

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

PROCEDURAL ORDER NO. 5
Claimant's Request for Provisional Measures

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

Date of dispatch to the Parties: 19 September 2019

Procedural Order No. 5

Whereas:

- (1) On 15 November 2018, the Claimant filed its Request for Provisional Measures together with Exhibits C-0001 through C-0070 and Legal Authorities CL-0001 through CL-0021 (“**Request**”).
- (2) Further to an objection from the Respondent, followed by the Parties’ comments on the matter, on 21 December 2018, the Tribunal issued Procedural Order No. 2 (“**PO No 2**”), in which the Tribunal admitted the Claimant’s Request for Provisional Measures in the redacted form into the record, excluding exhibits C-42¹ and C-43.² The Tribunal invited the Claimant to indicate by 7 January 2019 whether it wished to file these exhibits as an expert report and a witness statement, respectively. In addition, if the Claimant wished that the evidence of Witness A be given anonymously, it should apply by 14 January 2019.
- (3) By letter dated 7 January 2019, the Claimant requested that C-42 be treated as an Expert Report and that C-43 be treated as a Witness Statement, and also notified the Tribunal that it wished that Witness A’s evidence be treated anonymously.
- (4) As announced in its letter of 7 January 2019, and in accordance with the Tribunal’s directions in PO No 2, on 14 January 2019 the Claimant submitted an application for Witness A’s evidence in support of the Request to be given anonymously. After considering the Parties’ arguments, the Tribunal issued Procedural Order No. 3 (“**PO No 3**”) on 13 March 2019, in which it decided to adjourn that application.
- (5) On 1 March 2019, the Respondent filed its observations to the Claimant’s Request together with the Witness Statement of Mr İsmail Güler, dated 1 March 2019, Exhibit R-0030, and Legal Authorities RL-0034 through RL-0065 (“**Response**”).
- (6) On 8 May 2019, the Parties communicated their agreement to extend the deadlines for subsequent submissions. The Tribunal accepted the agreed extensions but noted that due to the proximity of the hearing on the Request, there could be no further amendments to the timetable for the written phase.
- (7) On 16 May 2019, the Claimant filed a Reply to the Respondent’s observations together with Exhibits C-0078 through C-0109, the Witness Statement of Mr. Hamdi Akin Ipek, dated 16 May 2019, together with Exhibits HAI-0001 through HAI-0015, the Witness Statement of Mr Auhan Yurttas (in English and Turkish), dated 16 May 2019, together with Exhibits AY-0001 through AY-0023, and Legal Authorities CL-0063 through CL-0072 (the “**Reply**”).
- (8) On 28 June 2019, the Respondent filed a Rejoinder to the Request together with the Second Witness Statement of Mr İsmail Güler in English and Turkish, dated 28 June

¹ C-42: Expert Report of Professor Sir Jeffrey Jowell KCMG QC in the Matter of an Extradition Request from Turkey.

² C-43: Anonymous witness statement of Witness A.

Procedural Order No. 5

2019, Exhibits R-0135 through R-0182, and Legal Authorities RL-0113 through RL-0116 (the “Rejoinder”).

- (9) A hearing was held at the premises of the International Arbitration Centre in London on 24, 25 and 26 July 2019 pursuant to the schedule agreed between the Parties and communicated to the Tribunal on 17 July 2019.
- (10) The hearing was attended by the following persons:

Tribunal

Prof Campbell McLachlan QC, President
The Hon. L. Yves Fortier QC
Dr Laurent Lévy

Ms Jara Mínguez Almeida, Secretary of the Tribunal

Claimant

Ms Penny Madden QC
Ms Lindsey Schmidt
Ms Besma Grifat-Spackman
Ms Rose Naing
Ms Sophy Helgesen
Ms Nadia Wahba
Ms Clementine Hollyer
Mr Robert Dickens, of Gibson, Dunn & Crutcher UK LLP

Mr Hamdi Akin İpek, Party Representative and Witness

Mr Ayhan Yurttaş, Witness

Sir Jeffrey Jowell, Expert witness

Respondent

Mr Tom Sprange QC
Mr Viren Mascarenhas
Mr Sajid Ahmed
Mr Ben Williams
Ms Charity Kirby
Ms Lisa Wong
Mr Sadyant Sasiprabhu
Ms Olivia Currie, of King & Spalding

Mr Eyüp Kul
Mr Murat Erbilen

Procedural Order No. 5

Mr Turgut Aycan Özcan
Ms Alya Yamakoğlu, of LEXIST

Mr İsmail Güler, of TMSF,³ Party Representative and Witness

Ms Atike Eda Manav Özdemir
Mr Güray Özsu, of The Presidency

Ms Melek Küreeminoğlu
Ms Sena Baldoğan
Mr Enis Güçlü Şirin, of TMSF

Ms Gönül Ekmekci, interpreter

- (11) On 9 August 2019, the Claimant wrote to the Tribunal in relation to what it alleged were new developments pertinent to its Request subsequent to the hearing.
- (12) The Tribunal afforded the Respondent the opportunity to comment on this correspondence by 16 August 2019, and the Respondent did so.
- (13) According to a further timetable that the Tribunal then established, the Claimant then replied on 23 August 2019 and the Respondent rejoined on 29 August 2019.

The Tribunal, having deliberated, now decides as follows:

Scope of the Application

1. By paragraph 89 of the Reply, as clarified during the hearing, the Claimant seeks the following relief:
 - (1) Turkey shall take all actions necessary to suspend and/or refrain from initiating any extradition proceedings against Mr Akin Ipek, Mr Yurttas, Ms Pelin Zenginer, Ms Nevin Ipek, Mr Erhan Basyurt and Mr Tarik Toros (together, “the Targeted Individuals For Extradition”);⁴
 - (2) Turkey shall suspend and/or refrain from initiating any further criminal proceedings against the persons named in paragraph 1 together with Mr Cafer Tekin Ipek, Ms Melek Ipek, Ms Ebru Ipek, Ms Efsun Unal, Mr Ali Yildiz, Mr

³ Savings Deposit Insurance Fund of Turkey or Tassarruf Mevdati Sigorta Fonu (“TMSF”), appointed as trustee of Koza Group Companies on 6 September 2016

⁴ Reply, [23].

Procedural Order No. 5

Hakan Yildiz, Mr Mehmet Rasim Kuseyri, and Mr Muhammet Gokhan Kilic (together “the Targeted Individuals For Criminal Proceedings”);⁵

- (3) Turkey shall suspend and/or refrain from initiating any legal proceedings in which Respondent seeks the determination of issues by the Turkish court that fall to be determined exclusively in this Arbitration (including without limitation the SPA Proceeding and the £60 Million Proceeding);
- (4) Turkey shall maintain the status quo between the Parties as of the date of this Order; further and as a consequence:
 - (a) Turkey shall refrain from engaging in any conduct that may directly or indirectly affect the legal or physical integrity of the Targeted Individuals for Criminal Proceedings and shall further provide suitable and humane conditions for Mr Tekin Ipek in prison, including allowing him to work with Turkish and/or foreign attorneys in confidence and enabling him to provide witness testimony in this Arbitration;
 - (b) Turkey shall cease any further appropriation or dissipation of the assets of or companies within the Koza Group;
 - (c) Turkey shall cease any interference with or destruction of value of the Koza Group or IIL’s legal rights under the BIT; and
- (5) Turkey shall preserve the following categories of documents relevant to this Arbitration under the control of any company within the Koza Group or any associated individuals or entities:
 - (a) Documents relating to the Comakli Report;
 - (b) Documents relating to the claim that Koza-Ipek Holding had supported the alleged terrorist organisation, FETO;
 - (c) Documents relating to the transfer of management of Koza Holding’s business to the United Kingdom;
 - (d) Documents relating to the SPA;
 - (e) Documents relating to the seizure, closure, and/or sale of the Koza Media Companies and any of their assets;
 - (f) Documents relating to the value of Claimant’s investment in Turkey, including but not limited to accounting and financial documents for each of the companies in the Koza Group, balance sheets, board minutes and decisions, documents relating to any sale or potential sale of company assets, documents relating to the retention or instruction of consultants to assist in the sale or potential sale of any Koza Group assets; and

⁵ Reply, [31].

Procedural Order No. 5

- (g) Documents relating to the management of the Koza Group by the Trustees and the SDIF since October 2015, including but not limited to accounting and financial documents, subcontractor or operator agreements, and amendments to or variations of agreements that were in place when the Trustees were appointed. Such documents may include, for example, the documents relating to the agreement between Ipek Natural Resources and Turkiye Petrolleri Anonim Ortakligi (“Turkish Petroleum”).⁶

Legal Principles

2. The Tribunal’s power to grant provisional measures derives from Art 47 of the Convention, which provides:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

3. By ratifying the Convention, a State accepts that a tribunal may grant provisional measures in an appropriate case even if that may entail some interference with a State’s sovereign powers and enforcement duties.⁷

4. Article 47 is supplemented by Rule 39 of the Arbitration Rules, paragraph 1 of which provides:

At any time after the institution of proceedings, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

5. There is no provision in the BIT⁸ that restricts the Tribunal’s power to recommend provisional measures.

⁶ Reply, [67].

⁷ *Burlington Resources Oriente Ltd v Ecuador* (Procedural Order No 1) ICSID Case No ARB/08/5 (29 June 2009) CL-3, [66].

⁸ United Kingdom–Turkey Agreement for the Promotion and Protection of Investments (signed 15 March 1991, entered into force 22 October 1996) UKTS 1997 No 13 (“BIT”) RfA Ex 1.

Procedural Order No. 5

6. In order to advance an application for provisional measures, the Claimant must establish a *prima facie* case that the Tribunal has jurisdiction over the substance of the claim and as to the merits of the claim.
7. The Tribunal ‘need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants.’⁹ As the Tribunal put it in *Paushok v Mongolia*, the Tribunal ‘needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal.’¹⁰ This approach is also supported by the jurisprudence of the International Court of Justice.¹¹
8. Provided the Tribunal is satisfied that the Claimant has established a *prima facie* case, the Claimant must make out the following grounds:¹²
 - (1) The possession by the Claimants of rights requiring protection;
 - (2) That the provisional measures are urgent;
 - (3) That the provisional measures are necessary to avoid irreparable harm; and
 - (4) That the provisional measures are proportionate.
9. The concept of ‘rights’ requiring protection denotes that:¹³

The rights to be preserved must relate to the requesting party’s ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party’s claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in the

⁹ *Paushok v Mongolia* (Order on Interim Measures) UNCITRAL (2 September 2008) RL-55, [55].

¹⁰ *Ibid.*

¹¹ See, e.g. *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Provisional Measures Order) [2013] ICJ Rep 398, [15]-[16].

¹² *Perenco Ecuador Ltd v Ecuador* (Decision on Provisional Measures) ICSID Case No. ARB/08/6 (*Perenco*), (8 May 2009) RL-56, [43], [55].

¹³ *Plama Consortium Ltd. (Cyprus) v Bulgaria*, (Order on Provisional Measures) ICSID Case No. ARB/03/24, (6 September 2005) CL-16, [40].

Procedural Order No. 5

arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.

10. The concept of necessity to 'avoid irreparable harm' is, as both Parties agreed, 'properly understood as requiring a showing of material risk or serious or grave damage to the requesting party, and not harm that is literally "irreparable" in what is sometimes regarded as the narrow common law sense of the term.'¹⁴
11. Where the provisional measures concern the effect of the exercise of a State's powers of criminal investigation and prosecution upon the tribunal's own process, the tribunal must balance the duties on the parties of good faith and the objective of the non-aggravation of the dispute whilst bearing in mind the need to minimise any intervention in the right of the State to act in the public interest:

[A]ny party to an arbitration should adhere to some procedural duties, including to conduct itself in good faith; moreover, one can expect from a State to adhere in that very capacity, to at least the same principles and standards, in particular to desist from any conduct in this Arbitration that would be incompatible with the Parties' duty of good faith, to respect equality and not to aggravate the dispute. But this Tribunal must be mindful when issuing provisional measures not to unduly encroach on the State's sovereignty and activities serving public interests.¹⁵

12. The institution of criminal proceedings does not in itself threaten the exclusivity of ICSID proceedings:

Criminal proceedings deal with criminal liability and not with investment disputes, and fall by definition outside the scope of the Centre's jurisdiction and the competence of this Tribunal. Neither the ICSID Convention nor the BIT contain any rule enjoining the State from exercising criminal jurisdiction, nor do they exempt suspected criminals from prosecution by virtue of their being investors.¹⁶

13. In order to obtain provisional measures in relation to criminal proceedings, the claimant has to establish that the criminal proceedings were preventing them from asserting their

¹⁴ *PNG Sustainable Development Program Ltd v Papua New Guinea*, (Decision on Provisional Measures) ICSID Case No. ARB/13/33 (21 January 2015) CL-17, [109]–[110].

¹⁵ *Caratube International Oil Co LLP v Kazakhstan (Caratube II)* (Decision on Provisional Measures) ICSID ARB/13/13 (4 December 2014), RL-100, [121].

¹⁶ *Quiborax SA v Bolivia* (Decision on Provisional Measures) ICSID Case No ARB/06/2 (26 February 2010) CL-18, [129].

Procedural Order No. 5

rights in the arbitration, causing them irreparable and imminent harm requiring urgent relief. The claimant must also establish ‘that there is no higher or equivalent public interest of the State to be a party to the criminal proceedings.’¹⁷

Nature of the provisional measures sought

14. In the present case, the provisional measures sought by the Claimant fall into four broad categories:

- (1) Measures of protection from criminal proceedings: Requests (1), (2) and (4)(a) relate to the alleged effect on the present arbitration of pending criminal proceedings in Turkey against a number of persons associated with the Claimant, whether as witnesses or shareholders;
- (2) Measures to restrain the pursuit of related civil proceedings: Request (3) concerns the pursuit of civil proceedings in the courts in Turkey that are alleged to be related to the arbitration;
- (3) Measures for the protection of assets: Request (4)(b) & (c) seeks the preservation of the assets of the Koza Group from disposal or dissipation pending the Tribunal’s Award;
- (4) Measures for the preservation of documents: Request (5) concerns the preservation of documents relevant to the issues in dispute in the arbitration.

15. In view of the fact that each of these four categories of measures engages distinct considerations, the Tribunal will consider each of them separately. Before it does so, however, there is a preliminary issue that is common to the Application as a whole. That is the question of *prima facie* case. The Tribunal turns to this issue first.

A prima facie case

16. As the Tribunal has already observed above, one of the requirements for the grant of provisional measures is that the Claimant has established a *prima facie* case both as to jurisdiction and the merits.

17. In the present case, however, the application of this factor is affected by the procedural positions taken by the Parties:

¹⁷ *Caratube II* [135]; *Hydro Srl v Albania* (Order on Provisional Measures) ICSID Case No ARB/15/28 (3 March 2006) CL-11.

Procedural Order No. 5

- (1) In the First Session on 10 November 2018, the Claimant had already intimated that it would shortly make its application for provisional measures, and both Parties agreed a pleading and hearing timetable for its disposition, including by way of a hearing in July 2019;¹⁸
 - (2) At the same time, the Parties agreed to bifurcate the proceedings so as to enable the question of the Respondent's objections to jurisdiction to be determined prior to the merits.¹⁹
 - (3) The pleading and hearing schedule for the jurisdictional phase contemplated a written phase that would run concurrently with the briefing of the provisional measures application with a hearing on preliminary objections in June 2020.
 - (4) By virtue of this agreement, all proceedings on the merits were suspended until the Tribunal's decision on jurisdiction, with the consequence that the Claimant is not during this initial phase called upon to file its Memorial on the Merits.
18. At the First Session, the Respondent did not dispute the Claimant's entitlement to bring its provisional measures application. Nor did it make an application under Rule 41(5) for a prompt decision from the Tribunal that the claim was "manifestly without legal merit."
19. Under this agreed timetable, the Tribunal will determine in June 2020, on the basis of the full evidentiary record then before it, the Respondent's jurisdictional objections. If that hearing were to lead to the dismissal of the claim, it would necessarily follow that provisional measures ordered in the interim would also be set aside. The question before the Tribunal at present is whether any measures are required to maintain the status quo or to protect its process in the interim, in order to enable it to decide the Respondent's jurisdictional objections.
20. In the view of the Tribunal, it would be inconsistent with the procedure agreed between the Parties for the Respondent to contest the present application on the ground that the Tribunal lacks *prima facie* jurisdiction, still less to prejudge the merits of the claim.
21. No doubt for this reason, the Respondent confined itself in its written pleadings to a submission that the Tribunal should take the Respondent's jurisdictional objections into account such that "the Tribunal must approach the Application with appropriate rigor,

¹⁸ PO No 1, [24.1].

¹⁹ [14.1].

Procedural Order No. 5

as an application for an exceptional and extraordinary remedy which should not be granted lightly.”²⁰

22. The Tribunal certainly agrees that an application for provisional measures, particularly one that relates to criminal proceedings, is one that must be approached with appropriate rigour.
23. In response to questions from the Tribunal at the hearing, the Respondent’s counsel confirmed:²¹

So we don’t ask you to decide jurisdiction today, and we don’t come here saying, “You can’t give this relief because you have no jurisdiction”. We don’t do either of these things.

24. For these reasons, the Tribunal approaches the present Request on the basis that it is not asked to determine jurisdiction, nor is it disentitled to order provisional measures on grounds that there is no *prima facie* basis for jurisdiction.
25. The Claimant has advanced a serious claim in its Request for Arbitration dated 9 May 2018, and has invoked an arguable basis for jurisdiction under the BIT. The Respondent has for its part advanced a substantial objection to the jurisdiction in its Memorial on Jurisdiction dated 12 April 2019, to which the Claimant has, since the hearing on provisional measures now filed its Defence on 5 September 2019.
26. At the heart of both the Claimant’s claim to jurisdiction and the Respondent’s objection is the validity of the Share Purchase Agreement (“SPA”), which the Claimant alleges it entered into on 7 June 2015.²² This forms the basis for the Claimant’s claim to be a “company” incorporated in the United Kingdom that has made an “investment” in Turkey within the meaning of the BIT;²³ and “national of another Contracting State” for the purpose of the ICSID Convention.²⁴

²⁰ Response, [23]; Rejoinder, [8]–[12].

²¹ T1/72/22–25.

²² RfA Ex 4.

²³ Arts 1(a) & 1(d)(ii) BIT

²⁴ Art 25(2)(b) ICSID Convention.

Procedural Order No. 5

27. For its part, the Respondent alleges that the SPA is a sham, which provides no basis for the jurisdiction of the Tribunal and that the Claimant's claim is an abuse of process, violating the universal requirement of good faith.²⁵
28. The validity *vel non* of that ground for jurisdiction will, by agreement of both Parties, fall to be determined next year on the hearing of all of the Respondent's objections to jurisdiction.
29. It would be inconsistent with this procedural posture and would prejudice the issues that both Parties have submitted for decision in the jurisdiction phase, for the Tribunal to make any further finding on jurisdiction or the merits at this stage.
30. Having clarified this initial question, it is now possible to move to consider each of the Claimant's four categories of provisional measures and to assess the grounds for each in light of the four requirements outlined in paragraph [8] above.

Measures of protection from criminal proceedings

31. The Claimant seeks three types of interim protection from criminal proceedings:
- (1) First, it seeks an order that Turkey suspend or refrain from seeking the extradition of the Targeted Individuals for Extradition (Request (1));
 - (2) Second, it seeks the suspension of criminal proceedings against the Targeted Individuals for Criminal Proceedings (Request (2)); and,
 - (3) Third, it seeks the protection of the legal and physical integrity of the Targeted Individuals for Criminal Proceedings and in particular the provision of humane conditions for Mr Tekin Ipek in order to enable him to prepare for and give evidence in this arbitration (Request (4)(a)).

It will be convenient to take each of these requests *seriatim*.

Targeted Individuals for Extradition

32. By the first limb of its Request, the Claimant seeks a provisional measure from this Tribunal that would recommend to Turkey that it take all necessary measures to

²⁵ Respondent's Preliminary Objections Memorial (12 April 2019).

Procedural Order No. 5

suspend or refrain from initiating extradition proceedings against the Targeted Individuals for Extradition.

33. The named persons fall into three categories:
- (1) Mr Akin Ipek, the Director of the Claimant, its Party Representative and a witness in these proceedings;
 - (2) Three witnesses, Mr Yurttas (former President of the Koza Media Group), Mr Erhan Basyurt (former Editor-in-Chief of the newspaper division of Koza Media) and Mr Tarik Toros (former Executive Producer of the radio and television division of Koza Media);²⁶ and,
 - (3) Two members of the Ipek family who are shareholders in the Claimant: Ms Pelin Zenginier (Mr Akin Ipek's sister) and Ms Nevin Ipek (Mr Akin Ipek's wife), but who do not intend to testify in these proceedings.²⁷
34. Protection from extradition from the United Kingdom to Turkey was at the forefront of the Claimant's original Request on 15 November 2018. Mr Akin Ipek, the Claimant's director, had been the subject of an extradition request from Turkey dated 2 February 2017.²⁸ A UK arrest warrant was issued on 2 May 2018,²⁹ and Mr Ipek was arrested on 23 May 2018. A full hearing was held in the Westminster Magistrates' Court on 25 September 2018. Judgment was still awaited when the Claimant filed its Request with this Tribunal.
35. District Judge Zani gave judgment on 28 November 2018 ("Extradition Judgment").³⁰ The learned judge refused the request for extradition on the grounds that the decision to prosecute was politically motivated and that, if returned there was a real risk that the defendant would be subject in prison to inhumane conditions. He discharged Mr Ipek.

²⁶ Mr Yurttas filed a witness statement and gave oral testimony at the hearing on provisional measures. Claimant's counsel confirmed that Mr Basyurt and Mr Toros are willing to testify for the Claimant: T3/37/12-13.

²⁷ T3/37/25-38/2.

²⁸ C-16.

²⁹ C-36.

³⁰ CL-29.

Procedural Order No. 5

36. Turkey applied to the High Court for permission to appeal the Extradition Judgment, which application was rejected on 5 March 2019.³¹ It renewed its application to the Court of Appeal, which also rejected it on 9 April 2019.³² Counsel for the Claimant confirmed at the hearing that the result is that the Extradition Judgment is final and that “those proceedings can go no further lawfully in the UK.”³³
37. The Claimant maintains its request for provisional measures under this head.
38. It submits that Turkey continues to seek the apprehension of Mr Akin Ipek and others of the Targeted Individuals for Extradition:
- (1) On 14 March 2019, the Prosecutor requested the Ankara Heavy Criminal Court to inquire into the status of the red bulletin for Mr Akin Ipek and Mr Yurttas;³⁴
 - (2) At the same hearing, the Court executed a warrant of apprehension against Mr Ipek, Ms Nevin Ipek and Ms Pelin Zenginer;³⁵
 - (3) On 9 April 2019, the Turkish Foreign Ministry announced the continuation of its efforts to extradite alleged Gülenists;³⁶
 - (4) Documentation for an extradition request for Mr Yurttas is still in preparation, having been remitted by the Turkish Extradition Bureau for redrafting on 11 June 2019.³⁷
39. In their post-hearing submissions, the Parties pleaded further as to the consequences of a hearing in the Heavy Criminal Court on 6 August 2019, a transcript of which has been supplied to the Tribunal.³⁸ It appears from this record that:

³¹ C-98.

³² Agreed Chronology of Key Events, 11.

³³ T1/23/13-15.

³⁴ C-100.

³⁵ C-100.

³⁶ C-103.

³⁷ R-177.

³⁸ Annex 3 to Respondent’s submission of 29 August 2019.

Procedural Order No. 5

- (1) The Prosecutor requested the issue of red notices for Ms Nevin Ipek and Ms Pelin Zenginler, but the Court made no ruling on this request, deciding to “wait for the execution of apprehension decisions” in respect of those persons;³⁹
 - (2) The Prosecutor enquired as to the status of the red notices against Mr Akin Ipek and Mr Yurttas, but the Court decided to “wait for the execution of apprehension decisions” in respect of those persons.⁴⁰
40. The Respondent confirmed at the hearing and subsequently that “there is no extant, existing red notice against Mr Ipek”⁴¹ and that “there is no extradition request which was conveyed to the foreign public authorities” about the Targeted Individuals for Extradition.⁴²
41. *Tribunal’s analysis:* The present Tribunal is constituted solely to determine the Claimant’s claim that the Respondent has breached the BIT by expropriating its assets in Turkey and failing to protect its investment in accordance with the Treaty provisions. Accordingly, its power to grant provisional measures under this head is limited to measures urgently necessary to ensure a fair trial of the claims that are before it.
42. In the Tribunal’s view, this ground would be engaged were persons with relevant evidence to provide to the Tribunal to be extradited so that they were not reasonably able to give that evidence. This is also the case for a Party’s representative, whose presence is also required in order for him to be able to instructions as to the conduct of the claim. This ground may also be engaged if it were sought to intimidate a party representative or a key witness from prosecuting the claim or giving evidence through the pursuit of extradition measures against a close member of his or her family.
43. Nevertheless, a tribunal will not exercise its powers in this respect where the alleged risk is only a potential one. It must be imminent.⁴³

³⁹ Ibid, 97, 99.

⁴⁰ Idem.

⁴¹ T3/73/1–2.

⁴² Memorandum from Extradition Bureau dated 19 July 2019, Annex 4 to Respondent’s submission of 29 August 2019.

⁴³ *Burlington Resources Oriente Ltd v Ecuador* (Procedural Order No 1) ICSID Case No ARB/08/5 (29 June 2009) CL–3, [45].

Procedural Order No. 5

44. There is no extant extradition request against any of the Targeted Individuals for Extradition. The only request that had been issued to a foreign state, namely the request to the United Kingdom in respect of Mr Akin Ipek, was dismissed by the English court.
45. On the current state of the evidence, the Tribunal does not consider that the steps taken by the criminal authorities in Turkey in respect of the apprehension of the Targeted Individuals are such as to meet the test of imminence justifying the issue of an order.
46. Nevertheless, while it is hearing and determining this case, the Tribunal would treat very seriously any attempt to seek the extradition to Turkey of persons who are responsible for the direction of the Claimant's case or who have relevant evidence to provide or to intimidate such persons through the pursuit of extradition requests against their close family members.
47. The Tribunal remains seised of this element of the request. The Claimant has leave to move the Tribunal on an urgent basis in the event that there were a material change in the position.

Targeted individuals for criminal proceedings

48. By the second limb of its Request, the Claimant seeks a provisional measure from this Tribunal that would recommend to Turkey that it suspend or refrain from pursuing further criminal proceedings against the Targeted Individuals for Criminal Proceedings.
49. The named persons fall into four categories:
- (1) The Targeted Individuals for Extradition (described above at [33]);
 - (2) A further witness and shareholder in the Claimant, Mr Tekin Ipek, who is currently under arrest in Turkey;
 - (3) Two further members of the Ipek family: Ms Melek Ipek (Mr Akin Ipek's mother) and Ms Ebru Ipek (Mr Tekin Ipek's wife);

Procedural Order No. 5

- (4) Five former lawyers for the Koza Group, who are possible witnesses: Ms Efsun Unal, Mr Ali Yildiz, Mr Hakan Yildiz, Mr Mehmet Rasim Kuseyri, and Mr Muhammet Gokhan Kilic.⁴⁴
50. All of these persons are the subject of criminal indictments in Turkey or are alleged to be under criminal investigation in pursuance of such indictments.⁴⁵
51. The Claimant seeks the suspension of the criminal process in Turkey pending the outcome of this arbitration on the ground that further pursuit of the criminal proceedings threatens the integrity of this arbitration and disturbs the status quo:
- (1) by inhibiting actual or potential witnesses from giving relevant testimony; or
 - (2) by chilling the pursuit of the arbitration through the use of criminal proceedings as reprisals.⁴⁶
52. The Respondent submits that it faces what it regards as a serious terrorist threat. It has a sovereign right to pursue criminal proceedings against those persons whom it considers perpetrated or assisted in terrorist offences and must not be prevented from exercising that right.⁴⁷ It points out that the criminal indictments were brought well before the commencement of the arbitration, so provisional measures are not necessary to protect the status quo. In any event, the Request does not meet the high threshold that both Parties agree must be met before any provisional measure may be ordered in respect of criminal proceedings.
53. *Tribunal's analysis:* Summarising the effect of the authorities cited at paragraphs [11]–[13] above, the Tribunal finds that:

⁴⁴ Claimant's counsel stated at the hearing that an order from the Tribunal "would greatly assist, but I can give you no assurance that any of those people would be prepared to testify." T3/36/19–20.

⁴⁵ Ankara High Criminal Court Indictment No 2016/1632 (6 June 2016) R–85; Ankara High Criminal Court Indictment No 2017/3386 (9 June 2017) R–21; Ankara High Criminal Court Indictment No 2017/3425 (14 June 2017) HAI–8 (in respect of Mr Ali Yildiz, Mr Hakan Yildiz, Mr Mehmet Rasim Kuseyri, and Mr Muhammet Gokhan Kilic, former Koza group lawyers); Ankara Heavy Criminal Court Indictment No 2018/713 (25 October 2018) C–0086. Claimant further submits that Mr Toros and Mr Basyurt are not indicted, but are referred to in the Indictments as having been referred to the Public Prosecutor for investigation: Reply, [29] n 81, citing R–21, 390, 515.

⁴⁶ T1/40/15–18.

⁴⁷ Rejoinder, [71]–[80]; T1/50–61.

Procedural Order No. 5

- (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;
 - (2) The right that is engaged is the right of both Parties before it to a fair process. No question of the exclusivity of ICSID proceedings is engaged in this context, since the arbitral process established under the ICSID Convention applies to investment disputes not to criminal process as such, which is the preserve of the State;
 - (3) Nevertheless, within the framework of the protection of the fairness of its own process, an ICSID Tribunal is entitled to consider in particular cases the effect of the pursuit of a criminal proceeding on the ability of a party to seek recourse under the ICSID Convention, including to present relevant evidence in support of its case;
 - (4) An applicant must meet a high threshold in establishing the requirements for the grant of provisional measures in relation to criminal proceedings; and,
 - (5) In considering whether the measures are proportionate, 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.
54. A further preliminary remark is warranted at this stage. The Tribunal heard submissions from counsel for both Parties as to the character of the Turkish criminal proceedings. It also heard some oral evidence from Mr Ipek and Mr Yurtass for the Claimant and from Mr Gülen for the Respondent, and expert evidence from Professor Sir Jeffrey Jowell.
55. The position of the Claimant is that the criminal charges against the Targeted Individuals are baseless and that the criminal proceedings are politically motivated. For its part, the Respondent alleges that Mr Akin Ipek and the other persons charged in Turkey are terrorists against whom it is fully entitled to take all measures within the framework of the criminal law.
56. The Tribunal is in no position now to make findings of fact about any of these wider allegations. It would not do so without the benefit of a full trial and in any event will only consider such allegations of criminal conduct as may properly be relevant and admissible as evidence in relation to the claims of expropriation and other breaches of treaty advanced in the present proceedings. This necessarily follows from the fact that, as already observed, it is an international investment tribunal not a criminal court.

. Procedural Order No. 5

57. Moreover, the Tribunal is not concerned with the pursuit of criminal proceedings against persons who are unconnected to the present Claimant or its claim. It is necessary to make this point expressly, because the Indictments take the form of an omnibus set of charges against many persons other than those named in the Request before this Tribunal.
58. Nevertheless, the Tribunal does find, on the basis of the case as pleaded, that there is a connection between the criminal proceedings against the Targeted Individuals and the present claim. Acts of the Respondent that the Claimant alleges in its Request for Arbitration gave rise to the expropriation and other breaches of the BIT were allegedly precipitated or carried out in the context of the criminal investigation and proceedings.⁴⁸
59. The only question that is currently before the Tribunal under this head is whether the continued pursuit of the criminal proceedings against the Targeted Individuals during the pendency of the present arbitration is so likely to inhibit the fair process of this arbitration that the grant of provisional measures is urgently necessary to prevent irreparable harm. This does not require the Tribunal to make an assessment of the evidentiary strength of the criminal charges and it does not do so.
60. It further follows that, in analysing this question, it is not dispositive that the criminal proceedings were commenced prior to this arbitration. It is correct that, as the Respondent submitted, an inquiry into timing is inherent in an application for provisional measures to preserve the status quo. The Tribunal accepts that in the present case the whole criminal process cannot be characterised as a response or reprisal for the bringing the arbitration. At the same time, it rejects the broader Respondent's argument that the object of preserving the status quo cannot be engaged. The Tribunal is not concerned with the pendency of criminal charges against the Targeted Individuals. It is concerned solely with steps that may be taken subsequent to its Order that may affect the fairness of its procedure.

⁴⁸ RfA, [8], [41]–[50].

Procedural Order No. 5

61. This is a factor that has led tribunals to grant provisional measures in relation to criminal proceedings in other cases:

- (1) In *Quiborax v Bolivia*, the tribunal decided to order the suspension of criminal proceedings. It took into account in particular “the effect that the criminal proceedings may have on potential witnesses.”⁴⁹ The tribunal was also in that case concerned that the underlying motivation for the criminal charges may have been the connection of the relevant individuals to the arbitration.
- (2) In *Lao Holdings v Lao*, the tribunal decided to suspend the criminal proceedings. It found that the proposed criminal investigation “strikes directly at the people and issues involved in the arbitration” which would be “highly disruptive of the Claimant’s ability to prepare and present its case.”⁵⁰
- (3) In *Hydro v Albania*, the tribunal recommended the suspension of criminal proceedings. It found that the pendency of criminal proceedings (which included a request for extradition and possible incarceration) against the central person on the claimants’ side would represent “a grave concern to the procedural integrity of the proceeding.”⁵¹ It was proper for the tribunal to intervene as the alleged offences were related to the subject matter of the arbitration. The measures were necessary in order to protect the ability of the claimants to put their cases adequately and participate in the arbitration. The measure was proportionate as the stay would not prevent the subsequent prosecution of the criminal proceedings. It would merely stay them pending the outcome of the arbitration.

62. In considering whether the Request for provisional measures is well founded in the present case, the Tribunal has paid particularly close attention to the current procedural status of the criminal proceedings against the Targeted Individuals in Turkey. As this was the subject of developments subsequent to the hearing at the end of July 2019, the Tribunal allowed the Parties two further rounds of pleadings concerning events in the criminal proceedings in August 2019.⁵²

⁴⁹ *Quiborax SA v Bolivia* (Decision on Provisional Measures) ICSID Case No ARB/06/2 (26 February 2010) CL-18, [143].

⁵⁰ *Lao Holdings NV v Lao* (Ruling on Motion to Amend Provisional Measures) ICSID Case No ARB(AF)/12/6 (30 May 2014) CL-13, [72].

⁵¹ *Hydro Srl v Albania* (Order on Provisional Measures) ICSID Case No ARB/15/28 (3 March 2006) CL-11, [3.18].

⁵² Above Preamble (10)–(12).

Procedural Order No. 5

63. There was some disagreement between the Parties as to the proper characterisation of these events. The Tribunal now has before it a full translation of the hearing in the Ankara Heavy Criminal Court on 6 August 2019.⁵³
64. The Tribunal makes the following findings of fact as to the current status of the criminal proceedings on the basis of the evidentiary record now before it:
- (1) The criminal proceedings against the Targeted Individuals were commenced notably by the Indictments of 6 June 2016 and 9 & 14 June 2017.⁵⁴ The Indictments of 9 & 14 June 2017 were issued after the Claimant had notified the Respondent of its arbitration claim under the BIT on 6 March 2017.⁵⁵ All of the above Indictments preceded the issue of the Request for Arbitration in these proceedings on 9 May 2018.
 - (2) The Ankara 24th High Criminal Court held its 14th periodic hearing on 6 August 2019. This hearing had been scheduled in the 13th hearing on 23 May 2019.
 - (3) At the hearing, the Prosecutor presented its conclusions on the merits and sought sentences of imprisonment for Mr Cafer Tekin Ipek, Ms Melek Ipek and Ms Ebru Ipek and the confiscation of their shares in companies transferred to the trusteeship of the SDIF;⁵⁶
 - (4) The Prosecutor also sought an enquiry into the status of the red notices for Mr Akin Ipek and Mr Yurttas and requested red notices for Ms Pelin Zenginer and Ms Nevin Ipek.⁵⁷
 - (5) The Court decided to:
 - (a) Wait for the issue of apprehension decisions for Mr Akin Ipek and Mr Yurttas, Ms Pelin Zenginer and Ms Nevin Ipek;
 - (b) Impose a ban on Ms Ebru Ipek from leaving Turkey; and,
 - (c) Notified all defendants that their defences are to be presented at a hearing on 14-17 October 2019, with the warning that “those who do

⁵³ Annex 3 to Respondent’s submission of 29 August 2019, and see above at [39].

⁵⁴ Ankara High Criminal Court Indictment No 2016/1632 (6 June 2016) R-85; Ankara High Criminal Court Indictment No 2017/3386 (9 June 2017) R-21; Ankara High Criminal Court Indictment No 2017/3425 (14 June 2017) HAI-8.

⁵⁵ Letter from Gibson Dunn (6 March 2017) RfA Ex 20. Article 8(2) of the BIT requires the investor to wait for one year after notification of a claim before it may institute arbitration proceedings under the ICSID Convention.

⁵⁶ Hearing Minutes (6 August 2019) Annex 3 to Respondent’s submission of 29 August 2019, 6–91.

⁵⁷ *Ibid*, 97.

Procedural Order No. 5

not give their statements against the merits and the prosecutor's opinion on these dates... will be considered to have renounced such rights."⁵⁸

65. In these circumstances, the Tribunal 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. It notes the following factors:

- (1) While the criminal process has been extant for three years, it appears that it is now reaching a point where the defendants will imminently have to submit evidence in their defence or renounce their right to do so;
- (2) Mr Tekin Ipek has been imprisoned in Turkey since April 2016. The Tribunal is satisfied that he is likely to have relevant evidence to give in these proceedings.
- (3) Charges are also pending against a number of other persons who either wish to give evidence before this Tribunal or would have relevant evidence to give, including former senior executives of the Koza Group and its lawyers.
- (4) The Tribunal has serious concerns about the pendency of criminal proceedings against members of the Ipek family, including the mother, sister and wives of the key witnesses. It notes that the conclusions as to their criminality that the Prosecutor presented at the hearing on 6 August 2019 sought sentences of imprisonment and the Court has, since the Provisional Measures hearing, re-imposed a ban on Ms Ebru Ipek from leaving Turkey. The Tribunal cannot discount the effect upon the Claimant's Party Representative and other key witnesses of the continued pursuit of these charges during the arbitration.
- (5) The pursuit of a separate Indictment specifically against the lawyers who had advised the Koza Group raises further serious concerns as to the ability of the Claimant to avail itself of legal advice in Turkey.

66. Further, the Tribunal is concerned that further pursuit of the criminal proceedings during the pendency of the arbitration will imperil the equality of the Parties by enabling the Respondent to obtain witness testimony and other evidence from the Claimant's witnesses through the use of its criminal process for use in the arbitration:

- (1) On 1 August 2019, immediately following the conclusion of the Provisional Measures hearing, the SDIF applied to the Ankara 24th Heavy Criminal Court by letter dated 30 July 2019 for a copy of every criminal case file before the

⁵⁸ Ibid, 99–100.

Procedural Order No. 5

Court relating to Mr Akin Ipek “in order to serve as basis in the defences” of the Respondent in the arbitration.⁵⁹

- (2) The schedule now set by the Criminal Court for the other defendants before it will require them to submit their evidence (or renounce their right to do so) by 14 October 2019.
67. The Tribunal makes no finding at this stage as to the admissibility before it of the material sought by the Respondent in its application to the Criminal Court of 1 August 2019. Rather, the Tribunal is concerned that the continued pursuit of the criminal process against the Targeted Individuals hereafter will prejudice the equality of the Parties by enabling the Respondent to obtain testimony and other evidence from the Claimant’s witnesses under compulsion of internal law.
68. For all of these reasons, the Tribunal considers that the Claimant has established that there is an imminent risk of irreparable harm in the arbitration by reason of the continued pursuit of the criminal proceedings.
69. The Tribunal has also given careful consideration to balancing the right of the Respondent to the pursuit of its criminal process. An Order from this Tribunal will not affect the pendency of the criminal proceedings that have already been brought; nor will it preclude the continued pursuit of those proceedings against persons other than the Targeted Individuals.
70. The criminal proceedings have already been extant for some three years. As has already been observed, if the Respondent is successful in its preliminary objections to jurisdiction, which will be heard in June 2020, any provisional measures recommended by this Tribunal will cease to have effect. In the event that the Tribunal were to decide to uphold its jurisdiction, it would revisit at that stage whether a provisional measure continues to be necessary and, if so, its scope. The Tribunal is therefore satisfied that any effect upon the Respondent’s criminal process is limited strictly to the extent necessary to enable the fair hearing of the present arbitration claim.

⁵⁹ Ex A to Letter from Gibson Dunn dated 9 August 2019.

Procedural Order No. 5

Legal and Physical Integrity

71. Further under this head, the Claimant seeks orders that:
- (1) “Turkey shall refrain from engaging in any conduct that may directly or indirectly affect the legal or physical integrity of the Targeted Individuals for Criminal Proceedings” and shall further
 - (2) “[P]rovide suitable and humane conditions for Mr Tekin Ipek in prison, including allowing him to work with Turkish and/or foreign attorneys in confidence and enabling him to provide witness testimony in this Arbitration.”
72. The Claimant alleges that the first element of this order is warranted on the grounds that Mr Akin Ipek and his family have been subjected to a campaign of harassment and threats.⁶⁰ The second element of this Order is necessary because Mr Tekin Ipek is held in inhumane conditions and lacks access to proper legal representation.⁶¹
73. The Respondent points out that there is no evidence that the Respondent is behind any threats that Mr Akin Ipek has received, noting that Mr Akin Ipek accepts in his witness statement that “[i]t is not necessarily clear to me who is behind these threats.”⁶² It submits a letter from the Turkish Ministry of Justice, which provides details as to the access afforded to Mr Tekin Ipek to his lawyers.⁶³
74. *Tribunal’s analysis:* The Tribunal regards it as fundamental to the fair administration of justice that persons pursuing a claim, or appearing as witnesses, are entitled to do so without fear for the physical integrity of their person. So far as concerns legal integrity, the Contracting States to the ICSID Convention gave their solemn undertaking under Article 22 to accord immunity from legal process to parties, agents, counsel, witnesses and experts in ICSID arbitral proceedings with respect to acts performed by them in that capacity. The Tribunal regards it as a paramount duty upon the parties to respect these fundamental rights.

⁶⁰ Akin Ipek WS 1, [83]–[88].

⁶¹ *Ibid.*, [62].

⁶² *Ibid.*, [84].

⁶³ Letter from the Ministry of Justice to SDIF (14 June 2019) R–150.

Procedural Order No. 5

75. Nevertheless, on the evidence before it, it does not find grounds to suggest that any threats to the physical integrity of the Targeted Individuals are attributable to the Respondent. It does not therefore find it necessary to make an order in relation to the first sub-category.
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.
78. Beyond the indications just given, the Tribunal does not consider that a further order is warranted at this stage.

Restraint of related civil proceedings

79. The Claimant seeks an order restraining the continued pursuit of civil proceedings that it alleges directly relate to the arbitration. It refers specifically to:
- (1) *Koza-Ipek Holdings AS (under the Administration of TMSF) v Ipek et al* Docket No 2017/202 ("the SPA Proceedings");⁶⁴ and,
 - (2) *Capital Markets Board v Ipek* ("the £ 60 million claim").⁶⁵
80. The SPA Proceedings were instituted after the Claimant had notified the Respondent of its claims in this Arbitration,⁶⁶ but prior to its institution. In those proceedings, the Turkish Court has already entered judgment against the Defendants, who are presently

⁶⁴ Case commenced 16 March 2017, Judgment of 2nd Commercial Court of First Instance delivered 11 July 2018, R-24.

⁶⁵ Case commenced 26 October 2016, Judgment of 10th Commercial Court of First Instance delivered 23 January 2019, C-93.

⁶⁶ RfA Ex 20.

Procedural Order No. 5

pursuing an appeal.⁶⁷ The Claimant accepts that, if this Tribunal were to make a provisional order to stay those proceedings, it would also apply to its appeal.⁶⁸

81. The Claimant puts its case in respect of the £ 60 million claim on the ground that, as this case seeks to recover £ 60 million from Mr Akin Ipek and Mr Tekin Ipek personally, it is an attempt to prevent the Claimant from pursuing its claim, despite the fact that the English Court of Appeal has held that Koza Ltd is entitled to devote its funds to supporting the present arbitration.⁶⁹
82. The Respondent submits that the SPA Proceedings were commenced before the present arbitration and that it is the Claimant and the Ipek family that have chosen to pursue an appeal from judgment. It further submits that the £ 60 million claim was also commenced prior to the arbitration and is not related to the matters at issue in the arbitration.⁷⁰
83. *Tribunal's analysis:* In contrast to the position in relation to criminal proceedings discussed in the previous section, the pendency of civil proceedings before national courts may engage the Parties' right to the exclusivity of ICSID arbitral proceedings, which is a right that is capable of protection by provisional measures.
84. The right itself is enshrined in Article 26 of the ICSID Convention, which provides:
- Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.
85. Article 26 is a provision of central importance in the scheme of the Convention. In their Report on the ICSID Convention, the Executive Directors of the World Bank explain its purpose under the heading 'Arbitration as Exclusive Remedy':

⁶⁷ Appeal Application 26 September 2018, R-149.

⁶⁸ T3/39/20-40/3.

⁶⁹ *Koza Ltd v Akçil* [2019] EWCA Civ 891, CL-74, permission to appeal to the Supreme Court pending.

⁷⁰ Rejoinder, [91]-[94].

Procedural Order No. 5

It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not preserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26.

86. The leading commentary on the Convention states the matter in this way:⁷¹

Art. 26 is the clearest expression of the self-contained and autonomous nature of the arbitration procedure provided for by the Convention. Unlike Art. 25, it only applies to arbitration but not to conciliation.

The first sentence of Art. 26 has two main features. The first is that, once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID. This principle operates from the moment of valid consent. This exclusive remedy rule of Art. 26 is subject to modification by the parties. The phrase "unless otherwise stated" in the first sentence gives the parties the option to deviate from it by agreement.

The second feature of Art. 26, first sentence, is that of non-interference with the ICSID arbitration process once it has been instituted. The principle of non-interference is a consequence of the self-contained nature of proceedings under the Convention. The Convention provides for an elaborate process designed to make arbitration independent of domestic courts.

87. The plain words of Art 26 require consideration of the *remedy* sought in the arbitration and the comparison of that remedy with any other remedies sought in other proceedings, since Art 26 operates to exclude those other remedies.

88. What are the consequences of such exclusion? As one Tribunal put it, 'once the parties have consented to ICSID arbitration, they must refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID' and 'the parties must withdraw or stay any and all judicial proceedings commenced before national jurisdictions ... in connection with the dispute before the ICSID tribunal.'⁷²

⁷¹ Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, CUP, 2009) ('Schreuer') 351.

⁷² *Tokios Tokelès v Ukraine* (Procedural Order No. 1 Claimant's Request for Provisional Measures) ICSID Case No. ARB/02/18, (1 July 2003) RL-107, [1]-[2].

Procedural Order No. 5

89. The question is whether on the facts the domestic proceedings might ‘jeopardize the principle of exclusivity’.⁷³ This in turn requires consideration of whether there is a ‘relevant relationship or nexus’ between the two proceedings and the issues raised in them.⁷⁴
90. It is well accepted that ICSID tribunals may exercise their power to grant provisional measures in order to enforce the exclusive remedy of ICSID proceedings.⁷⁵ So, for example, in *Millicom v Senegal*,⁷⁶ the Tribunal issued a provisional measure under Art 47 inviting the parties to send joint letter seeking the suspension of proceedings in Senegal pending the Tribunal's own decision on jurisdiction. It accepted on principle the application for provisional measures.⁷⁷ It held:⁷⁸
- Pursuing both sets of proceedings in parallel would necessarily involve complications, misunderstandings or even serious resistance at the stage of enforcing the decision, if the Arbitral Tribunal were to find in favour of the Claimants.
91. In the present case, both sets of Turkish civil proceedings had been commenced prior to the institution of the present arbitration and the Claimant agreed a timetable for the hearing of its Request that, in the event, has had the consequence that first instance judgments have already been entered in Turkey against the respective defendants. The Claimant and the other Defendants, members of the Ipek family, elected to pursue an appeal from that judgment despite the pendency of the present Arbitration and Request.
92. The judgment in the SPA proceedings plainly deals with an issue that will also be central to this arbitration, namely the validity of the SPA and in proceedings to which

⁷³ *Ibid*, [3].

⁷⁴ *Government of New Zealand v Mobil Oil New Zealand Ltd* (1988) XIII Ybk Comm Arb 638, 643, 4 ICSID Rep 117, 118 ILR 620 (NZ HC), cited by Schreuer at 393, who opines that ‘[t]he outcome of this case is undoubtedly in full accord with the requirements of Art. 26.’

⁷⁵ *Plama Consortium Ltd. (Cyprus) v Bulgaria* (Order on Provisional Measures) ICSID Case No. ARB/03/24, (6 September 2005) CL-16, [38]; *Tokios Tokelés*, [7]; Schreuer, Art 47, [99]-[134] (pp 784-793), and the numerous authorities there cited.

⁷⁶ *Millicom International Operations BV v Senegal* (Decision on Claimants' Request for Provisional Measures) ICSID Case No. ARB/08/20, (9 December 2009), CL-70.

⁷⁷ *Id.* at [49].

⁷⁸ *Id.* at [47(a)].

Procedural Order No. 5

both TMSF and the Claimant are party. Nevertheless, as the Respondent rightly accepts, this Tribunal is not bound by the findings of the Ankara Commercial Court.⁷⁹

93. This Tribunal is bound to apply international law to the determination of the Claimant's claims under the BIT. It is axiomatic that:⁸⁰

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.

94. Furthermore, the Contracting States to the ICSID Convention (which include Turkey and the United Kingdom) have accepted an international obligation to the effect that any Award in the present proceedings is "binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."⁸¹ In light of the general principle of state responsibility just cited, it is no answer to the due performance of such an obligation that there is an inconsistent judgment of a national court under internal law.

95. So far as concerns the SPA Proceedings, the Tribunal considers that, while this Tribunal is seised of the present claim, the continued pendency of these proceedings would infringe the exclusivity of ICSID arbitration, a cardinal element of the scheme of the Convention to which all Contracting States have subscribed. As the leading commentary observes: 'This principle operates from the moment of valid consent.'⁸² The present Tribunal is of course yet to determine its jurisdiction, including whether valid consent has been given. This it is due to determine following the hearing on Respondent's objections to jurisdiction in June 2020. A central element in that determination will be the validity of the SPA. In the interim, the Tribunal considers that neither Party should be placed in a position of having to litigate the same issue at the same time in a national court. It finds that a provisional measure staying the pending

⁷⁹ Preliminary Objections Memorial, [137].

⁸⁰ Art 3, International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] 2(2) YB ILC 26.

⁸¹ Art 53 ICSID Convention.

⁸² Schreuer, 351.

Procedural Order No. 5

SPA Proceedings is necessary to preserve the position of both Parties pending the outcome of the Preliminary Objections phase.

96. So far as concerns the £ 60 million claim, this proceeding has also resulted in a first instance judgment in Ankara. The Tribunal does not consider that there is sufficient identity of parties or subject-matter of claim between those proceedings and this Arbitration to engage the right to exclusivity.
97. In reaching this decision, the Tribunal observes that in any event nothing in this Order relates to or affects the judgment of the English Court of Appeal in *Koza Ltd v Ipek*⁸³ or the pending application for leave to appeal from that judgment.

Measures to protect the assets of the Koza Group

98. The remaining assets of the Koza Group are under the administration of the SDIF as trustee.
99. The Claimant seeks an order to prevent their “further appropriation or dissipation” or “any interference with or destruction of value” of the Koza Group or the Claimant’s legal rights under the BIT.
100. It submits that the Respondent intends to sell some of the assets of the Koza Group to the benefit of “the Erdogan Regime” and to the detriment of the Group.⁸⁴ It alleges in particular that the SDIF is preparing to sell Koza Gold, the Group’s most valuable remaining asset, to a Mr Ahmet Ahltaci, who is “close to President Erdogan.”⁸⁵
101. The Respondent submits that the assets of the Group are under the careful management of the SDIF as Trustee and are being managed strictly on a prudent commercial basis in the best interests of the Group. In support it adduced the evidence of Mr Güler, who is Vice President of the SDIF and member of the Board of Directors of Koza-Ipek

⁸³ [2019] EWCA Civ 891, CL-0074, CL-0075.

⁸⁴ Reply, [69].

⁸⁵ Claimant’s closing slides, sl 43.

Procedural Order No. 5

Holding, and who was cross-examined at the hearing.⁸⁶ Mr Güler confirmed his management responsibilities, and he also accepted in answer to questions from the Tribunal that it is within the power of the Trustee to dispose of the assets of a company under its administration.⁸⁷

102. Counsel for the Respondent further submits that, as a matter of law, this measure is not necessary to protect a legal right claimed by the Claimant in the arbitration. He submits that the Claimant seeks only a declaration and award of damages.⁸⁸ It does not seek restitution of the assets that it alleges were expropriated. As such, a measure to prevent further dissipation is unnecessary, as, if the Claimant is ultimately successful in its claim, it will be compensated in damages.
103. The Claimant accepts that damages is the relief that it seeks.⁸⁹ It submits that the taking is at present temporary, and so the preservation of the assets of the Group is relevant to how much of the Group's assets may ultimately be returned and thus the calculation of damages.⁹⁰
104. *Tribunal's analysis.* In the event that the Claimant's expropriation claim were ultimately to be upheld by this Tribunal, it would be entitled under the terms of the BIT to "compensation ... equivalent to the genuine value of the expropriated investment at the time the expropriatory action was taken...and shall include interest."⁹¹
105. The Tribunal accepts the Respondent's legal submission that the Claimant does not seek restitution of the assets that it alleges were expropriated from it. Accordingly, it finds the grant of provisional measures to restrain the disposal of those assets is not necessary for the protection of the right claimed.

⁸⁶ Güler WS 1 & 2, T2/1-92.

⁸⁷ T2/87/14-88/17.

⁸⁸ T3/92/22-93/14, citing RfA [126](b).

⁸⁹ T3/104/24.

⁹⁰ T3/103/12-104/7.

⁹¹ Art 5(1) BIT.

Procedural Order No. 5

Measures to preserve documentary evidence

106. Finally, the Claimant seeks a provisional measure to preserve certain specified categories of documents that it claims will be necessary to enable it to present its case.
107. It submits that the Respondent seized almost all of the documents of the Koza Group in Turkey, either through the execution of search warrants in connection with the criminal investigation or by reason of the transfer of the administration of the Koza Group to the SDIF. It complains that Turkey has refused to give an undertaking as to their preservation.
108. For its part, the Respondent confirms that the SDIF has kept the documents of the Koza Group securely. It declines to give an undertaking, stating that it would be too broad and uncertain in scope.
109. *Tribunal's analysis:* The power under Article 47 of the ICSID Convention to recommend provisional measures includes measures for the preservation of evidence.⁹² Indeed, as one Tribunal commented, “This is one of the most common forms of interim relief.”⁹³
110. In the present Tribunal’s view, it is essential for a fair trial before an international investment tribunal that, especially once a claim has been brought, both parties take steps to ensure that evidence relevant to the matters in issue is preserved and not destroyed or otherwise disposed of. This obligation is a continuing one during the pendency of the arbitration.
111. This ensures that both Parties have an equal ability to exercise their right to seek the production of relevant documents. It is also a corollary of the express power of the Tribunal itself, enshrined in Article 43 of the Convention, to “call upon the parties to produce documents or other evidence.” As ICSID Arbitration Rule 34(3) confirms: “The parties shall cooperate with the Tribunal in the production of the evidence.”

⁹² Schreuer, Art 47, 780–2.

⁹³ *Biwater Gauff (Tanzania) Ltd v Tanzania* (Procedural Order No 1) ICSID Case No ARB/05/22 (31 March 2006), CL-0001, [84].

Procedural Order No. 5

112. This rule gives expression in this context to the parties' more general duty to each other and to the Tribunal to arbitrate in good faith. An obligation to take steps to preserve relevant documents within a party's possession, power or control once a claim has been brought is an essential corollary of this duty. Otherwise the Tribunal's need to have a full record and power to order production could be frustrated by a party's pre-emptive action.
113. For the avoidance of doubt, the Tribunal confirms that the responsibility of the Respondent in this regard extends to its executive and judicial organs. Such organs include its prosecutorial and investigative authorities and the SDIF, whether in its capacity as Trustee of the Koza Group companies or otherwise.
114. The Tribunal expects both Parties to take due note of these observations. In the event that either Party were found subsequently to have disposed of relevant documentary evidence, the Tribunal is mandated under Rule 34(3) to take note of such Party's failure to comply with its obligations.
115. Furthermore, pursuant to Article 9 of the IBA Rules on the Taking of Evidence 2010 (which the Parties agree, pursuant to PO No 1, [15.1], 'may guide the Tribunal and the Parties'):
- (1) A failure without satisfactory explanation to produce any document ordered to be produced entitles the Tribunal to infer that such evidence would be adverse to the interests of that Party (Art 9(6)); and,
 - (2) The failure of a Party to conduct itself in good faith in the taking of evidence entitles the Tribunal, in addition to any other measures, to take such failure into account in its assignment of costs (Art 9(7)).
116. It is a separate question whether a provisional measure is necessary to preserve the documents. Counsel for the Respondent accepted in argument that its real objection in this case was to the breadth of the order sought.⁹⁴

⁹⁴ T1/100/10-13.

Procedural Order No. 5

117. Counsel for the Claimant accepted that the provisional measure that it seeks (as opposed to the general obligation of preservation for which it contends) is limited to the seven categories of documents specified in its Reply and enumerated above under head (5).⁹⁵
118. The Tribunal has carefully reviewed these categories in light of the issues as presently pleaded between the Parties. It finds the categories to be generally relevant. In some respects it accepts the Respondent's submission that they are too broadly framed. This applies in particular to categories (f) and (g). Accordingly, the Tribunal will limit category (f) and will not issue a provisional measures order in respect of category (g), which is not germane in light of the Tribunal's analysis above as to the nature of the claim advanced before it.
119. It proposes therefore to issue a provisional measures order for the specific preservation of the following categories of documents:
- (a) Documents relating to the Comakli Report;
 - (b) Documents relating to the claim that Koza-Ipek Holding had supported the alleged terrorist organisation, FETO;
 - (c) Documents relating to the transfer of management of Koza Holding's business to the United Kingdom;
 - (d) Documents relating to the SPA;
 - (e) Documents relating to the seizure, closure, and/or sale of the Koza Media Companies and any of their assets;
 - (f) Accounting and financial records for each of the companies in the Koza Group from 2015 to date.
120. The above order is without prejudice to:
- (1) The question whether any particular documents are subject to production at any stage in the proceedings, which the Tribunal will consider on their merits on application to it during each document production phase; and,

⁹⁵ T3/57/4-22.

Procedural Order No. 5

- (2) The general obligations of the Parties as regards document production as set out above.

* * * *

Order

121. Now therefore, for the reasons set out above, and subject to the observations set out above as to the Parties' continuing obligations in these proceedings, the Tribunal issues the following recommendation in respect of the Claimant's Request for Provisional Measures:

- (1) Request (1) regarding extradition proceedings is denied; the Claimant has liberty to re-apply on an urgent basis in the event of a material change of circumstances;
- (2) Request (2) regarding criminal proceedings is granted; the 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;
- (3) Request (3) regarding civil proceedings is granted in respect of the SPA Proceedings; in the exercise of its power under ICSID Arbitration Rule 39(3) the Tribunal directs that both Parties shall seek a stay of those Proceedings pending the outcome of the Respondent's Preliminary Objections in this arbitration; otherwise Request (3) is denied;
- (4) As to Request (4)(a) regarding the legal and physical integrity of the Targeted Individuals the Tribunal makes no order at this stage;
- (5) Requests (4)(b) & (c) regarding the assets of the Koza Group are denied;
- (6) Request (5) is granted in part. Both Parties have a general duty to preserve relevant evidence. The Respondent is specifically ordered to take steps to preserve:

Procedural Order No. 5

- (a) Documents relating to the Comakli Report;
 - (b) Documents relating to the claim that Koza-Ipek Holding had supported the alleged terrorist organisation, FETO;
 - (c) Documents relating to the transfer of management of Koza Holding's business to the United Kingdom;
 - (d) Documents relating to the SPA;
 - (e) Documents relating to the seizure, closure, and/or sale of the Koza Media Companies and any of their assets;
 - (f) Accounting and financial records for each of the companies in the Koza Group from 2015 to date.
- (7) Costs reserved.



Professor Campbell McLachlan QC

President of the Tribunal

19 September 2019