

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Ipek Investment Limited**

**v.**

**Republic of Turkey**

**(ICSID Case No. ARB/18/18)**

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**PROCEDURAL ORDER No. 2**

***Members of the Tribunal***

Professor Campbell McLachlan QC, President of the Tribunal

The Hon. L. Yves Fortier QC, Arbitrator

Dr. Laurent Lévy, Arbitrator

***Secretary of the Tribunal***

Ms. Jara Mínguez Almeida

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Date of dispatch to the Parties: December 21, 2018

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**Whereas:**

(1) On 10 November 2018, the Parties and the Tribunal held a First Session in person at the World Bank in Paris. As part of discussions concerning the draft Procedural Order No. 1 the Parties presented their views on the possibility of filing anonymous witness and expert testimony.

(2) At the First Session, the Claimant announced that it would file a request for provisional measures (the “Request”) on 15 November 2018. Accordingly, the Tribunal also established, with the agreement of the Parties, a timetable for the written and the oral phase of pleadings on that Request. It set aside three days, 24-26 July 2019, for the hearing of it.

(3) On 15 November 2018, the Claimant filed its Request together with exhibits C-01 – C-70 and legal authorities CL-01 – CL-21, which were then uploaded onto the arbitration electronic case file, Box, on 20 November 2018.

(4) By email dated 16 November 2018, the Respondent requested “that the Tribunal (a) not review Claimant’s Request for Provisional Measures [...] as filed; and (b) order Claimant to withdraw the Request” (the “Application”). The Respondent argued that the Claimant had improperly filed as exhibit C-43 the anonymous witness statement of Witness A (“Witness A Statement”) in support of its Request, and that it had tried to recast the statement as a fact exhibit. The Respondent further noted that the Tribunal had not yet issued Procedural Order No. 1 which would set forth the procedure for determining whether anonymous testimony may be allowed into the record.

(5) On 19 November 2018, the Tribunal issued Procedural Order No. 1 (“PO No 1”). Paragraph 17.3 of Procedural Order No. 1 established that:

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.

(6) On the same day, the Tribunal confirmed that pending the Tribunal’s further ruling the Tribunal would not read the Claimant’s Provisional Measures Application or the documents filed in its support and invited the Claimant’s comments on the Application.

(7) The Claimant, on 23 November 2018, addressed the Tribunal in opposition to the Application, seeking its dismissal. It added that if the Tribunal were to determine that an application to submit anonymous evidence was required, the Claimant would make such an application and offered that the Tribunal exclude C-43 from the record until the Tribunal decided on such application.

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(8) On 25 November 2018, the Respondent requested leave from the Tribunal to file a reply to the Claimant's comments. It also noted that the Claimant had submitted as exhibit C-42 the "Expert Report of Professor Sir Jeffrey Jowell KCMG QC in the Matter of an Extradition Request from Turkey" (the "Jowell Report").

(9) The next day, the Tribunal invited a second round of comments on the Application from both Parties.

(10) By letter dated 30 November 2018, the Respondent filed its Reply. The Respondent requested that the Tribunal continue to abstain from reviewing the Request, and order to exclude exhibits C-42 and C-43 from the record and order that should the Claimant wish to rely on exhibits C-42 and C-43 it should file C-42 as an expert report and apply for leave to file C-43 as an anonymous witness statement.

(11) On 6 December 2018, the Claimant submitted its Rejoinder. The Claimant requested that the Tribunal no longer abstain from reviewing the Request and provided as Annex A a redacted version of the Request where all references to the documents in question (C-42 and C-43) had been redacted.

**The Tribunal, having deliberated, now decides as follows:**

1. The Respondent, by its Application dated 16 November 2018, as amended on 30 November 2018, requests the Tribunal to order the exclusion from the arbitration file of two exhibits:
  - (a) Exhibit C-43: the Witness A Statement; and
  - (b) Exhibit C-42: the Jowell Report.
2. In order to determine the Application without prejudice to the position of either Party, the Tribunal has not read either the Witness A Statement or the Jowell Report. Rather, in order to understand the context in which the present evidentiary dispute arises, it has reviewed the Claimant's Request in the redacted form submitted by the Claimant on 6 December 2018 that omits all references to both exhibits.
3. The Witness A Statement and the Jowell Report were each originally filed in proceedings before the Westminster Magistrates' Court concerning a request from Turkey for the extradition of Mr Akin Ipek ("the Extradition Proceedings"). The Claimant submits that Mr Akin Ipek is a shareholder and the sole director of the Claimant. By its Request, the Claimant seeks various orders from the Tribunal in relation to the extradition request pending the conclusion of the present arbitral proceedings.
4. In its Rejoinder at [15], the Claimant informs the Tribunal that, on 28 November 2018, the Westminster Magistrates' Court refused to order the extradition of Mr Ipek, but states that Turkey may appeal.
5. The Respondent submits that:

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- (a) The filing of Witness A Statement in anonymous form as a fact exhibit breaches the requirements of paragraph 17.3 of PO No 1, which require leave for the filing of anonymous evidence; and
  - (b) The filing of the Jowell Report unfairly deprives it of the opportunity of testing the opinions therein expressed under cross-examination and creates an imbalance in the equality of the Parties as any expert evidence that it may wish to file in rebuttal would be subject to cross-examination.
6. For its part, the Claimant submits that it is not in breach of PO No 1 (which in any event was not issued until after its Request had been filed), nor can there be any other objection to the admissibility of these exhibits, as witness A is not being called as a witness and the Jowell Report, is not being filed as an expert report. These documents are being submitted by the Claimant “*as fact documents in the public domain*” [emphasis added]. It submits that, if these exhibits were excluded from the record, it would be deprived of its fundamental right to be heard. It accepts that “[i]t is of course up to the Tribunal what weight to put on such documentary evidence.” It offers to make an application in relation to the Witness A Statement and to submit the Jowell Report as an expert report if the Tribunal so directs. It points out that, in any event, “only a very limited number of paragraphs and footnotes are responsive to the issues raised by Respondent (*i.e.* 13 paragraphs in a total of 129 paragraphs).”
  7. The Tribunal accepts that, when filed, the Claimant’s Request was not in breach of PO No 1. Although the question of the treatment of applications for anonymous witness testimony had been discussed at the First Session, the Tribunal did not dispatch PO No 1 to the Parties until 19 November 2018, after the filing of the Claimant’s Request. In any event, the specific time periods provided in paragraph 17.3 cannot be strictly applied to evidence attached to a submission that both the Parties and the Tribunal agreed and stipulated would be filed within four business days of the First Session.
  8. The Tribunal therefore proceeds on the basis that the Application concerns the admissibility of these two exhibits into the evidentiary record in the present arbitration in relation to the Claimant’s Request.
  9. Rule 34(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”) establishes the general principle that:

“The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.”
  10. So far as concerns the testimony of witnesses and experts, the following provisions of the Arbitration Rules are pertinent:
    - (a) Rule 34(2)(a) empowers the Tribunal to “call upon the parties to produce...witnesses and experts;”
    - (b) Rule 35(1) provides that “Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President;”
    - (c) Rule 36(a) adds the proviso that, notwithstanding Rule 35, “the Tribunal may...admit evidence given by a witness or expert in a written deposition.”

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11. By PO No 1, the Tribunal, with the agreement of the Parties, established a general framework for the submission of evidence in these proceedings. In summary, this framework includes requirements that:
  - (a) Such documentary evidence as may be relied upon by either Party be submitted together with the submission that it supports: [16.1];
  - (b) Witness statements and expert reports be filed together with the Parties' pleadings: [17.1];
  - (c) Leave be sought for any witness or expert testimony that a Party wishes to be given anonymously 60 days prior to the filing of such testimony: [17.3];
  - (d) Notification of any witness that either Party wishes to cross-examine: [18.1];
  - (e) Any witness whom either Party or the Tribunal wishes to hear orally shall appear in person at the hearing: [18.2];
  - (f) The Tribunal is entitled either to disregard the testimony of a witness called to testify who fails to appear at the hearing or to attach such weight as it thinks appropriate in the circumstances to the witness statement or expert report: [18.3].
12. In determining the question of the admissibility of the two contested exhibits, the Tribunal must balance the due process rights of both Parties: both to adduce evidence that each Party considers supports its case and to have a reasonable opportunity to challenge the evidence of the other Party.
13. To these considerations of general application must be added some points specific to the Claimant's Request for Provisional Measures.
14. In the first place, as the President had cause to observe at the First Session, the mandate of the present Tribunal is to determine the investment dispute (including any preliminary objections to jurisdiction) that the present Parties have placed before it. It must do so on the basis of the evidence that is admitted into the record in this arbitration.
15. This mandate is separate and distinct from the jurisdiction of the English Court in the Extradition Proceedings involving Mr Akin Ipek (including that of any appellate court in the event of an appeal). In the Extradition Proceedings, the Court's determination will be based upon its assessment of the evidentiary record that was admitted before it.
16. That said, the subject matter of the Claimant's Request concerns the Respondent's conduct vis-à-vis the extradition request and the alleged potential effect on the Claimant's ability to present its case fairly before this Tribunal. In order to determine the Claimant's Request, it is important that both Parties should have a proper opportunity to explain their respective positions in relation to the Extradition Proceedings, and the risks for the present arbitration that the Claimant alleges would arise were Mr Akin Ipek to be extradited to Turkey. The Tribunal would then have to make its own determination as to these matters in the light of the evidence placed before it.
17. The Claimant relies on each of the disputed exhibits for the following purposes:

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(a) Witness A Statement is adduced to “establish certain basic facts about the indictment and to identify several deficiencies in the extradition request with respect to Turkish law.” It adds that the Statement deals with “the motivation behind their criminal prosecutions, and the likely treatment of those individuals should they be extradited to Turkey:” Rejoinder, [2](a).

(b) The Jowell Report deals with “the decline of the rule of law” in Turkey: *ibid*, [2](b).

In each case, it states that it relies on only a small number of paragraphs from the relevant Statement or Report for the purposes of the present proceedings.

18. It appears from the above citations from its pleadings and from the Claimant’s more general statement already mentioned that it relies upon the Statement and Report as evidence of fact: that it invites the Tribunal to make findings of fact that may be material to its overall determination of the Request based upon statements made by Witness A and Professor Jowell in these two exhibits.
19. As a consequence, these two exhibits cannot be treated as if they were simply documentary evidence whose significance and weight may be freely considered by the Tribunal. They are the written testimony of witnesses, albeit produced in the different context of the Extradition Proceedings.
20. In the view of the Tribunal, this marks an important distinction for the purpose of its evaluation of the question of admissibility. The Tribunal does not know, for example, to what extent these statements accurately represent the testimony of the two witnesses after their examination in the Extradition Proceedings. Nor has it had the opportunity of assessing that testimony for itself. It appears from the Claimant’s statement in reply that it relies upon only a small portion of the testimony in the present proceedings for the purpose of its Request, yet the whole document is exhibited.
21. So far as concerns the Witness A Statement, there is a further issue, which is that, as a result of the protective orders made by the Westminster Magistrates’ Court, the identity of the deponent is unknown to this Tribunal.
22. It is no doubt correct that an international arbitral tribunal is not bound by strict rules of evidence. The Tribunal does not accept that the Parties have an unqualified right to cross-examine witnesses and experts whose statements have been submitted by their opponent. Indeed, the Parties accepted as much in the present proceedings in agreeing the insertion of the proviso to paragraph [18.3] to PO No 1, which permits the Tribunal in its discretion to accept the written testimony of witnesses even if they fail to appear after having been called to testify.
23. There are contexts in which written statements of witnesses or experts prepared for the purpose of other proceedings will be admissible in an international arbitral proceeding. This may be the case, for example, where such statements are adduced as prior statements in relation to a witness that will give oral testimony; or where the witness is unable or unwilling to give evidence and the tribunal is satisfied that this is not due to the default of the party wishing to adduce the evidence and that its introduction would not be unfair to that party’s opponent.

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24. These considerations do not apply in the present case. The Claimant does not submit that it would not be possible for Witness A or Professor Jowell to give oral evidence before the present Tribunal, as they recently did before the English Court (subject in the former case to appropriate provision as to anonymity).
25. At both Parties' request, the Tribunal set aside up to three days for a hearing of the Claimant's Request (together with another proposed request from the Respondent for security for costs) in July 2019. The length of both the timetable and the hearing will enable the Tribunal to make proper provision for such oral testimony as either Party may wish to adduce.

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**26. Now therefore the Tribunal orders:**

- (1) The Claimant's Request for Provisional Measures shall be admitted into the record in the redacted form submitted on 6 December 2018, excluding Exhibits C-42, the Jowell Report, and C-43, the Witness A Statement, and shall be treated as having been duly filed as of the date of original filing, namely 15 November 2018;**
- (2) If the Claimant wishes to file Exhibit C-42, the Jowell Report, either in whole or in part, it shall have leave to do so, provided that by Monday 7 January 2019 it notifies the Respondent and the Tribunal that it wishes this Report to be treated as an Expert Report in these proceedings, in which event the provisions of paragraph 18 of PO No 1 shall apply to it;**
- (3) If the Claimant wishes to file Exhibit C-43, the Witness A Statement, either in whole or in part, it shall have leave to do so, provided that by Monday 7 January 2019 it notifies the Respondent and the Tribunal that it wishes this Statement to be treated as a Witness Statement in these proceedings, in which event the provisions of paragraphs 17 and 18 of PO No 1 shall apply, save that, in this specific case, paragraphs 17.3 and 18.2 are varied by the terms of this Order;**
- (4) In the event that the Claimant wishes to apply that the evidence of Witness A be given anonymously, it shall so notify the Respondent and the Tribunal by Monday 7 January 2019;**
- (5) The Claimant shall submit its grounds for such application (together with any specific conditions that it proposes) by Monday 14 January 2019;**
- (6) The Respondent shall submit its response by Monday 21 January 2019;**
- (7) Thereafter the Tribunal shall proceed to determine the application;**
- (8) Save as aforesaid, all other provisions of PO No 1 remain in force;**
- (9) No order as to costs.**



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Professor Campbell McLachlan QC  
President of the Tribunal  
December 21, 2018