INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

PROCEDURAL ORDER No. 18
on the confidentiality of Witness 1's testimony

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: 28 May 2021

Whereas:

(1) On 19 November 2018, the Tribunal issued Procedural Order No. 1 (**PO No 1**) which provided in the relevant sections as follows:

> 17.3. If a Party wishes to request leave for the Tribunal to authorize a witness or expert to testify anonymously, it must apply no later than 60 days before the witness or experts' testimony is due to be filed on the record. In the event that such an application is timely made, the Tribunal will, having consulted both Parties, determine the appropriate procedure by which to decide it.
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> 17.4. The Parties shall hereafter confer regarding the confidentiality arrangements that would need to be put in place in the event that a witness or expert were to testify anonymously and shall report the outcome of their consultations to the Tribunal.

(2) In Procedural Order No 2, dated 21 December 2018, the Tribunal excluded C-42, the Statement of Witness A in the Extradition Proceedings which had been filed as an exhibit, from the record and invited the Claimant to file an application if it wished Witness A's evidence to be given anonymously.

(3) The Claimant filed the application on 7 January 2019 (**Claimant's Application re: Witness A**), to which the Respondent objected, filing its Response on 28 January 2019, submitting as supporting evidence an Expert Report of Professor Jeffrey Waincymer dated 28 January 2019 (the **Waincymer Report)**; followed by a Reply on 4 February 2019, and a Rejoinder on 7 February 2019.

(4) On 13 March 2019, as a result of the judgment of the Westminster Magistrates' Court dated 28 November 2018 in the Extradition Proceedings, the relief sought in the Claimant's Application re: Witness A was moot and accordingly the application was adjourned (Procedural Order No. 3 [48]).

(5) Following one round of submissions from the Parties (**Claimant's Witness Anonymity Application, 17 June 2019**; **Response of 15 July 2019**), and further oral argument during the hearing that took place between 24 and 26 July 2019 in London, the Tribunal issued Procedural Order No. 4 (**PO No 4**).

(6) PO No 4 addressed, among other matters, the Claimant's request that Witness 1 be allowed to present evidence anonymously in this proceeding. In particular, the Tribunal found [36]:

> (2) The Claimant's Application to adduce fact evidence from Witness 1 on an anonymised basis is determined as follows:
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> (a) The Claimant may serve and file with its Statement of Defence a written statement of the evidence of Witness 1 in anonymised form;
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> (b) Any such statement will be available for review by counsel and party representatives for the Respondent and by the Tribunal and may be referred to for any subsequent application for witness anonymity that may be made.
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> (c) Such a statement will not form part of the record in this arbitration unless and until either:

(i) Witness 1 appears to give evidence in the ordinary way; or,

(ii) The Claimant makes a subsequent application for leave to adduce his/her evidence on an anonymised basis and that application is granted by the Tribunal,

(iii) Any such application is to be made at the latest 60 days before service of the Claimant's Rejoinder.

(7) The Claimant submitted a witness statement from Witness 1 (**Witness 1 WS1**) together with its Counter Memorial on Jurisdiction dated 5 September 2019.

(8) In accordance with the Tribunal's directions in PO No 4 [36(c)], the Claimant filed the Witness 1 Anonymity Application on 22 May 2020 (**W1 Application**). In its Application [92], the Claimant requests that the Tribunal admit the testimony of Witness 1 in accordance with the proposal set out in paragraph 28 of the Claimant's Application for Witness Anonymity dated 17 June 2019, to the extent applicable to Witness 1 (including that Witness 1 be identified as Witness 1 and referred to as he/she; the witness's identity would only be known to the Claimant and its counsel, the Tribunal, the Tribunal Secretary, a limited number of two solicitors qualified to practice in England and Wales from Respondent's UK Counsel, King & Spalding International LLP who enter into confidentiality agreements).

(9) In the alternative, if the Respondent did not agree to the identity being disclosed as suggested, the Claimant requests that Witness 1's identity should only be disclosed to the Tribunal and if so directed, to the Tribunal Secretary [W1 Application, 93]. The Claimant further proposes a protocol for the taking of evidence during the hearing (W1 Application [93]). In support of its Application the Claimant argues that Witness 1's testimony is relevant and material [20 - 37]; there is a compelling risk or danger if anonymity is denied [38–71]; and its proposal balances the Parties' due process rights [72–91].

(10) The Respondent filed its Response on 9 June 2020 (**W1 Response**). The Respondent objects to the W1 Application arguing that the Claimant has not satisfied the legal test as it has not demonstrated that Witness 1's evidence is relevant and material (W1 Response [26–58]); the Claimant has not proved any risk or danger [59–69]; and the rights of the Respondent would not be adequately protected if Witness 1 is permitted to testify anonymously [70–75].

(11) In the alternative, if the Tribunal were to allow Witness 1 to testify anonymously, the Respondent submits that the Tribunal would need to allow the Parties to submit evidence into the record relevant to Witness 1 and his/her testimony [76–83]. It further proposes an alternative protocol [88].

(12) The Claimant filed a Reply on 23 June 2020 (**W1 Reply**). In addition to addressing again the legal standards, the Claimant opposes the Respondent's request to be allowed to submit new evidence [55–56] or the need for further document production [57]. The Claimant also confirmed that it agrees to add Mr. Mascarenhas, a partner of King & Spalding and qualified in the State of New York, to the list of counsel that could know the identity of Witness 1 in accordance with the proposal set out in paragraph 28 of its W1 Application.

(13) On 30 June 2020 the Respondent filed a Rejoinder (**W1 Rejoinder**).

(14) Together with its Rejoinder on Jurisdiction, the Claimant filed a second statement from Witness 1 (**Witness 1 WS2**).

(15) On 2 March 2021, the Respondent filed a request for leave to be allowed to file an additional submission in opposition to the W1 Application alleging that the Claimant has failed to follow the Tribunal's procedure for anonymous witness evidence [4–9] and that the scope of Witness 1 WS2 exceeds that of a witness statement and goes into the territory of expert evidence, which the Tribunal had decided in PO No 4 [22] could not be given anonymously [10–12].

(16) By letter dated 25 March 2021, the Claimant opposed the Respondent's request arguing that the Parties have already made all the submissions necessary [3–9] and denying that Witness 1 WS2 qualifies as "quasi-expert evidence"[10–11].

The Tribunal, having deliberated, now decides as follows:

The Tribunal's analysis

General principles

1. The Tribunal has already set forth the general parameters of its task in PO No 4. It is convenient to begin by recalling here the key parts of its reasoning in that Order:

> 3. The Parties do not contest that the Tribunal has the power to make orders in relation to witness anonymity in appropriate cases and subject to suitable conditions. This is reflected in the agreed terms of paragraph 17 of PO No 1 cited above, which makes specific provision for such applications.
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> 4. Nevertheless, in the Tribunal's view, an application for witness anonymity is and must remain an exceptional procedural step, to be granted only in cases where a tribunal is satisfied that it is essential in the interests of justice and for the protection of the witness herself and that the due process rights of both parties can be adequately protected.
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> 5. Acknowledging the paucity of reported investment arbitration jurisprudence on the issue,[1] the Parties nevertheless helpfully agree on the test that the Tribunal should apply in the determination of the Application, which comprises the following three requirements:
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> (1) The Witnesses' testimony must be relevant and material;
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> (2) There is a compelling reason to find risk or danger to the Witnesses if anonymity is denied; and,
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> (3) The Tribunal must balance the Parties' due process rights, finding that the balance is in the Claimant's favour: Application, [4]; Response, [7].
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> …
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> 8. The Tribunal acknowledges the assistance that it has derived from the Waincymer Report and the authorities annexed thereto, which was admitted

[1] The only reported decision making provision for witness anonymity is: *Vladislav Kim and others v. Republic of Uzbekistan* (Decision on Jurisdiction) ICSID Case No. ARB/13/6 (8 March 2017) (*Kim v Uzbekistan*) (CL-30).

as part of the Respondent's submissions as useful but non-binding guidance (T3/247–248). It was also assisted by the oral testimony of Sir Jeffrey Jowell (expert witness for the Claimant) in response to specific questions from the Tribunal on this Application: T2/149–151.

9. At the same time, the contexts in which evidence has been permitted to be given anonymously in municipal cases vary considerably. As the Parties accept, the Tribunal's determination "*must be taken in light of the specific circumstances of the particular case and witness*."

10. The Tribunal has an overriding responsibility to ensure that the proceedings before it are fair, which includes the principle embodied in Article 18 of the UNCITRAL Model Law that: "*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*." The cardinal importance of this principle in investment arbitration is indisputable.[2]

11. Nevertheless, in the context of the present Application, as the Parties acknowledge, the application of this principle requires the Tribunal to *balance* the respective rights of each Party. On the one hand, it must seek to ensure that a Party who wishes to adduce evidence before the Tribunal in support of its case is "given a full opportunity" of doing so. At the same time, the principle of equality includes the right of the other Party to defend itself by meeting the case against it: the "*principe de la contradiction*."[3]

12. In the case of witness testimony, this principle includes ensuring an effective right to challenge the evidence proffered. An important mode of such challenge is provision for effective cross-examination, including as to the credibility of the witness. Ensuring that evidence can be challenged in this way serves both the interests of equality of the parties and the general interests of a fair trial, since as Lord Kerr has rightly observed: "*Evidence which has been insulated from challenge may positively mislead*."[4]

13. There is one other general principle that is applicable to the present arbitration by virtue of the international convention that governs its proceedings, namely the ICSID Convention.[5] By Article 22 of that Convention (read together with Article 21): "*parties, agents, counsel, advocates, witnesses or experts...shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions*."

14. This provision constitutes an important element in the self-contained system for the settlement of investment disputes that the Contracting States

[2] *Methanex Corp v USA* (Decision on Amici Curiae Interveners) (15 January 2001) 7 ICSID Rep 208, [26]; *Amco Asia Corp v Indonesia* (Decision on Annulment) ICSID Case No ARB/81/1 (16 May 1986) 1 ICSID Rep 509, [88]; *Wena Hotels Ltd v Egypt* (Decision on Annulment) ICSID Case No ARB/98/4 (5 February 2002) 6 ICSID Rep 129 (CL-25), [57].

[3] *Fraport AG Frankfurt Airport Services Worldwide v The Philippines* (Decision on Annulment) ICSID Case No ARB/03/25 (23 December 2010) (JW-9), [200].

[4] *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 (HL), [93].

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

> parties to the ICSID Convention (which includes the Republic of Turkey as well as the United Kingdom) agreed to establish. It ensures that, inter alios, counsel, witnesses and experts are not exposed, by virtue of the performance of their functions in, respectively, representing parties and giving evidence in support of a Party, to legal process in any Contracting State. In performance of those functions, such persons "*are immune from lawsuits or criminal prosecution as well as administrative proceedings*."[6]

2. To these general principles, which remain applicable to the present Application, the Tribunal desires at this stage to add one further observation. The grant of an order protecting the identity of a witness is an exercise of the powers of an international arbitral tribunal to decide questions of procedure[7] and determine the admissibility of evidence.[8]

3. Such a power includes the ability to protect confidentiality. Article 9(4) of the IBA Rules 2010 provides (under the chapeau of Article 9, devoted to 'Admissibility and Assessment of Evidence'):

> The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.[9]

4. The power to make confidentiality orders may extend in appropriate cases to protections for the identity of a witness, as recognised in the practice of the International Court of Justice[10] and of international arbitral tribunals.[11]

5. Although therefore it has been convenient to date to refer to the *anonymity* of a witness, the real issue to consider in this case, as in other cases where the question has arisen, is whether the circumstances warrant the grant of protection of confidentiality in respect

[6] Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, Cambridge UP, 2009), 63.

[7] Art 44 ICSID Convention.

[8] Rule 34(1) ICSID Arbitration Rules.

[9] Art 9(5) of the 2020 IBA Rules is to like effect, save that it adds in addition that arrangements may also extend to the production of documents.

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* [2015] ICJ Rep 3, 20-23, [33]–[43].

[11] *South American Silver Ltd (Bermuda) v Bolivia* PCA Case No 2013-15, Procedural Order No 14 (1 April 2016); Award (22 November 2018), [50].

of the identity of the witness and, if so, on what terms. In considering this issue, the tribunal must continue to ensure that both Parties are accorded due process.

Procedural steps to date re: Witness 1

6. When it issued PO No 4, the Tribunal accepted that the evidence of Witness 1 could be 'highly relevant': [28]. At the same time, it accepted the Respondent's submission that the issues could not be properly evaluated until the written statement of Witness 1 had been submitted, so that the Witness could give in their own words both the nature of the evidence proposed to be given and the personal danger that might potentially justify a protective order. Such an approach would be consistent with the protection of the Respondent's due process rights, since the statement would not form part of the record in the arbitration unless and until Witness 1 either appeared to give evidence in the ordinary way or the Claimant filed a timely application for leave to adduce his/her evidence on an anonymised basis, which application was granted by the Tribunal.

7. The Claimant duly filed Witness 1 WS1 with its Counter-Memorial and timely filed its W1 Application.

8. The Tribunal had not ruled on this Application before the time limited for filing of the Rejoinder. The Claimant filed Witness 1 WS2 with its Rejoinder.

9. The Respondent objects in its letter of 2 March 2021 that the filing of Witness 1 WS2 was not in accordance with the procedure laid down in PO No 4, and seeks leave to file a further submission in support of this objection. It further objects that Witness 1 provides expert evidence in Witness 1 WS2, contrary to the Tribunal's prior rulings. It sets forth its objections with specificity in paragraphs [4]–[13] of that letter and does not indicate what additional matters might need to be traversed in further pleadings.

10. The Claimant responds that the Respondent's objection is without merit. It states that there have already been three rounds of written submissions on whether to admit the evidence of Witness 1 on an anonymous basis. The Respondent raised no such objection when Witness 1 WS2 was filed with the Rejoinder and did not do so until some six months later. It states that Witness 1's testimony is presented as a witness of fact. It confirms that the Claimant does not rely on his/her testimony as a correct statement of

Turkish law, but rather simply for his/her understanding of Turkish law as the basis upon which s/he acted.

11. The Tribunal has received and considered the Respondent's submissions in its letter of 2 March 2021, including the paragraphs that detail its procedural objection as to the filing of Witness 1 WS2, as well as the Claimant's response. It finds that the nature of the objection is sufficiently stated in the letter of 2 March 2021 and that a further round of pleadings, in addition to the voluminous pleadings already presented by both Parties, and some six months after the filing of Witness 1 WS2, is not necessary either to accord due process or to assist the Tribunal in its present task.

12. The Tribunal finds that filing of Witness 1 WS2 in support of the Rejoinder is consistent with the overall procedural requirement in PO No 1 [17.1]–[17.2], which requires witness statements to be filed together with the Parties' pleadings and otherwise precludes (save in exceptional circumstances) submission of testimony. The rationale of PO No 4 is that both Parties should have an opportunity to see the proposed testimony of Witness 1 in written form prior to any decision by the Tribunal as to whether it could be adduced on an anonymous basis. Such an approach protects both Parties' due process rights. It does not prejudice them, since none of the written statements of Witness 1 will form part of the record in the arbitration unless and until the Tribunal rules on the Witness 1 Application.

13. The Tribunal therefore considers both Witness 1 WS1 and WS2 in evaluating now whether to grant the Claimant any relief on its Witness 1 Application. It treats both statements as those of a fact witness, not as expert evidence of Turkish law.

14. The Tribunal now proceeds to consider, in light of these statements and the pleadings of both Parties, the three criteria that both Parties agree must be weighed: (i) the relevance and materiality of Witness 1's evidence to the issues that arise in the determination of the Respondent's Jurisdiction Objection; (ii) the risk or danger to Witness 1 in the absence of protection; and (iii) the balance of the Parties' due process rights.

Relevance and materiality

15. In advance of the filing of Witness 1's statements, the Tribunal had already made the following provisional findings as to the materiality of Witness 1's evidence of fact as to the conclusion of the SPA in PO No 4:

> 25. On any view, the circumstances surrounding the conclusion of the SPA are of significant material relevance to the issues in this case, including at the jurisdictional stage. The Claimant alleges in its Request for Arbitration that it acquired the right to the Ipek family shares in the Koza Group "through the SPA" on 7 June 2015.[12]
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> 26. By contrast, the Respondent asserts in its Memorial on Preliminary Objections that "[t]he SPA is a sham" and that "no SPA was signed as at 7 June 2015." On this basis, the Respondent alleges that the Tribunal lacks jurisdiction, because the Claimant is not an Investor and there is no investment at the relevant time or at all.[13]
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> 27. Mr Akin Ipek, the Claimant's director, testified in evidence before the Tribunal that he signed the SPA on 7 June 2015 in reliance on legal advice that he had received on either 6 or 7 June 2015 from Witness 1: T1/133/3-7. The Claimant has confirmed that, if the evidence of Witness 1 were admitted, he would testify without reservation as to legal professional privilege: T3/239/2–9.
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> 28. In the Tribunal's view, evidence from Witness 1 on the circumstances surrounding the alleged conclusion of the SPA on 7 June 2015 could be highly relevant. Indeed, on the information currently on the record, counsel for the Respondent did not contend otherwise: T3/271/10–14.

16. Witness 1's statements as filed confirm the materiality of his/her evidence of fact:

(a) S/he confirms his/her involvement in settling the SPA in early June 2015: Witness 1 WS1, [17]–[19]; WS2, [7]–[23]);

(b) S/he also proffers testimony as to the preparation of the Consent Document that the Claimant alleges was executed on 31 August 2015: Witness 1 WS1, [21]–[23]; WS2, [24]–[26].

17. The Respondent alleges that both documents are shams: (i) SPA: Memorial, [114]–[143]; (ii) Consent Document: Reply, [126]–[134]. It submits that a finding to this effect would be dispositive in favour of its objection to jurisdiction.

[12] RfA, [31].
[13] Respondent's Preliminary Objections Memorial, Pt III.

18. On any view, consideration of the circumstances in which these documents were allegedly prepared and executed is highly material to the issues between the Parties. Although the Tribunal will have available to it other evidence, Witness 1 proposes to give fact testimony as to the preparation of both documents. The Tribunal considers that it is in the interests of both Parties in the fair determination of the Respondent's Jurisdiction Objection that such evidence be available and that it be tested under cross-examination.

Risk to the witness

19. There is the following evidence as to the risk to Witness 1 and his/her family:

(1) Witness 1 has deposed as to this risk in his/her statements (Witness 1 WS1, [4]–[5]; WS2, [29]–[33]), in which s/he states that s/he 'would be exposed to politically motivated criminal charges in Turkey' as well as the possibility of 'harassment, imprisonment, and other personal repercussions': Witness 1 WS2, [30]. Although Witness 1 states that s/he and their immediate family are now outside Turkey, Witness 1 states that there are still some members of his/her immediate family in Turkey and that s/he continues to 'fear for the safety of the members of my family who are with me, including my children': WS2, [31].

(2) Mr Selman Turk, another witness of fact for the Claimant, gives specific testimony, in which he claims that he had been intimidated by officials of the Respondent: Turk 1, [23]–[25];

(3) Sir Jeffrey Jowell gave expert evidence before the Tribunal, on which he was cross-examined. He deposed specifically as to the targeting of defence lawyers: Jowell 1, [102]–[104]; T2/101/15–102/2.

(4) The Tribunal notes with particular concern the criminal proceedings pursued inter alios against lawyers who have advised the Koza Group, in breach of its own order in PO No 5, as it found in PO No 15 (31 March 2020).

20. The Respondent submits that the evidence of a risk or threat to Witness 1 is insufficiently specific to require anonymity: W1 Rejoinder, [19]–[[28].

21. It is of the nature of an assessment in relation to a witness whose identity is as yet unknown that the risk may well not take the form of specific threats or acts directed

against that individual. The Tribunal also takes due regard of the fact—as must also be the case in the context of an interlocutory decision taken before any hearing—that the statements of Witness 1 and of Mr Turk have yet to be tested under cross-examination.

22. Nevertheless, it must weigh against that the statements that both of these witnesses have made and the wider context, including the findings that it has made as to the criminal proceedings brought against other lawyers for the Koza Group in Turkey.

23. Considering this evidence in the round, the Tribunal is satisfied on the material that is before it that Witness 1's concerns are sufficiently well founded so as to justify confidentiality protection as to his/her identity. The question that remains is how this might be achieved in a manner that ensures due process for both Parties.

Balancing due process

24. As the Tribunal has already observed,[14] the Tribunal's task is to balance the due process rights of both Parties so as to ensure that the Party who wishes to adduce evidence is given a full opportunity of doing so, while equally ensuring that the other Party is able to defend itself by meeting the case against it. An important mode of defence is effective cross-examination, including as to the credit of the witness, since evidence insulated from challenge may otherwise mislead.

25. The Claimant originally sought an extensive set of protections: Claimant's Witness Anonymity Application (17 June 2019), [28]; incorporated by reference: W1 Application (22 May 2020), [92], with alternative protective measures: [93].

26. The Respondent, while continuing to oppose the Application, submits in the alternative that any protocol must contain the following elements (W1 Response, [88]; W1 Rejoinder, [43.2]):

(1) Disclosure of Witness 1's identity to the whole of its international counsel team from King & Spalding on terms as to confidentiality.

(2) Disclosure to its Turkish legal representatives in the arbitration, Lexist, and to the Republic's Party Representative/s, so that international counsel may take instructions in order to be able to cross-examine Witness 1 effectively.

[14] PO No 4, [10]–[12], set out *supra* at [1].

(3) Mr Hamdi Ipek not to be present for Witness 1's examination, nor to have access to the transcript of Witness 1's testimony prior to his own testimony.

(4) No limitation on the scope of cross-examination.

27. In addition, the Respondent seeks orders:

(1) To submit additional documentary evidence relating to Witness 1: (W1 Response, [87.3]; and,

(2) For the production of documents in the possession of Witness 1: W1 Response, [87.4]. [W1 deposes that s/he deleted all documents and has no access to the relevant computer on which they were prepared: W1 WS2, [22]–[23]].

28. The Claimant's position on the Respondent's alternative proposals for a confidentiality protocol is:

(1) It agrees to disclosure on confidential terms to the whole King & Spalding team: W1 Reply, [51].

(2) It opposes disclosure to Lexist and to the Republic's Party Representative/s on the ground that this may expose Witness 1 to unacceptable risk: W1 Reply, [52].

(3) It opposes the exclusion of Mr Hamdi Ipek on the ground that it is premature to decide on the presence of witnesses and Party Representatives prior to the hearing: W1 Reply, [58].

(4) It submits that it is premature to give leave to the Respondent to adduce additional document evidence: W1 Reply, [56].

(5) It opposes further document production on the ground that the Claimant has given full production, verified by the statement of Mr Ipek, and this should not now be reopened: W1 Reply, [57].

29. The Tribunal makes the following decisions on those matters still in dispute between the Parties:

(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.

(2) *Mr Hamdi Ipek.* The Tribunal considers that, while Mr Hamdi Ipek is the Claimant's Party Representative, he also has material evidence to give related to the same issues on which Witness 1 will testify. In the exercise of its general power to ensure a fair procedure, the Tribunal has decided that Mr Hamdi Ipek may not be present for the Closed Session in which Witness 1 will give his/her evidence. Mr Ipek may review the transcript of Witness 1's evidence only after both Mr Ipek has testified himself and Witness 1 has testified. Paragraph [18.7] of PO No 1 is varied accordingly.

(3) *Scope of cross-examination.* The Respondent is entitled to cross-examine Witness 1 as to any matter that is properly relevant to the issues arising in the Arbitration, including as to credit. This does not derogate from the general power of the Tribunal President to rule on the permissibility of questions posed to any witness examined orally at the Hearing.

(4) *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.

(5) *Further document production.* In PO No 8, the Tribunal expressly provided that 'Documents within the possession, power or control of the Claimant include those of the Claimant's documents within the possession, power or control of its directors, employees, agents, advisors and shareholders': [2](a). It added: 'Documents within the possession of persons serving as witnesses for either Party are in the power or control

of the relevant Party to the extent that such documents came into the possession of the witness in the course of their employment by the Party or otherwise continue to be the property of the Party, but not otherwise': [2](e). By this decision, the Tribunal has already determined the scope of document production that was to be provided by the Claimant in respect of a witness such as Witness 1. As the document production phase is long complete, and each Party has verified the adequacy of its production by a signed statement of its Party Representative, the Tribunal finds no reason to order further document production now.

The Tribunal's decision

30. In light of the above considerations, the Tribunal decides:

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

(2) **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;**

(3) **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;**

(4) **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.**

(5) **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.**

(6) **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.

(7) **The Respondent's application for further documentary production is denied.**

(8) **Costs reserved.**

For and on behalf of the Tribunal

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Professor Campbell McLachlan QC
President of the Tribunal
28 May 2021

Annex A

PROTECTIVE ORDER

Whereas on 9 May 2018, Ipek Investment Ltd (**IIL** or **Claimant**) filed a Request for Arbitration with the International Centre for Settlement of Investment Disputes (**ICSID** or **the Centre**) against the Republic of Turkey (**Turkey** or **Respondent**) registered on 29 May 2018 as ICSID Case No ARB/18/18 (the **Arbitration**).

Whereas on 19 September 2018, a Tribunal to hear and determine the Arbitration was constituted in accordance with the provisions of the Convention on the International Settlement of Investment Disputes 1965 (**ICSID Convention**) and the Arbitration Rules made thereunder (**ICSID Arbitration Rules**).

Whereas on 19 November 2018, the Tribunal issued Procedural Order No 1 (**PO No 1**), Articles 17.3 and 17.4 of which made provision for either Party to seek the Tribunal's leave for a witness to give their evidence anonymously and for the Parties to confer regarding the necessary confidentiality arrangements.

Whereas on 22 May 2020, Claimant made such an application in respect of a witness (**Witness 1**) and the Tribunal subsequently received submissions from both Parties thereon.

Whereas on 28 May 2021, the Tribunal issued Procedural Order No 18 on the confidentiality of Witness 1's testimony (**PO No 18**), in which it granted certain confidentiality protections in relation to the identity of Witness 1, to include all and any information that is reasonably likely to identify the person of Witness 1 or of his/her immediate family or his/her current location (**Protected Information**).

NOW THEREFORE, THE TRIBUNAL HEREBY ORDERS that the Testimony shall be subject to the terms and conditions set forth in this protective order (the **Protective Order**):

1. Subject to the terms and conditions hereunder, the Protected Information shall be treated as strictly confidential. The Protected Information shall be disclosed only to: (i) members of Respondent's international counsel team; (ii) one member of Respondent's Turkish counsel nominated by Respondent; and (iii) one Party Representative in the Arbitration nominated by Respondent in order specifically to enable counsel for the Republic to obtain instructions necessary to test the testimony of Witness 1 in the Arbitration and not for any

other purpose. The Protected Information may only be disclosed to any of the above persons after that person has signed the Confidentiality Undertaking contained in Annex B hereunder.

2. The Parties accept that any reference to the Protected Information, or to any other information that may allow the determination of the identity of Witness 1 shall be redacted from the file in this Arbitration. This includes, without limitation, the Parties' pleadings and evidence, as well as the Tribunal's orders, decisions and Award. The Parties agree that, with a view to ensuring this confidentiality, this witness shall always be referred to as Witness 1.

3. The Parties agree that the oral testimony of Witness 1 (the **Testimony**) shall be heard in a closed videoconference session (**Closed Session**) of the Tribunal limited to: (i) the Tribunal and its Secretary; (ii) the court reporter, interpreters and technical hosts from FTI Trial Services; (iii) counsel for the Claimant and (iv) those counsel for the Respondent and its Party Representative who have signed a Confidentiality Undertaking. No other person shall be permitted to participate in or to observe the Closed Session.

4. The court reporter and interpreters (if they be needed) shall likewise sign a Confidentiality Undertaking covering receipt of the Protected Information prior to reporting the Testimony of Witness 1 in the Closed Session.

5. The representatives of FTI Trial Services that will be hosting and recording the Closed Session shall likewise sign a Confidentiality Undertaking covering receipt of the Confidential Protected Information prior to hosting and recording the Testimony of Witness 1 in the Closed Session. The sound recording of the Closed Session will be stored locally by FTI Trial Services and will not be stored on the Zoom cloud.

6. The sound recording of the Closed Session shall be provided only to the above persons subject to the Confidentiality Undertaking. Save for the copy held in the archives of the Centre, all copies of the recording shall be destroyed upon the conclusion of all proceedings under ICSID Case No ARB/18/18.

7. The transcript of the Testimony shall refer to the witness only as 'Witness 1'. The transcript of the Closed Session shall be circulated in draft only to those persons entitled to participate in the Closed Session. Within five (5) days following the conclusion of the Closed Session, Claimant's counsel may propose redactions to the transcript strictly limited to those

necessary to preserve the confidentiality of the Protected Information. After having received any comments thereon from Respondent's counsel, the President shall rule on any disputes as to redaction.

8. Respondent and its counsel undertake to refrain from contacting or communicating with Witness 1 prior to his/her Testimony.

9. The Testimony shall be used solely and exclusively in this Arbitration and solely for purposes related to it.

For and on behalf of the Tribunal

Professor C A McLachlan QC

President

The undersigned declare knowledge and acceptance of the above Protective Order

Ipek Investment Ltd	**Republic of Turkey**
Counsel for Claimant Date:	Counsel for Respondent Date:

Annex B

Confidentiality Undertaking

The undersigned, _____, hereby acknowledges that s/he has read the Protective Order issued by the Tribunal under Procedural Order No 18 in the matter of an arbitration between *Ipek Investment Ltd v. The Republic of Turkey* under the Rules of the International Centre for the Settlement of Investment Disputes in ICSID Case no ARB/18/18 (the **Arbitration**), that s/he understands the terms thereof, and that s/he agrees to be bound by such terms.

The undersigned, [acting as Respondent's counsel/representative] hereby agrees that s/he will not disclose the identity of Witness 1 or the Protected Information, as defined in the Protective Order, and that s/he will use such information only in the manner provided in the Protective Order and solely for the purposes of this Arbitration.

The undersigned hereby undertakes to refrain from approaching or attempting to communicate with Witness 1 or his/her immediate family.

The undersigned hereby undertakes to use the testimony of, and the Protected Information concerning Witness 1 exclusively for the purposes of this Arbitration.

Signature: _____

Date: _____