

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ipek Investment Limited

v.

Republic of Turkey

(ICSID Case No. ARB/18/18)

**PROCEDURAL ORDER No. 17
on New Evidence**

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: 17 March 2021

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Whereas:

- (1) On 3 April 2020, the Respondent filed with its Reply exhibit R-262, which it indexed as ‘Bylock correspondence’. It alleged that: ‘*The Ankara Chief Public Prosecutor’s Office has identified one Bylock account, bearing the ID No. 1010941 and the username “alicicek”, which they have determined is Hamdi Akin Ipek’s account.*’ Reply, [75]. It relies on extracts of that correspondence *inter alia* to support its allegation that the shares in Koza-Ipek Holding were not transferred to the Claimant as the latter claims: Reply, [151].
- (2) On 17 June 2020, the Claimant made application to the Tribunal for an order that the Respondent produce certain documents relating to the provenance and source of R-262 (**Claimant’s Application**, [25]).
- (3) On 26 June 2020, the Respondent answered the Claimant’s Application. It sought the dismissal of that Application. It stated (at [3]):

The Republic’s position is that it is not required to provide more information about Exhibit R-262. To the extent that [the Claimant] considers that Exhibit R-262 contains alleged deficiencies that undermine its probative value, it can make those submissions to the Tribunal, and the Tribunal no doubt will determine the weight that should be given to Exhibit R-262, taking into account the full evidentiary record.

- (4) The Respondent added (at [24.3]–[24.4]) the following explanation as to the provenance of R-262:

During the preparation of the Republic’s Reply, the Police Department prepared a copy of Hamdi Akin Ipek’s ByLock correspondence, together with a section entitled “General Evaluations Regarding ID (101941)”, which was not included in the version submitted to the Courts. This version was provided to TMSF, and submitted as R-262

.... Specifically, the Department of Smuggling and Organized Crimes provided TMSF with the R-262 document on 22 November 2019, which letter was only received by TMSF on 4 December 2019.

- (5) On 30 June 2020, the Tribunal permitted the Parties to exchange a further round of written pleadings on the Claimant’s Application, which they did on 7 July 2020 (Claimant) and 16 July 2020 (Respondent).
- (6) On 28 July 2020, the Tribunal wrote to the Parties in relation to an application from the Claimant for an extension of time to file its **Rejoinder** on Preliminary Objections. In so doing, it referred *inter alia* to the Claimant’s Application in the following terms:

R-262: Although exhibit R-262 was filed with the Respondent’s Reply in April 2020, the Claimant’s application for further document production in relation to exhibit R-262 was only made on 17 June 2020 and briefing on it completed on 16 July 2020. If (which the Tribunal does not here decide) any relief were to be granted on this application, compliance therewith could occasion further delay.

The Tribunal does not consider that the timetable for the filing of the Rejoinder should be contingent upon its decisions on these outstanding

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applications or compliance therewith. Rather, the Tribunal would be assisted by receipt of the Claimant's Rejoinder to the Respondent's Reply on the basis of the arbitration file as it currently stands.

- (7) The Tribunal ordered a one-month extension for filing of the Rejoinder to 25 August 2020 on the basis *inter alia* that ‘*in the event that the Tribunal were to grant any further relief in relation to the R-262 application, it would also make provision for consequential pleading.*’
- (8) The Claimant filed its Rejoinder on 25 August 2020, in which it disputed the authenticity and provenance of R-262 and submitted that the Tribunal should exclude it from the record on the ground that it is unreliable and the fruit of illegal evidence-gathering: [170]–[190].
- (9) The Claimant filed with the Rejoinder an expert report from Mr Thomas Moore dated 24 August 2020 (**Moore Report**), issues 1–3 of which deal with ‘*analysis of messages allegedly sent and received via the ByLock instant messaging application as recorded in exhibit R-262.*’
- (10) On 12 February 2021, the Respondent sought to introduce two revised translations of documents in the record, together with a number of new exhibits (numbered R-391–R-433).
- (11) On 15 February 2021, the Claimant objected.
- (12) On 16 February 2021, the Secretary communicated to the Parties the following directions from the Tribunal:

The Tribunal reminds the Parties that in accordance with paragraph 16.3 of Procedural Order No. 1 neither Party is permitted to submit additional evidence after the filing of its respective last written submission without prior leave from the Tribunal. Accordingly, the Tribunal has asked me to delete the exhibits and legal authorities uploaded by the Respondent to Box on 12 February 2021 until the status of this submission is decided.

The Respondent may file a request for leave to introduce the new evidence into the record in accordance with paragraph 16.3 of Procedural Order No. 1. If the Respondent files such request, the Claimant may comment within 5 business days, whereupon the Tribunal will proceed to decide any such request.

- (13) On 1 March 2021, the Respondent applied for leave to adduce the two translations, together with 31 additional documents (**Respondent's Application**).
- (14) On 8 March 2021, the Claimant offered its comments (**Claimant's Response**). The Claimant does not object to the introduction into the record of complete English translations of Exhibits C-255 and R-284. Accordingly, these translations can be admitted into the record and no relief is sought from the Tribunal in relation to them. For the sake of good order, the Tribunal will record this in its *dispositif*, providing a filing date.
- (15) However, by its Response, the Claimant renews its request that the Tribunal declare R-262 to be inadmissible and submits that the Respondent's Application to admit new documents should be denied.

The Tribunal, having deliberated, now decides as follows:

The procedural context

1. The Respondent's Application concerns a request to adduce late evidence.
2. Paragraph 16.3 of PO No 1 provides:

Neither Party shall be permitted to submitted additional evidence or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party:

16.3.1 Should a Party request leave to file additional or responsive documents, that Party may not annex the documents that it seeks to file to its request.

16.3.2 If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other Party is afforded sufficient opportunity to make its observations concerning such a document.

3. The present Application is made some six months after the close of the written pleadings phase concerning the Respondent's Preliminary Objections. The hearing on Preliminary Objections is presently set down for 19-27 July 2021, having been adjourned to those dates by agreement between the Tribunal and the Parties in view of the pandemic.

The Parties' submissions

The Respondent

4. The Respondent submits that exceptional circumstances warrant the inclusion of the additional 31 documents into the record, claiming that the evidence is '*critical to the Tribunal rendering its decision on the Republic's Preliminary Objections.*' (Respondent's Application, [12]). It claims (at [11]–[31]) that (i) some of the documents go to factual issues raised in the Moore Report, such as the alleged location of an IP address or the identity of persons alleged to be other Bylock users with whom Bylock ID no 101941 communicated; (ii) other documents are alleged to establish the identity of persons referred to in the messages and their links to FETÖ, the Group that the Respondent alleges is a terrorist organization; (iii) a further set of six documents are said to consist of Turkish court filings by other '*FETÖ-related companies*', which evidence, the Respondent claims, goes to establish that Koza Ipek Holding followed a playbook of such companies to internationalize their disputes; and (iv) three documents that are said to demonstrate that a number of other countries have recognised that FETÖ is terrorist organization.
5. The Respondent alleges (at [32]–[41]) that the Claimant would not be prejudiced by the admission of these documents into the record: (i) some of the documents are in the public record; or (ii) contained in Turkish court filings; (iii) in any event the evidentiary record is not yet complete as there are other outstanding applications for determination (for example in relation to Witness 1 and Mr Tekin Ipek); (iv) the

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Claimant may file rebuttal evidence; and (v) has a sufficient opportunity to examine the new evidence.

The Claimant

6. The *Claimant* submits first (Claimant's Response, [12]–[27]) that R-262 should not be admitted into the record. It alleges first that R-262 is '*of uncertain provenance and dubious authenticity*', the Respondent having refused to disclose the source data from which the document was prepared and its authors being anonymous. It alleges that the documents that the Respondent now wishes to file are simply designed to add plausibility to the Respondent's claims in relation to R-262 without addressing these fundamental defects.
7. Second, the Claimant seeks exclusion of R-262 on the ground that the Respondent's intelligence services illegally accessed the ByLock servers in Lithuania and '*manipulated data supposedly taken from the ByLock servers in order to convict and imprison large numbers of Turkish nationals:*' [19]. The Claimant alleges that there is a general principle in international arbitration that evidence obtained illegally is to be excluded.¹
8. The Claimant then opposes the admission of the 31 new exhibits: [28]–[46]. It denies that there are exceptional circumstances, pointing out that all of the documents existed at the time the Respondent filed its Reply. In particular it avers that: (i) the new documents do not respond to factual matters raised in the Moore Report, but relate to issues arising out the R-262, the Respondent's own exhibit; (ii) the same point applies to the identity of persons referred to in R-262; (iii) the documents relating to Turkish court filings by other unrelated companies are irrelevant to the issues to be determined in this arbitration; and (iv) the Respondent's allegation that FETÖ is a terrorist organization has already been extensively briefed and no case is advanced to support submission of additional evidence on this point now.

The Tribunal's analysis

9. The Tribunal deals first with the position in relation to R-262 itself and then with the admissibility of the 31 new documents that the Respondent seeks to adduce.

R-262

10. R-262 was exhibited to the Reply. The Respondent gave no explanation as to its provenance in the Reply. It subsequently explained on 26 June 2020 that it was '*prepared by the Police Department*'. It is alleged to be '*a copy of Hamdi Akin Ipek's ByLock correspondence*' together with an additional '*General Evaluations*' section. It does not suggest that R-262 itself is a contemporaneous document and has not disclosed the identity of those persons who prepared it or provide supporting evidence as to how they prepared it.

¹ Citing *Methanex Corp v USA* (UNCITRAL, Final Award, 3 August 2005), [55], [59]; *Glencore v Colombia* ICSID Case No ARB/16/6 (Award, 27 August 2019), [89]; *EDF (Services) Ltd v Romania* ICSID Case No ARB/05/13 (PO No 3, 29 August 2008), [48].

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11. The Claimant did not initially seek its exclusion from the record. Rather, two months after service of the Reply on 17 June 2020 it sought disclosure of the primary source data from which the document was prepared.
12. The Respondent resisted this application, declaring that the Tribunal should simply determine the weight to be accorded to it in light of the Parties' submissions.
13. Only then by way of reply on 7 July 2020 did the Claimant seek the exclusion of R-262 in the event that the requested primary source data were not produced. In the course of that reply, the Claimant referred to press reports indicating that the data had been obtained '*through covert and illegal means*' (at [36], citing C-190), but it did not then seek the exclusion of R-262 from the record on that ground.
14. In the event, the Tribunal decided that the Claimant should file its Rejoinder on the basis of the evidentiary record as it then stood, reserving the position in relation to the ordering of further disclosure. This the Claimant did, submitting with its pleading the Moore Report which raises certain questions of a technical nature regarding the authenticity of R-262.
15. In the view of the Tribunal, this sequence of events gives rise to certain consequences for both Parties.
16. The Respondent has been on notice since 17 June 2020 that the Claimant disputes the authenticity and admissibility of R-262. It chose to introduce this exhibit without explanation as to its provenance in its Reply or in the witness evidence submitted therewith. It did not provide the source data requested by the Claimant. It bears the evidentiary burden of proving the authenticity and admissibility of this document and the allegations that it makes as to its link to Mr Hamdi Ipek.
17. The Claimant has placed the authenticity and admissibility of R-262 in issue in its Rejoinder and adduced evidence in this regard, including the Moore Report. As a result, the Respondent knows the case it has to answer as to this document.
18. While therefore the Tribunal will not exclude R-262 from the record at this stage, it will determine the authenticity of R-262 and its probative value at the forthcoming Preliminary Objections hearing, in the light of the evidence that the Parties have placed before it as to its provenance and the Parties' submissions.

The 31 New Documents

19. The Tribunal does not consider that the Respondent has met its burden of exceptional circumstances to allow for the admission of 31 new documents. The Respondent does not claim that any of these documents have only come into existence or into its possession since its Reply. On the contrary, it appears from its description that all of them relate to matters that the Respondent itself placed in issue or in evidence in the Reply.
20. *Categories (i) and (ii)* concern matters allegedly referred to in R-262. The Tribunal rejects the submission that these documents are required because of the Moore Report. On the contrary, had the Respondent considered evidence on these matters relevant to its case, it could and should have dealt with them at the proper time, namely in the Reply. This would have enabled the Claimant and its expert Mr Moore to consider them. The Tribunal considers that it would be particularly unfair to permit the Respondent to seek to add additional evidence on matters referred to in R-262 in

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light of its refusal to disclose the source documents for R-262 that the Claimant had earlier sought.

21. *Category (iii)*. The Tribunal rejects the Respondent's submission that documents adduced in other Turkish court proceedings relating to other companies are relevant to the issues before it in the present case, in which the Tribunal must evaluate solely the Claimant's claim to engage the jurisdiction of this international Tribunal and not the conduct of other claimants in their disputes with the Respondent.
22. *Category (iv)*. The Tribunal considers that the issue of whether FETÖ is a terrorist organization has been raised and pleaded to by the Respondent since the outset of this litigation. It has had ample opportunity in the two rounds of written pleadings to date to adduce evidence on this point and should not be allowed to add further material on the record now after close of pleadings with the Claimant's Rejoinder.

The Tribunal's decision

23. **In light of the above considerations, the Tribunal decides that:**
 - (1) **The Respondent's Application to adduce 31 new documents into the arbitration record is denied.**
 - (2) **The Claimant's Application for further disclosure of the source documents for R-262 is not granted.**
 - (3) **The admissibility and authenticity of R-262, together with the weight to be attached to it (if any) remains to be determined by the Tribunal at the forthcoming Preliminary Objections hearing.**
 - (4) **The Claimant having no objection, the Respondent has leave to introduce its English translations of C-255 and R-284 into the record by 24 March 2021.**
 - (5) **Costs reserved.**

For and on behalf of the Tribunal



Professor Campbell McLachlan QC
President of the Tribunal
17 March 2021