

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

**PROCEDURAL ORDER No. 19
on the Testimony of Tekin Ipek**

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: 30 May 2021

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Whereas:

- (1) On 19 September 2019, by paragraphs 76 and 77 of Procedural Order No 5 (**PO No 5**), the Tribunal decided that:

76. So far as concerns Mr Tekin Ipek, the Tribunal wishes to ensure that Mr Ipek is enabled to prepare and give his evidence on matters relevant to this arbitration. This necessarily includes provision of access on a confidential basis to lawyers chosen by Mr Tekin Ipek to review his evidence relevant to this arbitration with him, including any drafts of his written testimony.

77. At the appropriate time prior to any hearing in which Mr Tekin Ipek's oral evidence is to be given, the Tribunal will wish to make suitable procedural directions to enable this evidence to be taken, for example by remote video link. It invites the Parties to consult each other with a view to reaching agreement on a protocol for this purpose.

- (2) On 31 March 2020, by paragraph 39 of Procedural Order No 15 (**PO No 15**), noting a dispute between the Parties 'as to the current state of their negotiations concerning the conditions under which Mr Tekin Ipek may give his evidence,' and having referred to the above passage, the Tribunal stated:

39. The Tribunal reiterates the importance of the essential minimum conditions for Mr Tekin Ipek's evidence that it stated in the above passage. It expects the Parties to confer in good faith in order to resolve any outstanding issues between them as to the necessary arrangements. The Tribunal remains available to the Parties on application in the event that there are aspects of these arrangements that cannot be agreed between them in due time for the preparation and presentation of Mr Tekin Ipek's evidence.

- (3) On 19 May 2020, the Claimant filed an application (**Application**) with the Tribunal. It stated that the Parties had been unable to reach agreement on such a protocol. It sought an interim protocol from the Tribunal (the **Claimant's Protocol**), securing it access to Mr Tekin Ipek on conditions there set out in paragraph [8] in order to enable him to prepare his evidence on a confidential basis with the Claimant's counsel.
- (4) On 28 May 2020, the Respondent filed its response (**Response**), in which it opposed the Claimant's interim protocol, and proposed in its place an alternative set of provisions set out in Annex A to the Response (the **Republic's Protocol**), comprising 32 paragraphs, which the Respondent submits are consistent with the requirements of Turkish law.
- (5) On 9 June 2020, in accordance with directions issued by the Tribunal for a further round of written submissions, the Claimant filed a reply (**Reply**), in which it submits that the Republic's proposals are neither reasonable nor practical; disputes the relevance of Turkish law; and expresses its concern as to the alleged potential under the Republic's Protocol for the interception of confidential and privileged communications between Mr Tekin Ipek and the Claimant's counsel.
- (6) On 16 June 2020, the Respondent filed its rejoinder (**Rejoinder**) in which it avers that it has made reasonable proposals, in accordance with Turkish law, to enable the Claimant's counsel to meet Mr Tekin Ipek; submits that its proposal does protect privilege; and confirms that '*Tekin Ipek will be able to testify by videoconference either*

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from the prison, or the hearing room of the relevant High Criminal Court... There is no restriction under Turkish laws preventing the examination at the ICSID hearing from being conducted by V/C. Thus, Cafer Tekin Ipek may be examined by the Tribunal via V/C.’ [32].

- (7) On 28 July 2020, on an application by the Claimant for an extension of time to file its Rejoinder to the Respondent’s Preliminary Objections, the Tribunal granted a short adjournment, and held, in relation to the evidence of Mr Tekin Ipek:

The Tribunal has already decided in PO No 5 paragraphs [76]–[77] that the Claimant is entitled to adduce evidence from Mr Tekin Ipek and that arrangements are to be made to enable such evidence to be taken. Such arrangements have not been agreed between the Parties and the Tribunal’s directions are required. This decision stands irrespective of the present decision on the timetable. Nevertheless, the taking of Mr Tekin Ipek’s evidence, following any further directions from the Tribunal, is likely to occasion a further delay, which will be further complicated in light of the pandemic... [B]oth Parties will have the opportunity (if so advised) to submit a short supplemental written pleading in relation to Mr Tekin Ipek’s statement when it is filed.

- (8) On 25 August 2020, the Tribunal wrote again to the Parties, in light of the ongoing pandemic, to refix the Preliminary Objections hearing for 19–27 July 2021. It expressed a preference to hold the hearing in person ‘provided that the world health situation then permits’, providing that otherwise it ‘will consult with the Parties in order to engage to arrange the modalities for a virtual hearing to be held on the same dates.’
- (9) 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.
- (10) In light of that agreement and those assurances, the Tribunal decided to convene the Preliminary Objections Hearing online from 19–27 July 2021.

The Tribunal, having deliberated, now decides as follows:

The Tribunal’s analysis

1. The Tribunal approaches the question of the procedure by which the evidence of Mr Tekin Ipek is to be adduced before it in the specific procedural context in which it currently arises, in which the Claimant seeks an interim order providing for his testimony in relation to the Preliminary Objections phase, now set down for Hearing by videoconference in two months’ time.
2. The present Order is without prejudice to any further arrangements that would have to be made in the event that the Tribunal were to uphold its jurisdiction and provision for the evidence of Mr Tekin Ipek needed to be made for any subsequent phase of the proceedings.
3. In analysing this issue, the Tribunal will consider:

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- (1) The law applicable to the procedure for witness evidence in ICSID proceedings generally;
- (2) The potential relevance of the witness evidence of Mr Tekin Ipek for the issues that arise in the Preliminary Objections phase; and,
- (3) The specific procedure to be adopted to hear the Mr Tekin Ipek's evidence.

The law applicable to the procedure for witness evidence in ICSID proceedings

4. The States parties to the ICSID Convention (which include the Republic of Turkey and the United Kingdom) agreed that arbitration proceedings under the Convention should be conducted according to the self-contained procedures of the Convention.
5. Article 44 of the Convention provides:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.
6. The leading commentary on the Convention observes: '*Art. 44 creates a comprehensive and self-contained system that is insulated from national rules of procedure.*'¹
7. ICSID Arbitration Rule 33 deals with the procedural rules concerning with the marshalling of evidence. It provides that:

[E]ach Party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.
8. Pursuant to this overall provision (together with ICSID Arbitration Rule 24, which requires supporting documentation ordinarily to be filed with the instrument to which it relates), the principal route by which witness evidence is adduced before an ICSID arbitral tribunal is by means of witness statements filed with the Parties' pleadings. Witnesses whose evidence is to be adduced in this way are then tendered for cross-examination, if the other Party or the Tribunal so requires.
9. In the context of the present arbitration, this process is reflected in the provisions of paragraphs [17] and [18] of PO No 1.
10. In addition, Article 43(a) of the ICSID Convention itself (which is within Section 3 of the Convention dealing with the Powers and Functions of the Tribunal) provides:

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

 - (a) call upon the parties to produce documents or other evidence...

¹ Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, Cambridge UP, 2009) Art 44, [3].

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11. This power is further provided for in ICSID Arbitration Rule 34(2)(a), which specifies (in accordance with the intention of the Convention's framers²) that the tribunal's power to call upon the Parties includes: 'to produce documents, witnesses and experts.'

12. Paragraph (3) adds:

The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

The evidence of Mr Tekin Ipek

13. It has been plain, at least since its application for provisional measures dated 15 November 2019, that the Claimant wishes to enable Mr Tekin Ipek, who is currently in prison in Turkey, to provide witness testimony in this Arbitration.³

14. In its Reply at [3], the Claimant specifies (supporting its submission by reference to other evidence on the arbitration file) that:

Mr. Tekin Ipek is undoubtedly an important witness in this arbitration. He is a shareholder of the Claimant and was a director of the Claimant from incorporation until 17 October 2016. Mr. Tekin Ipek took a leading role in the Koza Group's decision to expand internationally and move its holding company to the United Kingdom, including attending meetings with UK government officials on 2014 and 2015, and dealt directly with Morgan Lewis, the law firm that prepared the initial draft of the SPA.

15. The Respondent states that it is not seeking to minimise the scope of Mr Tekin Ipek's testimony: Rejoinder, [34.2].

16. In the Tribunal's view, evidence as to the course of events that led to the alleged execution of the SPA on 7 June 2015 is of considerable importance to the issues that arise on the Preliminary Objection. At the same time, of its nature, the evidence as to this question relates to a relatively confined sequence of events and will not require witnesses to deal with all of the matters that would arise in the event that this case were to proceed to a hearing on the substance.

The specific procedure to hear the evidence of Mr. Tekin Ipek

17. From the outset of its consideration of the position of Mr. Tekin Ipek, the Tribunal has indicated to the Parties that:

(1) The evidence of Mr. Tekin Ipek on matters relevant to the Preliminary Objections should be available to the Tribunal; and,

(2) Mr. Tekin Ipek should have access to legal counsel of his choice, on a confidential basis, in order to enable him to prepare to give his testimony.

² *History II*, 806.

³ See the Claimant's application for relief cited in PO No 5, [71](2).

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18. Both Parties accept these decisions.
19. The areas in dispute between the Parties as ventilated in their submissions turn on the arrangements to be made to enable the Claimant's counsel to interview Mr. Tekin Ipek and to assist him to prepare a witness statement:
 - (1) The Claimant seeks to be able to interview Mr. Tekin Ipek at the offices of the World Bank in Ankara, along with assurances as to protection for privileged communications between the Claimant's counsel and Mr. Tekin Ipek in the preparation of his statement.
 - (2) The Respondent cites provisions of Turkish penal law that it alleges circumscribe the manner in which Mr. Tekin Ipek may be permitted to communicate with the Claimant's counsel in this process.
20. In view of the self-contained nature of the arbitral process to which the States parties to the ICSID Convention (including the Republic of Turkey) have subscribed, international law governs the Tribunal's procedure, not the national law of any Contracting State. As the Tribunal observed in PO No 15 at [22]:

The obligations that the Respondent owes in the present proceedings on the plane of international law apply equally whether the acts in question are those of the executive or the judiciary and irrespective of their characterization under the Respondent's own Constitution or its other internal laws.
21. The Tribunal rejects as inapplicable to this arbitral procedure the provisions of Turkish penal law on which the Respondent seeks to rely. At the same time, for the reasons already given above, it is not the case that the only means by which the testimony of Mr. Tekin Ipek may be given necessarily require the prior preparation of a witness statement by the party wishing to adduce that testimony.
22. The Tribunal has decided to exercise its own power under Article 43(a) of the Convention, as further confirmed by ICSID Arbitration Rule 34(2)(a), to call upon the Parties to produce Mr. Tekin Ipek to give evidence at the forthcoming Preliminary Objections Hearing.
23. For this purpose, Mr. Tekin Ipek is to be provided with:
 - (1) A set of documents from the record in this Arbitration relevant to his testimony and freely chosen for this purpose by the Claimant and supplied to him in prison in Turkey (a list of such documents to be served on the Respondent on the same day as their provision to Mr. Ipek); and,
 - (2) Access to Counsel of Mr. Tekin Ipek's choice on a confidential and privileged basis in order to assist him in preparation for his testimony.
24. As this witness will be heard in the exercise of the Tribunal's own power to call for a witness, the Tribunal dispenses with prior service of a witness statement. The evidence of Mr. Tekin Ipek will be taken orally in the course of the Hearing: elicited in chief by counsel for the Claimant; followed by a right of cross-examination by counsel for the Respondent and re-examination by the Claimant. The Tribunal retains its right to ask questions of the witness at any time.
25. While Mr. Tekin Ipek appears before the Tribunal, no person may speak to him about his testimony, save on the record of the arbitration.

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26. By virtue of Article 22 of the ICSID Convention, he is immune from legal process in Turkey with respect to his appearance as a witness in these proceedings.
27. The Respondent has confirmed (Rejoinder at [32]) that there is no objection to Mr. Tekin Ipek giving his evidence via videoconference either from prison or from the Criminal Court. The Tribunal expresses its preference that the evidence of Mr. Tekin Ipek be given from the Criminal Court. It will, if necessary, make itself available by way of special sitting in order to facilitate the taking of Mr. Tekin Ipek's evidence in this way.

The Tribunal's decision

28. **In light of the above considerations, the Tribunal decides that:**
- (1) **The Tribunal calls upon the Parties to produce Mr. Tekin Ipek to give oral testimony via videoconference at the forthcoming Preliminary Objections Hearing in this Arbitration.**
 - (2) **In order to enable him to prepare to give testimony, Mr. Tekin Ipek is to be provided with:**
 - (a) **A set of documents from the record in this Arbitration relevant to his testimony and freely chosen for this purpose by the Claimant and supplied to him in prison in Turkey (a list of such documents to be served on the Respondent on the same day as their provision to Mr. Ipek); and,**
 - (b) **Access to Counsel of Mr. Tekin Ipek's choice on a confidential and privileged basis in order to assist him in preparation for his testimony.**
 - (3) **Save as aforesaid, the Claimant's Application for an interim protocol is adjourned until after the outcome of the Preliminary Objections phase.**

For and on behalf of the Tribunal



Professor Campbell McLachlan QC
President of the Tribunal
30 May 2021