimant’s Proposal, ¶ 28.

²¹ Claimant’s Proposal, ¶ 29.

²² *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, March 20, 2014 (“*Caratube v. Kazakhstan*”), CLA-0027.

²³ Claimant’s Proposal, ¶ 30, citing *Caratube v. Kazakhstan*, CLA-0027, ¶ 26.

²⁴ Claimant’s Proposal, ¶¶ 33-34, citing *Caratube v. Kazakhstan*, CLA-0027, ¶¶ 89, 93.

²⁵ Claimant’s Proposal, ¶ 35.

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in *Anaklia v. Georgia*,²⁶ where Anaklia Development Consortium LLC – the claimant in that case – also filed parallel ICSID proceedings and the Respondent also appointed the same individual as arbitrator in both cases. In upholding the challenge, the ICC Court stated that “the risk of unconscious biases resulting from the involvement in the two overlapping proceedings cannot be discarded”, and that the challenged arbitrator would “still have access to information that will not be available to his fellow arbitrators in the ICC proceedings, who will not participate to the ICSID Case, including evidence submitted in the ICSID Case that may not be produced in the ICC case, as well as internal discussions and deliberations within the ICSID arbitral tribunal”.²⁷

34. The Claimant asserts that it also endorses and relies upon the reasoning of the *Anaklia v. Georgia* tribunal in support of the Claimant's Proposal.²⁸

e. Grounds for Disqualification

35. Drawing support from the foregoing analysis, the Claimant relies on “two broad grounds” as to why Prof. Sands' prior appointment in the ICC Arbitration means he must be disqualified from the present Tribunal:

- a) *first*, given the commonality of witnesses between the two proceedings as well as the overlap in the factual matrix, there is “a real risk that Professor Sands will prejudge these matters or develop unconscious biases in relation to them”,²⁹ and
- b) *second*, his participation in the ICC Arbitration will demonstrably create an unacceptable asymmetry or imbalance within the present Tribunal, affecting the integrity of these proceedings.³⁰

(i) Risk of prejudgment or unconscious bias

36. The Claimant raises four arguments in support of the risk of prejudgment or unconscious bias.
37. *First*, the Claimant contends that there is “a clear overlap in the factual and expert witnesses that Buried Hill will adduce in each arbitration”, adding that a substantive hearing on jurisdiction and merits is scheduled to be held in the ICC Arbitration in February 2027, and

²⁶ *Anaklia Development Consortium LLC v. Georgia*, ICC Case No. 25542/HBH, Decision on the Disqualification of Arbitrator Klaus Sachs, February 25, 2021 (“*Anaklia v. Georgia*”), CLA-0028.

²⁷ Claimant's Proposal, ¶ 36, citing *Anaklia v. Georgia*, CLA-0028, ¶¶ 26-27.

²⁸ Claimant's Proposal, ¶ 36.

²⁹ Claimant's Proposal, ¶ 39.

³⁰ Claimant's Proposal, ¶ 39.

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that it “is unlikely that any merits hearing in the present case will be held before then”.³¹ Thus, according to the Claimant, Prof. Sands will therefore have “already formed a view of all of these witnesses by the time they come to give evidence in this case, which gives rise to a clear risk of prejudice or unconscious bias”.³²

38. *Second*, the Claimant argues that “not only is there a palpable commonality of witnesses between the two proceedings, there is also a clear overlap in relevant facts” since “specific factual matters have been raised by Buried Hill as relevant in both proceedings”.³³ Paraphrasing the unchallenged arbitrators in *Caratube v. Kazakhstan*, the Claimant argues that “the similarity in cases, in particular in the facts underlying the [ICC Arbitration] and the present arbitration, is an important consideration in the assessment of [Professor Sands’] perceived impartiality”.³⁴
39. *Third*, the Claimant contends that “despite the factual similarities between the two arbitrations”, its claims are “fundamentally different and conceptually distinct: they rely on different legal instruments, different applicable laws, and different material facts”.³⁵ Each tribunal “will need to assess Buried Hill’s claims based solely on the evidentiary record *in that case*” the Claimant asserts, adding that “a reasonable third party would conclude that there is a manifest risk that Professor Sands will not be able to render an impartial judgment in this case given his likely exposure to evidence in the ICC Arbitration that is not on the record in the present case”.³⁶
40. *Fourth*, the Claimant affirms that “there are certain individuals who will give evidence in the ICC Arbitration that will not give evidence in the present case”, and argues that “a reasonable observer would conclude that there is a real risk that Professor Sands would rely, even unconsciously, on such evidence (and other evidence not adduced in the present case) when considering the merits of Buried Hill’s claims under the ECT”.³⁷
41. According to the Claimant, it “will simply be impossible for Prof. Sands not to form a view of Buried Hill’s witnesses from his exposure to their evidence – particularly their oral evidence – in the ICC Arbitration, and for this view not to carry over (even unconsciously)

³¹ Claimant’s Proposal, ¶ 40.

³² Claimant’s Proposal, ¶ 41.

³³ Claimant’s Proposal, ¶ 42.

³⁴ Claimant’s Proposal, ¶ 42, citing *Caratube v. Kazakhstan*, CLA-0027, ¶ 75.

³⁵ Claimant’s Proposal, ¶ 43.

³⁶ Claimant’s Proposal, ¶ 43.

³⁷ Claimant’s Proposal, ¶ 44.

to his deliberations in the present case.³⁸

42. Responding to what it deems to be the Respondent's offer to "introduce the entire evidentiary record from the ICC Arbitration into the ICSID Arbitration", the Claimant notes that the ICC Arbitration is a commercial arbitration brought under the terms of the 2013 Production Sharing Agreement and is subject to confidentiality provisions, and it must therefore reserve its right to seek protective measures from the tribunal in the ICC Arbitration to prevent its evidentiary record from being adduced in full in the present case because it seeks to preserve its right to have each of its claims adjudicated solely on the evidence adduced in each proceeding.³⁹ But, according to the Claimant, even if the Respondent could adduce the entire evidentiary record from the ICC Arbitration into the present case, "Prof. Sands is even then unable to adjudicate [the Claimant's] claims under the ECT having been exposed to the views, assessments and impressions of Mr. Rubins and Prof. Douglas, including of the witnesses and experts and of Turkmennebit's conduct in the ICC Arbitration"⁴⁰ (emphasis by the Claimant).
43. Thus, the Claimant posits that a real risk of prejudgment demonstrably arises "where there is significant overlap in relevant facts and evidence between the two arbitrations and where Turkmennebit's conduct is likely to be relevant and attributable to Turkmenistan as its instrumentality".⁴¹

(ii) Manifest asymmetry or imbalance within the present Tribunal

44. The Claimant relies on what it believes is "a further or cumulative ground for disqualification": the manifest imbalance or asymmetry in the present Tribunal that would result if Prof. Sands is not disqualified, adding that the "relevant jurisprudence makes clear that an arbitrator must be disqualified in these circumstances, otherwise there would be a serious irregularity tainting the proceedings".⁴²
45. In this regard, the Claimant contends that Prof. Sands will have seen documentary and witness evidence, and will have heard the views, impressions and assessments of the arbitrators in the ICC Arbitration, which the unchallenged arbitrators in this case will not have seen, which means there "will clearly be an asymmetry or imbalance of information

³⁸ Claimant's Proposal, ¶ 45.

³⁹ Claimant's Further Observations, ¶ 18, referring to Respondent's Observations, ¶¶ 32-35.

⁴⁰ Claimant's Further Observations, ¶ 19.

⁴¹ Claimant's Further Observations, ¶ 19.

⁴² Claimant's Proposal, ¶ 46.

within the present Tribunal".⁴³

46. In support, the Claimant paraphrases *Caratube v. Kazakhstan*: "a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the [ICC] case, [Professor Sands] has benefitted from knowledge of facts on the record in that case which may not be available to the two other arbitrators in the present arbitration (or even be incompatible or contradictory with some facts on the record of the present arbitration), thereby giving rise to a manifest imbalance within the Tribunal",⁴⁴ and concludes this to be true, whether viewed separately or as an "aggravating circumstance".⁴⁵
47. In addition, the Claimant gathers support from *Anaklia v. Georgia*, paraphrasing the ICC Court's statement that "although [Buried Hill is] represented by the same legal counsel in both cases, the Court considered that [Professor Sands] may still have access to information that will not be available to his fellow arbitrators in the [ICSID] proceedings, who will not participate to the [ICC] Case, including evidence submitted in the [ICC] Case that may not be produced in the [ICSID] case, as well as internal discussions and deliberations within the [ICC] arbitral tribunal. It may moreover not be excluded that legal representation in either case could change during the course of the proceedings".⁴⁶
48. The Claimant recalls its statement to the ICSID Secretariat made in the context of the Claimant's request that Prof. Sands decline his appointment as arbitrator in this case. There, it indicated that the Unchallenged Arbitrators "who do not have the same additional knowledge as Professor Sands[,] will be unable to test his perspective, or challenge any extraneous information that underpins it,"⁴⁷ which would result in a situation where "in deliberations, the Unchallenged Arbitrators will not know if or when Professor Sands might be relying on extraneous information, evidence or previously-formed impressions of particular witnesses".⁴⁸
49. In response to the Respondent's assertion that the fact that the Claimant "is the same claimant in both the ICC Arbitration and ICSID Arbitration, and represented by the same counsel having full access to the record in both cases ... neutralizes any possible risk of asymmetry of information among the tribunal members", the Claimant states that this argument is a "non-sequitur" since it is "the asymmetry of information within the present

⁴³ Claimant's Further Observations, ¶ 20.

⁴⁴ Claimant's Proposal, ¶ 47, citing *Caratube v. Kazakhstan*, CLA-0027, ¶¶ 89-90.

⁴⁵ Claimant's Proposal, ¶ 47, citing *Caratube v. Kazakhstan*, CLA-0027, ¶ 96.

⁴⁶ Claimant's Proposal, ¶ 48, citing *Anaklia v. Georgia*, CLA-0028, ¶ 27.

⁴⁷ Claimant's Proposal, ¶ 49, citing Letter from Claimant's Legal Counsel to ICSID Secretariat, October 20, 2025, C-0072, p. 1.

⁴⁸ Claimant's Proposal, ¶ 49.

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Tribunal that matters, not within Buried Hill's counsel team(s)"⁴⁹ (emphasis by the Claimant).

50. Further, the Claimant rejects the position of the Respondent, who states that "the risk of asymmetry or imbalance rests on the assumption that the factual and legal issues overlap";⁵⁰ the Claimant instead contends that the *Anaklia v. Georgia* decision by the ICC Court speaks alternatively of "similar issues of fact or law"⁵¹ (emphasis by the Claimant).
51. Finally, the Claimant addresses the Respondent's final point: "that all is remedied by the introduction of the evidentiary record from the ICC Arbitration into the present case – again falls flat".⁵² In response, the Claimant argues that the Unchallenged Arbitrators in this case "must proceed on the basis that the entire evidentiary record from the ICC Arbitration *cannot* be adduced in the present case", but even if it were adduced, "Prof. Sands will have been exposed to deliberations in the ICC Arbitration, as well as his own assessments of the witnesses" – to which the Unchallenged Arbitrators in this case will not, meaning that they "will not have the same additional knowledge as Prof. Sands, and will be unable to challenge whether any extraneous considerations underpin Prof. Sands' views when the Tribunal comes to deliberate in the present case".⁵³ This is, the Claimant concludes, "unacceptable on any reading of the jurisprudence".⁵⁴

B. THE RESPONDENT'S OBSERVATIONS

52. The Respondent opposes the Claimant's Proposal. It contends that the Claimant's own admission that "[D]espite the factual similarities between the two arbitrations, Buried Hill's claims are *fundamentally different* and *conceptually distinct*: they rely on *different legal instruments, different applicable laws, and different material facts*" confirms the baseless nature of the Claimant's Proposal⁵⁵ (emphasis by the Respondent).
53. The Respondent's position is summarized in four sections: (a) the standard for disqualification under the ICSID Convention is high; (b) overlapping similarities between separate cases do not result in a manifest lack of impartiality or independence; (c) the two cases on which the Claimant relies for support are no support at all and clearly distinguishable; and (d) no justifiable doubts as to Prof. Sands' impartiality or

⁴⁹ Claimant's Further Observations, ¶ 21, quoting Respondent's Observations, ¶ 40.

⁵⁰ Claimant's Further Observations, ¶ 22, quoting Respondent's Observations, ¶ 41 (original emphasis).

⁵¹ Claimant's Further Observations, ¶ 22, citing *Anaklia v. Georgia*, CLA-0028, ¶ 26.

⁵² Claimant's Further Observations, ¶ 23, citing Respondent's Observations, ¶ 42.

⁵³ Claimant's Further Observations, ¶ 23.

⁵⁴ Claimant's Further Observations, ¶ 23.

⁵⁵ Respondent's Observations, ¶ 1, making reference to Claimant's Proposal, ¶ 43.

independence exist.

a. The Standard for Disqualification Under the ICSID Convention is High

54. The Respondent agrees with the Claimant on the legal standard for disqualification found in Article 57 of the ICSID Convention, which in turn refers to Article 14(1),⁵⁶ and adds that the principles surrounding this standard are well-established in respect to the requirement that arbitrators be both impartial and independent.⁵⁷
55. However, the Respondent doubts the Claimant's contentions regarding the test to determine impartiality and independence, stating that it is objective and not subjective as Claimant asserts. The Respondent also challenges the Claimant's reading of the IBA Guidelines and rejects the notion that the inclusion of a specific circumstance in the Orange List should be indicative – much less determinative – that such circumstance should trigger “doubts that *may* arise in the eyes of a reasonable third person having knowledge of all the relevant circumstances”.⁵⁸

b. Overlapping Similarities Between Separate Cases Do Not Result in a Manifest Lack of Impartiality or Independence

56. The Respondent contends that the “overwhelming weight of ICSID cases confirms that an arbitrator sitting in a case that has overlapping similarities with another case does not result in a manifest lack of impartiality or independence”;⁵⁹ it cites in support of its position *Electrabel v. Hungary*,⁶⁰ *Universal Compression v. Venezuela*,⁶¹ *Suez v. Argentina*,⁶² *KS*

⁵⁶ Respondent's Observations, ¶ 15.

⁵⁷ Respondent's Observations, ¶ 16.

⁵⁸ Respondent's Observations, ¶¶ 17-19.

⁵⁹ Respondent's Observations, ¶ 21.

⁶⁰ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Claimant's Proposal to Disqualify a Member of the Tribunal, February 25, 2008 (“*Electrabel v. Hungary*”), RLA-0004, ¶¶ 37-43.

⁶¹ *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, May 20, 2011 (“*Universal Compression v. Venezuela*”), CLA-0020, ¶ 83.

⁶² *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, RLA-0003, ¶ 37.

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Invest v. Spain,⁶³ *VM Solar v. Spain*,⁶⁴ *Sapec v. Spain*⁶⁵ and *İçkale v. Turkmenistan*.⁶⁶

57. According to the Respondent, the common thread in these different cases is that an arbitrator who has been exposed to similar legal or factual issues in concurrent or consecutive arbitrations, or who has expressed views on similar issues of fact or law without further elements or circumstances, should not be deemed to lack impartiality and/or independence.⁶⁷

c. The Two Cases on Which the Claimant Relies Are No Support at All and Clearly Distinguishable

58. The Respondent then distinguishes the two cases on which the Claimant primarily relies, *Caratube v. Kazakhstan* and *Anaklia v. Georgia*, and contends that these cases “undermine, rather than support” the Claimant’s position.⁶⁸
59. In the case of *Caratube v. Kazakhstan*, the Respondent asserts that a prior case against the same respondent had been brought by a different claimant, and further that the same State conduct that was at issue in both arbitrations; the claims arose under the same legal instruments and included the same legal claims. According to the Respondent, it was because the same conduct was at issue, that the claims arose under the same legal instrument, and that the claims themselves were exactly the same, that the claimant’s concerns were deemed to be justified.⁶⁹ The Respondent then argues that this case is different, since the claims are – as started by the Claimant – “fundamentally different and conceptually distinct: they rely on different legal instruments, different applicable laws, and different material facts”.⁷⁰ Further the Claimant is the same in both arbitrations.⁷¹
60. With respect to *Anaklia v. Georgia*, the Respondent claims that “Anaklia was *not* the claimant in both cases”; rather it was one of its indirect shareholders that filed the ICSID

⁶³ *KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/25, Decision on the Proposal to Disqualify Kaj Hobér, May 15, 2020, **RLA-0007**, ¶¶ 24-30, 89.

⁶⁴ *VM Solar Jerez GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify Prof. Dr. Guido Santiago Tawil, July 24, 2020, **RLA-0009**, ¶ 100.

⁶⁵ *Sapec, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/19/23, Decision on the Proposal for Disqualification of Judge James Spigelman, June 25, 2020, **RLA-0008**, ¶¶ 57-58.

⁶⁶ *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant’s Proposal to Disqualify Professor Philippe Sands, July 11, 2014, **RLA-0006**, ¶¶ 121-122.

⁶⁷ Respondent’s Observations, ¶¶ 21-22.

⁶⁸ Respondent’s Observations, ¶ 23.

⁶⁹ Respondent’s Observations, ¶¶ 24-25.

⁷⁰ Respondent’s Observations, ¶ 26, making reference to Claimant’s Proposal, ¶ 43.

⁷¹ Respondent’s Observations, ¶ 26.

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claim.⁷² Moreover, “it was undisputed that the ICC case and the ICSID case would, in fact, deal with similar questions of fact *and* law. On that basis, the ICC Court disqualified the arbitrator”.⁷³

61. The Respondent also notes that rather than having similar questions of fact or law, the Claimant has acknowledged that this “arbitration concerns breaches in international law of the legitimate expectations that Turkmenistan created in respect of a commercial opportunity, namely the development of the Serdar field, while the ICC arbitration addresses Turkmennebit's contractual breaches and violations of local law” (emphasis by the Respondent).⁷⁴

d. There Are No Justifiable Doubts as to Prof. Sands' Impartiality or Independence

62. The Respondent alleges that the Claimant's Proposal rests on two pillars: (i) that “Prof. Sands' appointment in the ICC Arbitration may cause him to ‘prejudge’ the claims in this ICSID Arbitration”; and (ii) “Prof. Sands' access to information in the ICC Arbitration will ‘create an unacceptable asymmetry or imbalance within the present Tribunal’”.⁷⁵ The Respondent challenges both grounds.

(i) There is no risk of prejudgment or unconscious bias

63. The Respondent relies on what it deems is an admission by the Claimant that the ICC Arbitration and the present case are “fundamentally different in numerous respects” and concludes that, even accepting the factual overlap between the two cases, “there is no reason to believe that Prof. Sands' decision on contractual issues in the ICC Arbitration would affect his impartiality to decide [the Claimant's] treaty claims in this ICSID Arbitration”.⁷⁶
64. According to the Respondent, “it is difficult to conceive of any circumstance where Buried Hill would be prejudiced: it is a party to both arbitrations; it is represented by the same counsel; and it has access to all the evidence, written and oral, to be submitted in the ICC Arbitration, which it can submit in this arbitration”.⁷⁷ There is, in the Respondent's view, “no credible risk of prejudgment or unconscious bias unless [the Claimant] intends to

⁷² Respondent's Observations, ¶ 27, although acknowledging that one of Anaklia's indirect shareholders was the claimant.

⁷³ Respondent's Observations, ¶ 27.

⁷⁴ Respondent's Observations, ¶ 28, making reference to Request for Arbitration, ¶ 7.

⁷⁵ Respondent's Observations, ¶ 30, quoting Claimant's Proposal, ¶ 39.

⁷⁶ Respondent's Observations, ¶ 31.

⁷⁷ Respondent's Observations, ¶ 33.

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advance different narratives depending on the forum. Witnesses and experts are under a non-negotiable duty to tell the truth, and that duty does not vary with the tribunal before which they appear. If the evidence is truthful and consistent, prior exposure cannot prejudice anything”.⁷⁸

(ii) *There is no asymmetry or imbalance of information within the Tribunal*

65. The Respondent challenges the Claimant's reliance on *Caratube v. Kazakhstan* and *Anaklia v. Georgia*, and states that the concerns that motivated those decisions are absent in this case.⁷⁹
66. *First*, because the Claimant “is the same claimant in both the ICC Arbitration and ICSID Arbitration and is represented by the same counsel having full access to the record in both cases”, this “neutralizes any possible risk of asymmetry of information among the tribunal members”.⁸⁰
67. *Second*, according to the Respondent, “the risk of asymmetry or imbalance rests on the assumption that the factual *and* legal issues in the cases overlap, such that Prof. Sands would benefit from knowledge gained in one case that is transferred to the other case, and which is unavailable to the other arbitrators”. Here, however, the Respondent contends that “any difference in knowledge that Prof. Sands gains in the ICC Arbitration would not give rise to a manifest asymmetry or imbalance, given that such extraneous information may not even be relevant to the adjudication of the ICSID Arbitration on account of the ‘different legal claims and issues’ at stake”.⁸¹
68. *Third*, the Respondent contends that the alleged “manifest risk that Professor Sands will not be able to render an impartial judgment in this case given his likely exposure to evidence in the ICC Arbitration that is not on the record in the present case”⁸² is “easily alleviated by the fact that the claimant in the ICC and ICSID Arbitrations [is] the same” and maintains full control of the evidence it chooses to submit in both arbitrations, adding that “Turkmenistan nevertheless undertakes to submit the full record of the ICC Arbitration into the record of this ICSID Arbitration”.⁸³
69. In closing, the Respondent argues that the “ability of parties to select their own arbitrators

⁷⁸ Respondent's Observations, ¶ 34.

⁷⁹ Respondent's Observations, ¶ 36.

⁸⁰ Respondent's Observations, ¶ 40.

⁸¹ Respondent's Observations, ¶ 41.

⁸² Respondent's Observations, ¶ 42, quoting Claimant's Proposal, ¶ 43.

⁸³ Respondent's Observations, ¶ 42.

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is widely considered a fundamental principle and a key hallmark of international arbitration, rooted in the broader principle of party autonomy”, adding that “for that reason, the standard to successfully challenge an arbitrator under the ICSID Convention is high, and the party raising the challenge must carry the heavy burden of making such a showing”.⁸⁴

C. PROF. SANDS' STATEMENT

70. Prof. Sands submitted a Statement affirming his conviction that issues of independence and impartiality are of “utmost importance”, and stressing that his practice is to decline appointments when he considers there “to be a risk that a perception of a lack of independence or impartiality may arise”.⁸⁵ Thus, Prof. Sands states that he “carefully considered the position when first approached to accept appointment, and then when the Claimant first raised the issue of independence and impartiality following my acceptance, and concluded that there were not any circumstances which made resignation appropriate or necessary”, and that, after having considered the Parties’ written submissions, he continues to hold this view.⁸⁶

71. Prof. Sands examines the two issues of concern identified by the Claimant.

a. Prejudgment and Unconscious Bias

72. Prof. Sands states that the jurisprudence cited by the Parties in their submissions emphasizes the importance of balancing the need to avoid prejudgment and unconscious bias with the reality that arbitrators often sit on cases which raise common legal or factual issues, adding that he has “particular regard to the statement in *Tidewater v Venezuela* that disqualification in such circumstances is only appropriate when ‘the arbitrator has in effect prejudged the liability of one of the parties in the context of the specific factual matrix’”.⁸⁷

73. Prof. Sands states that despite sitting as an arbitrator in disputes that have concerned fact patterns or legal issues similar to those which have arisen in other disputes, he approaches “each case with an open mind, irrespective of other cases which I am hearing or have previously heard. In no previous case have I been disqualified on the basis of a similarity

⁸⁴ Respondent’s Observations, ¶ 45.

⁸⁵ Prof. Sands’ Statement, ¶ 2.

⁸⁶ Prof. Sands’ Statement, ¶ 3.

⁸⁷ Prof. Sands’ Statement, ¶ 5, citing *Tidewater Inc. and others v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010, para 67 (available at: <https://www.italaw.com/sites/default/files/case-documents/ita0860.pdf>).

of issues with another case”.⁸⁸

74. In respect to the Claimant's reliance on *Caratube v. Kazakhstan*, Prof. Sands notes that in their reasoning, the unchallenged arbitrators in that case “relied heavily on the fact that both the proceedings being considered concerned identical allegations of persecution, intimidation and harassment”⁸⁹ and further notes that the Claimant has not identified any such similarity between these proceedings and the ICC Arbitration. In these circumstances, he concludes, it is difficult “easily to understand the argument which the Claimant seeks to advance, much less reach the view that it is appropriate for me to resign from the Tribunal”.⁹⁰
75. Prof. Sands also addresses the concern of the Claimant in connection with an overlap in the witnesses giving evidence in the two proceedings, and states that this “is hardly unusual ... particularly [in] investor-State arbitration”. That an arbitrator may be unconvinced by the evidence of a given witness or expert on a particular issue on one occasion, he adds, “does not mean that arbitrator will necessarily disbelieve the evidence of that witness or expert on all subsequent occasions, irrespective of the issues raised”.⁹¹

b. Asymmetry or Imbalance Within the Tribunal

76. Prof. Sands contends that he understands the concern that arbitrators sitting as part of a tribunal should not have access to information which is not available to the other members of the tribunal, but states that in this case he does “not consider that this should give rise to any concerns as to my independence or impartiality”.⁹²
77. Prof. Sands contends that “a necessary prerequisite to finding any asymmetry or imbalance within a tribunal is that one arbitrator has knowledge that is *relevant* to the dispute which the other arbitrators do not have”.⁹³ He adds that the Claimant “has not identified any issue in the ICC Arbitration which could give rise to knowledge on my part which is not, or will not be, available to the other members of the Tribunal”, nor has the Claimant “explained how any knowledge which I may gain by sitting on the ICC Arbitration could be in any way *relevant* to the current proceedings such that it would give rise to an asymmetry or imbalance within the tribunal in connection with the issues which this Tribunal will

⁸⁸ Prof. Sands' Statement, ¶ 6.

⁸⁹ Prof. Sands' Statement, ¶ 7, citing *Caratube v. Kazakhstan*, CLA-0027, ¶¶ 85, 87.

⁹⁰ Prof. Sands' Statement, ¶ 7.

⁹¹ Prof. Sands' Statement, ¶ 8.

⁹² Prof. Sands' Statement, ¶ 11.

⁹³ Prof. Sands' Statement, ¶ 12.

determine”.⁹⁴

78. In closing, Prof Sands makes reference to the principle of equality between the parties, noting that the Claimant “was free to express its choice of arbitrator in these proceedings, and could have appointed the same arbitrator it appointed in the ICC Arbitration”, but it “chose not to do so, as it was perfectly entitled to do”. But having decided not to follow that path, Prof. Sands argues that the Claimant “now seeks to prevent the Respondent from doing what it could have done. In this way, it appears to adopt an approach that has the effect of undermining the Respondent’s autonomy”.⁹⁵

IV. THE UNCHALLENGED ARBITRATORS’ ANALYSIS

A. APPLICABLE LEGAL STANDARD

79. The Parties agree on the legal basis for a party’s proposal for the disqualification of a member of a tribunal.

80. Article 57 of the ICSID Convention 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. (emphasis added)

81. Article 14(1) of the ICSID Convention in turn provides that:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields 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. (emphasis added)

82. The Claimant’s Proposal is decided by the Unchallenged Arbitrators as per Article 58 of the ICSID Convention which confers such authority:

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission

⁹⁴ Prof. Sands’ Statement, ¶ 13.

⁹⁵ Prof. Sands’ Statement, ¶ 15.

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or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. ...

This is also confirmed by ICSID Arbitration Rule 23(1).

83. Neither Party has challenged that the Claimant submitted its Proposal in a timely manner in accordance with Rule 22(1) of the ICSID Arbitration Rules and that the Respondent and Prof. Sands have likewise timely filed their respective Observations and Statement. As noted above, only the Claimant elected to file a final submission on the Proposal.
84. Both Parties agree on the well-established principles of the standard that an arbitrator needs to meet under the requirements of Article 14(1) of the ICSID Convention: he or she must be impartial and independent. With different words, and citing different precedents, both Parties agree what each notion means.
85. The Claimant indicates that impartiality has been interpreted as “refer[ring] to the absence of bias or predisposition”,⁹⁶ while the Respondent uses almost identical language and refers to “the absence of bias or predisposition towards a party”.⁹⁷
86. In the case of independence, on the other hand, both Parties point to “absence of external control”.⁹⁸
87. Further, both Parties agree that the test to determine impartiality and independence is not subjective but rather an objective one based on a third party’s reasonable evaluation of the evidence. The Claimant cites various legal authorities in support of the proposition that this is a “well established” principle.⁹⁹ The Respondent cites another.¹⁰⁰
88. The Claimant contends that the ICSID Convention does “not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias”; and further that the lack of impartiality and/or independence must be “manifest” namely “‘evident’ or ‘obvious’”, which “relates to the ease with which the alleged lack of

⁹⁶ Claimant’s Proposal, ¶ 27

⁹⁷ Respondent’s Observations, ¶ 16.

⁹⁸ Claimant’s Proposal, ¶ 27, citing *Blue Bank v. Venezuela*, CLA-0017, ¶ 59; Respondent’s Observations, ¶ 16, citing S. Schill *et al.*, “Article 14” in *Schreuer’s Commentary on the ICSID Convention* (2022), CLA-0016, p. 49, ¶ 9.

⁹⁹ Claimant’s Proposal, ¶ 28, citing, *Blue Bank v. Venezuela*, CLA-0017, ¶¶ 59-60; *BSG v. Guinea*, CLA-0022, ¶ 57; *Imeks Insaat v. Turkmenistan*, CLA-0023, ¶ 73; *Mobil v. Argentina*, CLA-0024, ¶¶ 36-37.

¹⁰⁰ Respondent’s Observations, ¶ 16, citing *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, May 5, 2011, RLA-0005, ¶ 45 (“There thus exists a relatively high burden for those seeking to challenge ICSID arbitrators”).

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the qualities can be perceived” (emphasis by the Claimant).¹⁰¹ These principles are not objected to by the Respondent, although the Respondent cautions that the *subjective* belief of the party requesting disqualification is insufficient to satisfy the requirements of the ICSID Convention.¹⁰²

89. The Unchallenged Arbitrators adopt the legal standard on independence and impartiality formulated by the *Blue Bank v. Venezuela* tribunal:¹⁰³

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.

90. It is based on these considerations that the Unchallenged Arbitrators shall examine the grounds for disqualification of Prof. Sands: (a) appearance of prejudgment or unconscious bias; and (b) asymmetry or imbalance within the Tribunal.

B. APPEARANCE OF PREJUDGMENT OR UNCONSCIOUS BIAS

91. The Unchallenged Arbitrators agree that, when establishing whether there is an appearance of dependence or bias, all relevant facts and circumstances must be considered. The Unchallenged Arbitrators also agree that the standard needs to be high to determine that there is the likelihood of a prejudgment or unconscious bias.
92. The existence of parallel or overlapping proceedings is not *per se* a factor that by itself should determine that there is the risk of prejudgment or unconscious bias. The Parties dispute whether the factual similarities in the two arbitrations (though with distinctions in

¹⁰¹ Claimant's Proposal, ¶ 28.

¹⁰² Respondent's Observations, ¶ 16.

¹⁰³ *Blue Bank v. Venezuela*, CLA-0017, ¶¶ 59-61.

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the nature of the claims), the legal instruments on which they are based, and some material facts are sufficient to materialize the risk.

93. While the Respondent highlights the statement made by the Claimant in its Proposal that “despite the factual similarities between the two arbitrations, Buried Hill’s claims are *fundamentally different and conceptually distinct*: they rely on *different legal instruments, different applicable laws, and different material facts*”¹⁰⁴ (emphasis by the Unchallenged Arbitrators), to argue that the distinctions among the two claims should allow the Unchallenged Arbitrators to conclude that the risk of prejudgment is not present,¹⁰⁵ the Claimant stresses that despite such distinctions it is necessary for the tribunal hearing this case to assess the Claimant’s claim and arguments “based solely on the evidentiary record in [this] case”.¹⁰⁶
94. It is not uncommon for members of tribunals to examine claims put forward in cases that share factual and legal similarities.¹⁰⁷
95. That, by itself, should not be a justification to conclude that the sitting arbitrator in both shall be affected by one case in detriment to the parties in the other case. Even if the parties involved were to be the same or different, this by itself should not be determinant to conclude that there was a not a risk. Among other factors to be considered, one that is critical is the experience and reputation of the arbitrator involved.
96. The Unchallenged Arbitrators take particular note of Prof. Sands’ Statement on this point. He has indicated that despite sitting as an arbitrator in disputes that have concerned fact patterns or legal issues similar to those which have arisen in other disputes, he approaches “each case with an open mind, irrespective of other cases which I am hearing or have previously heard. In no previous case have I been disqualified on the basis of a similarity of issues with another case”.¹⁰⁸ Undoubtedly, his experience is vast, and he has participated in cases that share facts, legal issues and nature of disputes, and the Claimant has not submitted evidence to suggest that these have not been examined and decided by Prof. Sands independently and impartially.
97. It is not uncommon that in cases that may involve the same or similar disputed facts or measures, and in which one or more of the same individuals are appointed as arbitrator in both cases, there can be the same witness of fact or expert witnesses participating. But

¹⁰⁴ Claimant’s Proposal, ¶ 43

¹⁰⁵ Respondent’s Observations, ¶ 7.

¹⁰⁶ Claimant’s Proposal, ¶ 43

¹⁰⁷ See, e.g., *Electrabel v. Hungary*, **RLA-0004**, ¶¶ 37-43; *Universal Compression v. Venezuela*, **CLA-0020**, ¶ 83.

¹⁰⁸ Prof. Sands’ Statement, ¶ 6.

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again, this does not trigger necessarily the consequence of prejudgment or unconscious bias that the Claimant fears. As Prof. Sands has expressed, an arbitrator may be unconvinced by the evidence of a given witness or expert on a particular issue on one occasion, but this “does not mean that arbitrator will necessarily disbelieve the evidence of that witness or expert on all subsequent occasions, irrespective of the issues raised”.¹⁰⁹ An experienced arbitrator will be particularly capable of discerning the accuracy of any testimony given.

98. Both Parties rely on the findings by the unchallenged arbitrators in *Caratube v. Kazakhstan*. However, despite their differences in how some of the arguments in said decision should be construed, neither Party disputes the exposed principle that, for a proposal for disqualification for lack of independence and impartiality to be upheld, the test is “whether 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”.¹¹⁰
99. The Claimant has not established that this test is met. In light thereof, the Unchallenged Arbitrators are not convinced that Prof. Sands would not be capable and able to assess the facts, testimony and legal issues of the two cases with independence and impartiality.
100. The more difficult question is whether Prof. Sands would be subject to an unconscious bias based on hearing contentious arguments in the prior case from the same counsel, the same witnesses, and the same documents, all dealing with the same asset. For the reasons summarized in para. 109 below, the Unchallenged Arbitrators find that this must be the case, such that a third party would find that there is an evident or obvious appearance of lack of independence in the sense of an absence of influence by factors other than those related to the merits of *this* case.

C. ASYMMETRY OR IMBALANCE WITHIN THE TRIBUNAL

101. As Prof. Sands and the Respondent have expressed,¹¹¹ a “fundamental principle” of international arbitration and party autonomy is the ability of a party to select its arbitrator. However, the issue here is not the ability to select an arbitrator, but one that reaches further: the ability of a constituted tribunal to have access to the same information to be able to reach a decision based on the same information.

¹⁰⁹ Prof. Sands’ Statement, ¶ 8.

¹¹⁰ *Caratube v. Kazakhstan*, CLA-0027, ¶ 64, which based this principle on *Blue Bank v. Venezuela*, CLA-0017, ¶ 69 (whether “a third party would find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts in this case”).

¹¹¹ Prof. Sands’ Statement, ¶ 15; Respondent’s Observations, ¶ 45.

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102. The issue to be examined by the Unchallenged Arbitrators in connection with this ground for disqualification is whether Prof. Sands will be in a position to see documentary and witness evidence, and whether he will have heard the views, impressions and assessments of the arbitrators in the ICC Arbitration, which the Unchallenged Arbitrators in this case will not have seen or heard, thereby giving rise to a clear asymmetry or imbalance of information within the Tribunal. Importantly, it is not just the impact of the documents or witnesses, but rather the light presented on the evidence, which affects both the interpretation and credibility.
103. The Unchallenged Arbitrators believe that this risk exists.
104. Indeed, since the testimony of witnesses of fact and expert witnesses will most likely be first examined in the ICC Arbitration before this occurs in this case, it is thus equally likely that Prof. Sands will have access to such testimony before the Unchallenged Arbitrators with the unavoidable consequence that it will no longer be spontaneous when heard in this case.
105. Even if the Claimant's claims in this case were to be *fundamentally different* and *conceptually distinct* and rely on *different legal instruments, different applicable laws, and different material facts*,¹¹² there will undoubtedly be factual similarities between the two arbitrations since both arbitrations concern the same underlying asset.
106. At this point in time, the case of the Claimant in this arbitration has not been fully expressed. Nor has the defence of the Respondent, or of Turkmennebit, an instrumentality of the Respondent (which the Respondent has not denied). But neither Party has disputed that the two arbitrations have substantial factual similarities or concern the same underlying asset.
107. It is not a question of whether the Claimant or the Respondent makes available the entire record of the ICC Arbitration to the Tribunal in this case, as the Respondent has offered to do. Even if such offer exists today, it is uncertain whether there may be limitations to do so in light of confidentiality restrictions that the Claimant has anticipated exist, or whether the nature of the claims may justify the submittal of the record.
108. Nor is it a question of both Parties having the same counsel having full access to the record in both arbitrations.
109. The relevant question is one of spontaneity of the witnesses (and description of the documents) in one case or the other, where Prof. Sands would have likely have a different

¹¹² As expressed in Claimant's Proposal, ¶ 43.

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perception arising from hearing testimony in one case and the other in a different context or question. Both direct and cross-examination are a powerful tool to question the credibility of a witness, and the context within which this takes place shall differ in each case. The experience of Prof. Sands in the ICC Arbitration would likely be different than that in this case, but the first would likely influence the latter, even if just on an unconscious basis.

110. In the same manner, the deliberations in the ICC Arbitration among Prof. Sands and his co-arbitrators would likely allow him to have a perspective of testimony that will not be shared with the Unchallenged Arbitrators.
111. In such instance, an asymmetry within the Tribunal in this case would be evident.
112. Any deviation of a balance and symmetry of information should be avoided.
113. For the foregoing reasons, the Unchallenged Arbitrators conclude that the participation of Prof. Sands in the ICC Arbitration would create an asymmetry and/or imbalance within this tribunal.

V. DECISION

114. For the reasons given above, the Unchallenged Arbitrators decide as follows:
 - (a) The Proposal to Disqualify Prof. Sands is accepted.
 - (b) A decision on costs incurred arising out of the Claimant's Proposal is reserved for a later stage.

[signed]

Mr. Eduardo Siqueiros

[signed]

Mr. Michael Goldberg