+INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

PROCEDURAL ORDER No. 11
on Use of Arbitration Materials in *Ipek v Koza Altin AS*

Members of the Tribunal
Professor Campbell McLachlan QC, President of the Tribunal
The Hon. L. Yves Fortier PC, CC, OQ, QC, Arbitrator
Dr Laurent Lévy, Arbitrator

Secretary of the Tribunal
Ms Jara Mínguez Almeida

Date of dispatch to the Parties: 21 February 2020

Whereas:

(1) On Friday 14 February 2020, the Claimant made an application (the **Application**) to the Tribunal for a confirmation that certain materials in the present arbitration, which it stated the Plaintiffs in *Ipek v Koza Altin AS* (Claim No HC-2016-002407, the **English Proceedings**) had provided to the English High Court, gave rise to no breach of Procedural Order No 1 (**PO No 1**) and for a confirmation that there is no general obligation of confidentiality in ICSID arbitration which the Claimant has breached;

(2) On the same date, the Respondent sought an opportunity to respond together with an order that the Claimant disclose whether it had disclosed PO Nos 4 & 5 to the Press (the **Respondent's Counter-Application**);

(3) On Saturday 15 February 2020, the Tribunal directed the Claimant to file any response that it wished to make to the Respondent's Counter-Application by 08.00 GMT on Monday 17 February 2020, following which the Tribunal would decide that application and it directed the Respondent to file any response that it wished to make to the Application by 12.00 GMT on Tuesday 18 February 2020;

(4) On Monday 17 February 2020, the Claimant responded in timely fashion to the Respondent's Counter-Application.

(5) The Tribunal issued its decision on the same date on the Respondent's Counter-Application in which it decided that:

> The Tribunal has considered the Respondent's application made on page 3 of its letter of 14 February 2020, together with the Claimant's reply of today.
>
> By PO No 6, the Tribunal directed the Respondent by the SDIF to provide copies of PO Nos 5 & 6 to the Ankara Criminal Court so that that Court could take this Tribunal's orders into account in determining its procedure. As a result, the Tribunal regards PO Nos 5 & 6 as having been placed on the record in open court. The Respondent's application is denied.

(6) On Tuesday 18 February 2020, the Respondent filed its **Response** to the Application in timely fashion.

The Tribunal, having deliberated, now decides as follows:

The Parties' pleadings

The Application

1. The Claimant informs the Tribunal that the Plaintiffs in the English Proceedings, Mr Hamdi Ipek and Koza Ltd, have provided the following documents from the present arbitration to the English High Court on the hearing of Koza Altin's application for an injunction to restrain Koza Ltd from payment of the Claimant's expenses in this arbitration:

   (a) The Request for Arbitration;

   (b) The Respondent's Application for Security for Costs;

(c) PO Nos 5, 6, 7 & 9;

(d) Procedural timetables dated 30 August 2019 and 28 January 2020;

(e) Witness statements of Mr Hamdi Ipek and Witness 1 dated 5 September 2019;

(f) *Inter partes* correspondence from the Claimant to the Respondent dated 20 December 2019;

(g) The Claimant's letter to the Tribunal dated 10 January 2020; and,

(h) The Respondent's letter to the Tribunal dated 14 January 2020

(together, **the Arbitration Materials**).

2. The Claimant further informs the Tribunal that the English High Court has directed that third parties be given the opportunity to make written submissions as to the use of these materials in the English Proceedings by 21 February 2020. It makes its present Application for confirmations from this Tribunal on the basis that these '*would be of great assistance to the learned judge in the English proceeding*[s].'[1]

3. The Claimant submits that the Arbitration Materials were provided to the Court for the proper purpose of informing the Court about the scope of the matters in dispute in the arbitration and its current procedural status. It submits that there is no general duty of confidentiality in investment arbitration and that the disclosure of these documents is no breach of the arbitration rules or of the procedural orders issued in the present case.

The Response

4. The Respondent replies that the Application should be denied. It submits that the provision of the Arbitration Materials to the Plaintiffs in the English Proceedings breached PO No 1; that there is no general rule of transparency or non-confidentiality under the ICSID Arbitration Rules; that the Claimant acted in bad faith in so doing, prejudicing the Republic and aggravating the dispute between the Parties. It further asks the Tribunal to reconsider its order on its Counter-Application on the ground that the file in Turkish criminal proceedings is open only to counsel of record.

The legal framework

5. The present arbitration is conducted under the provisions of the ICSID Convention (the **Convention**[2]) to which Turkey and the United Kingdom are parties, along with 152 other States. It establishes a procedure for the arbitration of investment disputes between investors and States that is governed by international law rather than national law.[3]

6. The sole provision in the Convention that deals with confidentiality is Article 48(5), which requires the Centre not to publish an award without the consent of the parties.

[1] Application, 5.

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

[3] Lord Collins et al, *Dicey*, *Morris & Collins on the Conflict of Laws* (15th edn, 2012), [16-184]–[16-185].

7. Pursuant to Article 6(1)(c) of the Convention, the Administrative Council is competent to make Rules (the **Rules**) for the conduct of arbitral proceedings. The version of the Rules currently in force and applicable to these proceedings is that adopted in 2006.

8. Rule 6(2) requires each arbitrator to sign a declaration upon acceptance of appointment in which he or she states *inter alia 'I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.'*

9. Rule 15(1) provides that *'[t]he deliberations of the Tribunal shall take place in private and remain secret.'*

10. Rule 48(4) repeats Article 48(5) of the Convention, but adds that *'[t]he Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.'*

11. As regards the oral procedure, Rule 32 provides that:

> Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

12. Administrative and Financial Regulations supplement the Rules. Regulation 22 of the Administrative and Financial Regulations requires the Secretary-General of ICSID to *'publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.'* The Secretary-General is also permitted, if both parties consent, to publish awards or the minutes and records of the proceedings *'with a view to furthering the development of international law in relation to investments.'*

13. Regulation 23 requires the Secretary-General of ICSID to maintain a register of *'all significant data concerning the institution, conduct and disposition of each proceeding.'* This register *'shall be open for inspection by any person.'*

14. Two features of the above provisions are relevant for present purposes:

    (a) Neither the Convention nor the Rules and Regulations made thereunder impose any obligation on the parties to a dispute with regard to confidentiality. The provisions that deal with confidentiality are solely directed to the Arbitral Tribunal and to the Centre.

    (b) The Rules and Regulations make provision for the availability on a public register of *'all significant data'* about the conduct of an arbitral proceeding. They also promote wider publication of awards with the parties' consent.

15. From the outset of the development of the ICSID Rules it has been accepted that *'the Convention and the Rules do not prevent the parties from revealing their case'*[4] and that, in particular *'[t]he parties are not prohibited from publishing their pleadings.'*[5]

16. In these respects, the conduct of investment arbitration under the auspices of ICSID differs from the confidentiality that may attach to the conduct of commercial arbitral proceedings under national law.

17. The Tribunal agrees with the observations of the tribunal in *Biwater v Tanzania* to the effect that:

> Considerations of confidentiality and privacy have not played the same role in the field of investment arbitration, as they have in international commercial arbitration. Without doubt, there is now a marked tendency towards transparency in treaty arbitration.[6]

18. The reasons for transparency were aptly summarised by the tribunal in *Beccara v Argentina* as *'a means to promote good governance of States, the development of a well grounded and coherent body of case law in international investment law and therewith legal certainty and confidence in the system of investment arbitration.'*[7]

19. The above statement of the general law does not detract from the ability of the parties to a particular dispute to agree with the Tribunal more specific provisions relating to confidentiality of the proceedings and the arbitration materials.

20. Nor does it detract from the powers of a tribunal:

    (a) Under Article 47 of the Convention and Rule 39 of the Arbitration Rules, whether on application of a party or on its own motion, to *'recommend any provisional measures which should be taken to preserve the respective rights of either party;'* and,

    (b) Under Article 44 of the Convention and Rule 19 of the Arbitration Rules to decide any question of procedure not covered by the Convention or the Rules.

21. These powers may be exercised in appropriate cases to impose restrictions on publication where a tribunal considers it necessary in order not to exacerbate the dispute, breach the confidentiality of particular documents in the proceedings or otherwise impair the right of both parties to a fair hearing.[8]

[4] *Amco Asia Corp v Indonesia* (Prov. Measures) ICSID Case No ARB/81/1 (9 December 1983) **RL-133**, **[**4].

[5] Notes to original version of ICSID Arbitration Rules, Rule 30 Note F, 1 ICSID Rep 93, cited in *Biwater Gauff (Tanzania) Ltd v Tanzania* (PO No 3) ICSID Case No ARB/05/22 (29 September 2006) **RL-130**, [125].

[6] *Biwater Gauff (Tanzania) Ltd v Tanzania* (PO No 3) ICSID Case No ARB/05/22 (29 September 2006) **RL-130**, [114]. This tendency is also reflected in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014 and in the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2015 (Mauritius, 15 March 2015, not yet in force).

[7] *Beccara v Argentina* (PO No 3) ICSID Case No ARB/07/5 (27 January 2010) **RL-129**, [72].

[8] *Biwater* [59]–[66]; *Beccara* [135]–[139].

The procedural framework of the present arbitration

22. The general procedure agreed between the Parties and the Tribunal for the conduct of the present arbitration is set forth in PO No 1.

23. The only provision that deals expressly with publication is paragraph [23.1], which states:

> The ICSID Secretariat will publish the award and any order or decision in the present case where both Parties consent to publication subject to the redaction of confidential information if the Parties so request. Otherwise, ICSID will publish excerpts of the award pursuant to Arbitration Rule 48(4) and include bibliographic references to rulings made public by other sources on ICSID's website and in its publications.

24. This provision concerns the duties of the ICSID Secretariat. It does not deal with the duties of the parties as to publication, save to the extent that it requires their consent to full publication by the Secretariat of any Award.

25. So far as concerns the production of documents by one party to the other pursuant to a request and an order of the Tribunal, paragraph [15.1] provides that:

> Without prejudice to Article 43(a) of the Convention, and absent contrary agreement of the Parties, the International Bar Association Rules for Taking of Evidence in International Arbitration (2010) (the "IBA Rules") may guide the Tribunal and the Parties regarding document production in this case, albeit the IBA Rules shall not be regarded as being strictly legally binding on the Tribunal or the Parties.

26. Article 3(13) of the IBA Rules provides that:

> Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

27. As noted above, this provision is not *'strictly legally binding on the Tribunal or the Parties'* in this arbitration. It relates to documents produced by the other Party (or a non-Party) pursuant to a Request to Produce Documents that are not in the public domain.

28. The Tribunal has made no order thereunder, nor has either Party requested either a recommendation of provisional measures or a procedural order dealing with confidentiality.

The Tribunal's decision on the Application

29. In light of the above considerations, the Tribunal considers that the Claimant has not committed a breach of its duties in the present arbitration by providing the documents set forth in paragraph [1] to the Plaintiffs in the English Proceedings for the purpose of their submission to the English Court. Its reasons are as follows:

30. *First*, there is no general duty of confidentiality imposed upon the parties in investment treaty arbitration.

31. *Second*, the Tribunal has not, either in PO No 1 or otherwise, made any specific order applicable to the Parties that would impose such a duty. The Tribunal rejects the Respondent's submission that such a duty may be implied from paragraph [23.1] of PO No 1. For the reasons explained above, this provision, like the more general provisions of the Convention and the Rules, relates to the duties of the Tribunal and the Centre, not the Parties.

32. *Third*, the Arbitration Materials comprise:

(a) The Claimant's own pleading and evidence (including the evidence of Mr Hamdi Ipek himself, who is a plaintiff in the English Proceedings);

(b) The Tribunal's procedural orders and directions as to timetable;

(c) *Inter partes* correspondence and correspondence between the Parties and the Tribunal; and,

(d) The Respondent's application for security for costs.

33. As to category (a), it is well accepted that the ICSID Rules do not prevent a party from disclosing its own case, including its own pleadings.

34. As to category (b), the fact that the Tribunal has issued procedural orders and timetable directions is a matter of public record. PO Nos 5 and 6 have already, pursuant to the Tribunal's direction to the Respondent in PO No 6, been produced to the Turkish Criminal Court *'so that that Court may take this Tribunal's Orders into account in determining its procedure.'*[9] The Tribunal will return to PO No 7 below in the context of its discussion of the Respondent's application for security for costs, which application was decided by PO No 7.

35. As to category (c), the Tribunal does not consider as a general matter that confidentiality attaches *ipso facto* to open correspondence between the Parties or with the Tribunal.

36. As to category (d)— the Respondent's application for security for costs, together with PO No 7, which decided that application—there is a reason specific to the issues raised in that application which renders disclosure appropriate.

37. In its application for security, the Respondent referred specifically to the application made by the Plaintiffs in the English proceedings for leave that Koza Ltd might expend its funds to meet the costs of the arbitration. It exhibited and relied upon the

[9] PO No 6, 4 (dispositive part).

Order of Asplin J dated 21 December 2016[10] and the Judgment of Mr Richard Spearman QC in the High Court dated 16 November 2017.[11]

38. As a result, the Tribunal had cause, for the purpose of deciding the Respondent's application for security for costs, to consider the application made by the Plaintiffs in the English Proceedings to enable the expenditure by Koza Ltd in respect of the Claimant's costs in this arbitration. It set out its findings of fact as to the sequence of events in those proceedings, as they had been presented in the Parties' pleadings before it, in paragraph [17] of PO No 7.

39. The Tribunal held at [19] that:

(a) The Claimant has in fact been making reasonable efforts to make financial provision for the risk of an adverse costs order against it in the event that it is not successful at the jurisdictional stage; and,

(b) It is the Respondent that has opposed, and continues to oppose, the making of such provision through the acts of its organ.

40. As a consequence, the Tribunal decided at [20] that *'the Respondent has not established conduct on the part of the Claimant in relation to the economic risk of non-payment that might support an award of security for costs.'*

41. In light of the close connection between the issue raised by the Respondent before this Tribunal in its security for costs application and the issues currently before the High Court, the Tribunal considers that it is of particular importance that the Court should be informed about the Respondent's Application for Security for Costs and the Tribunal's decision thereon.

42. It would, in this Tribunal's view, be contrary to public policy for a party to investment arbitral proceedings, which is seeking funding from a related company in order to enable it to prosecute those proceedings, not to be able to ensure that the Court was properly informed as to the current state of the record before the arbitral tribunal on a matter germane to the Court's decision. The Tribunal has, as previously noted, directed that PO Nos 5 and 6 be produced to the Turkish Court so that that Court might be able to take this Tribunal's Orders into account in reaching its decision. So too the Tribunal considers that the English Court should have PO No 7 and the application which it decided before it so that it may take them into account in reaching its decision.

43. The Tribunal notes that the Arbitration Materials, which have been provided to the English Court do not include documents provided by the opposing party as a result of PO No 8 on the production of documents; nor do they include witness statements or experts reports filed by the opposing party. Nothing in the present decision is intended to suggest that the parties may use such documents outside the arbitration. In the case of such documents, the considerations raised in Article 3(13) of the IBA Rules may well be pertinent. Any such question would have to be decided by the Tribunal upon the application of a Party.

[10] Respondent's Application for Security for Costs, [60.2].

[11] *Koza Ltd v Akçil* [2017] EWHC 2889 (Ch), **RL-3.**

Respondent's application for reconsideration

44. Finally, the Respondent applies to the Tribunal for a reconsideration of its decision of Monday 17 February 2020 on the Respondent's application made on page 3 of its letter of 14 February 2020.

45. The Respondent alleges that the Tribunal rendered its decision in reliance on incorrect information provided by the Claimant as to the public status of the court file in Turkish criminal proceedings. It submits that the court file is open for inspection only by counsel of record and is not available to the public.

46. The Respondent's application for reconsideration is denied. The Tribunal's order of 17 February 2020 was rendered on the ground that, as it had directed the Respondent to provide copies of PO Nos 5 and 6 to the Turkish Court, it regarded those orders *'as having been placed on the record in open court.'*

47. The Respondent confirmed to the Tribunal that its Orders had been provided to the Turkish Court on 14 October 2019.

48. On 15 October 2019, the Claimant provided a copy of an extract from the Hearing Minutes of the 24th Heavy Criminal Court on 14 October 2019, in which the Court records its receipt of the Tribunal's provisional measures decision but rejects the application for suspension of the criminal proceedings.

49. On the basis of this evidence the Tribunal concluded that PO Nos 5 and 6 have been placed on the public record in Turkey and no confidentiality attaches to them. They may be freely used by either Party.

Order

50. **For the above reasons, the Tribunal decides that:**

(a) **The Claimant has not breached the Tribunal's procedural orders or any general legal duty applicable in investor–State arbitration in providing the Arbitration Materials to the Plaintiffs in the English Proceedings so that they may be filed and used before the English High Court in those Proceedings;**

(b) **The Claimant shall provide a copy of this Order to the English High Court (either by itself as third party or by provision of a copy to the Plaintiffs) so that the Court may take it into account in reaching its decision;**

(c) **The Respondent's application for reconsideration of the Tribunal's decision of 17 February 2020 is dismissed;**

(d) **Costs reserved.**

Professor Campbell McLachlan QC
President of the Tribunal
21 February 2020