

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

**PROCEDURAL ORDER No. 14
on the Respondent's Joint Witness Statement**

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: 25 March 2020

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Whereas:

- (1) On 8 February 2020, the Tribunal issued Procedural Order No. 10 (**PO No 10**), in paragraph [30] (2) of which it ordered each Party “to file and serve a *Witness Statement from its duly authorised Representative, verifying, to the best of the deponent’s knowledge, information and belief after due enquiry, the completeness of that Party’s production of documents (including documents held in electronic form) pursuant to PO No 8, setting forth the steps taken by that Party to ensure compliance with the Order*” by 27 February 2020, 17.30 GMT.
- (2) On 5 March 2020, after an extension agreed by the Parties, the Claimant filed the third witness statement of Mr Hamdi Akin Ipek, and the Respondent filed the witness statement of Mr Nevzat Avunç and Mr Melek Küreeminoglu (the **Joint Witness Statement**).
- (3) On 6 March 2020, the Claimant sent an email to the Tribunal, in which it raised an objection to the Respondent’s decision to file the Joint Witness Statement (the **Objection**). It submitted that filing a joint statement by a witness of fact is not an accepted practice in international arbitration; is not contemplated by the IBA Rules on the Taking of Evidence (the **IBA Rules**) and frustrates the Claimant’s cross-examination of the Respondent’s witnesses. The Claimant requested the Tribunal to

“[D]irect the Respondent to file a witness statement responsive to paragraph 30(2) of PO10 signed by a single witness in accordance with Article 4 of the IBA Rules.”
- (4) The Claimant further submitted that if the Respondent wishes to file separate witness statements by the two individuals, they should each file a witness statement “*in accordance with Article 4 of the IBA Rules, clearly stating their respective roles in the document production exercise and the facts within their respective knowledge to which that individual is giving evidence.*”
- (5) On 11 March 2020, the Respondent filed its comments on the Claimant’s Objection, and requested the Tribunal dismiss the Claimant’s request. The Respondent submitted that Mr Avunç and Mr Küreminoğlu are both duly authorized to carry out all necessary actions on behalf of the Respondent in this arbitration and it is necessary that they provide a confirmation to the Tribunal that the Respondent has complied with its obligations under the Procedural Order No. 8 dated 15 November 2019. The Respondent rejected the Claimant’s assertion that joint factual witness statements are not an accepted practice in international arbitration and submitted that there is no basis for the Claimant to cross-examine either of the Respondent’s witnesses.

The Tribunal, having deliberated, now decides as follows:

PO No 10

1. The Tribunal begins by recalling its purpose in ordering, pursuant to its power under Article 43(a) of the ICSID Convention, the submission of witness statements from witnesses on behalf of each Party as to the completeness of the document production provided pursuant to PO No 8.
2. In PO No 10 at [18]–[20], the Tribunal observed that it had taken this decision ‘*given the importance of the authenticity issue to the matters entrusted to it for decision.*’ It

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required each Party to produce a witness statement to be given ‘*from its duly authorised representative, being the person who is responsible for ensuring compliance with that Party’s obligations under PO No 8*’. Such a witness statement was to ‘*set[] forth the steps taken to ensure compliance with PO No 8 and in particular the enquiries and checks undertaken in relation to any evidence held in electronic form.*’ The Tribunal mandated that ‘*The deponent shall be made available for examination at the Jurisdiction Hearing, should either Party or the Tribunal so request.*’

The Joint Witness Statement

3. The Respondent’s witness statement dated 5 March 2020, filed in response to this Order, is headed ‘*Witness Statement of Nevzat Avunç and Melek Küreeminoglu.*’ It is expressed in the first person plural. The deponents state at [3]:

Save where otherwise expressly indicated, we make this statement from facts within our knowledge and we confirm that such facts are true to the best of our knowledge and belief. Where we rely on information provided by others or contained in documents, we state the source of that information and we identify the documents (as applicable), and we confirm that the information is true to the best of our knowledge and belief.

4. The deponents further state at [6] that, as respectively Fund Vice-Chairman of TMSF and Head of its Legal Affairs:

[W]e were authorised to carry out all the necessary proceedings on behalf of the Republic in this arbitration. We have prepared this witness statement jointly as we coordinated our efforts together.

5. Finally they confirm at [30] that:

We hereby verify, to the best of our knowledge information and belief, that the Republic’s production of documents (including documents held in electronic form) is complete.

We believe that the facts stated in this Witness Statement are true and complete to the best of our respective knowledge, information and belief.

The Tribunal’s analysis

6. The Tribunal has carefully considered whether the Joint Witness Statement meets the requirements of PO No 10 in the light of the Claimant’s objections and the Respondent’s response thereto.
7. The Tribunal understands that the exercise required of each Party to comply with PO No 8 has been a large and complex one. It does not find the Respondent’s decision to appoint two persons to coordinate such an exercise, being respectively the Vice-Chairman and Head of Legal Affairs of the responsible government agency, to be unreasonable. Nor does it regard it as exceptional that the persons responsible for conducting a document production exercise on behalf of a party to arbitration should have to rely to some extent on work carried out by others at their direction as stated in paragraph [3] of the Joint Witness Statement.
8. Subject to its further observation below, the Tribunal does not consider that the production of a Joint Witness Statement is *per se* contrary to the requirement of PO No 10 or contrary to the IBA Rules.

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9. Nor does the Tribunal consider that the form in which the deponents to the Joint Witness Statement give their assurance to be on its face an inadequate or incomplete compliance with the requirements of PO No 10. The *substantive* adequacy of the witness statements filed by both Parties can be tested orally in the event that either the opposing Party or the Tribunal itself requests the attendance of the deponents for examination at the Jurisdiction Hearing.
10. One essential consequence of the Respondent's decision to file a Joint Witness Statement in order to comply with PO No 10 is that the Tribunal's requirement at [20] that *'[t]he deponent shall be made available for examination at the Jurisdiction Hearing, should either Party or the Tribunal so request'* applies to both Mr Avunç and Mr Küreeminoglu.
11. The Tribunal emphasises that the requirement applies should either the Claimant or the Tribunal so request.
12. Paragraph 18.1 of PO No 1 makes provision for each Party to notify *'which factual witnesses and expert witnesses of the opposing Party it intends to cross-examine at the hearing. Shortly (and in any event no more than two weeks) after the Parties' notifications, the Tribunal will indicate the witnesses and experts not called by the Parties that it wishes to question, if any.'*
13. On 28 January 2020, the Tribunal granted the Respondent's request for an extension of the procedural calendar dated 14 January 2020. Pursuant to that revised timetable, the date by which witness notifications must be made for the purpose of the Jurisdiction Hearing is: 27 July 2020.
14. Neither Party is required under this provision to state a basis for such a notification, nor is the Tribunal required to do so. Paragraph 18.2 provides that *'A witness whom either Party or the Tribunal wishes to hear orally shall appear in person at the hearing.'*¹ Paragraph 18.3 adds that *'The Tribunal may disregard the testimony of a witness or expert called to testify at the hearing who fails to appear at the hearing without justification, or may attach such weight as it thinks appropriate in the circumstances to the witness statement or expert report.'*
15. All of these provisions apply to each of the deponents to the Joint Witness Statement as much as to Mr Hamdi Ipek (the Claimant's deponent on document production) or any other witness or expert, whose evidence is tendered by either Party in relation to the Respondent's Jurisdiction Objection.
16. The Claimant's substantive objection to the Joint Witness Statement is the effect that it alleges it will have on its ability to cross-examine the two witnesses effectively *'since it is unclear which facts contained in the statement are within the knowledge of which witness, and which witness should be cross-examined on which facts.'*
17. The Tribunal accepts that this would be a justifiable concern if it were the case that either Mr Avunç or Mr Küreeminoglu were not able to speak as to their knowledge of all of the facts contained in the statement. The Tribunal understands from the confirmations quoted above from the Joint Witness Statement paragraphs [3] and [30] that each witness is prepared to depose as to the truth of all of the facts stated in the

¹ Subject to the exceptions there set out for the possibility of videoconference testimony and anonymous testimony.

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Joint Witness Statement to the best of each of their knowledge and belief and in the light of the enquiries there set out. If this is the case, a simple confirmation from each witness to that effect will suffice. The Claimant (and, if it so deems necessary, the Tribunal) will then be entitled, at its election, to call either or both of the two witnesses and cross-examine each of them separately on the whole Statement.

18. If, on the other hand, this is not the case, then it would be necessary for each witness to identify specifically for which parts of the Joint Witness Statement that witness takes responsibility and is able to provide testimony.
19. In either event, such confirmation would need to be provided prior to the date specified for notification of witnesses for cross-examination, so that the Claimant may decide whether, and if so which, of the Respondent's witnesses to notify.

The Tribunal's decision

20. **In light of the above considerations, the Tribunal decides that the Respondent shall by Wednesday 6 May 2020 serve and file a signed witness statement from each of Nevzat Avunç and Melek Küreeminoglu, in which each witness either (a) confirms that he is able to and does, to the best of his knowledge and belief, depose as to truth of the entire content of the Joint Witness Statement; or (b) identifies which portions of the Joint Witness Statement (identified by paragraph number) for which he is able to give such a confirmation.**



Professor Campbell McLachlan QC
President of the Tribunal
25 March 2020