INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

PROCEDURAL ORDER No. 20
on the Respondent's adjournment application

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: 22 June 2021

Whereas:

(1) On 22 April 2021, the Tribunal convened a case management videoconference (**CMC**) concerned solely with the convening of the oral phase of the Preliminary Objections. Both Parties were in agreement that a Hearing online on the dates already fixed would be preferable to a further adjournment and that the convening of the Hearing online was practicable. Both Parties further assured the Tribunal that they would cooperate with each other and with the Tribunal and the Secretariat in order to facilitate such a Hearing.

(2) In light of that agreement and those assurances, the Tribunal decided to convene the Preliminary Objections Hearing (the **Hearing**) online from 19–27 July 2021.

(3) On 28 May 2021, the Tribunal issued its Procedural Order No 18 (**PO No 18**) on the confidentiality of Witness 1's testimony. By that Order, having considered the Parties' submissions and for the reasons stated therein, the Tribunal decided:

a. To issue a Protective Order in respect of the identity of Witness 1 as set forth in Annex A hereto;

b. The Claimant shall notify the Tribunal Secretary by 7 June 2021 whether Witness 1 accepts to give oral evidence in the Arbitration on these terms and the Claimant will tender him/her for cross-examination accordingly;

c. In the event that the Claimant does give such a notification, counsel for each Party shall sign their confirmation of the Protective Order by 14 June 2021, filing a copy with the Tribunal Secretary;

d. Only those counsel and the Party Representative who fall within the category specified in paragraph 1 of the Protective Order and who have first signed and filed with the Tribunal Secretary a Confidentiality Undertaking in the terms of Annex B hereto may receive the Protected Information as to the identity of Witness 1.

e. Paragraph [18.7] of PO No 1 is varied such that Mr Hamdi Ipek may not be present for the Closed Session in which Witness 1 gives oral evidence. Following the hearing of Mr Ipek's own evidence, and the conclusion of the Closed Session, he may review the transcript thereof.

f. The Respondent may adduce additional documentary evidence strictly limited to matters arising from the disclosure of the identity of Witness 1 and not otherwise. Any such documents shall be provided first to the Claimant by 24 June 2021. In the event that their admission to the documentary record is not agreed, the Respondent has liberty to apply for leave.

g. The Respondent's application for further documentary production is denied.

(4) On 7 June 2021, the Claimant notified the Tribunal Secretary that Witness 1 accepts to give oral evidence in the arbitration on the terms set out in PO No 18.

(5) On 14 June 2021, the Claimant signed its confirmation of the Protective Order, filing a copy with the Tribunal Secretary.

(6) On 14 June 2021, the Respondent filed an application (the **Application**) for an adjournment of the Hearing on the alleged ground that PO No 18 '*cannot be implemented prior to the Hearing without infringing the Republic's due process rights to challenge effectively the alleged evidence of Witness 1*.' At the same time, it sought an order on its earlier application to strike from the record a certain portion of the Report of Mr Moore filed on behalf of the Claimant, or, failing that, to provide its own expert with an opportunity to inspect the computer of Mr Akin Ipek. The Respondent declines to sign the confirmation of the Protective Order until the Application is decided.

(7) By its Application, the Respondent now seeks the following relief:

a. The adjournment of the Hearing by at least four months in order to give the Republic proper opportunity to gather information regarding Witness 1's credibility;

b. An amendment to the relief in PO18 such that, upon the production of the proposed confidentiality undertaking, the identity of Witness 1 may be disclosed not just to the Republic's international counsel (King & Spalding), but also three representatives from the Republic's Turkish counsel (Lexist), two representatives from an independent, third-party, non-Turkish investigations firm; and then one representative from each of the (a) TMSF;

(b) the Presidency; (c) the Ministry of Justice; (d) the Ministry of Interior Affairs; (e) the relevant Prosecution Office(s) (whether Istanbul, Ankara or otherwise); (f) the Republic's Financial Crimes Investigation Board (MASAK); (g) the General Directorate of the Police Department and (h) the Ministry of Foreign Affairs;

c. That Sections 5.3-5.5 of the Moore Report be stricken from the record, failing which, the Tribunal should order that Mr. Rose be permitted to submit a supplemental report into the record following his examination of Hamdi Akin Ipek's laptop and mobile phone to which Claimant's expert Mr. Moore had been given unilateral access;

d. The right to seek further relief in this regard, including by way of expansion, amendment or revision to the list of individuals who may be informed of Witness 1's identity, once the scope of the exercise become clear.

(8) On 18 June 2021, in accordance with a direction given by the Tribunal on 15 June 2021, the Claimant filed its response (the **Response**) to the Application. The Claimant opposes the Application on the ground that PO No 18 appropriately balances the due process rights of both Parties and that the additional relief now sought is inconsistent with the Respondent's previous position and '*has likely been formulated with the precise intention of intimidating Witness 1 in order not to testify in this arbitration*.' It submits than an adjournment of the Hearing is unwarranted and would prejudice the Claimant.

The Tribunal, having deliberated, now decides as follows:

Witness 1: Scope of confidentiality undertaking ratione personae

1. The Respondent's Application for an adjournment of the Hearing hinges on the steps that it submits it needs to be able to take, consistent with its due process rights, in order to be able to cross-examine Witness 1.

2. The evidence in chief to be given by Witness 1 has been available to the Respondent in the form of written witness statements since his/her First Statement was submitted together with the Counter Memorial on Jurisdiction on 5 September 2019 (**Witness 1 WS1**), followed by a Second Statement submitted with the Rejoinder on 30 June 2020 (**Witness 1 WS2**).

3. The issue in dispute between the Parties is not therefore the substance of the evidence to be adduced by Witness 1 relating to the preparation of the SPA. That has been long available to both Parties.

4. The sole remaining issue in dispute between the Parties has been disclosure of the identity of Witness 1 and any necessary protections of his/her identity in order to enable that witness to give evidence at the Hearing.

5. The Parties have also long agreed the test applicable to that question. By PO No 4 dated 12 August 2019, the Tribunal noted that both Parties accept that, in determining any orders necessary for the protection of a witness giving oral testimony, the Tribunal must balance the due process rights of both Parties, so as to afford the Party wishing to present the witness a full opportunity to present its case, and at the same time to afford the opposing Party the opportunity to defend itself by challenging the proffered evidence, including by way of cross-examination as to the credibility of the witness.

6. The Tribunal endorses this requirement to balance the due process rights of both Parties. It forms the basis for its decision in PO No 18 on the confidentiality of Witness 1's testimony.

7. By that decision, the Tribunal did not accept the more extensive aspects of the Claimant's prayer for relief to the effect that Witness 1 should be able to give his/her evidence anonymously, nor did it accept the Respondent's submission that the Claimant's application should be rejected *in toto*. The former would have given insufficient protection to the Respondent's right to confront the evidence against it, while the latter would have led to an important part of the Claimant's evidence being excluded, with consequent impact on the Claimant's right to a full opportunity to present its case.

8. Rather, it focussed its attention on the Respondent's alternative submission as to the minimum conditions that it considered necessary in order to enable it to conduct an effective cross-examination of Witness 1. These criteria the Respondent set out first as long ago as its Response of 15 July 2019 on witness anonymity at [73.2].

9. By its Response of 15 July 2019, the Republic's request was put in the following terms:

> 73.1 The Republic requires access to all of its legal team (King & Spalding – regardless of qualification country, and Lexist), all of whom have applicable ethical and professional obligations as members of their respective legal bars.
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> 73.2 The Republic's legal team cannot work in a vacuum – they need to take instructions from their client. Accordingly, a restricted number of individuals within the Republic – at TMSF and the Presidency – that instruct King & Spalding and Lexist will be required to know the witnesses' identities, to answer queries of the legal team, and assist in cross-examination preparation.
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> 74. Each of the above individuals would be identified by name and invited to sign a confidentiality undertaking on appropriate terms before gaining access to any confidential information concerning the Witnesses.

10. By its Reply of 9 June 2020, the Republic added at [87.3] and [88. 2] that:

> 87.3 If Witness 1 testifies, the Tribunal must permit the Republic to submit additional evidence in the record that relates to Witness 1 and the expected subject matter of his/her testimony.
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> …
>
> 88.2 The Republic's representatives and the Republic's co-counsel in this arbitration, Lexist, must be present to hear the testimony. K&S need to be able to take instructions on lines of examination, particularly given that the Tribunal will be asked to take its decision on the oral testimony, in light of the lack of documentary evidence.

11. In PO No 18 at [29], the Tribunal decided to accede to both of these requests, in each case making only such provision as it judged reasonably necessary in the particular circumstances in order to secure the Respondent's right of defence:

> (1) *Disclosure to Lexist/ Respondent's Party Representative/s:* The Tribunal has carefully weighed the Claimant's concerns. Consistent with its earlier ruling as to the importance of ensuring the exercise of the right of defence through cross-examination, it considers that it is necessary to enable the Respondent's international counsel to take instructions for the purpose of enabling an effective cross-examination as to credit. In order to ensure that the protection of Witness 1's identity is limited to the greatest extent possible consistent with the exercise of the

> right of defence, it limits disclosure to one lawyer from Lexist and one Party Representative, in each case nominated by the Respondent from those persons already designated to the Tribunal Secretary under the provisions of PO No 1, [8]. Each of these two representatives shall sign the same Confidentiality Undertaking that is to be given by international counsel.
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> …
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> (3) *Additional documentary evidence.* The Tribunal considers that in principle the Respondent is entitled to introduce into the arbitration record additional documentary evidence strictly limited to matters arising from the disclosure of the identity of Witness 1 and not otherwise, the substance of Witness 1's evidence having already been disclosed to the Respondent in the written phase. Any such additional documents should first be disclosed to opposing counsel. Further application to the Tribunal may be made in the event that their introduction cannot be agreed in light of the above indication.

12. The Tribunal recalls the importance of the designation of a person as a Party Representative under PO No 1, [8]. ICSID Arbitration Rule 18(1) provides that '*Each party may be represented or assisted by agents, counsel or advocates,'* and requires that their *'names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.*'

13. This provision is not merely administrative in character. It exists in order that the tribunal (and the opposing party) may know on whom they may rely as properly authorised by the relevant party to give instructions as to the conduct of the matter.

14. The solemn character of the responsibilities assumed by such persons in the conduct of the arbitration is underscored by the mandatory requirement in ICSID Arbitration Rule 47(1)(d) that: '*The Award shall be in writing and shall contain… (d) the names of the agents, counsel and advocates of the parties.'*

15. In the present case, by PO No 1, [8], the Respondent, in addition to named counsel from King & Spalding and Lexist, designated four (4) named agents from the Savings Deposit Insurance Fund (**SDIF**, also known by its Turkish acronym **TMSF**) and four (4) named agents from the Presidency of the Republic (Directorate of Administrative Affairs, General Directorate of Law and Legislation).[1] It is these personsso designated,

[1] The Respondent has subsequently amended its list of representatives. The current representatives are reflected in the letterhead of ICSID's correspondence.

as amended by the Respondent subsequently, who are appointed by the Respondent to give instructions to counsel.

16. The Respondent had sought leave in its Response of 15 July 2019 to be able to disclose the identity of the relevant witness to *'a restricted number of individuals within the Republic – at TMSF and the Presidency'* each of which would be '*identified by name and invited to sign a confidentiality undertaking'* in order that they might be able *'to answer queries of the legal team, and assist in cross-examination preparation.'*

17. The Tribunal responded to that request by permitting the Republic to nominate itself one such person to receive the confidential information as to Witness 1's identity and thus be able to instruct counsel.

18. By its most recent Application, the Respondent now requests that to this list be added: *'two representatives from an independent, third-party, non-Turkish investigations firm; and then one representative from each of the (a) TMSF; (b) the Presidency; (c) the Ministry of Justice; (d) the Ministry of Interior Affairs; (e) the relevant Prosecution Office(s) (whether Istanbul, Ankara or otherwise); (f) the Republic's Financial Crimes Investigation Board (MASAK); (g) the General Directorate of the Police Department and (h) the Ministry of Foreign Affairs.'*

19. The Tribunal considers that this request is impermissible as inconsistent with the Respondent's pleaded case as to the relief that it—through its authorised counsel and representatives-- sought, in reliance upon which the Tribunal issued its ruling in PO No 18. The Respondent advanced its case on the basis that its counsel needed to take instructions from its Party Representatives '*at TMSF and the Presidency*'. The Tribunal decided the Claimant's application for confidentiality protections on that basis. It is not now open to the Respondent, after the Tribunal's decision on the point has been rendered, to seek disclosure to a wholly different, and much broader, list of persons.

20. Such a request goes far beyond that which is reasonably necessary to ensure due process for the Respondent by enabling its counsel to take instructions from its Party Representative. The Tribunal does not consider that the due fulfilment of this requirement, which is strictly limited to the proper purposes of the present arbitration, requires a wide-ranging enquiry amongst six ministries and criminal agencies. It would

undermine the balance that the Tribunal has struck with the essential protections for Witness 1 that the Tribunal has already found are needed in order to enable the Claimant to have a full opportunity of presenting its case. None of the other ministries or criminal agencies named in the Application have assumed responsibility for the conduct of the present arbitration.

21. The Tribunal decides that this part of the Application must be denied.

Witness 1: Documentary record as to identity/credibility

22. The Respondent then seeks *'adjournment of the Hearing by at least four months in order to give the Republic proper opportunity to gather information regarding Witness 1's credibility.*'

23. The Tribunal finds this Application to be without merit. The Respondent complains that, if it had known the information as to Witness 1's identity at an earlier stage, it *'would not only have sought documents from Claimant during the disclosure phase, but also would have independently gathered probative evidence, likely with the help of an investigation firm, the Republic and its agencies and through third party disclosure orders, which it would have submitted with its Reply.*'

24. Documentary production from the Parties as to *'the preparation, signing and custody of the SPA*' (including communications with lawyers) has already been the subject of the Tribunal's wide-ranging provisions in PO No 8, the adequacy of which each Party has verified by signed statement from Party Representatives. As the Tribunal has held (PO No 10, [25](2)): *'document production is a party-party exercise. It does not extend to evidence that is the property of the agent or witness himself.*'

25. Until its most recent Application, the relief that the Respondent sought was simply leave to submit additional documentary evidence in the record. The Tribunal granted such leave in PO No 18. In view of the fact that the only additional information to be provided is the identity of the witness, the Tribunal limited its permission to '*additional documentary evidence strictly limited to matters arising from the disclosure of the identity of Witness 1 and not otherwise.*'

26. The Respondent now complains that it has been allowed insufficient time to collect and submit such evidence. Both Parties knew at the CMC that the Claimant's application regarding Witness 1—and the Respondent's concomitant request for leave to adduce additional documentary evidence—remained outstanding when they confirmed their agreement to the Hearing date of 19 July 2021. Both Parties must therefore be taken to have accepted that preparations to cross-examine Witness 1 would and could be made within the time available, in the event that the Tribunal were to rule in the Claimant's favour.

27. Accordingly, this ground for an adjournment must be denied.

Moore Report

28. Finally, the Respondent asks for certain portions of Mr Moore's Report to be stricken from the record, failing which it seeks leave to file a reply report. The application that the Respondent originally made on 6 October 2020 (**Moore Application**) was to strike section [5.4] of Mr Moore's Report on the ground that his inspection of Mr Ipek's computer was in breach of PO No 12, in which the Tribunal had ordered that the computer be held in escrow by the Claimant's counsel '*not to be tampered with.'* The Claimant responded to that application on 21 October 2020 (**Moore Response**).

29. The Respondent now seeks to extend the scope of relief to sections [5.3] and [5.5] of Mr Moore's Report as well, on the basis that these sections of the Report deal with the results of his inspection of other electronic devices of Mr Ipek, to which the Respondent has not had access.

30. The Claimant responds that it afforded Mr Moore access to Mr Ipek's computer only on the basis of Mr Moore's undertaking not to tamper with it. It states otherwise the Respondent's application exceeds the scope of the relief that it originally sought and, insofar as it would require production of Mr Ipek's devices to the Respondent's expert, would be inconsistent with the Tribunal's prior decision in PO No 10.

31. Insofar as concerns Mr Ipek's computer, the Tribunal rules that it had already decided this matter in PO No 12, which required the computer *'to be held in escrow under the safe keeping of the solicitors to the Claimant not to be tampered with and to be held until the conclusion of the proceedings, subject to further order of the Tribunal.'* While

the Tribunal at this stage has no reason to doubt Mr Moore's detailed assurances that the forensic method he adopted did not affect the computer's hard drive, it would have expected, consistent with PO No 12, the Claimant to make application for a variation of PO No 12 were the computer to be subject to such inspection. In the circumstances, it has decided that the best course is to strike section [5.4] from the record.

32. The Respondent's additional complaints as to sections [5.3] and [5.5] are dismissed as untimely. It made no such complaint following receipt of the Moore Report on 25 August 2020 or at any time thereafter until 14 June 2021, five weeks prior to the Hearing. The Tribunal held in PO No 10 on Electronic Devices that it has no power to order inspection of an electronic device by the other Party's expert and that it would be contrary to principle to compel such production. It would run counter to the responsibilities of the Parties in relation to document production and potentially seriously infringe the legitimate interests of the requested Party in relation to confidential information unrelated to the specific categories of evidence in respect of which production has been ordered. The Respondent will have an opportunity to cross-examine Mr Moore on these sections of his Report if so advised.

Order

33. **Now therefore, for the above reasons, the Tribunal orders as follows:**

(1) **The Respondent's Application for an adjournment of the Hearing of its Preliminary Objections, currently fixed to commence on 19 July 2021 is denied;**

(2) **The provisions of PO No 18 on the confidentiality of Witness 1's testimony, including the Protective Order in Annex A, remain in full force and effect, save that:**

(a) **The date specified in paragraph [30](3) is extended to Monday 28 June 2021; and**

(b) **The date specified in paragraph [30] (6) is extended to Monday 5 July 2021;**

(3) **Section [5.4] of the Report of Mr Moore dated 24 August 2020 is stricken from the record. The Claimants are to file a redacted copy of this report on the record by Monday 28 June 2021.**

(4) **Save as aforesaid, the Respondent's Moore Application is denied.**

(5) **Costs of and occasioned by the Adjournment Application to be payable by the Respondent in any event.**

(6) **Costs of the Moore Application to be payable by the Claimant in any event.**

For and on behalf of the Tribunal

Professor Campbell McLachlan QC
President of the Tribunal
22 June 2021