

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

**PROCEDURAL ORDER No. 10
on Electronic Devices**

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: 8 February 2020

Procedural Order No. 10

Whereas:

- (1) On 15 November 2019, by Procedural Order No 8 (**PO No 8**), the Tribunal decided the Parties' respective applications for document production, as more particularly set out in the body of that Order and its Schedules A and B, and ordered production by 12 December 2019;
- (2) By paragraph 10 thereof, the Tribunal gave either Party leave to apply in respect of any aspect of the Order, provided that it did so by 22 November 2019;
- (3) On 22 November 2019, the Respondent applied thereunder for inspection of certain documents, namely the SPA, the Consent Document and the Koza Ipek Holdings share certificates (**Original Documents**);
- (4) On 24 December 2019, by Procedural Order No 9 (**PO No 9**), the Tribunal decided the Respondent's application for production and inspection of the Original Documents, in which it made provision for their forensic examination under the conditions therein specified;
- (5) By paragraph 6 of PO No 9, the Tribunal reserved its decision on the Respondent's application to inspect the computer of Witness 1 insofar as it may contain electronic information regarding the preparation of the Original Documents in the event that, pursuant to PO No 4, the Claimant applies to adduce the evidence of Witness 1;
- (6) By paragraph 7 of the same Order, the Tribunal reserved its decision on the Respondent's application for forensic examination of the computer of Mr Hamdi Ipek for subsequent order;
- (7) On 3 January 2020, the Respondent filed the present application (**Application**) for the forensic inspection of the computers and other electronic devices on which the final version of the SPA and/or the Consent Document was prepared (**Electronic Devices**) of Mr Hamdi Ipek, Witness 1 and of the Claimants 'directors, employees, agents, advisors and shareholders, including but not limited to Selman Turk, Mehmet Erdogan of Regnum Solicitors and Cafer Tekin Ipek' (together **the Other Named Individuals**); and
- (8) Pursuant to procedural directions issued by the President, the Parties exchanged written pleadings on the Application as follows:
 - (a) The Claimant filed its Response (**Response**) on 10 January 2020;
 - (b) The Respondent filed its Reply (**Reply**) on 17 January 2020;
 - (c) The Claimant filed its Rejoinder (**Rejoinder**) on 24 January 2020.

Now therefore the Tribunal, having deliberated, decides as follows:

The Parties' pleadings

1. The Respondent's Application seeks inspection of the Claimant's Electronic Devices for the purpose of forensic examination.
2. The grounds upon which it relies are:

Procedural Order No. 10

- (1) The Respondent contests the authenticity of the SPA and Consent Document. The means by which these documents were produced are at the heart of the issues in the forthcoming Jurisdiction Hearing.
 - (2) However, the Claimant has produced in response to PO No 8 no electronic evidence of the mode of production of these Documents, despite the fact that it was included in the Requests that were the subject of PO No 8.¹
 - (3) The Respondent avers that the Claimant's reasons for non-production are not credible.²
 - (4) It proposes to instruct experts to analyse the Electronic Devices 'in order to assess the authenticity and *bona fides* of the Contested Documents.'³
 - (5) It maintains that the Tribunal has power to order such inspection pursuant to Article 43(a) of the ICSID Convention.⁴
3. The Claimant objects to the Application as unwarranted under PO No 8 or otherwise:
- (1) It submits that Article 43 of the ICSID Convention does not empower a Tribunal to order 'one party to provide to the other party computers or other electronic devices so that the other party can search for evidence that it might find helpful.'⁵ Nor does it empower a Tribunal to obtain evidence from third parties.⁶
 - (2) It argues that the scope of the request and proposed inspection are unacceptably broad and oppressive.⁷
 - (3) It points out that the Respondent accepts that the Request is moot in relation to Witness 1 in light of PO No 9 paragraph 6.⁸
 - (4) Informs the Tribunal that Mr *Akin Ipek*'s computer was corrupted and that two successive computer experts have been unable to recover any responsive documents.⁹
 - (5) Finally, it avers that the Application is particularly unreasonable in relation to the Other Named Individuals:
 - (a) The Respondent alleges no grounds to suggest that Mr *Selman Turk* ever received the SPA electronically, and he is not a witness in these proceedings;¹⁰

¹ Application [4]–[6], referring in particular to the Respondent's Request No 15.

² Ibid, [7]–[21].

³ Ibid [22]–[25]

⁴ Reply [4]–[5], citing *Chevron Corp v Ecuador*, PCA Case No 2009-23, Decision on Track 1B (12 March 2015) & Second Partial Award on Track II (30 August 2018), **RL-128**.

⁵ Response [11]; Rejoinder [4]–[7]

⁶ The Claimant distinguishes *Chevron*, alleging that it was decided under different rules and does not in any event support the inspection of a computer of a witness of one party by the other: Rejoinder [9]–[15].

⁷ Response [16]–[17]; Rejoinder [8].

⁸ Response [18], citing Application [2].

⁹ Claimant's letter dated 20 December 2019, Annex 2; Rejoinder [24]–[25].

¹⁰ Rejoinder [8].

Procedural Order No. 10

- (b) Mr *Mehmet Erdogan* of Regnum Solicitors has not responded to the Claimant's enquiries; and
- (c) Mr *Tekin Ipek* has been imprisoned in Turkey since April 2016 and his electronic devices seized by the Respondent.¹¹

The Tribunal's powers

- 4. In order to determine the Application, it will be convenient to begin by restating some basic parameters.
- 5. The origin of the Tribunal's power in relation to evidence is set forth in Article 43(a) of the ICSID Convention, which provides:
 - Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,
 - (a) call upon the parties to produce documents or other evidence...
- 6. Five features of this power are salient for present purposes:
 - (1) The Tribunal's power under the Convention is limited to calling upon the *parties*. It does not have a corresponding power to call for evidence from third parties to the proceedings. Such a power was considered but rejected by States participating in the preparation of the Convention, as reflected in its *travaux*.¹²
 - (2) At the same time, Article 43(a) does not limit itself to documents, but also includes 'other evidence'. The reference to 'evidence' imports a category that includes:
 - (a) Witness testimony; and,
 - (b) Evidence held in any other form.
 - (3) The power conferred by Article 43(a) is a power on the part of the Tribunal to call upon a Party to produce such evidence *to the Tribunal*. Although the equal treatment of the parties would ordinarily require any evidence produced to and admitted into the arbitration record before the Tribunal to be made available also to the other Party, the focus of Article 43(a) is on the Tribunal's discharge of its own fact-finding powers in order to enable it to decide the case before it.
 - (4) In any such case, the Tribunal must be satisfied that the material is likely to constitute 'evidence' (an expression that the framers chose deliberately in favour of 'information'¹³) in that it would go to prove or disprove a matter in issue in the proceedings, and that its production is 'necessary'. Moreover, in view of (1) above, the Tribunal must be satisfied that the evidence exists and is in the possession, power or control of the relevant party.
 - (5) Rule 34(3) of the ICSID Arbitration Rules adds:
 - The parties shall cooperate with the Tribunal in the production of the evidence.... The Tribunal shall take formal note of the failure of a

¹¹ Response [20]–[24].

¹² ICSID, *Documents concerning the Origin and Formation of the Convention* (1968) vol II Pt 2, 807.

¹³ *Ibid* 806-7.

Procedural Order No. 10

party to comply with its obligations under this paragraph and of any reasons given for such failure.

The exchange of documents

7. The exchange of documents between the parties pursuant to an exchange of requests is now a common feature of ICSID arbitration.
8. In the present case, it took place in accordance with the procedure that the Parties and the Tribunal agreed, as set out in paragraph 15 of PO No 1, which included the following features:
 - (1) The process was conducted ‘[w]ithout prejudice to Article 43(a) of the Convention.’¹⁴
 - (2) The Parties agreed that the IBA Rules ‘may guide the Tribunal and the Parties regarding document production in this case, albeit the IBA Rules shall not be regarded as being strictly legally binding on the Tribunal or the Parties.’¹⁵
 - (3) The Parties empowered the Tribunal to ‘rule promptly...upon any objections to the production of documents or categories of documents.’¹⁶
 - (4) The Tribunal provided that: ‘Documents so disclosed shall not be considered part of the record unless and until one of the parties submits them in evidence to the Tribunal.’¹⁷
9. The IBA Rules makes the following specific provision for ‘Documents maintained in electronic form’. The arbitral tribunal may order the *requesting* Party to ‘identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner.’¹⁸
10. In accordance with the above provisions, the Tribunal took care to limit PO No 8 to the production of documents within the possession, power or control of the Parties and not otherwise. To that end the Order:
 - (1) Specifies, in the case of the Claimant, that ‘Documents within the possession, power or control of the Claimant include *those of the Claimant’s documents* within the possession, power or control of its directors, employees, agents, advisors and shareholders;’¹⁹
 - (2) Provides that documents in the hands of witnesses for either Party ‘are in the possession, power or control of the relevant Party to the extent that such documents came into the possession of the witness in the course of their employment by the Party or otherwise continue to be the property of the Party, *but not otherwise.*’²⁰

¹⁴ PO No 1, [15.1].

¹⁵ *Idem.*

¹⁶ *Ibid* [15.5].

¹⁷ *Ibid* [15.6].

¹⁸ IBA Rules, Art 3(3)(a)(ii).

¹⁹ PO No 8, [2](a), emphasis added.

²⁰ PO No 8, [2](e), emphasis added.

Procedural Order No. 10

- (3) The requisite search for documents held in electronic form is, in accordance with the IBA Rules, ‘limited to those identified files, search terms or individuals as agreed between the Parties or otherwise specified by the Tribunal.’
11. The Order places the responsibility to produce upon each of the Parties and provides that ‘*Any failure to produce as ordered may result in adverse inferences drawn by the Tribunal as regards the merits of the defaulting Party’s case.*’²¹

The relevance of electronic evidence on the production of the Original Documents

12. The Respondent alleges that the purpose of its Application is to determine whether such Devices contain pertinent evidence relating to the provenance and production of the SPA and Consent Document.
13. There is no doubt that evidence on this question would be relevant to the matters in issue between the Parties and to be determined by the Tribunal at the forthcoming Jurisdiction Hearing. The Respondent has, from the outset of the proceedings, contested the authenticity of these Documents, a proposition that the Claimant vehemently rejects.²²
14. It was for this reason that the Tribunal made provision for the forensic examination of the Original Documents by experts appointed by each Party under the supervision of the Secretary to the Tribunal.²³
15. The Tribunal has also already found that evidence as to the mode of production of the Documents must, if it is within the possession, power or control of either Party, be produced. This is reflected in the specific orders that it made under PO No 8 in response to requests made by each Party, notably:
- (1) Addressed to the Claimant: Schedule B, Requests 15 and 22; and,
 - (2) Addressed to the Respondent: Schedule A, Requests 2 & 3.
16. These orders include a requirement to produce evidence within their scope held in electronic form.²⁴
17. The Tribunal understands that both Parties have produced some paper copies of drafts of the SPA.²⁵ But this does not address the question of electronic evidence.

Verification of production

18. In these circumstances, given the importance of the authenticity issue to the matters entrusted to it for decision, the Tribunal considers that it is essential that it have an assurance from both Parties, to the best of their knowledge and belief, as to the completeness of the production ordered under PO No 8.
19. To that end, and in exercise of its power under Article 43(a) of the Convention, the Tribunal has decided that in any event, it shall call upon each Party to produce a witness statement from its duly authorised representative, being the person who is responsible

²¹ Ibid, [8], emphasis added.

²² PO No 4, [25]–[27].

²³ See PO No 9.

²⁴ See e.g. PO NO 8, Schedule B Request 15(b), (c), (g) & (i); PO No 8, Schedule A Requests 2 & 3.

²⁵ Rejoinder [22], Claimant’s letter dated 21 January 2020, enc. 2.

Procedural Order No. 10

for ensuring compliance with that Party's obligations under PO No 8, setting 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.

20. Such a statement shall deal with documents within the possession, power or control of the relevant Party as defined in PO No 8, paragraph 2. The deponent shall be made available for examination at the Jurisdiction Hearing, should either Party or the Tribunal so request.

Forensic examination of Electronic Devices by party experts

21. However, by its present Application, the Respondent asks for rather different relief. It seeks an order for the production by one Party to the other for forensic examination by the latter's appointed expert of Electronic Devices held by various individuals in order that such expert may determine for him/herself whether such evidence is held on the relevant Device and, if so, extract a copy.
22. The Tribunal considers that it has no power to make such an order and, assuming *arguendo* that such a power did exist, it must in any event be rejected on its merits. Its reasons are as follows.
23. Even if (which is not alleged) the Electronic Devices in question were the property of the Claimant, the Tribunal does not consider that its power under Article 43(a) of the ICSID Convention or otherwise extends to ordering one Party to provide to the other Electronic Devices for the latter's forensic examination. On the contrary, as already established, the Tribunal's power is limited to calling upon a party to produce evidence *to it* and not to the other party. The Tribunal accepts the Claimant's submission that the *Chevron II* decision invoked by the Respondent²⁶ for such an approach provides no such authority. It deals with a tribunal's power (expressly conferred under Article 27(3) of the UNCITRAL Rules 1976) to appoint its own expert to report to it, and not with inspection by an expert appointed by the opposing Party.
24. Not only is there no such power for the Tribunal to order inspection of a computer by a party-appointed expert, it would (1) run counter to the responsibilities of the Parties in relation to document production and (2) potentially seriously infringe the legitimate interests of the requested Party in relation to confidential information unrelated to the specific categories of evidence in respect of which production has been ordered:
- (1) The purpose of document production is to ensure that each Party assumes responsibility to the Tribunal and to its opponent to produce the ordered documents and other evidence. If it fails to do so to the satisfaction of the Tribunal at the hearing, the Tribunal is fully entitled to draw adverse inferences as to that Party's case on the merits. In the present case, the Tribunal made that point expressly in PO No 8. It is of particular importance in a case in which a central issue is the authenticity of documents. The requesting Party is, for its part, fully entitled to make submissions about the absence of evidence within ordered categories. But it is not entitled to substitute its own verification exercise for that of the requested Party.

²⁶ *Chevron Corp v Ecuador PCA Case No 2009-23, Decision on Track 1B (12 March 2015) & Second Partial Award on Track II (30 August 2018) RL-128.*

Procedural Order No. 10

- (2) Further (and however hedged about by undertakings) it is contrary to principle to compel a party to allow an expert appointed by its opponent to have access to its Electronic Devices. Of their nature, such Devices are likely to contain much information unrelated to the ordered categories of evidence. To permit such an inspection would infringe the legitimate rights of the requested Party in preserving the privacy of its other communications and documents.
25. There are more particular considerations that apply in view of the fact that the Respondent seeks inspection of Electronic Devices held by specific individuals:
- (1) *Witness 1*: It is common ground that the Tribunal is not asked to and will not make any order at this stage in view of the provisions of PO No 9 paragraph 6. This question will only arise in the event that the Claimant were to make an application to adduce the witness evidence of Witness 1, at which point the Tribunal would consider any question relating to his computer in the context of any renewed application by the Claimant for leave for Witness 1 to give his/her evidence anonymously pursuant to PO No 4. The date fixed for any such application is 60 days prior to service of the Rejoinder, which pleading is now due on 14 July 2020, making the date for any such application on the part of the Claimant 15 May 2020.
- (2) *The Other Named Individuals*: As already established, the Tribunal has no power to call for evidence from third parties. It carefully delineated the obligations upon the Claimant vis-à-vis its agents and witnesses in PO No 8, paragraphs [2](a) & (e). The effect of these provisions is that the obligation of the Claimant is to obtain *its* documents if and to the extent that they are in the hands of agents and witnesses. This flows from the fact that document production is a party-party exercise. It does not extend to evidence that is the property of the agent or witness himself. In any event, the concerns that the Tribunal expressed above as to unrelated confidential material on Electronic Devices apply *a fortiori* to such third parties.
- (3) *Mr Akin Ipek*: The same considerations apply in relation to Mr Akin Ipek so far as concerns forensic examination of his computer by an expert appointed by the Respondent. However, in his case, the Tribunal considers that a special procedural direction is warranted.

Mr Akin Ipek's computer

26. Mr Akin Ipek is the sole director and directing mind of the Claimant. He has the carriage of the present litigation on its behalf. He also has crucial evidence to give as to the authenticity of the Original Documents. The Claimant does not dispute that, if his computer held relevant electronic evidence as to the production of the Original Documents, they would be amenable to production. Rather its position is that the computer that he had at the relevant time is corrupted and that two successive computer experts have tried and failed to recover documents from it.
27. The Tribunal will expect Mr Ipek to verify this in the course of the Statement that he will give in response to its order for verification of document production.
28. The Tribunal further proposes on its own initiative in exercise of its power under Article 47 of the ICSID Convention and Rule 39(3) of the Arbitration Rules, to recommend that the computer itself be delivered into escrow under the safe keeping of the solicitors

Procedural Order No. 10

to the Claimant not to be tampered with and to be held subject to the further order of the Tribunal.

29. In accordance with Rule 39(4), the Tribunal hereby gives each party an opportunity to present any observations that it may wish to make on this proposal by simultaneous filing on **13 February 2020**.

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Procedural Order No. 10

Order

30. Now therefore, for the above reasons, the Tribunal orders as follows:

- (1) The Respondent's Application for inspection of electronic devices is denied;
- (2) Each Party is by 27 February 2020 at 17.30 GMT 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;
- (3) Each Party is by 13 February 2020 at 17.30 GMT to file and serve any observations that it may wish to make regarding the Tribunal's proposed exercise of its provisional measures power vis-à-vis the computer of Mr Akin Ipek;
- (4) Costs reserved.



Professor Campbell McLachlan QC
President of the Tribunal
8 February 2020