INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

PROCEDURAL ORDER No. 22
on New Evidence

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: 26 May 2022

Whereas:

(1) The Hearing on Respondent's Objections to Jurisdiction took place from 19–27 July 2021 and from 27–28 September 2021. In the course of the Hearing, the Tribunal heard evidence from a number of witnesses, including the evidence of Mr Selman Turk, a witness of fact called by the Claimant.

(2) At the conclusion of the Hearing, the President enquired of counsel for the Respondent: 'does that then conclude both the evidence and the submissions to be advanced by Respondent in support of its objections to jurisdiction, Mr Sprange?' Mr Sprange replied: 'Yes it does, thank you.' (T9/157/23–158/2). Counsel for the Claimant gave the like confirmation (T9/158/3–11).

(3) Whereupon, the President issued the following direction:

> The Tribunal therefore closes this phase of the proceedings, both as to evidence and as to submissions. This means that there are to be no further submissions from either party, or applications to the Tribunal in respect of this phase of the proceedings, save only were the Tribunal itself of its own motion in accordance with the powers that it enjoys to seek further clarification itself from the parties, in which event you will be notified through the usual channels (T9/158/13–22).

(4) On 29 April 2022, the Respondent submitted an application seeking leave to introduce three interlocutory judgments of the English court in the case *Isbilen v Turk*[1] into the record arguing that they "have a direct bearing on the credibility of one of the Claimant's key witnesses in this arbitration: Selman Turk" (**Application**).

(5) On 16 May 2022, further to the Tribunal's invitation, the Claimant submitted a response objecting to the Respondent's Application (**Response**).

The Tribunal, having deliberated, now decides as follows:

The procedural context

1. The Respondent's Application concerns a request to adduce late evidence after the Hearing.

2. Paragraph 16.3 of PO No 1 provides:

> Neither Party shall be permitted to submit additional evidence or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party:
>
> 16.3.1 Should a Party request leave to file additional or responsive documents, that Party may not annex the documents that it seeks to file to its request.
>
> 16.3.2 If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other Party is

[1] Nebahat Evyap İşbilen v Selman Turk and others [2021] EWHC 3425 (Ch), 20 December 2021; Nebahat Evyap İşbilen v Selman Turk and others [2022] EWHC 572 (Ch), 16 March 2022; Nebahat Evyap İşbilen v Selman Turk and others [2022] EWHC 697 (Ch), 25 March 2022.

afforded sufficient opportunity to make its observations concerning such a document.

The Parties' submissions

The Respondent

3. The Respondent submits that there are exceptional circumstances that justify introduction into the record of the three interlocutory judgments of the English court in the case *Isbilen v Turk*, which it seeks leave to adduce as evidence into the record in this arbitration. It states that all three judgments came into existence since the Hearing. It maintains that those judgments cast doubt on the credibility of Mr Selman Turk, a witness in this arbitration.

The Claimant

4. The Claimant responds that the Respondent's grounds for admission of these documents are inadequate. It maintains that it would be a serious violation of due process to admit documents said to go to the credibility of a witness, without those documents being put to that witness, giving him an opportunity to address them in evidence. It points out that the Respondent had already attempted to put other documents from the *Isbilen* proceedings to Mr Turk in cross-examination without having previously put them on record. This had been the subject of a ruling of the Tribunal in the course of the Hearing.

The Tribunal's analysis

5. The Tribunal considers the Respondent's Application to be without merit for four reasons.

6. *First,* it proceeds on the basis of a misapprehension as to what material is capable of constituting relevant evidence in this arbitration. The Tribunal had occasion to address this point at the outset of this arbitration in its decision in Procedural Order No 2 dated 21 December 2018 on an application of the Claimant, when it observed (at paras [14]–[15]) that its mandate is separate and distinct from that of the English Court. In each case, the trier of fact will make its decision in light of its mandate and the evidence on record before it.

7. In the context of the present Application, this point is particularly pertinent. Neither of the parties in the action *Isbilen v Turk* are parties to the present arbitration, nor is it suggested that the transaction that is apparently the subject of those proceedings has any substantive connection with the present arbitration. The Respondent bases its Application solely on impugning the credit of Mr Turk. The present Tribunal does not have the evidentiary record in that case before it. The judgments of the English court in that action do not constitute evidence of any fact or matter in dispute in the present case, which the present Tribunal will judge on its own merits.

8. *Second,* the Respondent was afforded a full opportunity to cross-examine Mr Turk during the Hearing, which it did on Day 6/47–113, including as to credit, by reference to his dispute with Ms Isbilen. The Respondent already had at that stage access to earlier decisions in *Isbilen v Turk,* which it had elected not to place on the arbitration record. The Transcript record at T6/65/7–11 is as follows:

> 'Q. She says, and this is in evidence that was accepted by Mr Justice Miles and Ms Justice Treacy—

> THE PRESIDENT: Is this in evidence before us, this material that you're quoting now to the witness?
>
> MR SPRANGE: No, it's a publicly available document.'

9. The question of whether it was permissible for the Respondent to rely upon such judgments was the subject of a ruling of the full Tribunal following deliberation as follows (T6/68/14–23):

> The decision of the Tribunal is that the Respondent is permitted to put questions to Mr Turk about matters on which he can give evidence concerning the transaction in question in the current line of cross-examination, but counsel may not put to the witness a document, including in this case what is represented to be a judgment, which is not in the arbitration record before us, and the Tribunal does not accept the introduction of such a document into the record midstream in cross-examination.

10. On further enquiry from counsel, the President added the following direction (T6/69/7–19):

> [Y]ou are entitled to put propositions to the witness and invite him to tell us what he has to say about those propositions, but such questions may not be premised upon a reference to a document, by which I mean to say you may derive your knowledge from wherever you derive it from, what we're interested in is not your knowledge, we're interested in the witness's knowledge, and you may not reinforce your proposition to the witness by reference to a document which is not in the arbitration record: is that sufficiently clear to enable you to continue, sir?
>
> MR SPRANGE: Yes that's clear. Thank you.

11. Following that direction, counsel for Respondent then put to Mr Turk a series of questions relating to the transaction with Ms Isbilen that is said to give rise to her dispute with Mr Turk and the proceedings that ensued and were continuing (T6/71/7–79/9).

12. The Tribunal has the transcript of the evidence that Mr Turk then gave to it. It will judge it (together with all the other evidence tendered by both Parties in this phase of the arbitration) in accordance with ICSID Arbitration Rule 34(1), which provides: 'The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.'

13. *Third*, the Tribunal accepts the Claimant's due process objection. The provisions in ICSID procedural orders, including in the present case, requiring the Parties to file all documentary materials on which they wish to rely during the written phase, are not included for mere administrative convenience. They respect a fundamental procedural requirement to ensure that, in the course of the oral phase, the examination of witnesses can be conducted on the basis of a documentary record that is disclosed in advance. In this way, if any such documents are relevant to the testimony of a particular witness, they can be put to that witness, so that he or she has a proper opportunity to address them.

14. *Fourth*, the fact that the present Application is made after the Hearing is also relevant in the context of the Tribunal's own process.

15. In the present case, the jurisdictional phase was prepared assiduously by both Parties over the course of some two years, during which time the Tribunal entertained and determined numerous interlocutory applications, including as to the production or admission of evidence.

16. The provisions of para.[16.3] of PO No 1 that the Respondent now seeks to invoke appear in that part of PO No 1 that deals with the submission of documents under ICSID Arbitration Rule 24, which provides that 'Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.'

17. Para.[16.3] provides a limited exception to that rule. It is apt to deal with the situation (not uncommon in international arbitration) in which between the close of the written procedure and prior to the hearing, a party wishes to adduce additional evidence. Indeed, it was precisely in this context that such an application was made and determined by the Tribunal in PO No 17 dated 17 March 2021.

18. The context in which the present Application is made is quite different. Following confirmations from counsel for both Parties, the Tribunal concluded the evidentiary phase on 28 September 2021 with an express direction that there were to be no further submissions or applications from either Party in respect of the jurisdictional phase, save only were the Tribunal itself to seek clarification itself from the Parties.

19. This direction serves an important purpose. The Tribunal is now deliberating on its decision in relation to Respondent's Objections to Jurisdiction. Such deliberation is conducted, as it must be, on the basis of an evidentiary record that is closed.

20. This is not to say that there can never be circumstances arising after a hearing that may justify reopening the evidentiary record. In the case of proceedings on the merits, this is specifically provided for in ICSID Arbitration Rule 38(2), which provides:

> Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

21. Rule 38(2) is not directly applicable. However, the Tribunal is presently engaged in reaching its decision on Preliminary Objections after closure of the evidentiary phase at the end of the Hearing. In these circumstances, the Tribunal considers that it would be necessary for it to be satisfied that the case for admission of the new evidence is exceptional because it is of such a nature to constitute such a decisive factor as to justify reopening the evidentiary phase, with all the consequences that would necessarily follow from that in due process terms.

22. The material that the Respondent seeks leave to adduce in the present Application does not begin to constitute such a factor. It is not said to go to any of the facts or matters that the present Tribunal is mandated to decide in order to determine the Respondent's Objections to Jurisdiction. Rather it is invoked as collateral material on which to impugn the credit of a witness, whom the Respondent has already been afforded a full opportunity to cross-examine, relating to matters which are the subject of the unrelated legal proceedings against the witness.

The Tribunal's decision

23. In light of the above considerations, the Tribunal decides that the Respondent's Application is dismissed.

For and on behalf of the Tribunal

Professor Campbell McLachlan QC
President of the Tribunal
26 May 2022