

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

**PROCEDURAL ORDER No. 13
on Confidentiality**

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: 13 March 2020

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Whereas:

- (1) On 21 February 2020, the Tribunal issued Procedural Order No. 11 (**PO No 11**), in which it decided on the use of certain materials pertinent to the present arbitration (the **Arbitration Materials**) in *Ipek v Koza Altin AS* (Claim No HC-2016-002407, the **English Proceedings**). For the reasons set out therein, the Tribunal decided that the Claimant had not breached the Tribunal’s procedural orders or any general legal duty applicable in investor–State arbitration in providing the Arbitration Materials to the Plaintiffs in the English Proceedings and ordered the Claimant to provide a copy of PO No 11 to the English High Court for its consideration.
- (2) On 3 March 2020, the Respondent applied for further relief (the **Application**) in relation to the confidentiality of documents in the proceedings, seeking an order ‘*protecting the confidentiality of the balance of the arbitration record to date and documents to be added to the arbitration record prospectively*’.¹ Specifically, the Respondent requested an order pursuant to which:
 - “...for the duration of these arbitration proceedings, and in the absence of any agreement between the parties,
 - 7.1 all parties refrain from disclosing to third parties:
 - 7.1.1 the minutes or transcript record of any hearings;
 - 7.1.2 any of the documents produced in the arbitral proceedings by the opposing party, unless specifically required by law;
 - 7.1.3 any of the pleadings or written submissions (including their exhibits and annexes which are not already public) submitted by the parties (and any attached witness statements or expert reports); and
 - 7.1.4 any correspondence (including their exhibits and annexes which are not already public) between the parties and/or the Tribunal exchanged in respect of the arbitral proceedings
 - 7.2 all parties are at liberty to apply to the Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis; and
 - 7.3 any disclosure to third parties of decisions, orders, directions or awards of the Tribunal (other than awards published by the ICSID Secretariat, which is addressed in 23.1 of PO1) shall be subject to prior permission by the Tribunal.”²
- (3) On 4 March 2020, the Tribunal invited the Claimant to respond to the Respondent’s Confidentiality Application by 11 March 2020.
- (4) Pursuant to the Tribunal’s direction, the Claimant submitted its comments (the **Response**) objecting to the Respondent’s Confidentiality Application on 11 March 2020.

¹ Confidentiality Application, [7].

² Confidentiality Application, [7].

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- (5) Without prejudice to its objection, the Claimant stated that it is willing to agree to the following protocol:

“[S]ubject to further order by the Tribunal upon a Party’s application, each Party shall only use the following material for the purposes of this arbitration and related legal proceedings, and in relation to any rights or interests arising from the arbitration, including without limitation for the purpose of enforcing any award:

1. Witness statements filed by the other Party;
2. Expert reports filed by the other Party;
3. Minutes or transcript record of any hearings;
4. Documents produced by the other Party in the document production phase of the arbitration (excluding any documents from the Koza Group server which have been produced by the Respondent to the Claimant).”

The Tribunal, having deliberated, now decides as follows:

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1. This Order is to be read together with the Tribunal’s Order in PO No 11.
2. In that Order, the Tribunal considered the position as to whether confidentiality attaches to ICSID arbitration proceedings. It concluded, for the reasons there set out, that the law applicable to such proceedings does not impose such a duty.³ It added that this does not detract from the powers of a tribunal to *‘impose restrictions on publication where a tribunal considers it necessary in order not to exacerbate the dispute, breach the confidentiality of particular documents in the proceedings or otherwise impair the right of both parties to a fair hearing.’*⁴
3. In the present proceedings, the Tribunal has not to date made such an order *‘nor has either Party requested either a recommendation of provisional measures or a procedural order dealing with confidentiality.’*⁵
4. Nevertheless, the Tribunal drew attention in PO No 11 to Article 3(13) of the IBA Rules (applicable as guidance in the present proceedings) which provides that:

Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

³ PO No 11, [5]–[19].

⁴ Ibid [21].

⁵ Ibid [28].

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5. It then went on to observe:

[T]he Arbitration Materials, which have been provided to the English Court do not include documents provided by the opposing party as a result of PO No 8 on the production of documents; nor do they include witness statements or experts reports filed by the opposing party. Nothing in the present decision is intended to suggest that the parties may use such documents outside the arbitration. In the case of such documents, the considerations raised in Article 3(13) of the IBA Rules may well be pertinent. Any such question would have to be decided by the Tribunal upon the application of a Party.⁶

6. The Application now before the Tribunal raises this question.
7. The Tribunal must now therefore determine whether and, if so, to what extent, it ought to impose restrictions on the Parties' use of documents produced in or for the purpose of the arbitration.

Matters agreed and in dispute between the Parties

8. In the light of the exchange of pleadings between the Parties on the Application, there is agreement between them on certain categories of documents, notably those identified by the Tribunal in the passage just cited from PO No 11, namely witness statements and experts reports filed by the other Party and documents produced by the other Party in the document production phase,⁷ together with the minutes or transcript record of any hearings.
9. The Respondent however seeks a broader form of relief that would apply also to the pleadings submitted by either Party (and exhibits thereto) correspondence in the action and the Tribunal's decisions and orders.
10. There is also a difference in the Parties' formulation of the requested restriction.
- (1) The Claimant proposes: *'each Party shall only use [the documents] for the purposes of this arbitration and related legal proceedings, and in relation to any rights or interests arising from the arbitration, including without limitation for the purpose of enforcing any award.'*
- (2) The Respondent proposes that: *'all parties refrain from disclosing [the documents] to third parties.'*

The Parties' submissions

11. The Respondent refers in support of its Application to the special need for confidentiality in order for it to be able to produce with its Reply Memorial *'sensitive information regarding its national security concerns and investigations into terrorist suspects'*⁸ without the risk of this information being disclosed outside the proceedings.

⁶ Ibid [43].

⁷ Subject to the exclusion that the Claimant seeks for documents from the Koza Group server noted in recital (5) above.

⁸ Application, [8].

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12. The Claimant responds that a blanket confidentiality order would be too wide. It would include material that is already on the public record or otherwise not confidential and is not justified by the alleged need to protect sensitive national security documents. It avers that the breadth of the order sought by the Respondent would prevent the Claimant from providing the material to witnesses and experts, which would have a disproportionate effect on the Claimant's ability to prepare its Rejoinder. Finally it raises the concern that the order sought would obstruct the conduct of the English Proceedings.

The Tribunal's analysis

13. The Tribunal agrees that a confidentiality order is warranted, restricting both Parties from the use of evidence filed in the arbitration by the other Party and not already in the public domain otherwise than for the purposes of the arbitration. As it already observed in PO No 11, Article 3(13) of the IBA Rules contemplates just such a provision.
14. Both Parties are entitled to have confidence that the pleadings, witness statements and experts reports (together with their exhibits) that they file in the arbitration, together with documents produced by them whether in support of their case or in response to a document production request or order (together '**the Confidential Arbitration Documents**') will be treated in confidence by the other Party and used only for the proper purposes of the arbitration and not otherwise.
15. Such use may include referring such documents on a confidential basis to witnesses (including prospective witnesses) and experts in order to elicit evidence from such persons. Such a use is an essential corollary of the right of each party to address evidence presented by its opponent, which is an integral part of the fundamental procedural right that each party has to present its case.⁹ The use of the Confidential Arbitration Documents however must be limited to that which is necessary for this purpose and on the basis of a formal commitment on the part of the witness or expert to respect their confidentiality.
16. The obligation of confidentiality herein provided limits the use of the Confidential Arbitration Documents to the present arbitration. It does not extend, as the Claimant had proposed, to '*related legal proceedings, and in relation to any rights or interests arising from the arbitration, including without limitation for the purpose of enforcing any award.*' Nor does the Tribunal accept the Claimant's proposal to exclude from the Confidential Arbitration Documents '*documents from the Koza Group server that have been produced by the Respondent to the Claimant.*'
17. By contrast, for the reasons that the Tribunal set forth in PO No 11, no such duty of confidentiality attaches to the use by a Party of its own pleadings or evidence (save if and to the extent that such a pleading or evidence refers to confidential evidence produced by the opposing Party).
18. The Tribunal also considers, and the Parties agree, that the Parties should not use the minutes or transcripts of its proceedings otherwise than for the proper purposes of the

⁹ *Fraport AG v The Philippines* (Annulment Decision) ICSID Case No ARB/03/25 (23 December 2010), [197]–[203]

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arbitration. Such a provision is justified both because such transcripts may well contain evidence of the opposing party and also in order to prevent aggravation of the dispute.

19. Further, and in order to prevent the aggravation of the dispute, neither Party may disclose the other Party's correspondence in the arbitration proceedings without that Party's consent or the prior leave of the Tribunal.
20. So far as concerns the Party's use of the Tribunal's orders and decisions:
 - (1) The Tribunal has already ruled in PO No 11 that, for the reasons there set out, no confidentiality attaches to PO Nos 5, 6, 7 or 9; and,
 - (2) That PO No 11 itself shall be provided to the English High Court for the purpose of its decision in the English Proceedings. As a result that Order must be treated as on the public record.
 - (3) As the present Order is to be read together with PO No 11, the Tribunal considers that either Party should be at liberty to refer to it.
 - (4) Save as set out above, the Tribunal considers that the fair conduct of the present proceedings will be best promoted if any other orders or decisions that it has rendered or will render in the course of the proceedings be treated as confidential to the Parties and the Tribunal (save to the extent already provided in ICSID Rules and Regulations), provided that either Party may apply on prior notice to its opponent and for cause for leave to use such other orders or decisions.
 - (5) The position in relation to the Tribunal's Award is already dealt with in PO No 1 at [23.1].

The Tribunal's decision

21. **In light of the above considerations, the Tribunal decides that:**
 - (1) **This Order is to be read together with PO No 11 and nothing herein varies or affects the Tribunal's decisions in PO No 11.**
 - (2) **Each Party shall as from the date of this Order treat as confidential and use only for the proper purposes of the arbitration:**
 - (a) **The pleadings, witness statements and experts reports (together with their exhibits) filed by the other Party in the arbitration;**
 - (b) **Documents produced by the other Party whether in support of its case or in response to a document production request or order that are not otherwise in the public domain; and,**
 - (c) **The minutes or transcripts of oral proceedings in the arbitration (together 'the Confidential Arbitration Documents');**

Provided however that such duty does not preclude either Party from referring such documents on a confidential basis to witnesses (including prospective witnesses) and experts solely for the specific purpose of eliciting evidence from such persons for use in the arbitration.
 - (3) **Neither Party may disclose the other Party's correspondence in the proceedings without that Party's consent or the prior leave of the Tribunal.**

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- (4) **Save to the extent that the Tribunal may hereafter specifically direct, the Parties shall treat the Tribunal's orders and decisions as confidential, provided however that:**
- (a) **Nothing in the present Order affects those Orders, which, as confirmed or provided in PO No 11, are in the public domain, namely PO Nos 5, 6, 7, 9 & 11; and,**
 - (b) **The present Order (which is to be read together with PO No 11) is not confidential.**
- (5) **Either Party may apply to the Tribunal on notice to the other Party for leave to lift or vary any of the above provisions.**
- (6) **Costs reserved.**



Professor Campbell McLachlan QC
President of the Tribunal
13 March 2020