

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

**PROCEDURAL ORDER No. 15
on the Criminal Proceedings**

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: 31 March 2020

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Whereas:

- (1) On 19 September 2019, the Tribunal issued Procedural Order No. 5 (**PO No 5**), in which it *inter alia* ordered the Respondent to suspend the further pursuit of criminal proceedings against the Targeted Individuals for Criminal Proceedings pending the outcome of the Respondent's Preliminary Objections in the present arbitration.¹
- (2) On 13 October 2019, the Tribunal issued Procedural Order No. 6 (**PO No 6**), in which it directed the Respondent to submit by 14 October 2019 the copies of PO No 5 and PO No 6 to the Public Prosecutor and to the Ankara Criminal Court that is hearing the proceedings brought against the Targeted Individuals for Criminal Proceedings, so that the Court may take the Tribunal's orders contained in PO Nos 5 and 6 into account in determining its procedure.
- (3) On 10 January 2020, the Claimant informed the Tribunal that the Respondent had failed to suspend the criminal proceedings and continued to pursue the Targeted Individuals for Criminal Proceedings in violation of the Tribunal's orders in PO No 5 and PO No 6 and reserved '*all of its rights in this regard*'.² In its communication the Claimant noted that '*the Turkish courts yesterday convicted and sentenced Mr Tekin Ipek, Ms Melek Ipek (the mother of Mr Akin Ipek and Mr Tekin Ipek) and Ms Ebru Ipek (the wife of Mr Tekin Ipek), each a Targeted Individual for Criminal Proceedings (as defined in PO5).*'
- (4) By letter dated 30 January 2020 (the **Application**), the Claimant informed the Tribunal that the Turkish court had also convicted and sentenced a number of other individuals in addition to the Targeted Individuals for Criminal Proceedings '*for their association with the Claimant, the Koza Group and/or the Ipek family*'³ and requested the Tribunal to order the Respondent

[T]o not take any steps to enforce any decision made by the Turkish courts concerning the Targeted Individuals for Criminal Proceedings or any member of the Ipek family or former employee or director of the Koza Group listed in **Annex B** to this letter, including (without limitation) not to take any steps to imprison or otherwise detain any of the Targeted Individuals for Criminal Proceedings who were not so imprisoned or otherwise detained on 19 September 2019 (i.e. the date on which PO5 was issued) while this arbitration is pending.⁴

The Claimant argued that such relief was necessary in order to maintain the integrity and the *status quo* of the arbitration.

- (5) Further to the Tribunal's directions, on 13 February 2020, the Respondent filed its comments (the **Response**), objecting to the Claimant's Application. The Respondent submitted that its executive branch cannot compel the independent judiciary to stay or suspend the criminal proceedings pursuant to the constitutional principle of separation of powers and that it '*at all times has sought to comply with the Tribunal's orders to*

¹ Procedural Order No. 5, [121(2)].

² Claimant's Letter to the Tribunal dated 10 January 2020, 3.

³ Application, 2.

⁴ Application, 4.

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*the fullest extent possible, in compliance with the rule of law in Turkey.*⁵ The Respondent requested that the Tribunal dismiss the Claimant's Application, as it violates the Turkish Constitution, constitutes an abuse of process and is not urgent.

- (6) In its Response, the Respondent further informed the Tribunal that on 17 and 29 January 2020, it had put in place a protocol, enabling Mr Tekin Ipek to testify in the present arbitration, to which the Claimant had not raised objections.⁶
- (7) On 17 February 2020, the Claimant commented on the Respondent's Response, denying that a protocol had been put in place to enable Mr Tekin Ipek to testify as the conditions proposed by the Respondent were not acceptable to the Claimant. The Claimant also stated that the Respondent had breached its international obligations by not suspending the criminal proceedings against the Targeted Individuals for Criminal Proceedings in breach of the Tribunal's Order in PO No 5 and the ICSID Convention.
- (8) Further to the Tribunal's invitation for a second round of comments from the Parties on the Application, on 2 March 2020, the Claimant submitted its comments on the Respondent's Response (the **Reply**) in which it submitted that its Application was necessary and reiterated that the Respondent cannot reference its municipal laws as an excuse or justification for the breaches of its obligations under international law. The Claimant further submitted that its Application is not an abuse of process, as the Respondent's conduct undermines the Claimant's ability to present its case and aggravates the dispute between the Parties.
- (9) The Claimant further submitted that the Respondent's proposal concerning the protocol for obtaining evidence from Mr Tekin Ipek contained a number of conditions which would not allow the Claimant to obtain the witness testimony *'in a fair environment free from undue influence'*⁷ and is indicative of the lack of good faith on the Respondent's side to allow the Claimant's legal representative to meet Mr Tekin Ipek in a confidential setting.
- (10) On 9 March 2020, the Respondent submitted its comments on the Claimant's Reply (the **Rejoinder**), in which it submitted that the Tribunal had already granted the relief sought by the Claimant with regard to the Targeted Individuals for Criminal Proceedings and reiterated that the Application is neither urgent nor practical, as the Respondent cannot institute a stay that is not permissible or provided for under its Constitution and relevant criminal laws and procedures. The Respondent further submitted that the Claimant's Application concerning the individuals other than the Targeted Individuals for Criminal Proceedings should be dismissed as those individuals are not covered by the scope of the Tribunal's decision in PO No 5.
- (11) The Respondent also noted that it had accommodated the Claimant's requests concerning collection of witness testimony from Mr Tekin Ipek to the extent permitted under the Turkish laws, allowing Mr Tekin Ipek to give witness evidence and testify should he and the Claimant so choose.

⁵ Response, [5].

⁶ Response, [4.3].

⁷ Reply, [p. 5].

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The Tribunal, having deliberated, now decides as follows:

1. The Application now before the Tribunal concerns further aspects of the Turkish criminal proceedings that were the subject of the prior orders of the Tribunal in PO No 5 dated 19 September 2019 and PO No 6 dated 13 October 2019. This Order is to be read together with those Orders. The Tribunal will not repeat everything that was there set out, but it is necessary to begin by recalling several of their essential elements.

Procedural Order No 5

2. One of the matters before the Tribunal in PO No 5 was the Claimant's application for provisional measures to restrain the continued pursuit of Turkish criminal proceedings during the pendency of the arbitration against 14 named persons associated with the Claimant, together: 'the Targeted Individuals for Criminal Proceedings' (herein 'the Targeted Individuals').
3. The Tribunal considered this application in paragraphs [48]–[70] of PO No 5. It held that:
 - (1) It has jurisdiction to grant provisional measures in relation to the effect of the exercise of a State's criminal law powers upon its own process. Its sole concern in that context is the right of both Parties before it to seek recourse under the ICSID Convention and to a fair process thereunder, including the right to present relevant evidence in support of its case.⁸
 - (2) Nevertheless the applicant for such relief must meet a high threshold. The Tribunal must also bear in mind the need to minimise any intervention in the ability of the State to exercise its criminal law powers in the public interest.⁹
 - (3) Its decision was limited to the Targeted Individuals, not to persons unconnected with the Claimant or its claim.¹⁰
 - (4) On the basis of the evidence then before the Tribunal as to the current status of the Turkish criminal proceedings against the Targeted Individuals, the Tribunal concluded that it *'has a grave concern that the continued pursuit of the criminal proceedings against the Targeted Individuals during the pendency of the arbitration is likely to affect adversely the ability of the Claimant fairly to present its case.'*¹¹ The Tribunal referred in particular to the fact that the Targeted Individuals included: (a) persons who wish to give evidence for the Claimant or would have relevant evidence to give; (b) close family members of the Ipek family or of key witnesses; and (c) lawyers who had advised the Koza Group, proceedings against whom would inhibit the Claimant's ability to obtain legal advice in Turkey.
 - (5) Balancing the right of the Respondent to the pursuit of its criminal process, the Order would not affect the pendency of such proceedings; it would be a

⁸ PO No 5, [53](1)–(3).

⁹ Ibid [53](4)–(5).

¹⁰ Ibid [57].

¹¹ Ibid [65].

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suspension strictly limited to the extent necessary to enable the fair hearing of the present arbitration claim.¹²

4. The Tribunal therefore granted the Application and ordered that:

[T]he Respondent shall suspend the further pursuit of criminal proceedings against the Targeted Individuals for Criminal Proceedings pending the outcome of its Preliminary Objections in this arbitration.¹³

Procedural Order No 6

5. On the Claimant's further application for urgent relief, in PO No 6 the Tribunal decided and directed *'the Respondent, by the SDIF, to submit by 14 October 2019 copies of PO No 5 together with this Order ("PO No 6") to the Public Prosecutor and to the Ankara Criminal Court that is hearing the proceedings brought against the Targeted Individuals for Criminal Proceedings, so that that Court may take this Tribunal's Orders into account in determining its procedure.'*

6. The Respondent confirmed to the Tribunal that it had provided a copy of PO Nos 5 and 6 to the Turkish Court on 14 October 2019.

7. On the same date, the 24th Heavy Criminal Court confirmed its receipt of the Tribunal's provisional measures decision but rejected the application for suspension of the criminal proceedings on the grounds that *'the dispute in question has nothing to do with the file that is the subject'* of the criminal proceedings and that the Tribunal's decisions are *'advisory in nature.'*¹⁴

Subsequent developments in the criminal proceedings

8. The Tribunal received further information about the criminal proceedings by way of a letter from the Claimant dated 10 January 2020, which attached a Hearing Minute of the proceedings of the 24th Heavy Criminal Court on 9 January 2020, together with further details as set out in the Application itself.

9. On 9 January 2020, the Turkish Criminal Court entered convictions against three of the Targeted Individuals: Mr Tekin Ipek, Ms Melek Ipek and Ms Ebru Ipek, sentencing them to terms of imprisonment.¹⁵ These sentences are currently under appeal to the Regional Court of Justice in Turkey.¹⁶

10. Mr Tekin Ipek has been imprisoned in Turkey since April 2016. Ms Melek Ipek and Ms Ebru Ipek are not yet imprisoned, pending the Court's decision on their appeals.

11. The Turkish Criminal Court also entered convictions on 9 January 2020 against a number of other persons who had been named in the same Indictment, but were not amongst those listed in the Claimant's original application for provisional measures as Targeted Individuals.¹⁷

¹² Ibid [70].

¹³ Ibid [121](2).

¹⁴ Extract Hearing Minutes 24th Ankara Heavy Criminal Court File No 2017/44 14 October 2019, attached to Claimant's letter dated 15 October 2019

¹⁵ Application, Annex A.

¹⁶ Application, 2–3.

¹⁷ Application, Annex B

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The Application

12. By its present Application, the Claimant seeks further provisional measures to restrain the Respondent from enforcing orders of the Turkish criminal court, including orders for imprisonment (other than in respect of persons already imprisoned on 19 September 2019). The Application seeks such relief in relation to two categories *ratione personae*:
- (1) The Targeted Individuals; and,
 - (2) The further 22 persons listed in Annex B to the Application (**Annex B Individuals**).
13. These categories raise different issues, requiring separate treatment in the Tribunal's analysis.

The Targeted Individuals

14. The Targeted Individuals are already the object of the provisional measures that the Tribunal granted in PO No 5, which requires that *'the Respondent shall suspend the further pursuit of criminal proceedings'* against them.¹⁸
15. The Claimant seeks a further measure restraining the Respondent from the enforcement of Court orders against such persons. It states that such a measure *'is appropriate given that it is directed against the executive branch of the Respondent which is responsible for the enforcement of decisions in criminal proceedings, with the result that the Respondent cannot hide behind the pretence of judicial independence that the Respondent has previously invoked as an excuse of not complying with its international obligations, including those that follow from PO No 5.'*¹⁹
16. In its Response, the Respondent invokes its Constitution and internal law as authority for its submissions that:
- (1) The executive branch cannot compel the judiciary to stay or suspend criminal proceedings;²⁰ and,
 - (2) The executive is bound to give effect to the orders of the judiciary.²¹
17. It submits that the Constitution takes precedence over its international legal obligations.²²
18. It adds in its Rejoinder that *'The Republic discharged its duties to the Tribunal, and the independent Turkish judiciary is the sole adjudicator of how those proceedings will unfold.'*²³
19. The Tribunal confirms that PO No 5 remains in full force and effect. Its effect was not discharged by the provision of a copy of the order to the Turkish Criminal Court as directed in PO No 6. Its purpose remains to ensure that both Parties have a proper

¹⁸ PO No 5, [121](2).

¹⁹ Application, 4.

²⁰ Response [4], citing Art 138 Turkish Constitution.

²¹ Response [6], citing *idem*.

²² Response [4], citing Arts 11 & 90 Turkish Constitution.

²³ Rejoinder, [4].

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- opportunity to present their respective cases to the Tribunal on the forthcoming hearing of the Respondent's jurisdiction challenge.
20. The Respondent voluntarily assumed obligations under international law when it entered into both the ICSID Convention and the BIT under which the present arbitration is conducted.
 21. The extent of these obligations is described by two basic rules of international law, to which the Tribunal has previously referred the Parties:²⁴
 - (1) *Conduct of organs of a State*: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions;'²⁵ and,
 - (2) *Characterization of an act of a State as internationally wrongful*: 'The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.'²⁶
 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.
 23. For this reason, the Tribunal regards the distinction that the Claimant draws in its Application as unnecessary and rejects as without foundation under international law the Respondent's submissions based on its Constitution.
 24. The Tribunal concludes that the requirements of PO No 5 continue to apply to all steps in the criminal proceedings. This includes the enforcement of any orders of the Criminal Court, including orders for imprisonment, as they apply to the Targeted Individuals. It will so record in its *dispositif*.
 25. As a result the further more limited form of relief now sought by the Claimant is unnecessary as regards the Targeted Individuals as the Tribunal's existing relief fully applies. For the avoidance of doubt, unless and until the Tribunal's existing Order is fully complied with, the Targeted Individuals are not precluded from taking necessary steps to pursue their appeals from criminal sentences in Turkey.

The Annex B Individuals

26. The position is different as regards the 22 Annex B Individuals. These persons were not the object of any prior application for preliminary measures by the Claimant. The Tribunal must approach the Application in respect of them as a new application.
27. The Claimant requests that the protection that it seeks should be extended to the Annex B Individuals, whom it describes as '*persons affiliated with the Claimant, the Koza*

²⁴ PO No 6, recitals (7) & (8).

²⁵ Art 4, International Law Commission, Draft Articles on Responsibilities of States for Internationally Wrongful Acts ('ARSIWA') [2001] 2(2) YB ILC 26.

²⁶ Ibid Art 3; and see the rule of customary international law codified in Art 27 Vienna Convention on the Law of Treaties (VCLT) (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

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*Group and/or the Ipek family who were convicted and sentenced on 3 or 9 January 2020.*²⁷

28. In order to grant relief in respect of those persons, the Claimant would need to satisfy the Tribunal that the same requirements for the grant of provisional measures, which it identified in PO No 5,²⁸ are met here.
29. The Tribunal is not satisfied that the Claimant has so established to the high threshold necessary to justify a measure directed to the Respondent's criminal process. This is so for the following reasons, which may be addressed under two headings: (a) rights requiring protection/proportionality; and (b) urgency and necessity.
30. *Rights requiring protection/proportionality.* The rights that the Tribunal is concerned to preserve are the rights to due process in the present arbitration and the right not to have the dispute which is the subject of the present arbitration aggravated. In the case of the Targeted Individuals, the Tribunal was satisfied, for the reasons set out in PO No 5, that both of these rights were engaged. The Claimant had made a specific showing that the particular Individuals who were the target of criminal proceedings were either (a) persons who wish to give evidence for the Claimant or would have relevant evidence to give; (b) close family members of the Ipek family or key witnesses; or (c) lawyers who had advised the Koza Group, proceedings against whom would inhibit the Claimant's ability to obtain legal advice in Turkey.
31. In the case of the Annex B Individuals, the Claimant makes no such showing. Rather it advances the general statement that the pursuit of proceedings against these persons *'has had the (presumably intended) effect of intimidating persons who might otherwise assist the Claimant with the presentation of its case in this arbitration and inflict maximum pressure on the Claimant's sole director, Mr Akin Ipek, and other members of the Ipek family who are shareholders of the Claimant.'*²⁹
32. The Tribunal notes that all of the Annex B Individuals were named in the 2017 Indictment.³⁰ They could therefore have been named, but were not so named, in the Claimant's original application for provisional measures, which was the subject of a full hearing in July 2019 and resulted in PO No 5.
33. This Tribunal must confine itself to a consideration of what is necessary to enable the fair trial of the specific investment dispute submitted to it. It is not a criminal court and has no general human rights jurisdiction.
34. The Claimant has not satisfied it that the further criminal process against the Annex B Individuals will either result in the inability of the Claimant to adduce relevant evidence before this Tribunal on the matters that it must decide or that such process constitutes such an aggravation of the present dispute (beyond that constituted by the criminal process against the Targeted Individuals) as would require the Tribunal's intervention. Nor does it consider that the extension of the existing provisional measures to a further 22 persons would be proportionate.

²⁷ Application, 2.

²⁸ PO No 5, [8]–[13].

²⁹ Reply, 3.

³⁰ Ankara High Criminal Court Indictment No 2017/3386 (9 June 2017) **R–21**.

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35. *Urgency/necessity*. For related reasons, the Tribunal does not consider that the Claimant's application in respect of the Annex B Individuals meets the requirements of urgency and necessity.

(1) There is first the consideration already mentioned that these Individuals were named in the 2017 Indictment, nearly three years ago, and yet were not the subject of the Claimant's original application for provisional measures brought in November 2018.

(2) Second, the present Application was made *after* the Turkish Criminal Court had sentenced those persons.

(3) Third, the Tribunal understands that the execution of those sentences currently awaits the hearing of the defendants' appeals. There is some dispute between the Parties as to the likely date on which such appeals will be heard and determined. The Respondent maintains that the appeals '*will likely only be finalized in late 2020.*'³¹ The highest that the Claimant puts it is that those proceedings '*may be concluded prior to the hearing on the Respondent's Preliminary Objections in this arbitration.*'³²

36. On this evidentiary record, the Tribunal is not satisfied that the Claimant's Application in respect of the Annex B Individuals is sufficiently urgent or necessary.

Conditions for Mr Tekin Ipek's evidence

37. Finally, there is some dispute between the Parties as to the current state of their negotiations concerning the conditions under which Mr Tekin Ipek may give his evidence in this arbitration.

38. The Tribunal recalls its decision in PO No 5 that:

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.

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.³³

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.

³¹ Response, [12]

³² Reply, 3.

³³ PO No 5, [76]–[77].

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Order

40. Now therefore, for the reasons set out above, the Tribunal hereby decides and declares:

- (1) In respect of the Targeted Individuals, the provisions of paragraph 121(2) of PO No 5 remain in full force and effect: the Respondent shall suspend the further pursuit of criminal proceedings (including measures for the enforcement of any criminal judgment) against the Targeted Individuals pending the outcome of the Preliminary Objections in this arbitration. Provided however that, until such time as this Order is fully complied with, nothing in this Order precludes the Targeted Individuals from pursuing any appeal from criminal judgments against them.**
- (2) In respect of the Annex 2 Individuals, the Claimant's Application is denied.**
- (3) Costs reserved.**



Professor Campbell McLachlan QC
President of the Tribunal
31 March 2020