

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

**PROCEDURAL ORDER No. 16
on the SPA Proceedings**

Members of the Tribunal

Professor Campbell McLachlan QC, President of the Tribunal
The Hon. L. Yves Fortier PC, CC, OQ, QC, Arbitrator
Dr Laurent Lévy, Arbitrator

Secretary of the Tribunal

Ms Jara Mínguez Almeida

Date of dispatch to the Parties: 22 April 2020

Procedural Order No. 16

Whereas:

- (1) On 19 September 2019, the Tribunal issued Procedural Order No. 5 (**PO No 5**), in which it *inter alia* directed that “both Parties seek a stay of the SPA Proceedings [*Koza-Ipek Holdings AS (under the Administration of TMSF) v Ipek et al* Docket No 2017/202 (the **SPA Proceedings**)] pending the outcome of the Respondent’s Preliminary Objections in the present arbitration.”¹
- (2) On 17 January 2020, the Claimant filed a letter with the Tribunal (the **Application**), in which it argued that the Respondent does not intend to comply with the Tribunal’s order in PO No 5, as it had rejected all of the options for the stay of the SPA Proceedings proposed by the Claimant, considering its submission of the SDIF’s letter to the civil court to be sufficient for the Respondent’s compliance with PO No 5. The Claimant submitted that in order to preserve the *status quo* of the present arbitration, it required an appropriate relief from the Tribunal, and requested the Tribunal to direct the Respondent through the SDIF to

“[P]rocurer that Koza Ipek Holding AS (plaintiff in the SPA Proceedings and now controlled by the Respondent through the SDIF as trustee and directors appointed by the SDIF and/or the Erdoğan regime itself) does not seek to enforce or execute any judgement or other decision handed down in the SPA Proceedings pending the outcome of the Respondent’s Preliminary Objections in this arbitration.”²
- (3) Further to the Tribunal’s directions, on 27 January 2020, the Respondent sent its comments on the Application (the **Response**), in which it stated that it had complied with the Tribunal’s order in PO No 5 by submitting a copy of PO No 5 to the civil court and that the decision on whether the SPA Proceedings will be stayed is up to the judiciary’s own independent determination, as the Respondent cannot compel the civil court to stay the proceedings. The Respondent further argued that the proposed options for the stay of the SPA Proceedings referred to by the Claimant were either beyond the scope of the relief in PO No 5, or had no effect under Turkish law. It finally noted that the relief sought in the SPA Proceedings is declaratory and therefore it was “*difficult to see how Koza-Ipek Holding would seek to ‘enforce or execute’ such a declaratory judgment.*”³
- (4) On 24 February 2020, the Tribunal invited a second round of comments from the Parties on this matter.
- (5) On 2 March 2020, the Claimant filed its comments on the Response (the **Reply**), and maintained its request that the Tribunal “*direct the Respondent to, through the SDIF, procure that Koza İpek Holding AŞ does not seek to enforce or execute any judgment or other decision handed down in the SPA Proceedings pending the outcome of the Respondent’s Preliminary Objections.*”⁴
- (6) On 9 March 2020, the Respondent submitted its comments on the Reply (the **Rejoinder**), requesting that the Tribunal dismiss the Application noting *inter alia* that since the judgment in the SPA Proceeding is of declaratory nature “there is no place

¹ Procedural Order No. 5, [121](3).

² Application, [p. 2].

³ Response, [4].

⁴ Reply, [p. 2].

Procedural Order No. 16

to enforce or execute it [...] and hence no prejudice from which the Claimant requires the Tribunal's protection."⁵

The Tribunal, having deliberated, now decides as follows:

The Tribunal's analysis

1. The present Application can be dealt with shortly, because the Tribunal has already set forth the essential elements of its approach in its previous procedural orders.
2. In PO No 5, it explained in paragraphs [83]–[95] that:
 - (a) Pursuant to Article 26 of the ICSID Convention (to which both Turkey and the United Kingdom are parties), consent to ICSID arbitration operates *'to the exclusion of any other remedy;'*
 - (b) This gives rise to a right that is capable of protection by provisional measures;
 - (c) This right is engaged in the present case by the continued pursuit of the SPA Proceedings because those proceedings concern an issue that is also central to the present arbitration, namely the validity of the SPA;
 - (d) The Tribunal is not bound by any judgment of a national court in the determination of the Claimant's claims under international law; and,
 - (e) Neither Party should be placed in the position of having to litigate the same issue in a national court at the same time as it is subject to the Tribunal's determination on the Respondent's Preliminary Objections.
3. For these reasons, the Tribunal ordered that *'both Parties shall seek a stay'* of the SPA Proceedings.
4. The Tribunal further found at [113] that the *'the responsibility of the Respondent...extends to its executive and judicial organs. Such organs include...the SDIF, whether in its capacity as Trustee of the Koza Group companies or otherwise.'*
5. The Claimant maintains in the Application that the Respondent has failed to agree to any of the three options that it proposed in its letter of 20 December 2019, namely withdrawal, recall or suspension. This being so, it seeks an order that the Respondent procure that the plaintiff in the SPA Proceedings *'does not seek to enforce or execute any judgement or other decision handed down in the SPA Proceedings pending the outcome of the Respondent's Preliminary Objections in this arbitration.'*
6. The Tribunal accepts the Respondent's submission that PO No 5 requires neither withdrawal nor recall of the Turkish proceedings. The purpose of provisional measures is, as Article 47 of the Convention states, *'to preserve the respective rights of either party.'* They are not intended to alter the position. Either withdrawal or recall of the Turkish proceedings would go further than the Tribunal ordered in PO No 5 and would exceed the proper purpose of provisional measures.
7. So far as concerns suspension, the Respondent maintains that the parties have no power, as a matter of Turkish civil procedure to agree to a stay of proceedings, and that any such relief is a matter for the Turkish judiciary, in whose decisions the executive may not

⁵ Rejoinder, [9].

Procedural Order No. 16

intervene. It contends that its letter to the Turkish court of 27 December 2019 constitutes sufficient compliance with the Tribunal's Order.

8. The Tribunal explained in PO No 15 at paragraphs [20]–[23] that, as a matter of international law, the obligations that the Respondent voluntarily assumed when it entered into both the ICSID Convention and the BIT apply to all of the organs of the State *'whether the organ exercises legislative, executive, judicial or other functions.'* It rejects as irrelevant under international law the distinction that the Respondent makes under its internal law between the executive and the judiciary.
9. For the same reason, it rejects as unfounded the more limited relief that the Claimant now seeks. The Tribunal's order that both Parties seek a stay of the SPA Proceedings, made in PO No 5 at [121](3), continues to apply. The stay that the Tribunal has mandated applies to all steps in the SPA Proceedings, including the pursuit of the appeal and any steps for enforcement.
10. In any event, the Tribunal considers that the Claimant has not supported by evidence the further relief that it seeks. It has adduced no evidence as to the current status of the SPA Proceedings, which might suggest that enforcement and execution is imminent.
11. Nevertheless, the Tribunal finds that the letter from the President of the SDIF to the Ankara Regional Court of 27 December 2019 is not in compliance with the Tribunal's order. The letter does not seek a stay of the SPA Proceedings.
12. Rather, it submits a copy of PO No 5 to the Ankara Regional Court for its information and recites Article 138 of the Turkish Constitution to the effect that *'No organ, authority, office or individual may give orders or instructions to courts or judges relation to the exercise of judicial power, send them circulars, or make recommendations or suggestions.'*
13. The Tribunal well understands the purpose of such a provision within the internal legal order of a constitutional state, namely to preserve the independence of the judiciary from executive interference. Such a provision is not germane to the question of due compliance with the provision of PO No 5 relating to the SPA Proceedings.
14. The SPA Proceedings were, as their short title confirms, brought by *'Koza-Ipek Holdings AS (under the Administration of TMSF)'* [SDIF]. The SDIF, while an organ of the state, is thus responsible for the initiation and pursuit of the SPA Proceedings as a civil litigant. As a plaintiff in civil proceedings, it is plainly entitled, like any civil litigant, to seek relief from the civil court. It has exercised that power by seeking the relief that it did in the SPA Proceedings, obtaining a judgment in its favour; and responding to the defendants' appeal. This is no incursion upon the principle of judicial independence from the executive. It merely reflects the ordinary powers of civil litigants to advance pleas and make submissions, on which the court must then rule.
15. In these circumstances, this Tribunal need not rule on whether there is, as Respondent asserts, any power in the Turkish Civil Code for parties to civil litigation to seek a stay of proceedings. In the Tribunal's view, the Parties have not properly joined issue on this question of national law. The Respondent cites no authority for its proposition. The Tribunal doubts whether the provision that the Claimant cites is applicable. It is not necessary to decide this finally at the present stage.

Procedural Order No. 16

16. All that the Tribunal has ordered is that the Parties both seek such an order. It will be for the Turkish Court to determine the relief to be granted, bearing in mind the international obligations of the State of which the Court forms a part.

The Tribunal's decision

17. **In light of the above considerations, the Tribunal decides that:**

- (1) **The Respondent, by the SDIF as Administrator of the Plaintiff in the SPA Proceedings, shall in compliance with PO No 5 paragraph [121](3) seek a stay of the SPA Proceedings from the Ankara Regional Court pending the outcome of the Respondent's Preliminary Objections.**
- (2) **Save as provided above, the Claimant's Application for additional relief is denied.**
- (3) **Either Party is at liberty to provide a copy of this Order to the Ankara Regional Court for the purpose of seeking compliance with it;**
- (4) **Costs reserved.**



Professor Campbell McLachlan QC
President of the Tribunal
22 April 2020