INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

PROCEDURAL ORDER No. 7
Respondent's Application for Security for Costs

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: 14 October 2019

Whereas:

(1) In advance of the First Session, the Respondent indicated that it would file an application for security for costs. On 19 November 2018, the Tribunal issued Procedural Order No. 1 ("**PO No 1**"), which included a timetable for the Parties' submissions on the announced application and also set the dates for a hearing in July 2019, during which the Tribunal would also hear the Parties' arguments on the Claimant's Request for Provisional Measures.

(2) On 21 December 2018, the Respondent filed the Application for Security for Costs together with Annex A, Exhibits R-0001 through R-0029, and Legal Authorities RL-0012 through RL-0033 ("**Application**")

(3) On 8 March 2019, the Claimant filed its Response to the Respondent's Application together with Exhibits C-0071 through C-0077 and Legal Authorities CL-0032 through CL-0062 ("**Response**").

(4) On 16 May 2019, further to an amended procedural calendar agreed by the Parties and accepted by the Tribunal, the Respondent filed its Reply on the Application together with Exhibits R-0130 through R-0134 and Legal Authorities RL-0099 through RL-0112 ("**Reply**").

(5) On 28 June 2019, the Claimant filed its Rejoinder on the Application together with Exhibits C-0115 and C-0116 and Legal Authorities CL-0073 through CL-0078 ("**Rejoinder**").

(6) 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. 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
Mr Turgut Aycan Özcan
Ms Alya Yamakoğlu, of LEXIST

Mr İsmail Güler, of SDIF, 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 SDIF

Ms Gönül Ekmekci, interpreter

The Tribunal, having deliberated, now decides as follows:

1. The Respondent makes an Application that the Claimant provide US$6.8 million by way of security for the costs of these proceedings up to the conclusion of the jurisdiction phase.
2. The Parties helpfully agreed a list of issues arising on this Application under three heads:
   (a) Jurisdiction;
   (b) Exceptional circumstances; and
   (c) The legal test for security for costs.

3. For reasons of procedural economy, the Tribunal finds that it does not need to decide all of the questions raised under head (a) (jurisdiction) and head (c) (legal test). This is because the Parties are agreed that, in any event, an award of security for costs of an arbitration under the ICSID Convention requires a finding of exceptional circumstances.

4. Unless the Tribunal were satisfied that the present case constituted one that meets the test of exceptionality, it should not award security in any event.

5. For reasons that the Tribunal has already explained at length in PO No 5, in view of the agreement of both Parties as to the procedural posture of the case, in which a hearing on jurisdiction is by agreement to be held next June 2020, the Tribunal has already found that it would be inconsistent for it to find that there is no *prima facie* basis for jurisdiction.[1]

6. So far as concerns the legal test, for the purpose of deciding the present Application, the Tribunal is content to assume in the Respondent's favour that it has the power to grant security for costs by way of a provisional measure under the general provisions of Article 44 of the ICSID Convention and Arbitration Rule 39.

7. It would only become necessary to decide whether these provisions extend to a power to order security and, if so, whether the requirements that are applicable to other provisional measures (which this Tribunal considered and applied in PO No 5) are also applicable in the same way to security for costs in the event that the Tribunal were to find the existence of exceptional circumstances.[2] Indeed this is envisaged by the order in which the Parties state the issues for the Tribunal in which the question of exceptional circumstances is raised for decision before the general legal test for provisional measures.

The test for exceptional circumstances

8. The requirement that security for costs only be ordered in exceptional circumstances, which both Parties accept to be applicable in the present case, has been explained by previous tribunals in the following terms:

   (a) In *Libananco v Turkey,* the tribunal observed that:[3]

   > [I]t would only be in the most extreme case—one in which an essential interest of either Party stood in danger of irreparable damage—that the possibility of granting security for costs should be entertained at all.

   (b) In *RSM v Grenada* the tribunal held that: [4]

   > It is difficult, in the abstract, to formulate a rule of general application against which to measure whether the making of an order for security for costs might be reasonable, but it seems clear to us that <u>more</u> should be required than a simple showing of the likely inability of a claimant to pay a possible costs award.

[1] PO No 5, [16]–[30], esp. [24].

[2] The Tribunal notes that the ICSID Secretariat currently proposes to deal with security for costs by way of a separate provision (Rule 52): ICSID, *Proposals for Amendment of the ICSID Rules* (Working Paper No 3, August 2019), 333-5.

[3] *Libananco Holdings Co Ltd v Turkey* (Decision on Preliminary Issues) ICSID Case No ARB/06/8 (23 June 2008) **RL–21**, [57].

[4] *RSM Production Corp v Grenada* (Decision on Security for Costs) ICSID Case No ARB/05/14 (14 October 2010) **RL–27,** [5.20] (emphasis added).

(c) In *Lighthouse v Timor-Leste,* the tribunal stated:[5]

> [E]ven if it were assumed that the Claimants have insufficient assets, this would not be enough in and of itself. Something more is required.

(d) In *South American Silver,* the tribunal added:[6]

> In relation to the necessity and the urgency of the measure, investment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances that prove a high real economic risk for the respondent and/or that there is bad faith on the part[y] from whom the security for costs is requested.

9. The Tribunal finds it convenient to examine the various grounds that the Respondent alleges give rise to exceptional circumstances under these two heads: (a) high economic risk and (b) bad faith/abuse of process.

High economic risk?

10. It is undisputed that the Claimant does not itself have the funds to meet an adverse costs order. This in itself is insufficient to justify an order of security for costs, as prior tribunals have repeatedly observed.

11. An important general principle underlies this approach. The remedy provided to claimants under investment treaties is designed to protect investors against the loss of their property as a result of acts of expropriation or other state measures that may constitute international delicts under the terms of the treaty protections. These protections could be rendered nugatory if claimants who allege that their property has been taken by a state were routinely required, at the outset of international proceedings designed to obtain redress for such a wrong, to provide security for the costs of the respondent state. Such a requirement could give rise to a denial of justice if it had the result of precluding the vindication of claims that might otherwise be protected under the treaty.

12. Accepting that it will not suffice for it to rely simply on the Claimant's impecuniosity, the Respondent submits that tribunals have pointed to a number of other factors that may be potentially relevant to the assessment of economic risk, including:

(a) Whether the Claimant has defaulted on financial obligations in the present or other proceedings;

(b) Whether the arbitration is funded by a third party and, if so, whether the terms of that funding cover adverse costs orders; and

(c) Whether the Claimant has taken steps to avoid enforcement of an adverse costs order.[7]

13. In the present case, the Respondent points in particular to:

(a) Alleged third-party funding arrangements with the Claimant's law firm[8] and with Encore Mining Ltd; and,

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[5] *Lighthouse Corp Pty Ltd v Timor-Leste* (Procedural Order No 2) ICSID Case No ARB/15/2 (13 February 2016) **RL–4**, [61].

[6] *South American Silver Ltd v Bolivia* (Procedural Order No 10) PCA Case No 2013-15 (11 January 2016), **CL–60**, [59].

[7] Application, [56]

(b) The allegedly unsatisfactory state of the evidence as to Mr Akin Ipek's personal assets.

14. In response, the Claimant states:

(a) There is no third-party funding arrangement with either Gibson Dunn or Encore Mining Ltd. Gibson Dunn has merely agreed to defer payments until the Claimant has resolved its funding arrangements. Encore Mining Ltd has advanced two loans to enable the Claimant to fund its costs. In neither case do these arrangements give the third party any stake in the success or failure of the arbitration and the Claimant's obligation to pay is not contingent.[9]

(b) Mr Ipek is not obliged to disclose the extent and location of his personal assets and, given the conduct of the Respondent of which it makes complaint in the proceedings, he should not be required to do so.

(c) It has not defaulted on its payment obligations in the arbitration to date. On the contrary, it has taken active steps to put in place funding arrangements that would enable its costs obligations, including its potential liability for an adverse costs award, to be met, steps that the Respondent has sought to oppose.

15. The Tribunal considers that the evidence does not establish a third-party funder of these proceedings in the sense of a person who has taken a stake in the outcome of the proceedings and who might therefore be expected to bear responsibility for any costs exposure.

16. The Claimant has plainly sought to find external sources of funding for its costs. In addition to the Encore Mining loans the Claimant's principal focus has been an application to the English court by Koza Ltd and Mr Akin Ipek (**"Koza Funding Application"**) which has as its object the funding of the arbitration out of the assets of that company.

17. In view of the pertinence of these proceedings to the instant question, it is necessary to set out the sequence of events in a little detail:

(a) There is a dispute in the English High Court between Koza Ltd, an English company, and Mr Akin Ipek (one of its directors) as claimants and Koza Altin (the Turkish parent company) and its Turkish appointed trustees as defendants as to who is entitled to exercise corporate powers in respect of Koza Ltd.

(b) In the course of that litigation, Koza Ltd and Mr Ipek made the Koza Funding Application. Its object is to vary an interim undertaking so as to permit inter alia the expenditure of up to GBP3 million in respect of costs in this arbitration up to the determination of jurisdiction, such costs to include a provision for GBP1.5 million to cover the risk of an adverse costs order.[10]

[8] On 7 October 2019, the Tribunal was informed that, with effect from 4 October 2019, Latham & Watkins replaced Gibson, Dunn as the Claimant's counsel of record in these proceedings. As argument on the Application preceded this change of representation, all references herein to Claimant's counsel are to its former counsel Gibson Dunn.

[9] T3/202/23–203/23.

[10] *Koza Ltd v Akçil* [2017] EWHC 2889 (Ch), **RL–3**, [56].

(c) The Koza Funding Application was opposed by the defendants inter alia on the ground that such expenditure would be improper because the arbitration is founded on an SPA which 'is a sham,' the expenditure of sums in support of which 'cannot be a proper use of corporate funds.'[11]

(d) At first instance, Richard Spearman QC (sitting as a deputy judge) denied the claimants' application. He found inter alia that, while funding the arbitration 'would be of benefit to Koza Ltd, and thus in the ordinary and proper course of business' the Court was entitled to take account of its doubts about the authenticity of the SPA and thus the attempt to invoke the jurisdiction of the arbitral tribunal on the basis of it.[12]

(e) The claimants appealed to the Court of Appeal, which allowed the appeal and discharged the negative declaration. Delivering the judgment of the Court on 23 May 2019, Floyd LJ observed:[13]

> I think, however, that attempting to resolve the issue of the jurisdiction of the ICSID tribunal in the meticulous and detailed manner attempted by the deputy judge, and repeated by the submissions made to us, is to approach the problem from the wrong end. The issue was whether providing funding for this arbitration was in the ordinary and proper course of business of Koza Ltd. The decision to pursue the funding of the arbitration is taken before, not after, the ICSID tribunal has ruled on its jurisdiction. It is therefore a matter to be considered from the perspective of the board of Koza Ltd, deciding on whether to embark on the funding. In my judgment, therefore, unless the prospects of success in the arbitration are so manifestly poor that they throw doubt on the board's motives in pursuing it, those prospects do not have any relevance to the issue.

(f) The Court of Appeal concluded that Ipek Investment Limited had a case that the board of Koza Ltd 'could properly support in good faith,'[14] but that nevertheless, because the authenticity of the SPA remains in doubt, Koza Ltd proceeds at its own risk in pursuing the funding of the arbitration.[15]

(g) The Respondent sought leave to appeal to the Supreme Court. The Court of Appeal denied leave, but ordered that the claimant must not make the payments pending the resolution of the Respondents' application to the Supreme Court for leave to appeal.[16]

18. The Defendants in the Koza Funding Application are represented by different legal counsel. Nevertheless, this Tribunal has already found that the SDIF, whether in its capacity as Trustee of the Koza Group of companies (which includes Koza Altin) or otherwise, is an organ of the Respondent state, whose conduct is attributable to the Respondent at international law.[17] Mr Güler of the SDIF attended the hearing as Party Representative of the Respondent.[18]

[11] Ibid [72].

[12] Ibid [126].

[13] *Koza Ltd v Akçil* [2019] EWCA Civ 891, **CL-0074**, [39].

[14] Ibid [41].

[15] Ibid [48].

[16] **CL–0075,** [7]–[8].

[17] PO No 5, [113].

[18] Ibid, n 3.

19. In light of the above, the Tribunal finds that:

    (a) The Claimant has in fact been making reasonable efforts to make financial provision for the risk of an adverse costs order against it in the event that it is not successful at the jurisdictional stage; and

    (b) It is the Respondent that has opposed, and continues to oppose, the making of such provision through the acts of its organ.

20. In light of these findings, the Tribunal concludes that the Respondent has not established conduct on the part of the Claimant in relation to the economic risk of non-payment that might support an award of security for costs.

Bad faith/abuse of process?

21. It remains to consider whether the Claimant's conduct more generally might justify a finding of bad faith or abuse of process.

22. For this purpose it is important to maintain a clear distinction between the merits of the claim—including the merits of the Claimant's alleged basis for invoking the jurisdiction of the tribunal—and the Claimant's conduct in the pursuit of the proceedings. The Respondent accepts that "[t]he Republic and the Claimant agree that the Tribunal must decide the Application without prejudging the likelihood of success or failure of each Party on the merits."[19]

23. The Tribunal has already found in PO No 5[20] that:

> 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. 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; and "national of another Contracting State" for the purpose of the ICSID Convention.
> 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.
> 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 prejudge 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.

[19] Reply, [3].

[20] PO No 5, [25]–[29] internal citations omitted.

24. The Tribunal considers that the same reasoning is equally applicable here: It would be inconsistent with the procedure agreed between the Parties for it to prejudge an issue–whether the SPA is a valid document or a sham—that they have placed squarely before the Tribunal for determination in the jurisdictional phase.

25. The Tribunal specifically rejects the Respondent's submission that the Claimant's agreement to bifurcate is indicative of bad faith. The Respondent could, had it so wished, have insisted that the Claimant file its Memorial on the Merits prior to advancing any jurisdictional objections.[21] The Respondent fairly accepted at the hearing that this was so and submitted that the agreement to bifurcate and proceed directly to the jurisdiction phase "was an effort on our part to mitigate costs and shorten the proceedings."[22] In any event, the effect of bifurcation will be to focus attention in the preliminary phase specifically on the conduct of the Claimant that the Respondent alleges constitutes bad faith and an abuse of process, namely its allegation that the SPA is a sham.

26. Aside from this central issue, on which the Tribunal cannot and would not prejudge the issues prior to the hearing on jurisdiction next year, it does not consider that the Respondent has established that the Claimant has acted in a manner that is abusive or in bad faith in its prosecution of the proceedings to date.

27. The case may be contrasted with the position in *RSM v Grenada,* where the tribunal ordered security for costs on the respondent's second renewed application.[23] In that case, the claimant had a prior proven record of non-payment of costs, including the advances on costs requested by the ICSID Secretariat. The tribunal in that case stressed that "Claimant's consistent procedural history in other ICSID and non-ICSID proceedings provide compelling ground for granting Respondent's request."[24] No comparable procedural conduct is found in the present case.

Order

28. **Now therefore, for the above reasons, the Tribunal denies the Respondent's Application for security for the costs of the preliminary jurisdictional phase of these proceedings and reserves the costs of the Application.**

Professor Campbell McLachlan QC
President of the Tribunal
14 October 2019

[21] ICSID Arbitration Rule 41(1).

[22] T3/134/18–22.

[23] *RSM Production Corp v Grenada* (Decision on Security for Costs) ICSID Case No ARB/12/10 (13 August 2014) **RL–6.**

[24] Ibid, [82].