INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE +1 (202) 458 1534 | FACSIMILE +1 (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

CERTIFICATE

IPEK INVESTMENT LIMITED

v.

REPUBLIC OF TÜRKIYE

(ICSID CASE NO. ARB/18/18)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated 8 December 2022.

Meg Kinnear
Secretary-General

Washington, D.C., 8 December 2022

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

IPEK INVESTMENT LIMITED

Claimant

and

REPUBLIC OF TÜRKIYE

Respondent

ICSID Case No. ARB/18/18

AWARD

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

Secretary of the Tribunal
Ms Jara Mínguez Almeida

Date of dispatch to the Parties: 8 December 2022

REPRESENTATION OF THE PARTIES

Representing Ipek Investment Limited:

Ms Sophie Lamb KC
Mr Charles Claypoole
Mr Sebastian Seelmann-Eggebert
Mr Robert Price
Mr Isuru Devendra
Ms Michelle Taylor
Latham & Watkins
99 Bishopsgate
London EC2M 3XF
United Kingdom
(*from 3 October 2019*)

Ms Penny Madden KC
Mr Cyrus Benson
Ms Meghan Higgins
Ms Besma Grifat-Spackman
Ms Nadia Wahba
Ms Rose Naing
Gibson, Dunn & Crutcher LLP
Telephone House
2-4 Temple Avenue
London EC4Y 0HB
United Kingdom
(*until 3 October 2019*)

Representing the Republic of Türkiye:

Mr Hakkı Susmaz
Assoc. Prof. Dr Atike Eda Manav Özdemir
Dr Muhammet Üzeyir Karabıyık
Ms Açelya Şahin
Dr Güray Özsu
Presidency of the Republic of Türkiye,
Department of Administrative Affairs, General
Directorate of Law and Legislation
Cumhurbaşkanlığı Külliyesi
06560 Beştepe – Ankara
Türkiye

and

Ms Melek Küreeminoğlu
Ms Sena Baldoğan
Mr Onur Yorulmaz
Ms Eda Akiş
Ms Asude Akgül
Ms Arzu Yüksel
Savings Deposit Insurance Fund
Büyükdere Cad. No 143
Esentepe/Şişli
34394 Istanbul
Türkiye

and

Mr Thomas K. Sprange KC
Mr Sajid Ahmed
Mr Viren Mascarenhas
Ms Charity Kirby
Mr Julian Ranetunge
Ms Lisa Wong
King & Spalding International LLP
125 Old Broad Street
London EC2N 1AR
United Kingdom

and

Mr Mustafa Doğan Inal
Dr Eyüp Kul
Dr Murat Erbilen

Mr Turgut Aycan Özcan
Lexist
Levent Mah. Büyükdere
Cad. Bahar Sok. Özdilek
AVM River Plaza No 13/22.
34330 Istanbul
Türkiye

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS/DEFINED TERMS

After Closing Actions	The obligations respectively imposed on the Claimant (as purchaser of Koza-Ipek Holding shares) and Koza-Ipek Holding pursuant to clauses 5.1 and 5.2 of the SPA
Akin Ipek (sometimes referred to as Hamdi Ipek or Mr Ipek)	Mr Hamdi Akin Ipek, director of and 20% shareholder in the Claimant
August 2014 Masak Report	AK Report No 2014/AR (71)-1, exhibit [R-48]
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT or the Treaty	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Türkiye for the Promotion and Protection of Investments, which entered into force on 22 October 1996
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
Claimant or Ipek	Ipek Investment Limited
Defence	Claimant's Statement of Defence to Respondent's Preliminary Objections, dated 5 September 2019
FETO	Fetullahçı Terör Örgütü
Gülen movement or Hizmet	An organisation of followers of Fethullah Gülen, an Islamic preacher residing in the United States of America
Hearing	Hearing on Jurisdiction held 19 to 23 July, 26 and 27 July and 27 and 28 September 2021
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes

Ipek Family	Hamdi Akin Ipek, Cafer Tekin Ipek, Melek Ipek, Pelin Zenginer, Nevin Ipek and Ebru Ipek
Koza Altin	Koza Altın İşletmeleri A.Ş., a Turkish gold mining company within the Koza Group
Koza Media Companies	The companies within the Koza Group that operate media properties, including newspapers, television channels and radio stations
Koza Group	A Turkish conglomerate consisting of eighteen companies spanning eleven industry sectors, including mining, energy, media, real estate, and agriculture
Koza-Ipek Holding	Koza-İpek Holding A.Ş., the Koza Group's Turkish parent holding company
MASAK	The Turkish Financial Crimes Investigation Board
Mehmet Ali	Mehmet Ali Erdogan, Regnum Solicitors, London
Memorial	Respondent's Memorial on Preliminary Objections, dated 12 April 2019
Parties	The Claimant and the Respondent
Proposal Document	Draft presentation document dated 20 May 2015, summarising the Proposed 10% SPA transaction which had been prepared by Morgan Lewis, attached to exhibit [R-50].
Proposed 10% SPA	The transaction structure proposed by Morgan Lewis wherein the Ipek Family would transfer 10% of their shareholding in Koza-Ipek Holding to the Claimant, including the draft SPAs at exhibits [C-222]–[C-224].
R-[#]	Respondent's Exhibit
R Cl sl	Respondent's Closing slides
RL-[#]	Respondent's Legal Authority
Respondent or the Republic	Republic of Türkiye

Rejoinder	Claimant's Rejoinder on Preliminary Objections, dated 25 August 2020
RfA-[#]	Request for Arbitration's Exhibit
Reply	Respondent's Reply Memorial in Support of its Preliminary Objections, dated 3 April 2020
Request	The Claimant's Request for Arbitration, dated 9 May 2018
SDIF or TMSF	Savings Deposit Insurance Fund of Türkiye
SHA	Draft Shareholders' Agreement dated 1 June 2015, attached to exhibit [R-53]
SPA	The Share Purchase Agreement, dated on its face 7 June 2015, for the purchase of the Ipek Family's shares in Koza-Ipek Holding by the Claimant, exhibit [RfA-4]
SPA Proceedings	*Koza–Ipek Holdings AS (under the Administration of TMSF) v Ipek et al* Docket No 2017/202. Case commenced 16 March 2017, Judgment of 2nd Commercial Court of First Instance delivered 11 July 2018 [R–24]
T[day/page/line]	Transcript of the Hearing (as revised by the Parties on 16 September 2021 and 20 October 2021)
Tribunal	Arbitral tribunal constituted on 19 September 2018
WS[#]	Witness Statement
Witness A Statement	Exhibit C-43, the anonymous statement of Witness A, originally filed with the Claimant's Request for Provisional Measures on 15 November 2018

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ('**ICSID**' or the '**Centre**') on the basis of the Article 8 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Türkiye for the Promotion and Protection of Investments, which entered into force on 22 October 1996 (the '**BIT**' or '**Treaty**') and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the '**ICSID Convention**').

2. The claimant is Ipek Investment Limited ('**Ipek**' or the '**Claimant**'), a limited company incorporated under the laws of the United Kingdom on 26 May 2015.

3. The respondent is the Republic of Türkiye (the '**Republic**' or the '**Respondent**').

4. The Claimant and the Respondent are collectively referred to as the '**Parties**.' The Parties' representatives and their addresses are listed above on page (i).

5. This dispute arises out of actions taken with respect to the Koza Group, a group of companies operating in a variety of fields in Türkiye, including mining, energy and the media (the '**Koza Group**'), the Turkish parent company of which – Koza-İpek Holding A.Ş. ('**Koza-Ipek Holding**') – the Claimant avers to be the sole shareholder.

6. The Claimant alleges a number of violations of the BIT on the part of the Respondent, including expropriatory conduct targeting the Koza Group through, *inter alia*, the appointment of trustees to Koza Group companies, the transfer of control of these companies to a state organ, and the closure of media companies in the Koza Group and the transfer of their assets to the Government. The Claimant additionally alleges a failure to accord fair and equitable treatment to the Claimant through, *inter alia*, adverse regulatory decisions and criminal proceedings that the Claimant avers to be specious. The Claimant further alleges a failure to accord national treatment or most-favoured nation treatment to the Claimant, and a failure to permit free transfers of dividends by denying recognition of the Claimant as sole shareholder of Koza-Ipek Holding.

7. The Respondent raises three objections to the jurisdiction of this Tribunal and alleges the Claimant's claim is an abuse of process. Pursuant to Procedural Order No 1 dated 19 November 2018, and by agreement between the Parties, the Respondent's Preliminary Objections have been addressed in a preliminary phase of the proceedings and are the subject of this Award.

II. PROCEDURAL HISTORY

8. On 9 May 2018, ICSID received a request for arbitration dated 9 May 2018 from Ipek against the Republic (the '**Request**').

9. On 29 May 2018, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

10. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the two co-arbitrators.

11. The Tribunal is composed of Campbell McLachlan, a national of New Zealand, President, appointed by agreement of the co-arbitrators; L. Yves Fortier, a national of Canada, appointed by the Claimant; and Laurent Lévy, a national of Switzerland and Brazil, appointed by the Respondent.

12. On 19 September 2018, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the '**Arbitration Rules**'), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms Jara Mínguez Almeida, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

13. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 10 November 2018 at the World Bank facilities in Paris, France.

14. Following the first session, on 19 November 2018, the Tribunal issued Procedural Order No 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. Procedural Order No 1 also sets out a schedule for the jurisdictional phase of the proceeding.

15. On 15 November 2018, the Claimant filed its Request for Provisional Measures, along with exhibits C-1 – C-70 and legal authorities CL-1 – CL-21.

16. On 16 November 2018, the Respondent by email requested that the Tribunal not review the Claimant's Request for Provisional Measures as filed and order the Claimant to withdraw the Request.

17. On 23 November 2018 the Claimant addressed the Tribunal in opposition to the Respondent's application. The Tribunal solicited a second round of comments from the Parties.

18. The Respondent filed its reply on 30 November 2018. As amended, the Respondent's request was that the Tribunal order exhibits C-42 and C-43 be excluded from the arbitration file.

19. Exhibit C-43 is the anonymous statement of Witness A ('**Witness A Statement**') while exhibit C-42 is entitled the 'Expert Report of Professor Sir Jeffrey Jowell KCMG KC in the Matter of an Extradition Request from [Türkiye]'. Both documents were originally filed in proceedings before the Westminster Magistrates' Court concerning the Republic's request for the extradition of Mr Akin Ipek, a shareholder and director of the Claimant.

20. The Claimant submitted its rejoinder on 6 December 2018, providing as Annex A a version of its request for provisional measures in which all references to exhibits C-42 and C-43 had been redacted.

21. On 21 December 2018, the Tribunal issued its Procedural Order No 2. The Tribunal ordered that the redacted form of the Claimant's Request for Provisional Measures, as submitted on 6 December 2018, be admitted into the record and treated as having been duly filed on the original date of filing (15 November 2018). The Tribunal additionally invited the Claimant to indicate by 7 January 2019 whether it wished to file exhibits C-42 and C-43 as an expert report and witness statement, respectively; and stated the Claimant should apply by 14 January 2019 if it wished the evidence of Witness A to be given anonymously.

22. Also on 21 December 2018, the Respondent filed its Application for Security for Costs, together with exhibits R-1 – R-29 and legal authorities RL-12 – RL-33.

23. On 7 January 2019, the Claimant notified its request that the Witness A Statement be treated as a witness statement.

24. On 14 January 2019, the Claimant submitted an application for Witness A's evidence in support of the Request for Provisional Measures to be given anonymously, together with legal authorities CL-29 – CL-30.

25. On 28 January 2019, the Respondent filed its response to the application for Witness A's evidence to be given anonymously, along with an expert report by Jeffrey

Waincymer containing exhibits JW-1 – JW-37. The Claimant filed its reply on 4 February 2019, and the Respondent submitted its rejoinder on 7 February 2019.

26. On 1 March 2019, the Respondent filed its Response to the Claimant's Request for Provisional Measures, together with the Witness Statement of Mr İsmail Güler, exhibit R-30 and legal authorities RL-34 – RL-65.

27. On 8 March 2019, the Claimant filed its Response to the Respondent's Application for Security for Costs, together with exhibits C-71 – C-77 and legal authorities CL-32 – CL-62.

28. On 13 March 2019, the Tribunal issued its Procedural Order No 3. The Tribunal found that it was entitled to review the Witness A Statement for the purpose of deciding its admissibility as evidence.

29. The Tribunal further ordered the 28 November 2018 judgment of the Westminster Magistrates' Court, in which the Republic's request for the extradition of Mr Akin Ipek was denied,[1] be admitted into the arbitration record.

30. The Tribunal's decision on the Claimant's application for Witness A's evidence to be given anonymously was adjourned, with the Parties to apprise the Tribunal of any further material developments regarding an appeal from the judgment of the Westminster Magistrates' Court affecting the likelihood of Mr Akin Ipek's deportation. In the event of such a development, the Claimant would have leave to renew its application by notice to the Respondent and the Tribunal.

31. On 12 April 2019, the Respondent submitted its Memorial on Preliminary Objections (the '**Memorial**'), together with the expert report of Professor Kendigelen and Associate Professor Pasli; exhibits R-31 – R-129; and legal authorities RL-66 – RL-98.

32. On 9 May 2019, the Tribunal issued a revised procedural timetable; the Parties having communicated their agreement to extend the deadline for subsequent submissions on provisional measures.

33. On 16 May 2019, the Claimant filed its Reply in Support of its Request for Provisional Measures, together with exhibits C-78 – C-101, the Witness Statement of Mr Hamdi Akin Ipek (itself together with exhibits HAI-1 – HAI-15), the Witness Statement of Mr Ayhan Yurttas (itself together with exhibits AY-1 – AY-23), and legal authorities CL-63 – CL-72.

[1] *Government of the Republic of Türkiye v Buyuk, Celik & Ipek*, Westminster Magistrates' Court, Judgment, 28 November 2018, [CL-29].

34. Also on 16 May 2019, the Respondent filed its Reply on the Application for Security for Costs together with exhibits R-130 – R-134 and legal authorities RL-99 – RL-112.

35. On 17 June 2019, the Claimant filed an Application for Witness Anonymity together with exhibits C-110 – C-114, requesting that four witnesses – Witness 1, 2, 3 and Witness A – be allowed to submit anonymous evidence, with proposed conditions, in support of the Claimant's Statement of Defence on Preliminary Objections.

36. On 28 June 2019, the Respondent filed its Rejoinder on Provisional Measures, together with the Second Witness Statement of Mr İsmail Güler, exhibits R-135 – R-182 and legal authorities RL-113 – RL-116.

37. Also on 28 June 2019, the Claimant filed its Rejoinder on the Respondent's Application for Security for Costs, together with exhibits C-115 – C-116 and legal authorities CL-73 – CL-78.

38. On 15 July 2019, the Respondent submitted its Response to the Claimant's Application for Witness Anonymity.

39. Having heard oral arguments from both Parties between 24 and 26 July 2019, the Tribunal issued its Procedural Order No 4 on 12 August 2019. The Claimant's application to adduce expert evidence on Turkish law from Witnesses 2, 3, and A on an anonymised basis was declined. With respect to the Claimant's application to adduce fact evidence from Witness 1 in an anonymised manner, the Tribunal determined:

> '(a) The Claimant may serve and file with its Statement of Defence a written statement of the evidence of Witness 1 in anonymised form;
>
> (b) Any such statement will be available for review by counsel and party representatives for the Respondent and by the Tribunal and may be referred to for any subsequent application for witness anonymity that may be made.
>
> (c) Such a statement will not form part of the record in this arbitration unless and until either:
>
> > (i) Witness 1 appears to give evidence in the ordinary way; or,
> >
> > (ii) The Claimant makes a subsequent application for leave to adduce his/her evidence on an anonymised basis and that application is granted by the Tribunal,
> >
> > (iii) Any such application is to be made at the latest 60 days before service of the Claimant's Rejoinder;'

40. On 28 August 2019 the Claimant sought permission from the Tribunal to extend the deadline for filing its Statement of Defence on Preliminary Objections by one week. The Respondent, by email on 28 August 2019 and by letter on 29 August 2019, requested the Tribunal reject the Claimant's application for an additional deadline, and suggested extensions to subsequent deadlines if the extension were to be granted. On 30 August 2019, the President of the Tribunal revised the procedural timetable, extending the filing deadline for the Statement of Defence on Preliminary Objections by three days.

41. On 5 September 2019, the Claimant filed its Statement of Defence to Respondent's Preliminary Objections (the '**Defence**'), together with the Witness Statement of Witness 1 (together with exhibit W1-1), the Second Witness Statement of Hamdi Akin Ipek (together with exhibits HAI-16 – HAI-75), the Second Witness Statement of Ayhan Yurttas (together with exhibits AY-24 – AY-26), the expert report of Professor Savas Bozbel, exhibits C-119 – C-138, and legal authorities CL-80 – CL-119.

42. On 19 September 2019, in accordance with the Revised Procedural Timetable, the Parties exchanged Requests for Production of Documents relevant to Jurisdiction.

43. Following a hearing before the Tribunal on 24 – 26 of July 2019, and an additional round of correspondence between the Parties and the Tribunal, the Tribunal issued its Procedural Order No 5 on Provisional Measures on 19 September 2019.

44. The Tribunal considered that the provisional measures sought by the Claimant fell into four broad categories: (i) protection from criminal proceedings in Türkiye against a number of persons associated with the Claimant due to their alleged effect on the arbitration; (ii) measures restraining the pursuit of related civil proceedings in Türkiye; (iii) measures preserving assets of the Koza Group from disposal or dissipation pending the Tribunal's award; and (iv) measures preserving documents relevant to issues in dispute in the arbitration.

    a. With respect to the first category, the Claimant's request for the Respondent to suspend and/or refrain from initiating extradition proceedings was denied, with the Claimant at liberty to re-apply on an urgent basis in the event of a material change of circumstances. The Claimant's request regarding criminal proceedings was granted; the Respondent was directed to suspend the further pursuit of criminal proceedings against the individuals named in the request pending the outcome of its Preliminary Objections. On the Claimant's request 4(a), concerning the legal and physical integrity of the same individuals subject to the criminal proceedings request, the Tribunal made no order at that stage.

    b. As to the second category: the Claimant's request for the suspension of civil proceedings was granted in respect of the proceedings where the validity of the share purchase agreement of Koza-Ipek Holdings' shares to the Claimant is at

issue, namely *Koza–Ipek Holdings AS (under the Administration of TMSF) v Ipek et al* Docket No 2017/202 (the '**SPA Proceedings**'), but otherwise denied.

c. As to the third category, the Claimant's requests concerning preservation of the Koza Group assets were denied.

d. As to the fourth category, the Claimant's request for preservation of documents was granted in part. The Tribunal noted that the Parties have a general duty to preserve relevant evidence, and specifically ordered the Respondent to take steps to preserve the documents listed in its order.

45. The Tribunal additionally noted the Claimant's intention to enable Mr Tekin Ipek, the brother of Mr Akin Ipek who has been imprisoned in Türkiye since April 2016, to give witness evidence. The Tribunal was 'satisfied that he is likely to have relevant evidence to give in these proceedings',[2] and invited the Parties to consult each other with a view to reaching agreement on a protocol for the giving of evidence by Mr Tekin Ipek.

46. On 13 October 2019, the Tribunal issued its Procedural Order No 6. In light of its previous order that the Respondent 'shall suspend the further pursuit of criminal proceedings against the Targeted Individuals for Criminal Proceedings pending the outcome of its Preliminary Objections in this arbitration',[3] and noting the imminent resumption of a criminal trial against a Targeted Individual, the Tribunal directed that the Respondent submit, by 14 October 2019, copies of its Procedural Order Nos 5 and 6 to the Public Prosecutor and the Ankara Criminal Court hearing the relevant proceedings, so that the Court may take into account the Tribunal's Orders.

47. On 14 October 2019, the Tribunal issued its Procedural Order No 7, in which the Respondent's application for security for costs was denied.

48. On 17 October 2019, the Parties filed Redfern schedules with the Tribunal, specifying Requests for Production of Documents relevant to Jurisdiction in respect of which relief was sought from the Tribunal.

49. On 15 November 2019, the Tribunal issued its Procedural Order No 8, together with two annexes. The Tribunal ordered each Party to produce to the other the documents specified by the Tribunal by 12 December 2019, with leave reserved for each Party to apply in respect of this Order by 22 November 2019. Schedule A annexed to the Order marked the Claimant's Request, while Schedule B annexed to the Order marked the Respondent's Request.

[2] PO No 5, [65(2)].

[3] PO No 5, [121(2)].

50. On 24 December 2019, following an application dated 22 November 2019 by the Respondent in respect of Procedural Order No 8 and the exchange of written submissions by the Parties, the Tribunal issued its Procedural Order No 9. The Tribunal treated the Respondent's application dated 22 November 2019 in substance to be a new application, and ordered the Claimant to make certain original documents available for forensic examination by Party-appointed experts, on conditions set by the Tribunal in its Order.

51. On 3 January 2020, the Respondent applied for the forensic inspection of computers and other electronic devices on which the final version of the documents sought in the application of 22 November 2019 were prepared.

52. On 10 January 2020 the Claimant informed the Tribunal that three individuals, in respect of whom the Tribunal had directed the Respondent suspend its criminal proceedings[4] – Mr Tekin Ipek, Ms Melek Ipek and Ms Ebru Ipek – had been convicted and sentenced before the Ankara 24th Assize Court.

53. On 17 January 2020 the Claimant wrote to the Tribunal, arguing the Respondent did not intend to comply with the Tribunal's direction in Procedural Order No 5 that both Parties seek a stay of the SPA Proceedings. The Claimant requested the Tribunal to direct the Respondent to procure that the plaintiff in the SPA Proceedings not seek to enforce or execute any judgment or decision handed down in the SPA Proceedings, pending the outcome of the Respondent's Preliminary Objections in this arbitration.

54. On 28 January 2020, the Tribunal granted the Respondent's application for an extension of the procedural calendar for the jurisdiction phase of the matter before the Tribunal and issued a Revised Procedural Timetable.

55. On 30 January 2020 the Claimant informed the Tribunal that a number of individuals had been convicted before the Turkish courts 'for their association with the Claimant, the Koza Group and/or the Ipek family' and requested that the Tribunal order the Respondent to not take steps to enforce the convictions of individuals either subject to the provisional measures in Procedural Order No 5, or listed by the Claimant in Annex B to its application.

56. On 8 February 2020 and following the exchange of written pleadings by the Parties, the Tribunal issued its Procedural Order No 10, denying the Respondent's application of 3 January 2020 for the forensic inspection of electronic devices. The Tribunal additionally proposed of its own initiative and in exercise of its powers under Article 47 of the ICSID Convention and Rule 39(3) of the Arbitration to recommend that Mr

[4] PO No 5, [121(2)].

Akin Ipek's computer be delivered into escrow and held subject to further order of the Tribunal.

57. The Tribunal additionally 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'.[5]

58. On 14 February 2020 the Claimant applied to the Tribunal for confirmation that no breach of the Tribunal's Procedural Order No 1 arose from the use of certain materials in the present arbitration in proceedings before the English High Court. On the same day, the Respondent sought an opportunity to respond together with a counter-application that the Claimant disclose whether it had disclosed the Tribunal's Procedural Orders Nos 5 and 6 to the press.

59. On 17 February 2020, the Claimant filed its response to the Respondent's counter-application on the provision of arbitration materials. On the same day, the Tribunal issued its decision on the counter-application, deciding that, since Procedural Order No 6 had directed the Respondent to provide copies of Procedural Orders Nos 5 and 6 to the Ankara Criminal Court, those Procedural Orders were regarded by the Tribunal as having been placed on the record in open court.

60. On 18 February 2020, the Respondent filed its response to the Claimant's application of 14 February 2020.

61. On 21 February 2020, the Tribunal issued its Procedural Order No 11, deciding that the Claimant had not breached the Tribunal's procedural orders or any general legal duty applicable in investor-State arbitration by the provision of materials for filing and use before the English High Court, and additionally dismissing an application by the Respondent for reconsideration of the Tribunal's decision of 17 February 2020.

62. On 3 March 2020, the Respondent applied for further relief with respect to the confidentiality of documents in the proceedings.

63. On 5 March 2020, having received observations from the Parties on 13 February 2020, the Tribunal issued its Procedural Order No 12. The Tribunal recommended that Mr Akin Ipek's computer be held in escrow under the safe keeping of the Claimant's solicitors, not to be tampered with and to be held until the conclusion of the proceedings.

[5] PO No 10, [30(2)].

64. Also on 5 March 2020 the Parties, pursuant to Procedural Order No 10, filed witness statements relating to the completeness of each Party's production of documents pursuant to Procedural Order No 8. The Claimant filed the third witness statement of Mr Hamdi Akin Ipek, and the Respondent filed the joint witness statement of Mr Nevzat Avunç and Ms Melek Küreeminoglu.

65. On 6 March 2020, the Claimant by email raised an objection to the Respondent's decision to file a joint witness statement from Mr Nevzat Avunç and Ms Melek Küreeminoglu.

66. On 11 March 2020, the Claimant filed its response to the Respondent's Confidentiality Application of 3 March 2020. Also on this day, the Respondent filed its comments on the Claimant's objection to the Respondent's filing of the joint witness statement.

67. On 13 March 2020, the Tribunal issued its Procedural Order No 13 on Confidentiality. The Tribunal ordered each Party, from the date of Procedural Order No 13, to treat as confidential and use only for the proper purposes of the arbitration: (i) the witness statements, pleadings, and expert reports (together with exhibits) filed by the other Party; (ii) documents provided by the other Party, whether in support of its case or in response to a document production request, that are not otherwise in the public domain; and (iii) the minutes or transcripts of oral proceedings in the arbitration. The Tribunal further ordered that neither Party is to disclose the other Party's correspondence in the proceedings without that Party's consent or leave of the Tribunal; and that save to the extent otherwise specifically directed by the Tribunal, the Parties are to treat the Tribunal's orders and decisions as confidential.[6]

68. On 23 March 2020, the Tribunal issued an Amended Procedural Calendar through to the Hearing on Preliminary Objections stage.

69. On 25 March 2020, the Tribunal issued its Procedural Order No. 14 on the joint witness statement of Mr Nevzat Avunç and Ms Melek Küreeminoglu. The Tribunal decided that by 6 May 2020, the Respondent shall file and serve signed witness statements from each of Mr Nevzat Avunç and Ms 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.'[7]

70. On 31 March 2020, following the exchange of written pleadings from the Parties, the Tribunal issued its Procedural Order No. 15 on the Criminal Proceedings. The Tribunal

[6] Excepting those procedural orders confirmed by the Tribunal in PO No 11 to be in the public domain, namely PO Nos 5, 6, 7, 9, 11; and PO No 13 itself.

[7] PO No 14, [20].

declined to make a new order regarding the individuals in respect of whom Procedural Order No. 5 directed the cessation of criminal proceedings, noting that this Order remained in full force and effect and continued to apply to all stages of the criminal proceedings. In respect of the individuals listed in Annex B to the Claimant's application of 30 January 2020, the Claimant's application for relief was denied.

71. The Tribunal additionally noted a dispute between the Parties as to the state of their negotiations concerning the conditions under which Mr Tekin Ipek was to give evidence. The Tribunal stated it remained available to the Parties on application in the event that aspects of these arrangements could not be agreed in suitable time for the preparation and presentation of Mr Tekin Ipek's evidence.

72. On 3 April 2020, the Respondent filed its Reply Memorial in Support of its Preliminary Objections (the '**Reply**'), together with the Legal Opinion of Professor Rudolf Dolzer (together with exhibits RD-1 – RD-32); the expert report of Nicholas Rostow (together with exhibits NR-1 – NR-40); the expert report of Valery Aginsky (together with exhibits VA-1 – VA-12); the expert report of Dr Williams Mazella; the expert report of Curtis Rose; the second expert report of Professor Kendigelen and Associate Professor Pasli; the witness statement of Alpaslan Kumaş; exhibits R-189 – R-351; and legal authorities RL-142 – RL-187.

73. On 22 April 2020 the Tribunal delivered its Procedural Order No 16 on the SPA Proceedings. The Tribunal decided that the Respondent, through the State organ acting as Administrator of the plaintiff in the SPA Proceedings, shall seek a stay of the SPA Proceedings pending the outcome of the Respondent's Preliminary Objections, as directed in Procedural Order No 5. The Claimant's request for additional relief was otherwise denied.

74. On 19 May 2020, the Claimant stated the Parties had been unable to agree on a protocol for the giving of evidence by Mr Tekin Ipek, and applied to the Tribunal with a proposed interim protocol that would allow it access to Mr Tekin Ipek on conditions, allowing Mr Tekin Ipek to prepare his evidence on a confidential basis with the Claimant's counsel. On 28 May 2020, the Respondent filed its response to this application, proposing an alternate protocol.

75. On 22 May 2020, in line with the earlier direction of the Tribunal,[8] the Claimant filed an application for Witness 1's testimony to be admitted by the Tribunal on an anonymised basis, using the conditions outlined in the Claimant's earlier proposal for witness anonymity in its application of 17 June 2019. In the alternative, the Claimant proposed Witness 1's identity be disclosed only to the Tribunal (and if so directed, the

[8] PO No 4, [36(2)(c)].

Secretary of the Tribunal), with a proposed protocol for the taking of evidence during the hearing.

76. On 9 June 2020 the Respondent filed its response to the Claimant's application for Witness 1's anonymity, objecting to the application and proposing a counter-protocol in the alternative.

77. Also on 9 June 2020, in accordance with a direction by the Tribunal for a second round of written submissions on the matter, the Claimant filed its reply on the protocols for the giving of evidence by Mr Tekin Ipek. The Respondent filed its rejoinder on 16 June 2020.

78. On 17 June 2020 the Claimant applied to the Tribunal for an order that the Respondent produce documents relating to the source and provenance of exhibit R-262, which the Respondent had filed together with the Reply on 3 April 2020.

79. On 26 June 2020, the Respondent answered the Claimant's application of 17 June 2020, seeking its dismissal by the Tribunal.

80. On 30 June 2020, the Tribunal permitted the Parties to exchange a further round of written pleadings on the Claimant's application with respect to exhibit R-262. In the Claimant's reply of 7 July 2020, the Claimant additionally sought the exclusion of exhibit R-262 if the primary source data for the exhibit were not produced. The Respondent filed its Rejoinder on Exhibit R-262 on 16 July 2020.

81. On 28 July 2020, the Tribunal informed the Parties, in response to an application from the Claimant, that it had ordered a one-month extension for the filing of the Claimant's Rejoinder on Preliminary Objections to 25 August 2020.

82. On 25 August 2020, the Claimant filed its Rejoinder on Preliminary Objections (the '**Rejoinder**'), together with the expert report of Ellen Radley; the expert report of Thomas Moore; the second expert report of Professor Savas Bozbel; the witness statement of Selman Turk (together with exhibits ST-1 – ST-6); the second witness statement of Witness 1; the third witness statement of Ayhan Yurttas (together with exhibits AY-27 – AY-33); the fourth witness statement of Hamdi Akin Ipek (together with exhibits HAI-100 – HAI-111); exhibits C-205 – C-290); and legal authorities CL-133 – CL-236.

83. Also on 25 August 2020, the Secretary of the Tribunal wrote to the Parties concerning the hearing date for the jurisdictional phase of proceedings. The Tribunal considered that holding a hearing by videoconference would not best serve the interests of justice unless there were no alternatives. In light of that view, as well as ongoing travel restrictions and commitments of Tribunal members, the Tribunal re-fixed the hearing date for the jurisdiction phase for 19—27 July 2021.

84. On 12 February 2021, the Respondent sought to introduce revised English translations of two documents in the arbitration record, along with a number of new exhibits numbered R-391 – R-433. The Claimant objected on 15 February 2021.

85. Following a communication from the Secretary of the Tribunal to the Parties on 16 February 2021 outlining the process for introducing new evidence following the respective Party's filing of its last written submission,[9] on 1 March 2021 the Respondent applied for leave from the Tribunal to adduce the two revised translations, together with 31 additional documents. The Claimant filed its response on 8 March 2021.

86. On 17 March 2021, the Tribunal issued its Procedural Order No 17 (**PO No 17**) on New Evidence. The Respondent's application to adduce 31 additional documents said to relate to the identity of persons or IP addresses referred to in exhibit R-262 was denied, while the question of R-262's ultimate admissibility and authenticity remained for the Tribunal to determine at its Preliminary Objections hearing.

87. On 29 March 2021, the Respondent made an application for reconsideration of the Tribunal's decision on R-262 in PO No 17, to which the Claimant replied on 8 April 2021. The Tribunal decided that application by letter dated 24 May 2021. The Tribunal held that:

> Having refused to provide more information about R-262 in June 2020, [Respondent] cannot be permitted, after close of written pleadings, to adduce further evidence in relation to R-262 now…The material that Respondent wishes to adduce could, if Respondent regarded it as relevant, have been filed at the latest with the Reply in April 2020.
>
> The Tribunal's decision in PO No 17 flows from its overriding duty to treat the Parties with equality and fairness in light of the decisions that each of the Parties themselves took about how they wished to present the evidence in support of their respective cases at the proper time so that their opponent could respond.[10]

88. On 22 April 2021, the Tribunal convened a case management videoconference regarding the oral phase of the Preliminary Objections. The Parties agreed that proceeding with the already fixed hearing dates (19—27 July 2021) online was both practicable, and preferable to a further adjournment.

89. On 28 May 2021, following two additional rounds of written pleadings (one round following the filing of the second witness statement of Witness 1), the Tribunal issued its Procedural Order No 18 on the confidentiality of Witness 1's testimony. The

[9] See PO No 1, [16.3].

[10] Letter from the Tribunal to the Parties, 24 May 2021, [5]–[6].

Tribunal issued a Protective Order in respect of Witness 1's identity, limiting disclosure of information reasonably likely to identify Witness 1, or his/her immediate family or his/her current location to '(i) members of Respondent's international counsel team; (ii) one member of Respondent's Turkish counsel nominated by Respondent; and (iii) one Party Representative in the Arbitration nominated by Respondent', following the signing and filing of a Confidentiality Undertaking.[11]

90. The Tribunal additionally ordered that Mr Akin Ipek not be present during the Closed Session in which Witness 1 gives oral evidence, but may review the transcript of the Closed Session following the conclusion of the Closed Session itself and the hearing of Mr Ipek's own evidence. The Tribunal further decided that the Respondent may adduce additional documentary evidence strictly limited to matters arising from the disclosure of Witness 1's identity.

91. On 30 May 2021, the Tribunal issued its Procedural Order No 19 on the Testimony of Mr Tekin Ipek. The Tribunal decided to exercise its own power under Article 43(a) of the ICSID Convention (further confirmed by Rule 34(2)(a) of the Arbitration Rules) to call upon the Parties to produce Mr Tekin Ipek to give evidence via videoconference at the Preliminary Objections Hearing. Utilising this process, the Tribunal dispensed with prior service of a witness statement. Mr Tekin Ipek's testimony instead was to be taken orally, elicited in chief by counsel for the Claimant, with rights of cross-examination by counsel for the Respondent and re-examination by counsel for the Claimant. To allow Mr Tekin Ipek to prepare, the Tribunal decided that he was to be provided with a set of documents from the arbitration record relevant to his testimony and freely chosen for this purpose by the Claimant, as well as access to counsel of Mr Tekin Ipek's choice on a confidential and privileged basis to assist in preparation for his testimony.

92. On 2 June 2021, the Claimant wrote to the Tribunal regarding the Confidentiality Undertaking annexed to Procedural Order No 18, stating the undertaking did not contain an express governing law or jurisdiction clause, and requesting the Tribunal revise the undertaking to expressly state it would be governed by English law and that any dispute, controversy or claim arising out of or in connection with the undertaking be subject to the exclusive jurisdiction of the English courts. The Secretary of the Tribunal wrote to the Parties the same day, confirming the Tribunal was in receipt of the Claimant's letter and had decided to make no revision to the terms of the undertaking.

93. On 7 June 2021, the Claimant wrote to the Tribunal, alleging that the Respondent had breached Procedural Order No. 19 by preventing Mr Tekin Ipek access to counsel of his choice. The Claimant requested that the Tribunal order the Respondent to allow Mr Tekin Ipek access to visits from his criminal lawyer with a mobile internet-connected

[11] PO No 18, Annex A, [1].

computer and mobile telephone to allow for confidential and privileged videoconference communications with counsel from Latham & Watkins, with such remote consultation to take place in a room that is confidential. The Respondent filed its response to the Claimant's request on 9 June 2021.

94. Also on 7 June 2021, the Claimant notified the Secretary of the Tribunal that Witness 1 had accepted to give oral evidence in the arbitration based on the terms set out in Procedural Order No. 18. The Claimant signed its confirmation of the Protective Order and filed a copy with the Secretary of the Tribunal on 14 June 2021.

95. On 11 June 2021, the Secretary of the Tribunal wrote to the Parties, conveying the Tribunal's determination of the Claimant's request of 7 June 2021 regarding Procedural Order No. 19. The Claimant's application for relief was declined, the Tribunal considering that, in light of Mr Tekin Ipek's status as the Tribunal's witness under Article 43(a) of the Convention, it would not be consistent with that purpose for Mr Tekin Ipek to be represented by counsel of record for either Party. The Tribunal also directed that any interview between Mr Tekin Ipek and counsel may be within sight but must not be within hearing of the Respondent's agents or officials, and that any communications between Mr Tekin Ipek and counsel are privileged.

96. On 14 June 2021, the Respondent applied to the Tribunal seeking a four-month adjournment of the hearing on jurisdiction to allow the Respondent to gather information regarding Witness 1's credibility. The Respondent's application also sought, upon production of the proposed confidentiality undertaking, an amendment to Procedural Order No 18 allowing disclosure of Witness 1's identity to representatives of the Respondent's Turkish counsel, an independent third-party investigations firm, and a number of Turkish State organs.

97. On 18 June 2021 the Claimant filed its response to the Respondent's application of 14 June 2021.

98. On 22 June 2021 the Tribunal issued its Procedural Order No. 20. The Tribunal dismissed the Respondent's application for an adjournment and for an expansion of the scope of the confidentiality undertaking *ratione personae.* In response to an earlier application originally made by the Respondent on 6 October 2020, the Tribunal ordered section [5.4] of the expert report of Thomas Moore filed with the Claimant's Rejoinder of 25 August 2020 to be stricken from the arbitration record.

99. Also on 22 June 2021, the Secretary of the Tribunal wrote two letters to the Parties, conveying decisions of the Tribunal. In response to a letter from the Claimant dated 21 June 2021, the Tribunal confirmed that Mr Tekin Ipek 'should be freely able to prepare to give his testimony; seek and obtain his own privileged and confidential legal advice thereon; and able to give his evidence without fear of sanction for so doing' and expected the Respondent to fully respect these rights of Mr Tekin Ipek without

qualification. In response to a second letter from the Claimant dated 21 June 2021, the Tribunal stated that it had no objection to the Claimant's desire to correct two discrepancies in exhibit C-283 and invited the Respondent to indicate whether it had any objection.

100. On 28 June 2021, the Respondent wrote to the Tribunal, stating that it declined to execute the confidentiality undertakings annexed to Procedural Order No. 18, for the same reasons given in its application for relief dated 14 June 2021. The Respondent instead requested, under reservation of all its rights, that the Claimant present Witness 1 for cross-examination on an anonymous basis. On 30 June 2021, the Claimant accepted the Respondent's proposal, on the basis that the Tribunal and support staff would know Witness 1's identity and the Respondent only have access to the English interpretation of Witness 1's testimony. The Respondent filed further submissions on 2 July 2021.

101. Also on 28 June 2021, the Tribunal and the Parties held a pre-hearing organisational meeting by video-conference to discuss the draft Procedural Order circulated to the Parties on the organisation of the jurisdiction hearing, and the Parties' submissions of 14 June 2021 advising the Tribunal of areas of agreement and disagreement on the various items within the draft Procedural Order. Further to the discussions during this pre-hearing organisational meeting, the Parties each submitted on 2 July 2021 a revised Annex A, no agreement having been reached between the Parties on the Hearing schedule.

102. Also on 2 July 2021, the Parties filed and uploaded finalised copies of a List of Issues, chronology of key events and *dramatis personae*, a pre-reading list, a chronological list of all factual exhibits, and a core bundle of key factual exhibits.

103. On 5 July 2021, the Secretary of the Tribunal wrote to the Parties, conveying the Tribunal's directions in respect of the modalities of taking evidence from Witness 1. The Tribunal took formal notice, pursuant to rule 34(3) of the Arbitration Rules, of the fact that the Respondent did not comply with the provisions of Procedural Order No. 18 and the reasons that it gave for non-compliance. The Tribunal decided, considering the Parties' agreement (subject to their respective reservations) that Witness 1's testimony may be given anonymously, to accept Witness 1's testimony on that basis; however Procedural Order No. 18 would remain in effect such that the Parties have it at their disposal should they agree to avail themselves of it. The Tribunal directed that it will not receive any information (including that of Witness 1's identity) unless it is common to the Parties. The Tribunal directed that Witness 1 may elect to give testimony in either Turkish or English, that Witness 1's natural voice shall be subject to a voice distinguisher and he/she shall be able to give evidence from behind a protective screen. The Tribunal confirmed, in line with rule 35(1) of the Arbitration Rules and as

confirmed in Procedural Order No. 1, the examination of Witness 1, as with all witnesses, is to be conducted under the control of the President of the Tribunal.

104. On 7 July 2021, the Secretary of the Tribunal wrote to the Parties, communicating the Tribunal's direction on the modalities for taking the testimony of Mr Tekin Ipek pursuant to Procedural Order No. 19. The Tribunal directed that Mr Tekin Ipek may give evidence from any hearing room at the prison campus or from the Ankara Court House from which a secure connection with FTI Trial Services' servers may be maintained; that based on the draft indicative hearing timetable Mr Tekin Ipek will begin giving evidence at the commencement of Day 4 of the Hearing (Thursday 22 July 2021); and that Mr Tekin Ipek's counsel may attend the examination but no counsel from either Party or Party representatives will be present in the hearing room. A prison security officer and IT technician may attend the hearing room but are directed by the Tribunal that they may not communicate with Mr Tekin Ipek about his testimony while he is giving evidence.

105. On 8 July 2021, the Tribunal issued its Procedural Order No. 21, setting out the procedural rules the Parties had agreed upon, or failing agreement, that the Tribunal determined will govern the conduct of the jurisdiction hearing. The Order provided for, *inter alia*, the date, time and format of the jurisdiction hearing; the order of proceedings and schedule (indicated in the agenda annexed to the Order); the time allocation between the Parties; the provision and management of several documents for use at the hearing;[12] audio recording and transcription of the jurisdiction hearing; and several modalities unique to a virtual hearing.

106. Procedural Order No. 21 also set out modifications to the rules present in section 18 of Procedural Order No. 1 regarding witnesses and experts appearing at the jurisdiction hearing, such modifications accounting for the virtual nature of the hearing. The Parties being unable to agree on the matter, the Tribunal determined the following order for witnesses:

(1) Melek Küreeminoğlu [*testifies in Turkish*] [Respondent's witness]

(2) Alpaslan Kumas [*testifies in Turkish*] [Respondent's witness]

(3) Hamdi Akin Ipek [Claimant's witness]

(4) Ayhan Yurttas [*testifies in Turkish*] [Claimant's witness]

(5) Selman Turk [Claimant's witness]

[12] Specifically, the Electronic Hearing Bundle, hearing summary documents, demonstrative exhibits, and electronic copies of documents in the arbitration record.

(6) Tekin Ipek [Tribunal's witness pursuant to Article 43(a) of the Convention and rule 34(2)(a) of the Arbitration Rules]

(7) Witness 1 [Claimant's witness, to give evidence anonymously in accordance with the modalities set out by the Tribunal's direction of 5 July 2021]

(8) Valery Aginsky [Respondent's expert witness]

(9) Ellen Radley [Claimant's expert witness]

(10) Thomas Moore [Claimant's expert witness]

(11) Ali Pasli & Abuzer Kendigelen [testify in Turkish] [Respondent's expert witnesses]

(12) Savas Bozbel [testifies in Turkish] [Claimant's expert witness][13]

107. On 13 July 2021, the Respondent wrote to the Tribunal, stating the Claimant intended to deliver to Mr Tekin Ipek witness statements prepared by Mr Akin Ipek and Ayhan Yurttas. The Respondent argued the provision of these statements would allow the Claimant to influence the testimony of Mr Tekin Ipek, the Tribunal's witness, and sought the prevention of their transmission.

108. Following the Tribunal's direction, the Claimant provided its response on 14 July 2021. The Claimant opposed the Respondent's application in full and argued that the provision of witness statements was compliant with para [28](2)(a) of Procedural Order 19. The Respondent, by email later on 14 July 2021, maintained its objection to the provision of the witness statements to Mr Tekin Ipek.

109. On 17 July 2021, the Tribunal Secretary informed the Parties of the Tribunal's decision that the witness statements of Mr Akin Ipek and Ayhan Yurttas are within the category of materials identified in para [28](2)(a) of Procedural Order 19, and are to be supplied to Mr Tekin Ipek in accordance with that Procedural Order.

110. A hearing on jurisdiction was held virtually via Zoom, and hosted by FTI Trial Services (FTI), from 19 to 23 July, and 26 and 27 July 2021, with oral closing submissions heard on 27 and 28 September 2021 (the '**Hearing**'). The following persons were present at the Hearing:

Tribunal:

Professor Campbell McLachlan KC	President
The Hon L. Yves Fortier KC	Arbitrator
Dr Laurent Lévy	Arbitrator

ICSID Secretariat:

Jara Mínguez Almeida	Secretary of the Tribunal

[13] PO No 21, [36] and [41].

For the Claimant:

Charles Claypoole	Latham & Watkins LLP
Sophie Lamb KC	Latham & Watkins LLP
Sebastian Seelman-Eggebert	Latham & Watkins LLP
Isuru Devendra	Latham & Watkins LLP
Tom Watret	Latham & Watkins LLP
Michelle Taylor	Latham & Watkins LLP
Hamdi Akin Ipek	Ipek Investment Limited

For the Respondent:

Tom Sprange KC	King & Spalding LLP
Viren Mascarenhas	King & Spalding LLP
Sajid Ahmed	King & Spalding LLP
Charity Kirby	King & Spalding LLP
Erin Collins	King & Spalding LLP
Julian Ranetunge	King & Spalding LLP
Lisa Wong	King & Spalding LLP
Eyüp Kul	Lexist
Murat Erbilen	Lexist
Turgut Aycan Özcan	Lexist
Alya Yamakoglu	Lexist
Hayrunnisa Ravli	Lexist
Sezer Yakut	Lexist
Eylül Ataol	Lexist
Batuhan Kaplan	Lexist
Atike Eda Manav Özdemir	Presidency
Açelya Sahin	Presidency
Güray Özsu	Presidency
Hizmaligül Süslü	Presidency
Muhammet Üzeyir Karabiyik	Presidency
Melek Küreemnoglu	TMSF
Sena Görgülü	TMSF
Asude Sahin	TMSF
Onur Yormulaz	TMSF
Serap Kullar	TMSF
Eda Akis	TMSF
Serif Samil Danis	TMSF
Hayrettin Erdem Ervanos	TMSF (Hearing days 8 and 9 only)

Court Reporters:

Anne-Marie Stallard	
Clare Mariscal	On behalf of Trevor McGowan
Georgina Vaughn	

Interpreters:

Hande Güner	Turkish-English Interpreter
Ahu Latifoglu Dogan	Turkish-English Interpreter
Esra Ozsoy Kaya	Turkish-English Interpreter

Technical Support:	
Steve Schwartz	FTI Trial Services
James Watkins	FTI Trial Services
Usamah Ali	Claimant Technical Emergency Contact
Emrah Kuyumcu	Technical Emergency Contact/Turkish transcriber for the Respondent
Intern:	
Sacha Cannon	Cabinet Yves Fortier

111. During the Hearing, the following persons were examined:

On behalf of the Claimant:
Hamdi Akin Ipek
Witness 1
Ayhan Yurttas
Selman Turk
Savas Bozbel

On behalf of the Respondent:
Melek Küreeminoglu
Alpaslan Kumas
Valery Aginsky
Abuzer Kendigelen and Ali Pasli

Tribunal's Witness:
Cafer Tekin Ipek

112. On 20 July 2021, during the second day of the Hearing, the Tribunal issued a further ruling on R-262, stating that the exhibit's authenticity, admissibility and weight, is an issue reserved by the Tribunal, to be considered in rendering its decision on preliminary objections; with the Parties free to put the document to witnesses of fact and expert witnesses during the Hearing.[14]

113. On 23 July 2021, the fifth day of the Hearing, the Tribunal issued two rulings on the participation in the Hearing of Akin Ipek, in his capacity as party representative for the Claimant. The Tribunal determined that Akin Ipek, having completed his evidence, should be permitted to participate in his capacity as a party representative during the taking of evidence from Witness 1,[15] and to view a video transcript of Mr Tekin Ipek's testimony.[16]

[14] Hearing T2/117/20–122/17.

[15] Hearing T5/4/15–5/21.

[16] Hearing T5/117/23–119/15.

114. On 27 July 2021, following the examination of witnesses, the Tribunal adjourned the Hearing until 27 September 2021.

115. On 30 July 2021, the Tribunal outlined to the Parties its proposed order regarding the modalities of the oral closing submissions. The Tribunal proposed that each party be given three hours to make their closing oral submissions, over 27 and 28 September 2021. The Tribunal considered it likely that it would wish to put questions in writing to the Parties, and that it would give an indication by 1 September 2021 as to the questions it may wish the Parties to address in closing. The Tribunal lastly proposed that it would order each Party to file and exchange written skeletons of their closing argument by 20 September 2021.

116. On 9 August 2021, the Tribunal directed the oral closing submissions, including advance written questions and exchange of written skeleton arguments, to be managed according to the terms proposed by the Tribunal on 30 July 2021.

117. On 31 August 2021, the Tribunal Secretary, in line with the Tribunal's direction of 9 August 2021, relayed to the Parties the Tribunal's list of 11 questions to be addressed by the Parties in their closing submissions.

118. On 10 September 2021, the Respondent made an application to admit into the arbitration record the pre-2011 version of art 6 of the Koza-Ipek Holdings articles of association, in advance of the oral closing submissions. The Claimant submitted its response to the application on 17 September 2021.

119. Also on 10 September 2021, the Tribunal received a joint request for the introduction into the arbitration record of provisions of Turkish law together with their agreed translations. On 15 September 2021, the Tribunal invited the Parties to submit the agreed provisions and their agreed translations into the record.

120. On 20 September 2021, the Parties exchanged and filed written skeleton arguments in advance of the oral closing submissions.

121. On 22 September 2021, the Respondent applied to introduce into the arbitration record an arbitral award dated 20 September 2021, in which the Republic was also the Respondent. The Claimant submitted its response to the application later on 22 September 2021.

122. On 23 September 2021, the Tribunal ruled on the Respondent's applications of 10 and 22 September 2021:

    a. The Tribunal allowed the Respondent's application to admit the pre-2011 version of art 6 of the Koza-Ipek Holding articles of association, considering that the text was not new evidence in any material sense, having been cited in

part in the evidence of the Claimant's Turkish law expert, who had additionally been cross-examined on the subject.

b. In respect of the Respondent's application to introduce an arbitral award as a legal authority, the Tribunal declined the application. The Tribunal considered that, as the Respondent was a party in the other proceeding (and had there been represented by the same counsel), it would have access to the record that the Claimant does not have. The Tribunal determined the introduction of the award, particularly within days of the oral closing submissions and after the exchange of written skeleton arguments, would place the Parties in an unequal position.

123. On 26 September 2021, the Respondent applied for its closing oral submissions to be bifurcated into an opening on 27 September 2021, and a reply following the Claimant's closing submissions on 28 September. At the opening of the closing submissions on 27 September 2021, the Claimant expressed its opposition to this course of action.

124. Also on 26 September 2021, the Respondent confirmed to the Tribunal Secretary that the agreed provisions of Turkish law, together with their translations, had been uploaded and introduced into the arbitration record, enumerated as exhibits R-446 – R-450B.

125. On 27 September 2021, the Tribunal ruled on the application at the outset of oral closings, declining the Respondent's request for a split closing oral submission.[17] The Tribunal declined a separate application by the Respondent to introduce into the arbitration record two redacted portions of the arbitral award that formed the subject matter of the Respondent's application of 22 September 2021.[18]

126. At the conclusion of the Hearing on 28 September 2021, the President enquired of counsel for the Respondent: 'does that then conclude both the evidence and the submissions to be advanced by Respondent in support of its objections to jurisdiction, Mr Sprange?' Mr Sprange replied: 'Yes it does, thank you.'[19] Counsel for the Claimant gave the like confirmation.[20]

127. Whereupon, the President issued the following direction:

> The Tribunal therefore closes this phase of the proceedings, both as to evidence and as to submissions. This means that there are to be no further submissions from either party, or applications to the Tribunal in respect of this phase of the proceedings, save only were the Tribunal itself of its own motion in accordance with the powers that it enjoys to

[17] Hearing T8/5/7–8/1.

[18] Hearing T8/14/16–16/13.

[19] Hearing T9/157/23–158/2.

[20] Hearing T9/158/3–11.

> seek further clarification itself from the parties, in which event you will be notified through the normal channels.[21]

128. The Parties filed their submissions on costs on 1 November 2021.

129. On 2 November 2021, the Claimant wrote to the Tribunal, arguing that the Respondent's costs submissions included supplementary submissions in support of its case on preliminary objections, beyond the scope of the Tribunal's directions with respect to cost submissions. The Claimant requested that paragraphs [4]–[6] and [10]–[17] be struck from the arbitration record. On 4 November 2021 the Tribunal invited comment from the Respondent on the Claimant's request.

130. On 10 November 2021 the Respondent provided its response to the Claimant's request. The Respondent objected to the Claimant's request, arguing the paragraphs in question directly concern the cost implications of the Claimant's conduct in the arbitration. The Respondent argued that, should the relevant paragraphs be stricken, so too should paragraphs [12]–[15], [18] and [23]–[29] of the Claimant's costs submissions.

131. On 17 November 2021, the Secretary wrote to the Parties to inform them that the Tribunal had taken note of their respective positions on the cost submissions. The Tribunal will revert to the question of costs in Part VII below.

132. On 29 April 2022, the Respondent submitted an application seeking leave to introduce three interlocutory judgments of the English court in the case *Isbilen v Turk* into the record arguing that they "have a direct bearing on the credibility of one of the Claimant's key witnesses in this arbitration: Selman Turk".

133. On 16 May 2022, further to the Tribunal's invitation, the Claimant submitted a response objecting to the Respondent's Application.

134. On 26 May 2022, the Tribunal issued Procedural Order No. 22 whereby it dismissed the Respondent's application to admit new evidence in the form of the three judgments. The Tribunal found that, in light of the closure of the evidentiary phase on 28 September 2021, 'it would be necessary for it to be satisfied that the case for admission of new evidence is exceptional because it is of such a nature to constitute such a decisive factor as to justify reopening the evidentiary phase, with all the consequences that would necessarily follow from that in due process terms.' The Tribunal found that the material that the Respondent wished to adduce did not begin to constitute such a factor.[22]

135. On 8 December 2022, the Tribunal closed the proceeding.

[21] Hearing T9/158/13–22.

[22] PO No 22, [22].

III. SUMMARY OF PLEADED FACTS

A. THE KOZA GROUP AND THE IPEK FAMILY

136. This arbitration arises out of a series of actions taken by the Respondent with respect to Akin Ipek, Cafer Tekin Ipek, Melek Ipek, Pelin Zenginer, Nevin Ipek and Ebru Ipek (collectively the '**Ipek Family**'), and the Koza Group.[23]

137. The Koza Group is a group of Turkish companies, consisting of 18 companies operating across 11 sectors, including mining, construction, aviation, agriculture, tourism, and media, with a particular strength in the mining and energy sectors.[24]

138. Fifteen of the 18 Koza Group companies are directly or indirectly wholly owned by the Ipek Family, while three have a proportion of their shares listed on the Istanbul Stock Exchange.[25] One of the more prominent Koza Group companies is Koza Altın İşletmeleri A.Ş. ('**Koza Altin**'), a gold mining company acquired by the Koza Group in 2005. Following a 2010 initial public offering of a portion of its shares, approximately 30% of its shares are traded publicly on the Istanbul Stock Exchange.[26]

139. The Koza Group additionally includes a number of media companies that operated Turkish newspapers, television channels, and radio stations (the '**Koza Media Companies**').

140. Koza-Ipek Holding, incorporated in Türkiye in March 2004 by Mr Akin Ipek,[27] is the Turkish parent company of the Koza Group.[28]

141. The Claimant, Ipek Investment Limited, was incorporated in England and Wales on 26 May 2015, with Akin Ipek and Tekin Ipek as founding directors, and Pelin Zenginer, their sister, acting as company secretary.[29]

142. The Claimant maintains that it acquired the right to 100% of the shares in Koza-Ipek Holding on 7 June 2015 by way of a Share Purchase Agreement (the '**SPA**') in which it acquired the Ipek Family's more than 99% shareholding in Koza-Ipek Holding[30] with reciprocal shares in the Claimant given as consideration, and that ownership of Koza-

[23] Request, [3].

[24] Request, [32].

[25] Memorial, [15]; Request, [30].

[26] Request, [6].

[27] Memorial, [14].

[28] Request, [3].

[29] Request, [12]; Certificate of Incorporation for Ipek, 26 May 2015, [RfA-33]; Memorial, [22].

[30] The residual shares in Koza-Ipek Holding not held by the Ipek Family are owned by the company itself: Request, [3].

Ipek Holding's shares passed to the Claimant as a matter of Turkish law on 31 August 2015 by the endorsement of the share certificates to the Claimant.[31]

143. The Respondent argues the SPA is a sham, meaning the Claimant is not an investor within the meaning of the ICSID Convention and the BIT.[32] This factual dispute forms the basis of the Respondent's first preliminary objection.

B. THE REPUBLIC AND THE KOZA GROUP

144. This arbitration arises out of a series of actions taken by the Respondent with respect to the Koza Group, which the Claimant argues constitute 'a wide-ranging campaign to dismantle and expropriate the assets of the Koza Group.'[33] The actions discussed in the Claimant's Request are as follows.

Criminal Investigation into the Koza Group and Appointment of Trustees

145. In May 2015, Koza Altin received a letter dated 13 May 2015 from the Turkish Financial Crimes Investigation Board ('**MASAK**') stating that Koza Altin was under investigation.[34] The Claimant states that, despite Koza Altin's full compliance with the MASAK investigation at the time, the police then seized documents and computers from the Koza Group under a search warrant on 1 September 2015, based on fabricated allegations of criminal conduct.[35] The Respondent states the May 2015 investigation and September 2015 search were the results of a detailed report by MASAK dated 4 August 2014 and a report of the Department of Anti-Smuggling and Organised Crime dated 3 March 2015 containing persuasive evidence of financial impropriety, and that the search warrant executed in September 2015 was judicially endorsed in light of those reports.[36] An appeal against the search warrant by the Koza Group was rejected.[37]

146. On 26 October 2015, a judgment of the Ankara 5th Civil Court of First Instance, pursuant to Article 133 of the Turkish Criminal Procedure Code, appointed 25 trustees to act on an interim basis in place of the existing boards of directors of 22 Koza Group companies, including Koza-Ipek Holding.[38] The Claimant states this judgment relied

[31] Request, [3] and [31]; Share Purchase Agreement between Hamdi Akin Ipek, Nevin Ipek, Cafer Tekin Ipek, Ebru Ipek, Melek Ipek and Pelin Zenginer and Ipek Investment Limited ("IIL") and Koza Ipek Holdings A.S, 7 June 2015, [RfA-4].

[32] Memorial, [54]—[58].

[33] Request, [34].

[34] Request, [41]; Memorial, [42].

[35] Request, [41]—[42].

[36] Memorial, [37], [40]—[41] and [62]; MASAK Report No 2014/AR (71)-1 ('**August 2014 MASAK Report**'), 4 August 2014, [R-48].

[37] Request, [43].

[38] Request, [44]; Judgment of Yunus Süer at the Ankara 5th Civil Court of First Instance, 26 October 2015, [RfA-6].

on evidence obtained in breach of the Turkish Criminal Procedure Code, was contrary to Turkish law and could not have been reasonably made in good faith.[39] The Respondent states this judgment was given in light of an Organised Crime Control Bureau report linking the Koza Group to what the Turkish authorities classify as a terrorist organisation led by Fetullah Gülen, and have labelled Fetullahçı Terör Örgütü ('**FETO**').[40] The Claimant states the Respondent has made 'widespread use' of allegations of terrorism against persons accused of association with Gülen's followers (the '**Gülen movement**' or '**Hizmet**'); that the Koza Group has no financial links to Hizmet; and that the Claimant has no knowledge of Hizmet possessing links to terrorism.[41]

147. Mr Akin Ipek appealed the 26 October 2015 judgment unsuccessfully.[42] Mr Tekin Ipek attempted to challenge the judgment at the European Court of Human Rights, where the claim was declared inadmissible for non-exhaustion of domestic remedies.[43]

148. The Claimant states the Koza Media Companies suffered from the sudden cancellation of contracts with State-owned or controlled broadcast providers in September and October 2015, which combined with a 28 October 2015 police raid and the re-opening under editorial control of appointed trustees led to a collapse in their popularity. After Mr Akin Ipek requested their closure to avoid further losses in February 2016, the appointed trustees ceased the Koza Media Companies' operations and dismissed their staff.[44]

Relevant Legislative Action

149. On 1 July 2016, article 133 of the Turkish Criminal Procedure Code was amended, allowing for appointed trustees to exercise the powers of shareholders in addition to possessing management authority.[45]

150. Following an unsuccessful coup attempt on 15 July 2016, the Republic declared a state of emergency, allowing for the enactment of emergency decree laws.[46] On 1 September 2016, Decree Law No. 674 entered into force, allowing for the transfer of appointed trustees' responsibilities to a State organ, the Savings Deposit Insurance Fund ('**SDIF**' or '**TMSF**'), and envisioning an SDIF power to liquidate or close companies in respect

[39] Request, [45]—[46].

[40] Memorial, [70]—[71]; Letter from the Province Directorate of Security to the Directorate-General of Security, attaching the KOM Investigation Report dated 19 October 2015, 3 December 2018, [R-108].

[41] Request, [20], [43] and [66].

[42] Request, [50].

[43] Request, [51]—[52]; Memorial, [78]—[79].

[44] Request, [47]—[49].

[45] Request, [54].

[46] Request, [53]; Memorial, [101].

of which trustees had been appointed if the SDIF was satisfied economic conditions so justified.[47] On 6 September 2016, the Ankara 4th Penal/Criminal Court of Peace, over the Ipek Family's objections, ordered the transfer of the Koza Group's appointed trustees' functions to the SDIF. The SDIF announced new boards of directors of all Koza Group companies on 22 September 2016.[48]

151. Decree Law No. 686, which passed on 7 February 2017, provided that any transfer by shareholders of rights in a company over which trustees had been appointed, from the date of the commencement of the investigation leading to the trustee appointment, were to be null and void.[49] Decree Law No. 680, which came into effect on 6 January 2017, provided that the directors of companies under article 133 trusteeships operate under SDIF supervision, and stated the Minister responsible for the SDIF possessed the power to liquidate, close, or sell any of the assets of a company under the control of article 133 trustees (including the Koza Group companies).[50] The Claimant states it does not know whether any of the Ministers responsible for the SDIF's powers to liquidate or sell relevant assets have been exercised in respect of the Koza Group.[51]

Criminal Proceedings against the Ipek Family

152. In April 2016, Mr Tekin Ipek was arrested and remains in prison. In June 2017, the Ankara Chief Public Prosecutor's office prepared a bill of indictment against Mr Akin Ipek and other members of the Ipek Family containing multiple criminal allegations, including membership in a terrorist organisation.[52]

C. SUBSEQUENT STEPS TAKEN REGARDING THE SPA

153. On 23 December 2016, the Claimant sent a letter to Koza-Ipek Holding, enclosing either the SPA or a copy thereof, and requesting in accordance with the SPA's terms that Koza-Ipek Holding obtain a board resolution approving the transfer of shares to the Claimant, register the Claimant as the new owner of the shares in the share ledger, and convene a meeting to allow the current Koza-Ipek Holding board resign and be replaced by appointees of the Claimant.[53] The Claimant states that following this letter, the Respondent has 'taken a number of steps against [the Claimant] and members of

[47] Request, [56]; Memorial, [102]; Decree Law No 674 on the Measures Taken under the State of Emergency, 15 August 2016, [RfA-9].

[48] Request, [57]; Memorial, [102]; Order by Ankara 4th Penal Court of Peace to Transfer Trustee Powers to the SDIF, 6 September 2016, [RfA-10].

[49] Request, [60]; Memorial, [105]; Decree Law No 686 on Measures to be Taken under the State of Emergency and Arrangements Made on Certain Institutions and Organisations, 2 January 2017, [RfA-16].

[50] Request, [59]; Decree Law No 680 on Measures to be Taken under the State of Emergency, 2 January 2017, [RfA-15].

[51] Request, [63].

[52] Request, [66]; Memorial, [107]; Ankara High Criminal Court Indictment, 9 June 2017, [R-21].

[53] Request, [35]; Memorial, [103]; Letter from IIL to Koza-Ipek Holdings A.S., 23 December 2016, [RfA-14].

the Ipek Family to frustrate their transfer of shares to the Claimant and deprive [it] of the benefits of its Investment'.[54] The Respondent states the letter of 23 December 2016 did not enclose the Koza-Ipek Holding share certificates or evidence of their endorsement.[55]

154. On 19 January 2017, the Ankara 6th Criminal Court of Peace issued a judgment ordering the seizure of assets belonging to members of the Ipek Family who were shareholders in the Claimant, and restricting their dealing in assets, including the transfer of shares owned by them. As Koza-Ipek Holding had not registered a transfer in its share register, this judgment would purportedly apply to the Ipek Family's shares in Koza-Ipek Holding which the SPA seeks to transfer to the Claimant. The Claimant describes this judgment as 'arbitrary'; the Respondent describes it as based on 'strong suspicion and concrete evidence' of mismanagement of Koza Group assets by members of the Ipek Family.[56]

155. On 17 March 2017, Koza-Ipek Holding, under the management of SDIF, commenced the SPA Proceedings at the Ankara 2nd Commercial Court of First Instance, arguing the SPA is a sham and therefore null and void.[57] The Ipek Family unsuccessfully sought the recusal of the judges of the 2nd Commercial Court, arguing they had previously reached an unreasonable decision against the Ipek Family in a claim brought by Koza Altin's appointed trustees;[58] after which the President of the 2nd Commercial Court submitted a criminal complaint against the Ipek Family's lawyer alleging libellous and threatening statements.[59]

D. OTHER ACTIONS RELEVANT TO THE DISPUTE

156. Decree Law No. 667, issued on 23 July 2016, listed a number of private institutions and organisations for closure.[60] Pursuant to the Decree Law, the Republic ordered the closure of the Altın Koza University and Koza-İpek Foundation of Education, Health, Service, and Aid; both of which were funded through donations from three Koza Group companies on a conditional basis in accordance with a protocol entered into in March

[54] Request, [69].

[55] Memorial, [104].

[56] Request, [70]; Memorial, [100]; Order by Ankara 6th Criminal Court of Peace seizing the assets of the Ipek Family, 19 January 2017, [RfA-18].

[57] Request, [72]—[73]; Memorial, [106].

[58] Request, [73].

[59] Request, [74].

[60] Request, [55], [80]; Decree Law No 667 on Measures to be Taken under State of Emergency, 22 July 2016 (published on 23 July 2016) [RfA-7].

2011.[61] The Claimant states the University's facilities appear to now be used by the State-owned Social Sciences University of Ankara, in breach of the protocol.[62]

157. Decree Law No. 668, issued on 27 July 2016, empowered the Turkish Government to close media outlets deemed to be linked to terrorist organisations and threats to national security; its second annex listing media outlets to be closed included television and radio concerns owned by the Koza Media Companies.[63] Media reports then indicated some properties owned by Koza Media Companies were to be sold by the Government at auction.[64]

158. Since being placed under the management of appointed trustees, Koza Group companies have been notified by the Tax Investigation Board of tax penalties which the Claimant characterises as unfair and, through the appointed trustees' assent to the payment of penalties, '[facilitates] the transfer of funds from the Koza Group Companies to the government.'[65] Koza Altin stated on 26 October 2016 it would pay a tax penalty of 64.7 million Turkish lira.[66]

159. On 6 March 2017, the Claimant by way of letter to the Respondent gave notice of the dispute, alleging the Respondent had by its actions against the Claimant's investment breached the BIT and caused loss or damage to the Claimant as a result.[67]

160. On 8 May 2017, the Claimant wrote again to the Respondent seeking a meeting regarding a resolution to the dispute and stating it would submit this dispute to the Centre if the Respondent continued to fail to engage.[68]

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

161. In its Memorial on Preliminary Objections, the Respondent raises four objections to jurisdiction.

162. The Respondent argues there is no qualifying investment over which the Tribunal could have jurisdiction: firstly, because the SPA transferring the right to Koza-Ipek Holding's shareholding to the Claimant is a backdated sham; secondly and in the alternative, the

[61] Request, [8(g)], [38], [81].

[62] Request, [55], [80]—[83].

[63] Request, [77]; Decree Law No 668 on Measures to be Taken under the State of Emergency and Arrangements made on Certain Institutions and Organizations, 25 July 2016, [RfA-8].

[64] Request, [79]; Turkish Minute, "*Properties of 4 critical media outlets seized by government up for sale*," 9 August 2017, [RfA-26].

[65] Request, [84].

[66] Koza Altın İşletmeleri A.Ş. Special Circumstances Disclosure, 26 October 2016, [RfA-12].

[67] Request, [105]; Memorial, [108]; Letter from IIL to Türkiye, 6 March 2017, [RfA-20].

[68] Request, [106]; Memorial, [109]; Letter from IIL to Türkiye, 8 May 2017, [RfA-22].

transfer of Koza-Ipek Holding's shares to the Claimant was unlawful under Turkish law; and thirdly in the alternative, the Claimant has not made a qualifying investment under the BIT and/or the ICSID Convention.[69]

163. The Respondent further argues the Claimant committed an abuse of process in submitting its claim to the Tribunal as, at the time of the Claimant's alleged investment, a dispute between the Claimant and the Respondent already existed or was foreseeable.

164. In respect of relief, the Respondent requests that the Tribunal:

> 1. Dismiss [the Claimant's] claims for lack of jurisdiction or lack of admissibility of Claimant's claims; and
>
> 2. Order [the Claimant] to pay the Republic's costs of the arbitration, including but not limited to the fees and expenses of the Tribunal and the Republic's costs of legal representation and assistance, and all other fees and expenses incurred in participating in the arbitration, including internal costs, with post-award interest at a commercially reasonable rate.[70]

165. At this preliminary phase, the Claimant requests the following relief:

> [T]he Claimant respectfully requests that the Tribunal:
>
> a. Reject the Respondent's preliminary objections in their entirety;
>
> b. Declare that it has jurisdiction over the Claimant's claims and that the Claimant's claims are admissible;
>
> c. Declare that the Respondent has violated Article 47 of the ICSID Convention; and
>
> d. Order the Respondent to pay all of the costs and expenses of this arbitration, including the Claimant's legal and expert fees and disbursements and the fees and expenses of the Tribunal and ICSID, with interest calculated at a commercially reasonable rate.[71]

[69] Memorial, [112].

[70] Reply, [347]; Memorial, [248].

[71] Rejoinder, [568]; Defence, [175].

V. OBJECTIONS TO JURISDICTION: THE PARTIES' POSITIONS

A. IS THE SPA A SHAM?

166. The Respondent argues the SPA dated 7 June 2015, by which the Ipek Family agreed to sell their shares in Koza-Ipek Holding to the Claimant in return for shares in the Claimant, is a sham backdated by the Claimant and/or the Ipek Family 'in order to manufacture the Tribunal's jurisdiction over their otherwise domestic complaints against the Republic.'[72] As a result, the Respondent argues the Tribunal has no jurisdiction as a sham document cannot serve as its basis.[73]

167. The Claimant argues that allegations of fraud impose a heavy burden of proof on the Respondent to support these allegations, and that the Respondent has not met this burden. The Claimant argues that it has discharged its burden of proof by producing the executed SPA and endorsed share certificates.

(1) The Respondent's Position

168. The Respondent submits the SPA is a backdated sham, and did not exist on 7 June 2015, the date listed on its face.[74] The Respondent's submissions on this objection can be divided into five categories: (1) a lack of contemporaneous evidence pointing to the SPA's existence; (2) contemporaneous evidence pointing toward the existence of a materially different, unexecuted transaction concerning Koza-Ipek Holding's shares; (3) subsequent representations by the Claimant and the Ipek Family inconsistent with the SPA being entered into on 7 June 2015; (4) doubt cast on the veracity of the SPA by English and Turkish court judgments; and (5) the terms of and timeline surrounding the SPA itself.

169. The Respondent submits that there is no contemporaneous evidence to indicate the SPA existed and was signed on 7 June 2015, nor to demonstrate the veracity of the Consent Document permitting the transfer of shares in Koza-Ipek Holding to the Claimant.[75]

170. The Respondent argues that, as the Claimant has not submitted into the arbitration record the usual documents contemporaneously accompanying the cross-border acquisition of a large group of companies through share transfers – board resolutions, minutes of meetings of the purchaser approving the transfer, documents evidencing the authority to execute the SPA – the inference is the authenticating documents do not exist.[76] The Respondent submits the documentary evidence that does point to the

[72] Reply, [101]; Memorial, [115].

[73] Memorial, [143]; Reply, [172].

[74] Memorial, [115].

[75] Memorial, [115]—[122]; Reply, [107]—[121], [126]—[134] and [135]—[140]; Hearing T8/72/13–74/7.

[76] Memorial, [117]; Reply, [135], [137].

existence of the SPA – namely, the Claimant issuing shares to the Ipek Family in accordance with the SPA, and correspondence from the Claimant to Koza-Ipek Holding – only came to light in late 2016 and early 2017, and that these documents themselves do not prove the SPA was executed on 7 June 2015.[77] The Respondent invites the Tribunal 'to take the strongest possible adverse inferences' from the Claimant's reluctance to allow the Respondent to inspect Mr Akin Ipek's laptop for forensic analysis of metadata pointing to the creation date of the SPA and Consent Document.[78]

171. The Respondent additionally submits the Consent Document dated 31 August 2015 and permitting the transfer of Koza-Ipek Holding's shares to the Claimant, introduced into the arbitration record together with the Claimant's Defence,[79] is a sham.[80] The Respondent argues the Consent Document is a sham as it was not produced by the Claimant or the Ipek Family in prior English and Turkish court proceedings challenging the SPA's validity;[81] its existence appears inconsistent with subsequent correspondence between the Claimant and Koza-Ipek Holding;[82] and the lack of details, forensic information or contemporaneous electronic evidence indicating the Consent Document's provenance.[83] The Respondent further submits there is 'simply no evidence' that Mr Akin Ipek endorsed share certificates in Koza-Ipek Holding to the Claimant on 31 August 2015.[84]

172. The Respondent argues the contemporaneous evidence before the Tribunal indicates the Claimant envisioned a different, unexecuted transaction, wherein the Claimant would acquire 10% of Koza-Ipek Holding's shareholding rather than the transfer described in the SPA.[85] The Respondent argues that ten days prior to the date on the face of the SPA, the proposed transaction, which differed significantly from the SPA,[86] was 'the only transaction apparently envisaged.'[87] Noting a presentation from Morgan Lewis, the London law firm, to Koza Group employees detailing the proposed transaction in late May 2015,[88] and discussions between the Ipek Family and the Baycan Law Firm relating to the SPA and/or proposed transaction between 25 May

[77] Memorial, [118]—[119].

[78] Reply, [137]—[139]; see also Hearing T8/72/14–73/7.

[79] Written Consent of Hamdi Akin Ipek permitting the transfer of shares in Koza-Ipek Holding, 31 August 2015, [HAI-52].

[80] Reply, [126]—[134].

[81] Reply, [128]; See Hearing T4/11/11–12/11.

[82] Reply, [129]; Letter from IIL to Koza-Ipek Holdings A.S., 23 December 2016, [RfA-14].

[83] Reply, [130]—[134].

[84] Reply, [104] and [147].

[85] Memorial, [123]—[124].

[86] Memorial, [125.1]—[125.3].

[87] Memorial, [125].

[88] Email from Mehmet Ali Erdogan to Okan Bayrak entitled "IPEK Investment Limited – Presentation.PPTX" with attachment, 23 May 2015, [R-50].

2015 and 10 June 2015, the Respondent submits these discussions are 'impossible to reconcile' with the SPA having been signed and the Claimant gaining the right to Koza-Ipek Holding's shares on 7 June 2015.[89] The Respondent submits the Claimant's explanation for how the proposed transaction became the SPA is unsatisfactory;[90] lacks documentary evidence such as communications between Witness 1 (who is stated to have finalised the SPA using the proposed transaction as a starting point) and Mr Akin Ipek regarding the SPA's preparation;[91] and is instead based on the 'convoluted account gleaned from [the] oral testimony' of Mr Akin Ipek.[92]

173. The Respondent submits that subsequent representations by the Claimant and Ipek Family are inconsistent with the SPA having been signed on 7 June 2015.[93] The Respondent argues since 7 June 2015, the Ipek Family continued to hold themselves out as active shareholders of Koza-Ipek Holding, without indicating that their shareholding in Koza-Ipek Holding had been transferred to the Claimant.[94] The Respondent submits the Ipek Family's representations were express that the Ipek Family remained direct shareholders, and cannot be taken as representations of indirect shareholding and/or the Ipek Family's right to receive dividends from Koza-Ipek Holding via the Claimant.[95] The Respondent additionally argues encrypted ByLock communications from Mr Akin Ipek in September 2015 show no share transfer had taken place at that time.[96] The Respondent submits that the filing of the Claimant's inaugural accounts by Mr Akin Ipek in June 2016, stating the company had been dormant throughout 2015, is inconsistent with the SPA being signed and Koza-Ipek Holding's shares being transferred to the Claimant.[97]

[89] Memorial, [128]—[130].

[90] Reply, [109].

[91] Reply, [110]—[118].

[92] Reply, [119].

[93] Memorial, [131]—[132]; Reply, [149]—[152].

[94] Memorial, [131]; Hearing T8/81/2–83/15.

[95] Reply, [149]; Power of Attorney issued by Ebru İpek, 19 February 2016 [R-10]; Power of Attorney issued by Nevin İpek, 19 February 2016, [R-11]; Power of Attorney issued by Hamdi Akın İpek, 25 February 2016, [R-12]; Decision No 2016/259 of the Third Commercial Court of Ankara, 15 April 2016, [R-13]; Witness Statement of Hamdi Akın İpek in Case No HC-2016-002407, *Koza Ltd and another v Mustafa Akçil and others*, 16 August 2016, [R-14]; Notice No 32385 from Melek İpek to Koza İpek Holding, 3 November 2016, [R-16]; Notice No 43507 from Melek İpek to Koza İpek Holding, 30 December 2016, [R-18]; Koza-Ipek Holding and Koza Limited Structure Charts, [R-66]; Ipek Investment Limited: Form SH01 - Return of Allotment of Shares, 17 October 2016, [R-68]; Table of Shareholding Status in the various Koza-Ipek Companies, [R-72]; Individual Application Form submitted by Hamdi Akin Ipek to the Constitutional Court for an Injunction and Privileged and Urgent Examination Decision, 18 November 2015, [C-8].

[96] Reply, [151]—[152]; ByLock correspondence, [R-262]. Exhibit R-262 should be read in conjunction with PO No 17.

[97] Reply, [153]—[159]; Memorial, [88]—[89], [119.1]; Hearing T8/83/11–85/6.

174. The Respondent submits that both English and Turkish courts have considered the SPA, and '[n]either … has been persuaded by the validity of the SPA.'[98] Although not binding on the Tribunal, the Respondent submits these judgments are 'evidence that a thorough review of the background to, and contemporaneous documents surrounding the SPA leads to the conclusion that it is not an authentic document', and argues the Tribunal must conclude likewise.[99]

175. The Respondent argues the terms of the SPA itself, and its surrounding timeline, also raise questions as to its date of origin.[100] Since on the Claimant's case, Koza-Ipek Holding would remain under the direct control and ownership of the Ipek family shareholders until issue of the Consideration Shares, it is notable that IIL was entitled to notify Koza-Ipek Holding 'at any time' thereafter of its obligations to take After Closing Actions, while the latter would have only three days to comply.[101]

176. Regarding the timeline, the Respondent argues that the closing date of 31 August 2015, the day before the Claimant alleges the first violation of the BIT took place, is a 'shocking coincidence that beggars belief'.[102] The Respondent also argues its forensic experts confirm there is no physical evidence to tie the SPA to an execution date of 7 June 2015.[103]

177. The Respondent argues the Claimant's conduct is fatal to its claim, as case law states 'the only natural consequence of a claim brought on the basis of a sham transaction must be for jurisdiction to be declined'.[104] The Respondent argues that it has, through direct and indirect evidence, established a *prima facie* case of fraud, and the burden of proof must now shift to the Claimant to provide counterevidence demonstrating the authenticity of the SPA.[105] The Respondent argues that burden shifting is appropriate

[98] Memorial, [133]—[137]; Reply, [21], [103] and [160]; Decision of the Ankara Second Commercial Court, 11 July 2018, [R-24]; *Koza Ltd and another v Mustafa Akçil and others* [2017] EWHC 2889 (Ch), [RL-3]; *Koza Ltd and Hamdi Akın İpek v Akcil and Others* [2019] EWCA Civ 891, [RL-114]; *Koza Limited v Hamdi Akin İpek v Koza Altin Isletmeleri AS* [2020] EWHC 654 (Ch), [RL-179].

[99] Memorial, [137]; Reply, [160]; Hearing T8/80/17–25.

[100] Memorial, [121]; Reply, [141]—[148].

[101] Memorial, [121.2]; Hearing T8/79/4–80/2; Share Purchase Agreement between Hamdi Akin Ipek, Nevin Ipek, Cafer Tekin Ipek, Ebru Ipek, Melek Ipek and Pelin Zenginer and Ipek Investment Limited ("IIL") and Koza Ipek Holdings A.S, 7 June 2015, [RfA-4], cls [5.1] —[5.2].

[102] Reply, [141].

[103] Reply, [122], [136].

[104] Memorial, [138]—[143]; Reply, [170]—[172]; *Libananco Holdings Co Limited v Türkiye*, ICSID Case No ARB/06/8, Award, 2 September 2011, [RL-22] [483] and [537]; *Cementownia "Nova Huta" SA v Türkiye*, ICSID Case No ARB(AF)/06/2, Final Award, 17 September 2009, [RL-1] [135], [147] and [149]; *Europe Cement Investment & Trade SA v Türkiye*, ICSID Case No ARB(AF)/07/2, Award, 13 August 2009, [RL-2] [163] and [170]; *Churchill Mining v Indonesia*, ICSID Case No ARB/12/14 and 12/40, Award, 6 December 2016, [RL-15] [508]; *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, [RL-23] [100]—[107], [113] and [144]; *Inceysa v El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006, [RL-95] [3]—[5].

[105] Reply, [163]—[169].

in circumstances where the respondent State raises a reasonable doubt concerning the ownership of the entity seeking treaty protection or where proof of a fact presents difficulty, particularly where the evidence is in the hands of the other party.[106] Once the burden of proof is shifted, the Respondent submits, the Tribunal is able to draw adverse inferences from the Claimant's 'failure to rebut conclusively allegations of illegality.'[107]

(2) The Claimant's Position

178. The Claimant argues the SPA is not a sham, was validly signed on 7 June 2015 and the shares in Koza-Ipek Holding endorsed on 31 August 2015.[108] The Claimant's submissions on this objection can be broadly divided into three heads: (1) the Respondent has a high burden to provide evidence in support of allegations of fraud which cannot be shifted on to the Claimant; (2) the Respondent has not discharged its burden of proof to demonstrate fraud; and (3) the Claimant has introduced sufficient evidence to evince the validity of the SPA, Consent Document, and Endorsed Share Certificates.

179. The Claimant submits the burden of proof in support of allegations of fraud is a high one, in line with the gravity of the allegation, and cannot be discharged through reliance on circumstantial evidence alone.[109] The Claimant submits, contrary to the Respondent's submissions on the shifting burden of proof, the principle of *onus probandi incumbit actori* applies, as stated in the jurisprudence of the International Court of Justice and other international tribunals,[110] as well as in investment treaty arbitral tribunals.[111] The Claimant argues there is no general principle of international

[106] Reply, [163]—[165]; *Karkey Karadeniz Elektrik Uretim AS v Pakistan*, ICSID Case No ARB/13/1, Award, 22 August 2017, [RL-164] [497]; *Zhinvali Development Ltd v Georgia*, ICSID Case No ARB/00/1, Award, 24 January 2003, [RL-178] [311]; ICC Case No 6497 (1994), [RL-161]; *CCL v Kazakhstan*, SCC Case No 122/2001, Jurisdiction Award, 1 January 2003, [RL-147] [82]; *Zhinvali Development Ltd v Georgia*, ICSID Case No ARB/00/1, Award, 24 January 2003, [RL-178] [311]; *Marco Gavazzi v Romania*, ICSID Case No ARB/12/25, Excerpts of Award, 18 April 2017, [RL-165] [224]; *Conocophillips Petrozuata BV v Venezuela*, ICSID Case No ARB/07/30, Award, 8 March 2019, [RL-151] [275].

[107] Reply, [166]; *David R Aven v Costa Rica*, ICSID Case No UNCT/15/3, Final Award, 18 September 2018, [RL-152] [275]; *CCL v Kazakhstan*, SCC Case No 122/2001, Jurisdiction Award, 1 January 2003, [RL-147] [82].

[108] Defence, [125]; Second Witness Statement of Mr Hamdi Akin Ipek, [44] and [49].

[109] Defence, [125]; Rejoinder, [112] and [133]—[141]; Hearing T9/31/21–33/10; *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, [CL-113] [273]; *Libananco Holdings Co Limited v Türkiye*, ICSID Case No ARB/06/8, Award, 2 September 2011, [RL-22] [125]; *Iran v United States of America, Judgment*, 2003, [CL-86] [234]; *Siag and Vecchi v Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, [CL-109] [326]; *Saba Fakes v Türkiye*, ICSID Case No ARB/07/20, Award, 14 July 2010, [RL-28] [131]; *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [CL-25] [77] and [117].

[110] Rejoinder, [114]—[117], citing *inter alia*, *William A Parker (USA) v United Mexican States*, Mexico-USA General Claims Commission, Judgment, 31 March 1926, [CL-232] [5]—[7]; *Nicaragua v United States of America*, ICJ Judgement on Jurisdiction and Admissibility, 26 November 1984, [CL-156] [437]; Cambodia v Thailand, ICJ Judgement on Merits, 15 June 1962, [CL-163] [16]; *Argentina v Uruguay*, ICJ Judgment, 20 April 2010, [CL-160] [14] and [71]; *Greece v United Kingdom*, PCIJ Judgment, 26 March 1925, [CL-162] [5] and [29].

[111] Rejoinder, [118], citing, *inter alia*, *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, [CL-113] [179]; *Marvin Roy Feldman Karpa v Mexico*, ICSID Case No ARB(AF)/99/1, Award, 16

law reversing the burden of proof, including on the basis of one party's better access to relevant information,[112] which the Claimant additionally disputes on the facts in this case.[113] The Claimant submits the Respondent has relied on authorities that do not support the Respondent's contention on burden shifting, as the Respondent has 'mistakenly conflat[ed] … issues of the burden and standard of proof.'[114]

180. The Claimant argues the Respondent has not met its high evidential burden to demonstrate the SPA, Consent Document, or Endorsed Share Certificates, are backdated and/or forgeries, and instead relies on 'circumstantial inferences.'[115] In respect of the factors discussed by the Respondent with respect to the SPA, the Claimant submits contemporaneous email correspondence concerning drafts of the SPA are available;[116] valid reasons exist for Mr Akin Ipek to keep the details of the transaction confidential and set out a delayed closing date;[117] subsequent representations by the Ipek Family as Koza-Ipek Holding shareholders are correct inasmuch as the Ipek Family remained indirect shareholders;[118] the filing of dormant accounts for the Claimant for the year 2015 is a result of the time period around the filing date being 'a complete blur' for Mr Akin Ipek;[119] and that the terms of the SPA itself merely 'include standard representations consistent with Turkish law'.[120]

181. The Claimant additionally submits that forensic evidence indicates that there is no evidence supporting the contention the SPA is backdated,[121] and invites the Tribunal to draw an adverse inference from the Respondent's reluctance to allow the Claimant access to emails and other documents on the Koza Group servers, which the Claimant argues indicates the Respondent 'is in possession of documents that are detrimental to its case.'[122] The Claimant submits that the Tribunal should not have regard to *dicta* of the Turkish and English courts regarding the SPA's validity, arguing in particular the English courts 'were not presented with all the evidence relevant to the authenticity of

December 2002, [CL-201] [177]; *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Award, 7 July 2004, [CL-186] [58] and [81]; *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Arbitral Award, 26 January 2006, [CL-189] [95]; *Saipem SpA v Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction, 21 March 2007, [RL-60] [83].

[112] Rejoinder, [120]—[122]; *United Kingdom v Albania*, ICJ Judgement on the Merits, 9 April 1949, [CL-153] [4] and [18]; *Bernhard von Pezold v Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015, [RL-68] [174]—[176].

[113] Rejoinder, [122].

[114] Rejoinder, [123]—[131].

[115] Defence, [133]—[139]; Rejoinder, [145]—[202].

[116] Defence, [133].

[117] Defence, [133]—[135]. See also Hearing T3/104/1–105/25.

[118] Defence, [136]; Hearing T9/22/17–24/22.

[119] Defence, [137]; Second Witness Statement of Mr Hamdi Akin Ipek, [45(b)]; Hearing T1/82/6–83/7.

[120] Defence, [138]; Rejoinder, [154]—[155].

[121] Rejoinder, [151]—[152].

[122] Rejoinder, [156]—[160]; Hearing T9/28/13–29/19.

the SPA'.[123] With respect to the Consent Document, the Claimant argues its authenticity is supported by the witness statements of Mr Akin Ipek and Witness 1,[124] and that the Respondent has failed to discharge its burden of proving the Consent Document to be a forgery in light of forensic evidence which is 'inconsistent with the Respondent's case theory'.[125]

182. With respect to the Endorsed Share Certificates, the Claimant argues there is no forensic evidence to indicate the certificates were not endorsed on 31 August 2015;[126] the Respondent relies primarily on the ByLock correspondence of Exhibit R-262, the veracity of which the Claimant contests.[127] The Claimant submits Exhibit R-262 is unreliable and would violate the Claimant's due process rights in a disproportionate manner were it to be admitted into evidence.[128] The Claimant submits that in any event Exhibit R-262 should not be admitted into evidence as it is the fruit of illegal activities.[129] The Claimant submits the Respondent has misrepresented certain facts, including the Ipek Family's conduct, in arguing the share certificates were not endorsed on 31 August 2015.[130]

183. The Claimant submits it has provided sufficient evidence regarding the SPA and endorsed share certificates' validity to demonstrate its status as an investor under the BIT.[131] The Claimant submits the availability of the SPA and share certificates are 'in marked contrast' to the cases relied upon by the Respondent where claims were discontinued for want of jurisdiction.[132] The Claimant submits the signing of the SPA on 7 June 2015 is corroborated by the witness statements of Mr Akin Ipek, Witness 1, and Mr Selman Turk.[133]

B. SHOULD THE TRIBUNAL DECLINE JURISDICTION BASED ON NON-COMPLIANCE WITH

[123] Rejoinder, [161]—[162].

[124] Rejoinder, [164]; Written Consent of Hamdi Akin Ipek permitting the transfer of shares in Koza-Ipek Holding, 31 August 2015, [HAI-52]; Second Witness Statement of Mr Hamdi Akin Ipek, [49]; First Witness Statement of Witness 1, [21]—[23].

[125] Rejoinder, [165]—[168]; Expert Report of Ellen Radley, [36]; Expert Report of Dr Aginsky, [37]—[39] and [51].

[126] Rejoinder, [169].

[127] Rejoinder, [170]—[187].

[128] Rejoinder, [188]; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Procedural Order No 3, 29 August 2008, [CL-175] [35].

[129] Rejoinder, [189]—[190].

[130] Rejoinder, [191—[202].

[131] Defence, [126]; Hearing T1/59/9–60/15.

[132] Defence, [127]—[129].

[133] Defence, [129]—[131]; Rejoinder, [145]—[150].

TURKISH LAW APPLICABLE TO THE INVESTMENT?

184. The Respondent's second objection to jurisdiction states that, assuming *arguendo* that the SPA is authentic and validly signed on 7 June 2015, the purported transfer of Koza-Ipek Holding shares to the Claimant is non-compliant with Turkish law and thereby void, depriving the Tribunal of jurisdiction.

185. The Claimant argues that the question of compliance with administrative or procedural requirements of domestic Turkish law is irrelevant to the question of the Tribunal's jurisdiction over the dispute between the Parties, and in any event the formalities of Turkish law were complied with so as to transfer to the Claimant a right to the Koza-Ipek Holding shares under Turkish law.

(1) The Respondent's Position

186. The Respondent's arguments on this objection can be listed as follows: (1) the legal requirements under Turkish law for the transfer of shares were not met; (2) the terms of the SPA itself render it void as a matter of Turkish law; (3) the purported transfer of shares would in any event have been voided by Turkish legislation; and (4) non-compliance with domestic law operates to deprive the Tribunal of jurisdiction over this dispute. The Respondent additionally submits the expert evidence furnished by the Claimant on Turkish law demonstrates a lack of impartiality,[134] and that, for the reasons given in its first jurisdictional objection, the SPA would be unenforceable under English law as a false instrument.[135]

187. The Respondent argues that the legal requirements for the transfer of shares under Turkish law were not met. The Respondent submits that while the SPA itself may be governed by English law, the validity of the transfer of Koza-Ipek Holding shares to the Claimant is governed by Turkish law.[136] The Respondent submits that:

a. The Claimant has not provided sufficient evidence to prove the transfer of possession procedure – endorsement of share certificates by the seller and delivery of the same to the purchaser – has taken place.[137] The Respondent submits there is no documentary evidence identified within the Koza Group's email correspondence regarding the endorsement of the share certificates, especially legal advice regarding the legal requirements for such transfer, and the logical inference is that no such documents exist.[138]

[134] Reply, [180]—[181].

[135] Reply, [207]—[210]; Forgery and Counterfeiting Act 1981, [RL-186].

[136] Memorial, [147]; First Expert Report of Professor Kendigelen and Associate Professor Pasli, [12].

[137] Memorial, [152]—[153].

[138] Reply, [177].

b. The Claimant's letter dated 23 December 2016 to Koza-Ipek Holding was invalid, as it contains insufficient evidence of any transaction to allow the board of directors of Koza-Ipek Holding to be able, under Turkish law, to approve the transaction and register the Claimant in the share ledger.[139]

c. The board of directors of Koza-Ipek Holding had the right to reject a proposed share transfer, and has not approved the purported transfer of shares to the Claimant.[140] The Respondent submits that, in the absence of approval of the transfer by the board, under Turkish law ownership of the shares and all associated rights remain with the transferor.[141] The Respondent submits the Articles of Association of Koza-Ipek Holding give to the Koza-Ipek Holding board the right to invoke an 'escape clause' rather than approve a share transfer.[142] The Respondent submits there is no evidence of board approval in the prescribed form of a board resolution:[143] Mr Akin Ipek, the Respondent submits, was not empowered within Koza-Ipek Holding's internal arrangements to approve share transfers on behalf of the entire board, and in any event this would involve a non-delegable function of the board per art 375(f) of the Turkish Commercial Code.[144]

d. This position is supported by amendments to the Koza-Ipek Holding articles of association in 2011 that demonstrate an intent to limit the transferability of shares (in practice exercisable through the escape clause);[145] legal advice given to the Claimant before the SPA's execution indicating the need for a board resolution;[146] and the terms of the SPA itself creating an obligation on Koza-Ipek Holding to '[o]btain a Board resolution to approve the transfer'.[147]

---

[139] Memorial, [154]—[157]; Reply, [187]—[192]; First Expert Report of Professor Kendigelen and Associate Professor Pasli [30]; Second Expert Report of Professor Kendigelen and Associate Professor Pasli, [31]—[37], [43].

[140] Memorial, [158]—[160]; Reply, [183]—[186] and [193]—[194].

[141] Memorial, [158.2] and [160]; First Expert Report of Professor Kendigelen and Associate Professor Pasli, [20], [22] and [41].

[142] Reply, [173], [183]—[186]; Hearing T8/122/11–123/19; Second Expert Report of Professor Kendigelen and Associate Professor Pasli, [14]—[17] and [23].

[143] Reply, [175], [193]—[194]; Second Expert Report of Professor Kendigelen and Associate Professor Pasli, [50], [55], [58], [74] and [90.14].

[144] Hearing T8/129/16–133/16; Hearing T7/104/8–16.

[145] Hearing T8/120/8–123/19; see also Second Expert Report of Professor Kendigelen and Associate Professor Pasli, [14]—[17] and [23].

[146] Hearing T8/127/3–23; Email from İsmail Biçer to Okan Bayrak entitled "Revised – Additional Info Notes" with attachments, 10 June 2015, [R-56].

[147] Hearing T8/127/24–128/10; Share Purchase Agreement between Hamdi Akin Ipek, Nevin Ipek, Cafer Tekin Ipek, Ebru Ipek, Melek Ipek and Pelin Zenginer and Ipek Investment Limited ("IIL") and Koza Ipek Holdings A.S, 7 June 2015, [RfA-4], cl [5.2.1].

188. The Respondent additionally submits that the terms of the SPA itself render the agreement void under Turkish law:[148]

a. The post-closing terms in clauses 5 and 6 of the SPA (requiring Koza-Ipek Holding any time after the closing date, but within three working days of the Claimant's demand, to approve the transfer of shares by board resolution, register the Claimant as the new owner, and compel the resignation of the Koza-Ipek Holding board for replacement) lack a commercial rationale. In the Respondent's submission, as well as indicating that the SPA is backdated, these terms indicate the SPA is a collusive agreement and therefore void under Turkish law.[149]

b. The question whether Mr Akin Ipek had the authority to bind Koza-Ipek Holding to the SPA is to be determined by Turkish law, which imposes a duty on the individual to protect the interests of the represented company.[150] The Respondent submits that there was a conflict of interest in his conduct in purporting to bind Koza-Ipek Holding to the SPA when, as an eventual shareholder in the Claimant, he would personally benefit from the operation of the SPA's penalty provision,[151] and the SPA may constitute a 'fraudulent agreement detrimental to the interests of [Koza-Ipek Holding], and therefore the contract should be deemed null and void.'[152]

c. The SPA contains terms contrary to Turkish law that render the SPA unenforceable and not binding on Koza-Ipek Holding. The Respondent submits the purported three-day deadline for Koza-Ipek Holding to approve the share transfer contravenes provisions in the Turkish Commercial Code prescribing a three-month period in which companies may object to a proposed transfer,[153] and the penal provision in clause 6.2 of the SPA in substance operates as a guarantee of a share transfer, which is unenforceable as an attempt to

[148] Memorial, [161]—[164].

[149] Memorial, [165]—[167]; First Expert Report of Professor Kendigelen and Associate Professor Pasli, [54]; Reply, [195]—[201]; Second Expert Report of Professor Kendigelen and Associate Professor Pasli, [59], [31], [66], [72]; See also Hearing T8/114/17–115/5.

[150] Memorial, [169]—[170]; Act on Private International and Procedural Law No 5718, [RL-97] [9(4)]; First expert report of Professor Kendigelen and Associate Professor Pasli, [59].

[151] Memorial, [171].

[152] Memorial, [171], quoting the First Expert Report of Professor Kendigelen and Associate Professor Pasli, [67].

[153] Memorial, [172]; First Expert Report of Professor Kendigelen and Associate Professor Pasli, [64]; Turkish Commercial Code, [RL-94], arts [490]—[501].

circumvent article 380 of the Turkish Commercial Code (prohibition for a company to assist in the funding of purchases of its own shares).[154]

189. In any event, the Respondent submits, had the SPA been executed on 7 June 2015, any purported transfer would have been deemed null and void by operation of Emergency Decree No. 686, which nullified any transaction or transfer of rights undertaken by shareholders of a company which had its board of directors replaced by trustees.[155]

190. The Respondent submits that the above-argued violations of Turkish law demonstrate the Tribunal must dismiss the claim for want of jurisdiction, as the Claimant does not possess a qualifying investment entitled to protection under the BIT.[156] The Tribunal must look to host state domestic law, including in the absence of explicit reference to domestic legal compliance in the BIT, as to do otherwise 'would effectively turn the BIT into an instrument that produces property rights that would not exist in a State's own territory.'[157] The Respondent submits this principle is clear in the arbitral case law,[158] including in the specific context of invalid or ineffective share transfers,[159] and the non-compliance in this case is not technical or bureaucratic but rather goes 'to the very heart of [the Claimant's] supposed investment.'[160] The Respondent submits that the case law provided by the Claimant does not support the reverse proposition and may be distinguished.[161]

(2) The Claimant's Position

191. The Claimant's arguments on this issue are twofold: (1) that the allegations of non-compliance with Turkish law raised by the Respondent amount to procedural irregularities that do not operate to deprive the Tribunal of jurisdiction; and (2) that in

[154] Memorial, [173]; Hearing T1/13/17–20; First Expert Report of Professor Kendigelen and Associate Professor Pasli, [71]; Reply, [202]—[204]; Second Expert Report of Professor Kendigelen and Associate Professor Pasli, [78]—[83].

[155] Memorial, [174]; Reply, [205]—[206]; First Expert Report of Professor Kendigelen and Associate Professor Pasli, [78]—[79]; Decree Law No 686 on Measures to be Taken under the State of Emergency and Arrangements made on Certain Institutions and Organisations, 2 January 2017, [RfA-16]; Article 4 of Law No 7086, [RL-93].

[156] Memorial, [175]—[184]; Reply, [211]—[218].

[157] Memorial, [175]; Reply, [211].

[158] Memorial, [176]—[184]; Reply, [212], [214]; *Emmis International Holding BV v Hungary*, ICSID Case No ARB/12/2, Award, 16 April 2014, [RL-75] [162] and [252]; *Libananco Holdings Co Limited v Türkiye* ICSID Case No ARB/06/8, Award, 2 September 2011, [RL-22] [398] and [537]; *Blusun SA v Italy*, ICSID Case No ARB/14/3, Award, 27 December 2016, [RL-69] [264]; *Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008, [RL-24]; *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, [RL-23] [101]–[105]; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v Albania*, ICSID Case No ARB/11/24, Award, 30 March 2015, [RL-76] [481]—[483].

[159] Reply, [217]; *Urbaser SA v Argentina*, ICSID Case No ARB/07/26, Award, 8 December 2016, [RL-176] [281].

[160] Reply, [217].

[161] Reply, [213].

any event, the requirements under Turkish law for the transfer of shares were completed.

192. The Claimant submits the arbitral case law, including that cited by the Respondent, states the alleged illegality of an investment will only lead to a consideration of the Tribunal's jurisdiction where the alleged illegality goes directly to the 'essence' of the investment.[162] Relatedly, the Claimant submits case law indicates it is inappropriate to 'read in' a requirement of compliance with domestic law into the underlying treaty, which the Claimant argues is in effect what the Respondent asks of the Tribunal vis-à-vis the BIT.[163] The Claimant submits the Respondent alleges only objections of a 'procedural or administrative' nature that do not come within this rule.[164] The Claimant argues the Tribunal's jurisdiction is only barred where there is either no express treaty provision mandating host State legal compliance, but the illegality vitiates the State's consent to arbitrate,[165] or where there is an express treaty provision mandating host State legal compliance, and the illegality constitutes 'fundamental' non-compliance.[166]

193. The Claimant additionally submits that the SPA itself is a contract governed by English law and as such 'the Claimant's rights under the SPA are […] unaffected by the Respondent's arguments on Turkish law.'[167] The Claimant submits these rights under the SPA are a protected investment under the terms of the BIT.

194. The Claimant submits that, in any event, the requirements of Turkish law were complied with, in the following ways:

---

[162] Defence, [95]; *South American Silver Limited v Bolivia*, PCA Case No 2013-15, Award, 30 August 2018, [CL-111] [468]; *Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008, [RL-24] [145]; *Inceysa v El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006, [RL-95] [101], [236], [244] and [252]; *Libananco Holdings Co Limited v Türkiye*, ICSID Case No ARB/06/8, Award, 2 September 2011, [RL-22] [514]—[515].

[163] Rejoinder, [262]—[266] and [271]; *Bear Creek Mining Corporation v Peru*, ICSID Case No ARB/14/21, Award, 30 November 2017, [CL-84] [320]; *Saba Fakes v Türkiye*, ICSID Case No ARB/07/20, Award, 14 July 2010, [RL-28] [112] and [114]; *Achmea BV (formerly Eureko BV) v Slovakia*, PCA Case No 2008-13, Final Award, 7 December 2012, [CL-134] [176]; *Anatolie Stati v Kazakhstan*, SCC Case No V 116/2010, Award, 19 December 2013, [CL-140] [812]; *Yukos Universal Limited (Isle of Man) v Russia*, PCA Case No 2005-04/AA227, Judgment of the Hague Court of Appeal, 18 February 2020, [CL-234] [5.1.11.5].

[164] Defence, [96], quoting Memorial, [112.2]; Rejoinder [259]—[260].

[165] Rejoinder, [267]—[270]; *Malicorp Limited v Egypt*, ICSID Case No ARB/08/18, Award, 7 February 2011, [CL-199] [119]; *Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, [CL-210] [130]; *Gustav F W Hamester GmbH & Co KG v Ghana*, Award, 18 June 2010, [CL-47] [138]-[139]; *Vladimir Berschader v Russia*, SCC Case No 080/2004, Award, 21 April 2006, [CL-231] [111]; *Liman Caspian Oil BV v Kazakhstan*, ICSID Case No ARB/07/14, Excerpts of Award, 22 June 2010, [CL-197] [87].

[166] Rejoinder, [271]—[276]; *LESI SpA v Algeria*, ICSID Case No ARB/05/3, Decision on Jurisdiction, 12 July 2006, [CL-194] [83]; *Rumeli Telekom AS v Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, [CL-214] [319].

[167] Rejoinder, [205]; Hearing T9/46/20–47/6, Hearing T9/49/1–10.

a. Firstly, the Claimant submits it has provided evidence that met the requirements to acquire fully effective ownership rights in Koza-Ipek Holding's shares through the Endorsed Share Certificates and in its letter dated 23 December 2016 to Koza-Ipek Holding.[168]

b. Secondly, the Claimant submits the board of Koza-Ipek Holding did give its approval to the share transfer, and in any event such approval is not required.[169] The Claimant submits the Koza-Ipek Holding board gave its approval by authorising Mr Akin Ipek to sign the SPA and by the Consent Document,[170] and that, in a transaction such as the SPA where all shareholders and board members are parties to the transaction, approval of the transaction can be evidenced through execution of the transaction itself.[171] The Claimant submits board approval in any event is not a requirement owing to a legislative change having the effect that Koza-Ipek Holding shares had 'been unregistered, and freely transferrable since 1 July 2013'.[172] The Claimant submits the Respondent's argument that the Koza-Ipek Holding board had the right to exercise an 'escape clause' is based on misapplication of legal principle.[173]

c. Thirdly, the Claimant submits the SPA is not void under Turkish law. The Claimant submits the SPA is not a collusive document and the Respondent's arguments are primarily factual claims related to the allegation that the SPA is backdated,[174] and the SPA does not contain objectionable terms.[175]

d. The Claimant submits that Mr Akin Ipek had authority to bind Koza-Ipek Holding and its board to the obligations contained in the SPA, and to approve the share transfer to the Claimant. Specifically, the Claimant argues that clauses 5 and 6 of the SPA do not call into question Mr Akin Ipek's authority to bind Koza-Ipek Holding,[176] that the Koza-Ipek Holding board, through an internal directive, delegated to Mr Akin Ipek the full authority to approve a share

[168] Rejoinder, [225]—[233] and [252]—[254].

[169] Defence, [103]—[109]; Rejoinder, [236]—[255].

[170] Rejoinder, [246]—[250]; Hearing T9/96/16–97/6; Article 492/1 of the Turkish Commercial Code, [C-285]; Second Expert Report of Professor Bozbel [71]—[77]; Second Witness Statement of Hamdi Akin Ipek, [44]; Fourth Witness Statement of Hamdi Akin Ipek, [31]. Written Consent of Hamdi Akin Ipek permitting the transfer of shares in Koza-Ipek Holding, 31 August 2015, [HAI-52]; Second Witness Statement of Hamdi Akin Ipek, [49]; First Witness Statement of Witness 1, [24].

[171] Hearing T9/82/10–83/11; Judgment of the Turkish Court of Cassation 11th Civil Chamber, 15 January 2015, [SB-74].

[172] Defence, [103]—[105]; Rejoinder [240]—[243]; Hearing T9/66/22–67/24; First Expert Report of Professor Bozbel, [72].

[173] Rejoinder, [244]—[245]; Hearing T9/67/8–68/17, Hearing T9/72/20–77/9.

[174] Defence, [112]—[114]; Rejoinder, [214]—[219].

[175] Defence, [120]—[122]; Rejoinder, [220]—[224].

[176] Defence, [116]—[119].

transfer to the Claimant,[177] and that the Consent Document in any event confirmed the board's approval to Mr Akin Ipek approving the share transfer.[178]

e. Fourthly, the Claimant submits Emergency Decree 686 should not deprive the Tribunal of jurisdiction as it is instead 'evidence of [Türkiye]'s continued attempt to expropriate Claimant's assets.'[179]

C. HAS THE CLAIMANT MADE A QUALIFYING INVESTMENT?

195. The Respondent's third jurisdictional objection argues that, assuming *arguendo* the SPA was validly signed on 7 June 2015, and the transfer of Koza-Ipek Holding shares to the Claimant took place in compliance with Turkish law, the Claimant's acquisition of shares would nevertheless not amount to an 'investment' in accordance with both the BIT and the ICSID Convention. The Respondent argues an investment has not been 'made' under the BIT, and the *Salini* criteria are not met so as to create a qualifying investment under the Convention.

196. The Claimant argues the transfer of Koza-Ipek Holding shares is sufficient to qualify as an investment as broadly defined in the BIT, that the *Salini* criteria are not applicable in this case, and in any event the Claimant's acquisition of Koza-Ipek Holding shares satisfies the *Salini* criteria.

(1) The Respondent's Position

197. The Respondent's submission on this objection can be divided into three heads: (1) the Claimant has not 'made' an investment that qualifies under the BIT; (2) the *Salini* criteria apply in determining whether an investment qualifies under the ICSID Convention, and the criteria are not met in this case; and (3) the Claimant's characterisation of the SPA as a 'right to purchase' agreement does not create a qualifying investment.

198. The Respondent submits that, in order to qualify for protection under the BIT, the 'investment' must be 'made' by the investor, rather than applying to passive ownership of shares.[180] The Respondent submits this position is supported by the wording of the BIT,[181] arbitral case law interpreting a bilateral investment treaty that contained

[177] Hearing T9/90/11–92/2; Trade Registry Gazette indicating the amendments made in the Articles of Association of Koza İpek Holding, 15 July 2015, [R-3].

[178] Rejoinder, [246]—[250]; Hearing T9/96/16–97/6; Written Consent of Hamdi Akin Ipek permitting the transfer of shares in Koza-Ipek Holding, 31 August 2015, [HAI-52].

[179] Defence, [123]—[124]; Rejoinder, [256]—[257].

[180] Memorial, [187]—[200]; Reply, [250]—[253].

[181] Memorial, [187]; Reply, [251].

identical wording in relevant places,[182] and other arbitral case law confirming that an investment requires 'at the very least, some contribution, or allocation of resources, by the purported investor.'[183] The Respondent submits the Claimant has not 'made' an investment, and is merely passively holding Koza-Ipek Holding shares without any active participation.[184]

199. The Respondent secondly submits the Claimant has not proven it has made a qualifying investment under the ICSID Convention, the jurisdictional conditions of which must be met in addition to those of the BIT.[185] In respect of the Convention, the Respondent submits:

a. Firstly, that the *Salini* criteria – in which 'contribution, duration and risk' are treated as the 'minimum requirements for an investment'[186] – apply to the interpretation of the term 'investment' under both the ICSID Convention and the BIT.[187] The Respondent submits the Claimant must demonstrate whether the alleged investment meets the *Salini* criteria, as the assessment is necessitated by article 25 of the ICSID Convention, which provides an objective outer limit to the definition of 'investment', independent of any underlying agreement between the parties to a dispute or the language of a particular bilateral investment treaty.[188] The Respondent submits that arbitral case law demonstrates 'the mere act of acquiring shares is on its own insufficient' to quality as an investment under article 25 of the Convention,[189] the case law relied on by the Claimant accepts the applicability of the *Salini* criteria,[190] and

[182] Memorial, [188]—[194]; Reply, [251]; *Standard Chartered Bank v Tanzania*, ICSID Case No ARB/10/12, Award, 2 November 2012, [RL-85] [214]—[232]; UK-Tanzania BIT, [RL-90].

[183] Memorial, [195]—[199]; Reply, [251]—[253]; *KT Asia Investment Group BV v Kazakhstan*, ICSID Case No ARB/09/8, Award, 17 October 2013, [RL-20] [165]; *Orascom TMT Investments SARL v Algeria*, ICSID Case No ARB/12/35, Award, 31 May 2017, [RL-80] [372]; *South American Silver Limited v Bolivia*, PCA Case No 2013-15, Dissenting Opinion of Osvaldo Cesar Guglielmino, 22 November 2018, [RL-173] [100].

[184] Memorial, [200]; Reply, [250].

[185] Memorial, [201]; Reply, [224].

[186] Memorial, [201]—[202]; *Nova Scotia Power Incorporated v Venezuela*, ICSID Case No ARB(AF)/11/1, Award, 30 April 2014, [RL-78] [84].

[187] Reply, [222].

[188] Reply, [222]—[225]; Expert Opinion of Professor Rudolf Dolzer, [10] and [17]—[22]; *Saba Fakes v Türkiye* ICSID Case No ARB/07/20, Award, 14 July 2010, [RL-28] [110]; *TSA Spectrum de Argentina SA v Argentina*, ICSID Case No ARB/05/5, Award, 19 December 2008, [RL-175] [134]; *Joy Mining Machinery Limited v Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004, [RL-168] [50]; *CMC Muratori Cementisti CMC Di Ravenna SOC Coop v Mozambique*, ICSID Case No ARB/17/23, Award, 24 October 2019, [RL-143] [191]; Christoph H Schreuer, 'Article 25 — Jurisdiction' in The ICSID Convention, A Commentary, [RL-149] [83], [117].

[189] Reply, [226]; *Quiborax SA v Bolivia*, ICSID Case No ARB/06/2, Decision on Jurisdiction, 27 September 2012, [RL-26] [210]-[211].

[190] Reply, [227]—[229].

the criteria are also relevant for interpreting the term 'investment' in the BIT itself.[191]

b. Secondly, the Respondent submits there was no contribution made by the Claimant, either monetarily or in kind, as the SPA purports merely to transfer Koza-Ipek Holding shares from the Ipek Family to the Claimant in return for shares in the Claimant.[192] The Respondent submits the act of receiving shares without payment for such is not a contribution, and the Claimant's failure to make a contribution is fatal to its claim.[193] The Respondent submits the Claimant's argument that it acquired a right to manage the company and thereby satisfied the contribution criterion is wrong in law,[194] and in any even the Claimant never in fact managed Koza-Ipek Holding's operations.[195] The Respondent submits the Claimant's argument that declining jurisdiction due to non-satisfaction of the contribution criteria would reward the Respondent for wrongful conduct is misguided, as the Respondent's obligations under the BIT only arise once the Claimant has made a qualifying investment.[196]

c. Thirdly, the Respondent submits the Claimant has undertaken no risk, as it 'made no contribution in the course of its alleged investment and therefore did not stand to lose anything.'[197] The Respondent submits the Claimant's argument on long-term commitments entailing risk is misleading, as 'risk related to hypothetical or planned future activity does not constitute a risk sufficient to meet the *Salini* criteria'.[198]

200. The Respondent additionally submits that characterising the SPA as a 'right to purchase' agreement[199] does not assist the Claimant on this jurisdictional objection, as

[191] Reply, [230]—[231].

[192] Memorial, [204]—[206]; Reply, [233]—[235].

[193] Memorial, [206]—[209]; Reply, [240]; *Quiborax SA v Bolivia*, ICSID Case No ARB/06/2, Decision on Jurisdiction, 27 September 2012, [RL-26] [233]—[234].

[194] Reply, [236]—[237]; *Société Générale v Dominican Republic*, LCIA Case No UN 7927 (UNCITRAL), Award on Preliminary Objections to Jurisdiction, 19 September 2008, [CL-110] [36]; *Caratube International Oil Company LLP v Kazakhstan*, ICSID Case No ARB/08/12, Award, 5 June 2012, [RL-145] [434]—[435].

[195] Reply, [238].

[196] Reply, [239].

[197] Memorial, [210]—[213]; Reply, [241]; *KT Asia Investment Group BV v Kazakhstan*, ICSID Case No ARB/09/8, Award, 17 October 2013, [RL-20] [219]; *Toto Costruzioni Generali SpA v Lebanon*, ICSID Case No ARB/07/12, Decision on Jurisdiction, 11 September 2009, [RL-86] [84]; *Romak SA (Switzerland) v Uzbekistan*, UNCITRAL, PCA Case No AA280, Award, 26 November 2009, [RL-171] [231].

[198] Reply, [242]—[243]; *Doutremepuich v Mauritius*, PCA Case No 2018-37, Award on Jurisdiction, 23 August 2019, [RL-153] [147] and [91].

[199] Reply, [244], citing Defence, [76].

a contractual right, in the absence of subsequent economic activity constituting an investment, does not entitle a party to BIT protections:[200]

a. The Respondent submits a share swap does not merit treaty protection under the BIT or the ICSID Convention, as such an arrangement, absent the execution of a plan and intention to invest in the host state, lacks 'something tangible by way of enhancing the economy of the host state'.[201] The Respondent argues that contractual rights under a valid but unconsummated SPA governing a share swap arrangement lack economic materiality in Türkiye and do not meet the territoriality requirements of the BIT.[202]

b. The Respondent submits that, until the transaction envisioned by the SPA is consummated through, *inter alia*, a resolution of the Koza-Ipek Holding board and updates to the share ledger, the SPA only creates a contingent liability of Koza-Ipek Holding to the Claimant, which cannot constitute a protected investment.[203]

c. Lastly, the Respondent submits that, based on the post-closing obligations contained in the SPA, the transaction could only be said to be consummated, and thereby constitute a protected investment, following the demand letter to Koza-Ipek Holding of 23 December 2016, by which point the dispute had crystallised on either Party's case.[204]

(2) The Claimant's Position

201. The Claimant's arguments on this jurisdictional objection contain the following four points: (1) the acquisition of Koza-Ipek Holding shares fit within the scope of 'investment' as broadly defined under the BIT; (2) there is no additional requirement that an investment be actively 'made', and in any event, an investment has been 'made' by the Claimant; (3) the *Salini* criteria are not a necessary prerequisite to jurisdiction in this case; and (4) in any event, the Claimant's investment meets the *Salini* criteria.

202. The Claimant submits the BIT defines 'investment' broadly to encompass 'any kind of asset', including property rights, company shares, and claims to contractual

[200] Reply, [245]—[249]; *Doutremepuich v Mauritius*, PCA Case No 2018-37, Award on Jurisdiction, 23 August 2019, [RL-153] [150]; *H&H Enterprises Investments Inc v Egypt*, ICSID Case No ARB/09/15, Decision on Jurisdiction, 5 June 2012, [RL-160] [42]; *Almasryia v Kuwait*, ICSID Case No ARB/18/2, Award on the Respondent's Application Under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019, [RL-142] [68]; *Koch Minerals Sarl v Venezuela*, ICSID Case No ARB/11/19, Award, 30 October 2017, [RL-105] [6.57].

[201] Hearing T8/91/23–93/7, Hearing T8/94/12–23.

[202] Hearing T8/91/2–92/21, Hearing T8/93/4–7 and Hearing T8/106/11–107/5.

[203] Hearing T8/88/9–19; *Joy Mining Machinery Limited v Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004, [RL-168] [45].

[204] Hearing T9/150/13–151/20.

performance associated with any financially valuable investment.[205] The Claimant submits its investment falls within this definition, as the Claimant acquired property rights and the right to contractual performance in association with a valuable investment through the SPA,[206] and acquired shares in a Turkish company through the endorsement of the Koza-Ipek Holding share certificates to the Claimant.[207] The Claimant submits the case law is clear that, under the ICSID Convention and many bilateral investment treaties, 'contractual rights can give rise to a protected investment',[208] and the authorities cited by the Respondent on the contrary view are either incorrectly cited or inapplicable on the facts of the present case.[209] The Claimant submits the contractual rights to performance and entitlement to shares under the SPA merit treaty protection, irrespective of whether intervening acts left the transaction unconsummated or its benefits unrealised.[210]

203. The Claimant submits that passive ownership of the Koza-Ipek Holding shares and the contractual rights created by the SPA are sufficient to qualify as an investment, and the Respondent's argument that there must be an investment 'made' in some 'active way' is incorrect.[211] The Claimant submits the Respondent's argument in favour of imposing an 'actively made' requirement contravenes the plain language of the BIT,[212] relies on limited case law that applied a materially different treaty and has been subsequently doubted,[213] and does not engage with the case law cited by the Claimant indicating the

[205] Defence, [75]; Rejoinder, [287]—[288] and [292]; BIT, [1(a)] [RfA-1].

[206] Defence, [76(a)]; Rejoinder, [289]—[290] and [293]—[296]; Hearing T9/39/24–40/19.

[207] Defence, [76(b)]; Rejoinder, [289]—[290]; Hearing T9/36/12–20 and Hearing T9/81/14–16; *Telefónica SA v Argentina*, ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, [CL-112] [71].

[208] Rejoinder, [297]—[302]; *Alpha Projektholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010, [CL-36] [217] and [263]; *Helnan International Hotels A/S v Egypt*, ICSID Case No ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006, [CL-183] [77]; *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine*, ICSID Case No ARB/08/8, Decision on Jurisdiction, 8 March 2010, [CL-96] [84]; *Eureko BV v Poland*, Partial Award, 19 August 2005, [CL-178] [144] and [240]; *Marco Gavazzi v Romania*, ICSID Case No ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015, [CL-200] [94]—[95].

[209] Rejoinder, [302]—[310]; *Christian Doutremepuich v Mauritius*, PCA Case No 2018-37, Award on Jurisdiction, 23 August 2019, [RL-153] [93]—[97]; *H&H Enterprises Inc v Egypt*, ICSID Case No ARB/09/15, Decision on Jurisdiction, 5 June 2012, [RL-160] [43]; *Koch Minerals Sàrl v Venezuela*, ICSID Case No ARB/11/19, Award, 30 October 2017, [RL-105] [6.59].

[210] Hearing T9/42/24–43/12, Hearing T9/44/18–45/8.

[211] Defence, [77]—[78], [80]; *Bernhard von Pezold v Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015, [RL-68] [312]; *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Award, 19 December 2016, [RL-82] [231]; *South American Silver Limited v Bolivia*, PCA Case No 2013-15, Award, 30 August 2018, [CL-111] [331]; *Orascom TMT Investments Sàrl v Algeria*, ICSID Case No ARB/12/35, Award, 31 May 2017, [RL-80] [384].

[212] Rejoinder, [311]—[321]; *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [CL-216] [211].

[213] Rejoinder, [322]—[327]; Defence, [79]; *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Award, 19 December 2016, [RL-82] [230]—[231]; *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, [CL-32] [393].

simple holding of assets qualifies for treaty protection.[214] The Claimant submits that, in any event, it had actively 'made' an investment through the purchase of Koza-Ipek Holding shares by means of the SPA and subsequent share swap.[215]

204. The Claimant submits the term 'investment' under the ICSID Convention is to be interpreted broadly by tribunals,[216] as the term is left undefined by the Convention in deference to parties' autonomy to define the term as they choose in their relevant bilateral investment treaty.[217] The Claimant submits application of the *Salini* criteria as a jurisdictional requirement in this case would render the BIT's definition of investment 'meaningless', and operate to arbitrarily exclude from protection investments explicitly covered by a bilateral investment treaty.[218] The Claimant submits the *Salini* criteria are to be applied flexibly rather than as strict jurisdictional requirements,[219] as the term 'investment' under the Convention exists only to 'weed out non-investment-related disputes that fall to the "outer margins of economic activity"'.[220] The Claimant submits it would be inappropriate to adopt the 'restrictive' *Salini* criteria in this context, where there is 'a clear investment by the Claimant, by way of the shares of Koza-Ipek Holding and the claims to performance under the SPA that entitle the Claimant to those shares.'[221]

---

[214] Defence, [78]; Rejoinder, [328]—[334]; *Telefónica SA v Argentina*, ICSID Case No ARB/03/20, Decision on Objections to Jurisdiction, 25 May 2006, [CL-112] [71]; *Siemens v Argentina*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, [CL-218] [137]; *Ioannis Kardassoupolous v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, [RL-163] [123]—[124]; *Teinver SA v Argentina*, ICSID Case No ARB/09/1, Decision on Jurisdiction, 21 December 2012, [CL-223] [230]-[231]; *CEMEX Caracas Investments BV v Venezuela*, ICSID Case No ARB/08/15, Decision on Jurisdiction, 30 December 2010, [CL-164] [145]-[158]; *Anglo American PLC v Venezuela*, ICSID Case No ARB(AF)/14/1, Final Award, 18 January 2019, [CL-141] [189]-[213].

[215] Defence, [79].

[216] Defence, [82]; *Mera Investment Fund Ltd v Serbia*, ICSID Case No ARB/17/2, Decision on Jurisdiction, 30 November 2018, [CL-101] [168]; *Philip Morris Products SA (Switzerland) v Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction, 2 July 2013, [CL-58] [206].

[217] Defence, [81]—[82]; Rejoinder, [339]—[342]; R. Dolzer and C. Schreuer, *Principles of International Investment Law*, [RD-26] [74]; *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, [CL-39] [312]—[314]; *Malaysian Historical Salvors, SDN, BHD v Government of Malaysia*, ICSID Case No ARB/05/10, Decision on the Application for Annulment, 16 April 2009, [CL-99] [69].

[218] Rejoinder, [349]—[356].

[219] Rejoinder, [343]—[347]; *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Final Award, 13 March 2009, [CL-213] [241]; *Ceskoslovenska Obchodni Banka AS v Slovakia*, ICSID Case No ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, [RL-14] [64] and [90]; *M Meerapfel Sohne AG v Central African Republic*, ICSID Case No ARB/07/10, Excerpts of Award [French], 12 May 2011, [CL-198] [184]; *Pantechniki SA Contractors & Engineers (Greece) v Albania*, ICSID Case No ARB/07/21, Award, 30 July 2009, [CL-106] [43].

[220] Defence, [82], quoting *Ambiente Ufficio SPA v Argentina*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, [RL-99] [470]; Rejoinder, [348].

[221] Rejoinder, [348]; Defence, [83]—[84].

205. The Claimant submits that the territoriality requirement in art 8 of the BIT[222] is satisfied, as 'rights under the SPA relate to shares in a Turkish company, [and] some of the post-closing obligations were to take place in [Türkiye]'.[223]

206. The Claimant submits that, in any event, if the *Salini* criteria are to be applied, they are satisfied in this case:[224]

a. Firstly, the Claimant submits the contribution element is met. The Claimant submits that a contribution may take many forms and need not necessarily be monetary in nature.[225] The Claimant submits its contribution in this case included its plans to 'make significant contributions to the Koza Group by way of know-how and the industry leading expertise of the UK-based management team', the provision of executive and administrative resources, and increased capital flows into the Koza Group as a result of greater investor attraction with UK-based ownership and headquarters.[226] The Claimant submits the realisation of this contribution has been prevented only by the Respondent's wrongdoing.[227] The Claimant finally submits the holding of assets is in fact sufficient to create a qualifying investment, and the Respondent's reference to authorities purportedly to the contrary is incorrect.[228]

b. Secondly, the Claimant submits it undertook risk. The Claimant submits the Respondent is incorrect to argue there can be no risk without injection of financial resources, and that relevant arbitral case law indicates risk is inherent in any long-term commitment, and may include the political, economic, or juridical climate of the host State.[229] The Claimant submits it undertook risk

[222] Wherein the contracting parties to the BIT consent to submit to the Centre 'any legal dispute … concerning an investment of the latter in the territory of the former': BIT [RfA-1] [8(2)].

[223] Hearing T9/37/18–38/8, Hearing T9/40/8–19 and Hearing T9/44/21–45/8.

[224] Defence, [85]; Rejoinder, [357]—[359].

[225] Defence, [87] and [89]; Rejoinder, [361]—[366]; *Venezuela Holdings BV v Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction, 10 June 2010, [CL-117] [198]; *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine*, ICSID Case No ARB/08/8, Decision on Jurisdiction, 8 March 2010, [CL-96] [123]; *Romak SA v Uzbekistan*, UNCITRAL, PCA Case No AA280, Award, 26 November 2009, [RL-171] [214]; *Jande Nul NV v Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction, 16 June 2006, [CL-192] [102]-[106]; *Malicorp Limited v Egypt*, ICSID Case No ARB/08/18, Award, 7 February 2011, [CL-199] [113]; *Flughafen Zürich AG v Venezuela*, ICSID Case No ARB/10/19, Award [Spanish], 18 November 2014, [CL-179] [247]; *A11Y LTD v Czech Republic*, ICSID Case No UNCT/15/1, Award, 29 June 2018, [CL-133] [117] and [153].

[226] Defence, [87]; Rejoinder, [360].

[227] Defence, [88]; Rejoinder, [368].

[228] Defence, [89]; Rejoinder, [369]—[372].

[229] Defence, [90]—[91]; Rejoinder, [373], citing *inter alia*, *Consortium RFCC v Morocco*, ICSID Case No ARB/00/6, Decision on Jurisdiction [French], 16 July 2001, [CL-170] [63]—[64]; *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, [RL-163] [117].

when it 'made its investment without certainty of when returns might be made on the investment or whether it would actually make any at all.'[230]

c. Thirdly, the Claimant submits its investment was of a sufficient duration, as it intended for its investment to be long-term through the international expansion of the Koza Group with the Claimant as the shareholder of Koza-Ipek Holding.[231]

D. IS THE CLAIM AN ABUSE OF PROCESS?

207. On the fourth jurisdictional objection, the Respondent argues the Claimant has committed an abuse of process as, at the time of the alleged investment, the dispute between the Parties either already existed or was foreseeable. The Respondent argues 'this arbitration exclusively involves Turkish nationals engaged in an entirely domestic dispute', and only once the dispute arose or became reasonably foreseeable did Mr Akin Ipek 'seek to insert [the Claimant], an English registered company, at the head of the Koza Group's corporate structure, so that [the Claimant] could bring an ICSID claim under the BIT.'[232]

208. The Claimant argues its claim is not an abuse of process that deprives this Tribunal of jurisdiction. The Claimant submits the Respondent has not provided evidence to meet the high threshold for alleging an abuse of rights as an aspect of bad faith, or that a dispute was foreseeable as a very high probability. The Claimant submits a dispute between the Parties had not crystallised until after it had made its investment.

(1) The Respondent's Position

209. The Respondent's submissions on this objection can be divided into (1) the appropriate legal standard and evidentiary burden; (2) the submission that the Claimant engaged in abusive nationality planning, which (3) means the Tribunal should decline jurisdiction as a result. The Respondent submits that, independent of the backdating objection, a finding that the SPA was abusively created in order to internationalise an already crystallised or foreseeable domestic dispute would also make the SPA characterizable as a sham.[233]

210. The Respondent submits the legal test to be applied in determining an abuse of process is one in which the Respondent must demonstrate that 'a dispute of the same subject matter (and not any "specific action" of the Republic in relation to such dispute) existed or was objectively "reasonably foreseeable" at the time of the making of the

[230] Rejoinder, [374].

[231] Defence, [92].

[232] Memorial, [214].

[233] Hearing T1/5/18–6/1, Hearing T8/20/6–21 and Hearing T8/22/2–10.

investment.'[234] The Respondent submits the Claimant is incorrect in arguing that foreseeability only applies 'where a Government expressed its intent to act clearly and publicly',[235] or that the laws applicable to a dispute must not change in order for the dispute to be foreseeable.[236] The Respondent submits foreseeability of a dispute does not require a specific measure to be foreseen but rather that the Parties foresee a dispute concerning the same subject matter,[237] and that the Claimant relies incorrectly on authority in arguing that foreseeability requires a 'very high probability'.[238]

211. The Respondent submits that the analysis as to the foreseeability of a dispute operates on a continuum from early 2014 until either the consummation of the transaction through the issuance of Consideration Shares on 17 October 2016,[239] or 1 September 2016 when the dispute crystallised on the Claimant's own case.[240]

212. On the evidentiary standard, the Respondent submits it is able to use circumstantial evidence to discharge its burden as arbitral case law indicates parties are able to use direct or indirect evidence to prove factual claims.[241]

213. The Respondent submits the Claimant and the Ipek Family engaged in abusive nationality planning by, at a time when a dispute between the Parties either existed or was foreseeable, seeking to remove assets and 'simultaneously engineering a holding company who could claim entitlement to the value of the Koza Group as a whole under the UK-[Türkiye] BIT in ICSID arbitration.'[242] The Respondent submits the Claimant and Ipek Family would have been aware of investigations and arrest warrants against companies and individuals with connections to the Gülen movement commencing in December 2013 and early 2014,[243] and in any event were put on notice by MASAK's letter of 13 May 2015.[244] Specifically, the Respondent submits:

    a. That as criminal charges against the Koza Group arise out of connections with the Gülen movement, in respect of which the Turkish authorities proceeded with

[234] Reply, [256] and [258]; Memorial, [242]—[243].

[235] Reply, [259].

[236] Reply, [261].

[237] Reply, [260] and [262]—[263]; Memorial, [244]; *Industria Nacional de Alimentos v. Peru*, ICSID Case No ARB/03/4, Award, 7 February 2005, [RL-162] [51]—[53]; *Tidewater Inc v Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013, [RL-31] [149].

[238] Reply, [264]—[267].

[239] Hearing T8/59/8–25.

[240] Hearing T8/139/18–140/14.

[241] Reply, [268]—[269], citing *Methanex Corporation v United States of America*, UNCITRAL, Partial Award, 7 August 2002, [RL-167] [149]; *Renée Rose Levy v Peru*, ICSID Case No ARB/11/17, Award, 9 January 2015, [RL-5] [188]; and *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, [RL-23] [138]-[144].

[242] Reply, [270]; Memorial, [221].

[243] Memorial, [221]; Reply, [270].

[244] Memorial, [222]; Reply, [271]; Hearing T1/30/10–12.

a number of investigations commencing in December 2013, and considering media coverage indicating the Koza Group and Mr Akin Ipek had Gülen movement associations, 'it was highly foreseeable that the acts of which [the Claimant] now complains would occur, and therefore that a dispute with the Republic had arisen or it was reasonably foreseeable would arise.'[245] The Respondent submits the statements of the Claimant, the Ipek Family, and the reportage of the Koza Media Companies all indicate the Claimant was aware of or could foresee the dispute prior to the alleged investment,[246] in addition to widespread media reporting on the prospect of State action against the Koza Group.[247] The Respondent additionally submits that the foreseeability of the dispute is evidenced by the Ipek Family's actions in 2014, establishing Koza Ltd as a wholly-owned English subsidiary of Koza Altin with a capitalisation of GBP 60 million, which the Respondent submits was done in order 'to remove assets from the Republic that the İpek Family could use when they fled to England.'[248] Lastly, the Respondent submits the secrecy on the part of those involved in the SPA's creation is indicative of a foreseeable dispute between the Ipek Family and the Respondent existing before the investment date.[249]

b. That the timing of the Claimant's alleged investment, absent commercial explanation, supports the argument that the Claimant took action to bring an anticipated ICSID arbitration against the Respondent:[250] the Respondent submits that the timing of the purported investment and the claim are relevant factors when considering foreseeability,[251] and the less than 24-hour period between the endorsement of Koza-Ipek Holding shares to the Claimant (31 August 2015) and the Turkish authorities' inspection of Mr Akin Ipek's residence and the Koza-Ipek Holding offices are of a 'striking proximity' unlikely to be coincidental.[252]

---

[245] Memorial, [223]—[224], citing "The Great Escape", Turkish Daily Newspaper, Takvim, 2 April 2014, [R-45], "Arrest request for Dumanlı and Karaca", 18 December 2014, [R-118], "The last status in operation of December 14", 18 December 2014, [R-119], "December 14 Operation to the Community", 17 December 2018, [R-120], and "Samanyolu Head Hidayet Karaca and 3 others arrested", 21 December 2014, [R-90]; Reply, [274]—[277], and [283]—[284]. See also Hearing T8/39/1–40/21.

[246] Memorial, [227]—[228]; Reply, [278]—[279], [280]—[282].

[247] Hearing T8/44/9–46/13, citing "UPDATE 5-Turkey takes over management control of Bank Asya", 4 April 2015, [R-261]; @cemkucuk55 tweet, 25 November 2014, [R-289] "Pennsylvania will end up with in Silivri!", 16 December 2014, [R-290]; @cemkucuk55 tweet, 4 April 2015, [R-291]; "How the parallel media will be expropriated?", 2 May 2015, [R-292]; and Internal Koza Gold Email with news article entitled "Will the Fethullah Gülen's media be confiscated?", 2 May 2015, [R-293].

[248] Reply, [285]—[300]; Hearing T1/53/16–54/2.

[249] Hearing T8/51/24–55/5.

[250] Memorial, [229]—[235].

[251] Memorial, [229]—[230]; *Renée Rose Levy v Peru*, ICSID Case No ARB/11/17, Award, 9 January 2015, [RL-5] [187]—[188];

[252] Memorial, [231]; Hearing T8/69/4–72/10.

214. The Respondent submits factual considerations indicate the SPA's intended purpose was to acquire investment treaty protection in respect of the extant or foreseeable dispute. The Respondent highlights the lack of detailed business planning, feasibility studies, tax advice, and minimal examination of regulatory considerations as factors indicating the transaction contained an abusive purpose.[253]

215. The Respondent submits its investigations into the Koza Group through the Department of Anti-Smuggling and Organised Crime and MASAK make clear the dispute had either arisen, or was foreseeable, prior to the date on which the SPA is signed on its face, 7 June 2015.[254] The Respondent submits the Koza Group were put on notice that their finances were being investigated by MASAK in MASAK's letter of 13 May 2015, and were contemporaneously aware of the seriousness of a MASAK investigation under the Money Laundering Law.[255] The Respondent submits the Tribunal should not accept Mr Akin Ipek's denials that he was not aware of the August MASAK 2014 Report and the Report of the Anti-Smuggling and Organised Crime Branch dated 3 March 2015 at the time of their preparation.[256]

216. The Respondent submits the Claimant has sought to re-characterise the dispute giving rise to the arbitration, both in respect of the date of dispute, and of the alleged investment:

    a. The Respondent argues the Claimant had, in its Request for Arbitration, alleged breaches of the BIT dating back to 2015,[257] on its own case alleging the dispute arose in August 2015.[258] The Respondent submits the Claimant has sought to now characterise the dispute as crystallising on 1 September 2016,[259] based on ascribing unwarranted significance and drawing incorrect inferences regarding the effect of Decree Law No. 674.[260]

    b. In respect of the date of investment, the Respondent argues the Claimant has claimed multiple dates of investment – 7 June 2015 as the execution of the SPA, 31 August 2015 as the date of the endorsement and delivery of share certificates to the Claimant, and 17 October 2016 as the date on which the Claimant stated it issued Consideration Shares in return for the receipt of Koza-Ipek Holding

[253] Hearing T8/62/1–66/13; Email from Mehmet Ali Erdogan to Okan Bayrak entitled "IPEK Investment Limited – Presentation.PPTX" with attachment, 23 May 2015, [R-50]; Email from İsmail Biçer to Okan Bayrak entitled "Revised – Additional Info Notes" with attachments, 10 June 2015, [R-56].

[254] Memorial, [225]—[226]; Reply, [301], [302]—[303] and [344].

[255] Reply, [304]—[318].

[256] Reply, [319]—[323].

[257] Reply, [326]—[328].

[258] Reply, [329].

[259] Reply, [331], citing Defence, [62]. 1 September 2016 is the date of enactment of Decree Law No 674 [RfA-9].

[260] Reply, [331]—[340].

shares[261] – each of which the Respondent suggests are flawed.[262] The Respondent submits that, by MASAK's letters dated 13 May 2015, the Ipek Family were 'on notice that the subject matter of the dispute had crystallized',[263] and resultantly a dispute was either in existence or foreseeable by 7 June 2015, the earliest possible investment date.[264]

217. The Respondent submits that, where restructuring in order to create treaty-based jurisdiction occurs after a dispute arises or is foreseeable, this restructuring constitutes an abuse, on the basis of which the Tribunal should decline jurisdiction.[265] The Respondent submits that where a restructuring takes place in such circumstances, it is irrelevant whether there were additional or other intentions that may have also justified the restructuring.[266] The Respondent also submits the doctrine of abuse of process is rooted in the broader requirement of good faith, non-adherence of which entitles the Tribunal to dismiss the claim in line with 'the inherent powers of arbitral tribunals to determine their own jurisdiction and to protect the integrity of the international arbitration system'.[267]

(2) The Claimant's Position

218. The Claimant's position on this jurisdictional objection is effectively twofold: (1) that the Respondent has misstated the correct legal threshold for determining whether a claim is an abuse of process, and (2) there is not sufficient evidence to suggest the dispute existed or was foreseeable as a high probability at the time of the investment. The Claimant submits the dispute crystallised on 1 September 2016 with the entry into force of Decree Law No. 674, 'long after the Claimant acquired its investment'.[268]

219. In respect of the appropriate legal standard, the Claimant submits:

a. Firstly, that the doctrine of abuse of rights is an aspect of the broader principle of good faith,[269] and accordingly the Respondent faces a high threshold in making out an allegation of abuse owing to the seriousness of the charge.[270] The

[261] Reply, [341].

[262] Reply, [342].

[263] Reply, [344].

[264] Reply, [342]—[343], [345].

[265] Memorial, [236]—[247]; Reply, [345].

[266] Memorial, [245]—[246].

[267] Memorial, [218]—[220].

[268] Rejoinder, [383].

[269] Rejoinder, [389]—[393]; *ConocoPhillips Petrozuata BV v Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, [CL-169] [273]; *Mobil Corp v Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction, 10 June 2010, [RL-77] [175]—[176].

[270] Rejoinder, [394]—[400]; citing, *inter alia*, *Chevron Corporation (USA) v Ecuador (I)*, PCA Case No 2007-02/AA277, Interim Award, 1 December 2008, [CL-87] [143].

Claimant submits the Respondent's reliance on authorities to argue the use of circumstantial evidence is permitted does not affect the high threshold that faces a respondent State seeking to argue a claim constitutes an abuse of process.[271] The Claimant suggests the high threshold associated with an allegation of bad faith led the Respondent to discard its line of argumentation on the good faith principle between its Memorial and Reply.[272]

b. Secondly, the Claimant submits that arbitral case law confirms as a proposition that 'restructuring of a company's ownership structure in order to obtain investment treaty protection is not in and of itself illegitimate or abusive,'[273] and that it is not an abuse of process for an investor 'to seek to protect itself from the general risk of future disputes with a host state in this way.'[274] The Claimant submits these situations must be compared to those where the restructuring takes place against the backdrop of a pre-existing dispute.[275] The Claimant submits that, when determining whether a restructuring constitutes an abuse of rights, the respondent State must demonstrate the restructuring 'was done for the sole or predominant purpose of bringing an arbitration claim under an investment treaty.'[276]

c. Thirdly, the Claimant submits the Respondent incorrectly identifies 'foreseeability of a dispute' as the legal test to be applied: the Claimant submits a restructuring may be considered abusive if it is done in order to obtain international jurisdiction over a pre-existing dispute, or a dispute that is foreseeable as a 'high probability'.[277] The Claimant submits the approach generally taken in characterising what is a pre-existing dispute and what is foreseeable as a high probability indicate that tribunals have 'only in exceptional cases found that claimants have acted abusively in restructuring their investments and declined jurisdiction'.[278] The Claimant submits the Respondent

[271] Rejoinder, [402]—[404].

[272] Rejoinder, [380].

[273] Rejoinder, [405].

[274] Rejoinder, [409], quoting *Tidewater v Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013, [RL-31] [184].

[275] Rejoinder, [410].

[276] Rejoinder, [411]—[418]; Hearing T9/106/25–107/2; *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, [RL-23] [142]; *Cementownia 'Nowa Huta' SA v Türkiye*, ICSID Case No ARB(AF)/06/2, Award, 17 September 2009, [RL-1] [154]; *Cervin Investissements SA v Costa Rica*, ICSID Case No ARB/13/2, Decision on Jurisdiction [Spanish], 15 December 2014, [CL-165] [292]; *OAO Tatneft v Ukraine*, PCA Case No 2008-8, Judgment of Paris Court of Appeal [French], 29 November 2016, [CL-205] [29]; *ST-AD GmbH v Bulgaria*, PCA Case No 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, [RL-84] [415], [421] and [423].

[277] Defence, [140], [154]; Rejoinder, [419], [439], [443]—[445], [447]; Hearing T9/111/1–3; *Pac Rim Cayman LLC v El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, [CL-57] [2.99].

[278] Rejoinder, [420]—[439].

is incorrect in stating foreseeability of a dispute does not require foreseeability of specific measures.[279] The Claimant submits the Respondent's reliance on *Philip Morris v Australia* as authority is misplaced, as the tribunal in that case held that a restructuring may be an abuse of process where it takes place '(a) in order to obtain BIT protection (b) at a time when a specific dispute is foreseeable.'[280] The Claimant submits the Respondent has overlooked the purposive element in *Philip Morris v Australia*,[281] and that the case is in any event distinguishable on its facts.[282]

d. Lastly, the Claimant submits that a foreseeability analysis is conducted 'from an objective viewpoint … as to whether the claim was in the reasonable contemplation of the investor'.[283] Temporally, the question of whether the claim was foreseeable should be assessed based on the position as at 7 June 2015, when the Claimant's decision and intention to invest crystallised.[284]

220. The Claimant submits the legal standard has not been met, and the transfer of Koza-Ipek Holding shares to the Claimant was not an abuse of process.

221. Firstly, the Claimant submits the Respondent has provided no evidence to indicate the relocation of the Koza Group headquarters to London was primarily, or even in part, done in order to gain protection under the BIT, despite the Respondent having access to Koza Group internal records.[285] The Claimant also submits the Respondent's theory is inconsistent with the Koza Group's history of international expansion beginning in or around 2009, before the Respondent claims expropriation was foreseeable.[286]

222. Secondly, the Claimant submits the Respondent is incorrect to argue the dispute between the Parties crystallised by 13 May 2015. The Claimant argues the MASAK letter was 'innocuous' and 'gave no indication that Respondent would expropriate the Koza Group' or otherwise violate the Claimant's rights,[287] that there is no evidence to suggest the SPA was executed in reaction to the letters and that such a theory is inconsistent with the chronology of the SPA's preparation.[288] The Claimant argues it is unrealistic to suggest the May 2015 letters would render the seizure of Koza Group

[279] Rejoinder, [446].

[280] Rejoinder, [451]—[464].

[281] Rejoinder, [465].

[282] Rejoinder, [467]—[468].

[283] Hearing T9/110/4–21; *Tidewater Inc v Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013, [RL-31] [149].

[284] Hearing T9/126/18–127/14, Hearing T9/128/1–17 and Hearing T9/129/16–21.

[285] Rejoinder, [470]—[473].

[286] Defence, [142].

[287] Defence, [165]—[167]; Rejoinder, [476]—[485]; Hearing T9/118/9–120/18, Hearing T9/134/3–134/14.

[288] Defence, [167]—[168]; Rejoinder, [486].

assets foreseeable, considering the use of article 133 of the Turkish Criminal Procedure Code to appoint the SDIF as management of the Koza Group in 2016 was 'novel and unprecedented'.[289]

223. More generally, the Claimant submits the Respondent does not correctly characterise the dispute that is subject to this arbitration, including the date when the dispute crystallised. The Claimant submits a dispute requires 'disagreement on a point of law or fact, a conflict of legal views or interests between two persons', based on 'clearly identified issues between the parties' giving rise to the claim.[290] The Claimant submits the Respondent's argument that the dispute crystallised on 13 May 2015 ignores these requirements,[291] and relies on irrelevant legal authority.[292] The Claimant submits the dispute giving rise to this arbitration arose in September 2016, when by Decree Law No. 674, the Respondent through the State organ SDIF was appointed to replace the previously-appointed Koza Group trustees, as it was at this point that 'the deprivation of the Claimant's investment became permanent.'[293]

224. The Claimant submits the Respondent's argument that, if not already in existence, the dispute between the Parties was foreseeable at the time of the Claimant's investment, must be rejected for applying the wrong legal test and for its evidentiary basis consisting of 'speculation and inference'.[294] The Claimant submits the Respondent's evidence on the question of the dispute's foreseeability relies on internal Government documents,[295] examples of general Government practices not specifically aimed at the Koza Group,[296] and media and social media commentary.[297] The Claimant submits the Respondent's theory that Koza Ltd was incorporated as a UK subsidiary of Koza Altin in order to remove assets from the Republic is speculative and ignores clear evidence of a legitimate business rationale for such a move.[298] The Claimant submits the evidence indicates the MASAK investigation arose as a result of the Koza Group's prior decision to expand internationally rather than *vice versa*, and the timeline of MASAK's report, only finalised and issued in October 2016, postdates the Claimant's investment and cannot be taken as evidence the dispute had crystallised or was foreseeable by June

[289] Defence, [143], [174]; Rejoinder, [488]—[497]. See also Hearing T9/113/12–135/18.

[290]Defence, [147]—[150], quoting *Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Judgement, 30 August 1924, [CL-100]; *Emilio Agustín Maffezini v Spain*, ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, [CL-91] [94]; Rejoinder, [498]—[503].

[291] Rejoinder, [504].

[292] Rejoinder, [505]—[510].

[293] Rejoinder, [510]—[522]; Defence, [153] and [160].

[294] Rejoinder, [526]; Defence, [160]—[161]. See also Hearing T9/14/10–15/7.

[295] Defence, [164]; Rejoinder, [531]—[532].

[296] Rejoinder, [530], [533]—[535].

[297] Defence, [162]—[163]; Rejoinder, [536]—[544]; Hearing T9/114/5–117/16.

[298] Rejoinder, [544]—[558]. See for example testimony of Mr Tekin Ipek, Hearing T4/67/8–68/2.

2015.[299] The Claimant submits that the testimony of the Ipek Family, including Mr Tekin Ipek, to the effect that they did not anticipate an imminent seizure of assets or criminal proceedings against members of Ipek Family can be taken as an indication of what would be within the contemplation of a reasonable investor at the time.[300]

VI. THE TRIBUNAL'S ANALYSIS

A. INTRODUCTION

225. It is apparent to the Tribunal from the number and nature of the interlocutory applications that the Parties have advanced in the course of the proceedings thus far, that this dispute has been bitterly fought. On the merits, both Parties advance allegations of the utmost gravity. The Claimant alleges that the Respondent, in a flagrant abuse of State power, has expropriated the entirety of its substantial businesses in Türkiye, as well as subjected its shareholders to grave human rights abuses. The Respondent, for its part, avers that those shareholders were or are members of a terrorist organization and colluded in or supported an attempted coup, which had aimed to infiltrate and overthrow the Government of the Republic. It maintains that the measures that it has adopted vis-à-vis the Koza Group's businesses in Türkiye were and are in the proper exercise of its law enforcement powers.

226. If this case were to proceed to the merits, the Tribunal would have to consider these allegations against the background of the full evidentiary record then presented to it. However, those allegations do not fall for decision in the context of the present phase, which is concerned only with the Tribunal's determination of its jurisdiction and whether the claims advanced by the Claimant are admissible before it. This is the subject of the Tribunal's analysis.

(1) Jurisdiction

227. The present Tribunal, in common with all international arbitral tribunals, is a tribunal of limited jurisdiction. Those limits are set as a matter of international law by the ICSID Convention (to which both the United Kingdom and Türkiye are parties) and the relevant instrument of consent, namely the BIT between the United Kingdom and Türkiye.

228. The Tribunal must decide whether it is indeed competent to determine the dispute. It is empowered by Article 41 of the ICSID Convention to 'be the judge of its own competence.'

[299] Rejoinder, [557]—[566].

[300] Hearing T9/14/1–8.

a. ICSID Convention

229. Article 25(1) of the ICSID Convention, under whose aegis the Tribunal is constituted, provides, in relevant part that: 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State…and a national of another Contracting State, *which the parties to the dispute consent in writing to submit to the Centre.*'[301]

230. The importance of this provision is underscored by the final recital in the Preamble to the Convention, in which the Contracting States declare that 'no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention *and without its consent* be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration'.[302] 'Consent,' commented the Directors of the World Bank in their Report on the Convention, 'is the cornerstone of the jurisdiction of the Centre.'[303] The Directors added that the consent of the parties need not be given in a single instrument: the State might extend an offer to the investor, to which the latter might give its consent by accepting the offer in writing.[304]

231. The Report goes on to point out that 'consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction is further limited by reference to the nature of the dispute and the parties thereto.'[305] Article 25 requires both a 'legal dispute arising directly out of an investment' and that such dispute be between 'a Contracting State' and 'a national of another Contracting State'.

b. The BIT

232. In the present case, the Claimant invokes the jurisdiction of the Centre pursuant to the provisions of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Türkiye for the Promotion and Protection of Investments 1996 (the **BIT** or **Treaty**).[306]

233. Pursuant to Article 8(2) of the BIT, each Contracting Party consents to submit to the Centre for settlement under the ICSID Convention 'any legal dispute arising between

[301] Emphasis added.

[302] Emphasis added.

[303] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), [23].

[304] ibid, [24].

[305] ibid, [25].

[306] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Turkey for the Promotion and Protection of Investments, 15 March 1991, [RfA-1].

that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.'

234. Article 8(1)(c) defines a legal dispute as one involving 'an alleged breach of any right conferred or created by this Agreement with respect to an investment.' Such rights include, *inter alia*, the protection of investments from expropriation under Article 5 'except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation.'

235. Article 1(a) defines "investment" in relevant part as:

> every kind of asset and in particular, though not exclusively includes:
>
> …
>
> (ii) shares in and stock and debentures of a company and any other form of participation in a company;
>
> (iii) claims to money or to any performance under contract associated with any investment having a financial value;
>
> …

236. "Companies" is defined in Article 1(d)(ii) to mean, in respect of the United Kingdom 'corporations, firms and business associations incorporated or constituted under the law in force in any part of the United Kingdom'.

(2) The Parties' cases on jurisdiction in outline

a. The Respondent

237. The Respondent, for its part, objects to the jurisdiction of the Centre and this Tribunal. In broadest terms, it says that the Claimant has made no investment in Türkiye: (1) the document on which it relies as the legal materialization of its investment, the SPA, is a sham; (2) the Claimant did not obtain a valid title to the shares in Koza-Ipek Holding in accordance with Turkish law; (3) it acquired no investment that qualifies for protection under the Treaty; and (4) the claim is inadmissible as an abuse of process because the ownership structure of the Koza Group was only reorganized under a British company—the Claimant—at a time when the present dispute was reasonably foreseeable. In reality, the Respondent says, this is a claim by Turkish nationals against their own State, for which neither the ICSID Convention nor the BIT provide any protection.

b. The Claimant

238. The Claimant submits that it is a British company and accordingly entitled to invoke the protections of the BIT and the ICSID Convention in relation to its investment in Koza-Ipek Holding in Türkiye by pursuing its claim in arbitration before the present Tribunal against the Republic.

239. It says that: (1) the SPA is a valid document executed on 7 June 2015, pursuant to which it acquired an investment in Türkiye; (2) Turkish law did not require it to take any further step beyond endorsement of the share certificates in order to perfect its shareholding; (3) its investment is constituted by its acquisition of shares in Koza-Ipek Holding by endorsement of the share certificates on 31 August 2015; alternatively it says that its investment is constituted by the SPA itself, as a claim 'to money or to any performance under contract associated with an investment having a financial value;' and (4) the reorganization of the shareholding in Koza-Ipek Holding under its ownership was undertaken as part of a business decision to internationalize the operations of the Group and not because the present dispute was foreseeable or foreseen at the time when the investment was acquired.

(3) Relationship between the Objections to Jurisdiction

240. On the Respondent's case, it would suffice for it to prevail on any one of its four objections. Each objection concerns the jurisdiction of the Tribunal or the admissibility of the claim in its entirety.

241. As summarized in Part V above, the Parties have advanced their pleadings on each of the four objections separately and seriatim. The Tribunal has been greatly assisted by the quality of these submissions and the depth of analysis of the issues presented by counsel in their submissions, both in the written phase and orally at the Hearing.

242. Yet, to some extent, the Respondent's objections advance alternative theories of the case. Its First Objection—that the SPA is a sham—proceeds on the basis that, as counsel put it 'the whole transaction is fake; in other words, it's a construct that was made after the fact'.[307] Its Fourth Objection (abuse of process), on the other hand, proceeds on the basis that the steps that the Claimant alleges that it took, and the documents that were executed, were taken and executed on the dates alleged. It is precisely for that reason that the Respondent alleges those steps cannot give rise to an admissible claim because the dispute between the Parties that would form the subject of the claim was reasonably foreseeable. Nevertheless, the Respondent alleges that its argument under this head is

[307] Hearing T1/5/20–21.

still that the transaction is a sham 'because it was designed to internationalise a domestic dispute.'[308]

243. The Claimant submits that 'there is a contradiction, or at least an inconsistency between these two theories.'[309]

244. The Tribunal, in addressing questions to counsel on which it invited closing submissions, put this point to the Respondent and asked it to address:

> (a) On the basis of what authorities in international law does the Respondent contend that its second alternative alleged meaning would lead to the SPA being described as a "sham"?
>
> (b) How, if at all, does this submission differ from Respondent's abuse of process argument?
>
> (c) Which of the two alternative meanings constitutes the Respondent's primary case?
>
> (d) What does Respondent submit in answer to Claimant's allegation that its first alternative case is inconsistent with its position on the second alternative?[310]

245. In answering that question, the Respondent insists that its objections are alternative cases and not inconsistent.[311] It submits, citing *Tokios Tokelės*,[312] that the term 'sham' is equally applicable to its Fourth Objection as 'the label we ask you to put on the transaction as part of your conclusion that it's an abuse of process.'[313] Nevertheless the Respondent also accepts that, in addressing each of the Second to Fourth Objections, '[t]he Tribunal need not consider arguments as to the true date of the SPA.'[314]

246. The citation from the award in *Tokios Tokelės* on which the Respondent relies is not in fact concerned with the legal test for investment under international law at all. Rather, that tribunal is discussing the use of fictitious enterprises for purposes of money-laundering or tax evasion under Ukrainian law.

247. In the context of the present case, the Tribunal is not convinced that it assists its analysis of the Respondent's Fourth Objection to consider whether, for this purpose, the transaction is to be treated as a sham. On the contrary, a submission that a corporate

[308] Hearing T1/5/24–6/1.

[309] Hearing T1/56/12–14.

[310] Tribunal's Questions for Closing Submissions, Qu 8.

[311] Respondent's Closing Skeleton, [1]; Hearing T8/20/4–5, 15–21.

[312] *Tokios Tokelės v Ukraine*, ICSID Case No ARB/02/18, Award, 26 July 2007, [CL-114], [10].

[313] Hearing T8/22/8–10.

[314] Respondent's Closing Skeleton, [4].

restructuring at a time when the parties' dispute is reasonably foreseeable constitutes an abuse must proceed on the footing that the steps taken by the Claimant did take place when alleged. The question is whether they are effective to give rise to a claim of the Claimant that is admissible under the BIT and the ICSID Convention. On this question, there is an established jurisprudence, which, even if it differs on some points of emphasis (on which the Tribunal will revert later), indicates in broad terms the legal questions that must be addressed. These questions, and the evidence relevant to them, have been considered extensively by both Parties in their pleadings. The Tribunal will revert to them in Part C of its analysis.

248. Nevertheless, the development of this issue in argument underscores an important point that is preliminary to the analysis that is to follow. It is for the Tribunal to determine for itself whether any one or more of the Respondent's objections are well founded. For this purpose, it is not bound by the order in which the Parties have chosen to debate the Objections. It is for the Tribunal itself to characterise the issues to which the Parties' claims give rise and the order in which to address those issues.

(4) Order of analysis

249. In the present case, the Tribunal will proceed to consider the issues in the following order:

a. It will first address a central issue that arises under the Third Objection (Qualifying Investment), namely: does the Claimant's acquisition of contractual rights under the SPA of 7 June 2015 constitute a protected Investment under the BIT and the ICSID Convention?

b. It will then consider the claim of abuse of process under the Fourth Objection, namely: whether the Claimant's claim is an abuse of process, being an attempt to internationalize an otherwise domestic dispute at a point when the dispute was reasonably foreseeable?

250. In the Tribunal's view, these two questions are necessarily linked. A decision on whether the dispute was reasonably foreseeable requires the Tribunal to ascertain the relevant date at which such a determination is to be made. This it may only do once it has decided when the Claimant acquired a qualifying investment.

251. For this purpose, the Tribunal makes the assumptions that: (a) the SPA was signed by Akin Ipek on 7 June 2015, and (b) the Share Certificates were endorsed by him on 31 August 2015. This is what the Claimant alleges. The Respondent accepts that the Tribunal need not consider the arguments in relation to when these documents were executed in order to determine its Third and Fourth Objections.

252. It would only be if the result of the Tribunal's analysis on these two objections were in the Claimant's favour that it would then be necessary for the Tribunal to go on to address the First Objection (SPA a sham) and the Second Objection (share transfer not completed under Turkish law).

(5) Evidentiary issues

253. In the course of the preparation of this case for hearing, the Tribunal has had to determine numerous contested issues of evidence: as to document production; electronic records and witnesses. Each Party has complained that it has been hampered in the presentation of its case by alleged failures of the other Party to produce relevant evidentiary material. Despite these challenges, the Tribunal now has before it a substantial evidentiary record, which includes both documents and other records, as well as witness testimony, tested under cross-examination when requested.

254. The evidentiary phase on jurisdictional objections is now closed and the Preliminary Objections must be decided on the basis of the evidence presented. As ICSID Arbitration Rule 34(1) provides: 'The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.'

255. Where particular issues as to the probative value of the evidence arise in the course of the ensuing analysis, the Tribunal will make its judgements. However, there are two preliminary points on the weight to be attached to particular pieces of evidence that need to be addressed at the outset on: (a) Exhibit R-262; and (b) the testimony of Witness 1.

a. Exhibit R-262

256. Exhibit R-262 is alleged by the Respondent to contain messages sent and received by Akin Ipek over a secure message service called 'Bylock'. As already noted above,[315] this exhibit has already been the subject of procedural applications, which the Tribunal decided in PO No 17, in the following terms:

> [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.

[315] Above [86].

[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 Akin 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. [316]

257. By letter dated 24 May 2021, for the reasons stated therein,[317] the Tribunal denied the Respondent's application for reconsideration of that decision.

258. Further, on 20 July 2021, during the second day of the Hearing, the Tribunal issued a further ruling on R-262, stating that the exhibit's authenticity, admissibility and weight, is an issue reserved by the Tribunal, to be considered in rendering its decision on preliminary objections; with the Parties free to put the document to witnesses of fact and expert witnesses during the Hearing.[318]

259. In pursuance of that ruling, the Respondent put R-262 to Akin Ipek in cross-examination.[319] He maintained that it is a fabricated document.[320]

260. The Claimant submits that R-262 is an unreliable document and no weight should be given to it. It states that it was created by unknown authors, who are members of the Respondent's intelligence or police authorities and purports to reflect data of unknown provenance.[321] It relies on the report of its forensics expert, Mr Moore, who opines that R-262 cannot be authenticated, is unreliable and inconsistent.[322] It avers that it is significant that the Respondent elected not to cross-examine Mr Moore.

261. In the Tribunal's view, considering both the procedural record in relation to R-262 and the evidence of Akin Ipek and Mr Moore, R-262 is not a reliable record of conversations that it purports to record. The Respondent refused to provide the source data from which R-262 was allegedly produced; nor did it call as witnesses the persons who prepared it. Both Akin Ipek, the alleged maker of the statements recorded on it, and Mr Moore, a forensics expert, deny its authenticity.

262. Accordingly, the Tribunal excludes from consideration the alleged record of Bylock messages contained in R-262.

b. Evidence of Witness 1

263. The Claimant relies on the evidence of a Turkish lawyer, who, it maintains, assisted in the finalization of the SPA of 7 June 2015 and the Consent Document of 31 August

[316] PO No 17, [10]—[18].

[317] Above [87].

[318] Hearing T2/117/20–122/17.

[319] Hearing T4/48–53.

[320] Hearing T4/49/16–17.

[321] Rejoinder, [171]—[172]; Claimant's Closing Skeleton, [27].

[322] Expert Report of Mr Thomas Moore, pp [36]—[38].

2015. It filed two witness statements from Witness 1 on an anonymized basis.[323] As detailed above, the circumstances under which Witness 1's evidence might be admitted were the subject of detailed argument and a number of procedural orders prior to the Hearing.[324] By PO No 18, the Tribunal had made provision for Witness 1's identity to be disclosed to a limited class of the Respondent's counsel and a party representative under a confidentiality undertaking and for his/her evidence to be given in closed session. The Respondent declined to execute the confidentiality undertaking provided for under PO No 18.

264. On 5 July 2018, pursuant to ICSID Arbitration Rule 34(3), the Tribunal took formal note of the fact that the Respondent did not comply with the provisions of PO No 18 and of its reasons for non-compliance. It decided that, in the circumstances, the Tribunal would accept that Witness 1's testimony be admitted and given anonymously. The provisions of PO No 18 would remain in effect should the parties wish to avail themselves of it.

265. In the event, Witness 1 gave his/her evidence anonymously and was subjected to cross-examination, save as to his/her identity.[325]

266. The Tribunal accepts the limitations inherent in the giving of evidence where the credit of the witness cannot be fully tested in light of his/her identity. It was for those reasons that it made provision for the giving of Witness 1's evidence in closed session on a confidential basis. However, the Respondent elected not to avail itself of this procedure. The Tribunal will consider the relevant portions of Witness 1's testimony, and will determine its weight in light of other evidence in the file and bearing in mind the limitations inherent in evidence anonymously given.

267. With these observations in mind, it is now possible to turn to a consideration of the first issue that the Tribunal has identified for determination, namely: does the Claimant's acquisition of contractual rights under the SPA of 7 June 2015 constitute a protected Investment under the BIT and the ICSID Convention? For the reasons already discussed, the Tribunal will consider this question on the assumptions that (i) the SPA was executed on the date that it bears, 7 June 2015; and (ii) that the endorsement of share certificates in Koza-Ipek Holding into the Claimant's name took place on 31 August 2015. The legal effect of such an endorsement under Turkish law (second objection); and the question whether the SPA is a post-dated sham (first objection) are both reserved at this stage in the analysis.

[323] First Witness Statement of Witness 1; Second Witness Statement of Witness 1.

[324] Notably PO No 4, above, [39] and PO No 18 above, [89].

[325] Hearing T5/6–115.

B. QUALIFYING INVESTMENT

268. The Tribunal will treat this objection in the following order:

a. First it will present the key features of the SPA that are relevant to the analysis of the nature of the rights acquired by the Claimant;

b. Then it will specify the issues on qualifying investment to which this document gives rise in light of the requirements of the BIT and the ICSID Convention;

c. Third, it will consider the Parties' submissions in light of those issues;

d. Fourth, it will address the law relevant to those issues; before

e. Fifth, reaching its conclusion.

(1) Key features of the SPA

269. The SPA[326] embodies the following key contractual obligations:

a. It is an agreement between the existing shareholders in Koza-Ipek Holding, being members of the Ipek Family (the **Sellers**), Ipek and Koza-Ipek Holding whereby the Sellers agree to sell, and Ipek agrees to buy, 100% of their shares in Koza-Ipek Holding: cl 2.1.

b. Ipek agrees to give consideration for its purchase by issuing Consideration Shares to the Sellers at any time after Closing upon the Sellers giving 3 days' notice: cls 3 & 5.1.

c. Closing is to take place on 31 August 2015 (unless the Parties agree otherwise) and at such place as the Sellers may determine unilaterally: cl 4.1. Closing is by way of the signing and endorsement of the Share Certificates by Sellers (or Akin Ipek on their behalf) to Ipek, upon which event '[t]itle shall be transferred': cl 4.2.1.

d. After the issuance and delivery of the Consideration Shares by Ipek to the Sellers, Ipek is authorised to notify Koza-Ipek Holding in writing to obtain a Board resolution to approve the transfer and register Ipek as the new owner of the shares (the **After Closing Actions**): cl 5.2.

e. If the After Closing Actions do not occur: (i) the Sellers have the right to ask compensation from Ipek; and (ii) Ipek has the right to ask compensation from

[326] Share Purchase Agreement between Hamdi Akin Ipek, Nevin Ipek, Cafer Tekin Ipek, Ebru Ipek, Melek Ipek and Pelin Zenginer and Ipek Investment Limited ("IIL") and Koza Ipek Holdings A.S, 7 June 2015, [RfA-4]. Save where expressly stated otherwise, the following summary adopts the definitions used in the SPA.

Koza-Ipek Holding. In each case, 'The Parties agree and acknowledge that the fair market value of the Shares shall be the reasonable compensation': cl 6.2.

270. The final provisions include relevantly:

a. Clause 8.2, which provides that: 'Neither Party may, without the prior written consent of the other, assign, grant any security interest over, hold on trust or otherwise transfer the benefit of all or any of its obligations under this Agreement, or any benefit arising under or out of this Agreement.'

b. Clause 8.9, which provides that the governing law of the SPA 'and any non-contractual obligations arising out of or in connection with it' is English law and the Parties irrevocably agree that the English courts have jurisdiction to settle any disputes under it.

271. The SPA bears the signature of Akin Ipek on behalf of (i) each of the six Sellers; (ii) Ipek; and (iii) Koza-Ipek Holding. His signature is witnessed by Mr Selman Turk.

272. So far as concerns each of the relevant dates provided for under the SPA, the Claimant contends that:

a. The SPA itself was executed on 7 June 2015; and,

b. The Share Certificates were endorsed on 31 August 2015.

273. In terms of the After Closing Actions, it is uncontested that:

a. The Consideration Shares in Ipek were allotted to the Sellers on 17 October 2016, according to the certificate received for filing at Companies House in London on 25 November 2016;[327]

b. Ipek, by its London solicitors, Morgan Lewis, wrote to the Board of Koza-Ipek Holding on 23 December 2016 to give notice requiring the issue of a Board resolution approving the transfer and registering Ipek as the new owner of the Shares.[328]

c. No such Board resolution was issued and Ipek was not registered in Türkiye as the new owner of the Shares.

[327] Ipek Investment Limited: Form SH01 - Return of Allotment of Shares, 17 October 2016, [R-68].

[328] Letter from IIL to Koza-Ipek Holdings A.S., 23 December 2016, [RfA-14].

(2) Specific issues

274. The present Tribunal is not called upon to determine a contractual dispute between the parties to the SPA. Rather, it is constituted pursuant to the ICSID Convention and the BIT.

275. Pursuant to the arbitration agreement in Article 8(2) of the BIT, the jurisdiction of this Tribunal extends to 'any legal dispute between that Contracting Party and a national or company of the other Contracting Party *concerning an investment of the latter in the territory of the former*.'[329]

276. Investment is further defined as 'every kind of asset' including:

> (ii) shares in and stock and debentures of a company and any other form of participation in a company;
>
> (iii) claims to money or to any performance under contract associated with any investment having a financial value.[330]

277. In the present case, ascertainment of whether the Claimant has made a qualifying investment for the purpose of the Treaty is linked to the question of timing. There can be no doubt that the Koza Group constitutes a major economic undertaking in Türkiye. The critical question for Treaty protection is whether, and if so when, the Claimant, a British company, became the owner of that undertaking. Even on the Claimant's case, it did not become the legal owner of the shares in Koza-Ipek Holding until 31 August 2015, upon the Closing of the transaction by signing and endorsement of the Share Certificates. The Respondent disputes whether this on its own, and without the approval of the Koza-Ipek Holding Board, suffices in light of what it maintains are the requirements of Turkish law.

278. The date of acquisition is highly material in this case, because the question raised by the Fourth Objection—whether the dispute was reasonably foreseeable—has to be determined by reference to a specific point in time. For the purpose of the Third Objection, the Tribunal will proceed on the basis that the earliest date on which the Claimant claims to have become the owner of the Koza-Ipek Holding shares is 31 August 2015. As a result, it will be important to analyse the nature of the legal interest that the Claimant obtained prior to that date by virtue of the execution of the SPA itself on 7 June 2015.

---

[329] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Turkey for the Promotion and Protection of Investments, 15 March 1991, [RfA-1], emphasis added.

[330] ibid, art [1].

279. The question whether the SPA, considered as at 7 June 2015—the date of its alleged execution—constitutes an 'investment' gives rise to two key issues:

    a. *Subject-matter:* Is the SPA itself an 'asset' of the Claimant comprising 'claims to money or to any performance under contract associated with any investment having a financial value'?

    b. *Location:* Do the Claimant's rights under the SPA constitute an 'investment of [the Claimant] *in the territory of* [the Respondent]'?[331]

280. These questions give rise to the following questions of interpretation and application:

    a. Is a claim to performance of the share transfer under the SPA itself a qualifying investment constituted by a claim 'to any performance under contract associated with any investment'?

    b. Is a claim for compensation for Koza-Ipek Holding's non-performance of the After Closing Actions pursuant to clause 6.2.2 SPA a claim 'to money…under contract associated with any investment having a financial value'?

    c. In each case, is such an asset an investment of the Claimant 'in the territory of' the Respondent'?

281. The issues as the Tribunal has framed them above are all essentially concerned with what is sometimes called the 'legal materialisation' of an investment.[332] That is to say: they address the legal character of the claimant's assets or rights in property in the host State, the invasion of which by a respondent State may be the subject of a claim under the treaty.

282. It is also often said that the requirement, in both a BIT and the ICSID Convention, that the claim be based upon an investment also denotes an economic materialisation. A 'commitment of resources' or 'contributions that have produced such fruits and assets.'[333]

283. As it was put in *KT Asia:*

> The assets listed in Article 1(1)(a) of the BIT are the result of the act of investing. They presuppose an investment in the sense of a commitment of resources. Without such a commitment of resources,

[331] Emphasis added.

[332] Douglas, *The International Law of Investment Claims* (CUP, 2009) Rule 22.

[333] *KT Asia Investment Group BV v Kazakhstan*, ICSID Case No ARB/09/8, Award, 17 October 2013, [RL-20] [146], [166].

> the asset belonging to the claimant cannot constitute an investment within the meaning of…the BIT
>
> …
>
> [A]ssets cannot be protected unless they result from contributions, and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived.[334]

284. In their submissions on this Objection, summarised in Part V.C above, the Parties devoted considerable attention to issues related to the nature and extent of the economic materialization requirement:

    a. The Respondent invokes the so-called *Salini* criteria in which 'contribution, duration and risk' are treated as the minimum requirements for an investment.[335] It maintains that the Claimant did not meet these requirements.

    b. The Claimant submits that these criteria are not mandated by the BIT and that it would be wrong to read them in. It says that, in any event, if such criteria are to be applied, it met them in this case.[336]

285. It would only be necessary to reach these questions, in the event that the Tribunal were to find that the SPA creates an asset capable of giving rise to a legal materialisation of the investment.

286. The question of legal materialisation was traversed by the Parties in their written submissions:

    a. The Claimant submits that when it entered into the SPA, and prior to the endorsement of the share certificates, it 'acquired the right to purchase the Ipek Shareholders' shares in Koza-Ipek Holding. It thereby acquired "*property rights*" as well as a *"claim to … performance under contract associated with any investment having a financial value.*"'[337] It adds that the legal remedy provided under clause 6 of the SPA in the event that the After Closing Actions did not take place also constitutes such a legal claim to performance under a contract associated with an investment.[338]

[334] ibid, [166]—[167].

[335] Above [199]; Reply, [222] citing *Salini Costructtori SpA v Morocco,* ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2001, (*'Salini'*) [RL-29].

[336] Above [204], [206].

[337] Defence, [76(a)].

[338] Rejoinder, [295]—[296].

b. The Respondent submits that 'a simple right to purchase agreement does not suffice as an investment,' [339] unless such an agreement is followed by 'subsequent activity that qualifies as an investment'.[340]

287. In view of the potential importance of this point, the Tribunal invited the Parties' submissions in closing on the question whether the 'claim to compensation for non-performance of the post-completion obligation under clause 6 of the SPA' could constitute 'an [i]nvestment…in the territory' of the Respondent.[341]

288. Addressing this question:

a. *The Claimant* pleads that its rights under the SPA include its 'right to performance of the transaction and its right to the shares in Koza-Ipek Holding, which is a company incorporated in [Türkiye].' [342] It submits that the territoriality requirement under Article 8 of the BIT is met in that its rights under the SPA concern 'rights to acquire shares in Koza-Ipek Holding, a Turkish company, and other related rights. Moreover, at the time of execution, all parties to the SPA other than the Claimant were based in [Türkiye]and several of the post-closing obligations were to be done by Koza-Ipek Holding in [Türkiye].'[343] It adds that 'contractual rights to performance under the SPA also constitute an indirect investment in a Turkish company, which is within the territory of the Respondent.'[344] It says that this contractual right to the shares constitutes an investment even if the transaction were not consummated.[345]

b. *The Respondent* maintains that '[a] claim to performance under the SPA does not constitute an investment by [Ipek] in [Türkiye].'[346] It is not 'an undertaking in the host state of some commercial activity.'[347] Specifically, it pleads that clause 6.2.2 'contained a contingent liability for [Koza-Ipek Holding], which previous tribunals have held does not qualify as an investment.'[348] Rather it is a right 'between two holding companies and their rights to sue each other in England if one of them doesn't perform.'[349]

[339] Reply, [244].
[340] Ibid, [245].
[341] Tribunal's Questions for Closing Submissions, Qu 5.
[342] Claimant's Closing Skeleton, [4]; Hearing T9/39/24–40/19, 49/3–6.
[343] Claimant's Closing Skeleton, [15].
[344] idem.
[345] Hearing T9/43/5–12.
[346] Respondent's Closing Skeleton, [74]; Hearing T8/91/13–92/19.
[347] Hearing T8/91/19–20.
[348] Respondent's Closing Skeleton, [75].
[349] Hearing T9/150/18-20.

(3) The law

289. The importance of determining the legal character and location of the claimant's investment has been repeated and emphasised in arbitral awards. The tribunal in *Emmis* said:

> The need to identify a proprietary interest that has been taken is confirmed by the definition of 'investment' in the Treaties. In each case, the Treaty refers compendiously to 'every kind of asset[s]' The Oxford English Dictionary definition of 'asset' is:
>
> > (usually **assets**) an item of property owned by a person or company, regarded as having value and available to meet debts, commitments or legacies.
>
> The definitions in the Treaties go on to provide particular examples of types of property or rights that may constitute an asset for this purpose. But these examples are not exhaustive.[350]

290. This point is particularly important in cases in which the claimant contends that contractual rights form the basis of its claim against the State. After a full review of the authorities,[351] the *Emmis* tribunal summarised the position in relation to rights conferred by contract in the following way:

> [T]he loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. The claimant must own the asset at the date of the alleged breach. It is the asset itself—the property interest or chose in action—and not its contractual source that is the subject of the expropriation claim. Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation.[352]

291. This point is equally applicable to the threshold question of the existence of an 'investment' for the purpose of the jurisdiction of the tribunal. It applies in the case of a treaty definition, such as that found in the BIT in the instant case, in which 'investment' is defined to include 'claims to money or to any performance under contract associated with any investment having a financial value.' This element, in common with all of the other limbs of the Treaty definition, forms part of a general definition of 'asset', that is to say: the claimant's property rights.

---

[350] *Emmis International Holding BV v Hungary*, ICSID Case No ARB/12/2, Award, 16 April 2014, [RL-75] [161].

[351] ibid, [162]—[168].

[352] ibid, [169].

292. The distinction between purely contractual rights, which do not constitute an investment, and contractual rights constituting an 'asset' is basic to international investment law. It explains why an ordinary contract for the sale and purchase of goods is accepted not to be an investment. Such a contract undoubtedly has 'a financial value'; it gives rise to a claim to money or to performance; but such a claim is not 'associated with any investment' because it does not involve any commitment of capital in the host State.

293. By contrast, rights under a contract that are associated with an investment may well constitute property of the claimant that is a qualifying investment. An example is the agreement that was at the heart of the dispute in *Ampal-American Israel Corp v Egypt.*[353] In that case, the Egyptian State entities had contracted with a private party to build and operate a gas pipeline, to carry gas from Egypt to Israel. An integral part of the arrangements was a commitment on the part of Egypt by contract (the Source GSPA) to supply a certain amount of gas on agreed terms to the pipeline. The pipeline had been built with the claimant's commitment of capital and was in operation before the acts of which the claimant made complaint. The claimant alleged that that contract had been unlawfully terminated. In its Decision on Jurisdiction, the tribunal held:

> the Tribunal accepts that, in order for it to find that there has been a breach of those standards in relation to the Gas Supply Dispute, it will need to determine as an incidental question whether the Source GSPA was validly terminated. However, this does not change the fact that the key issue under the Treaty…is whether there has been *a loss of property right constituted by the contract*…[354]

294. The tribunal in *Ampal* had jurisdiction *ratione materiae* in respect of the Gas Supply Dispute because the right to a defined supply of gas at a fixed price under the Source GSPA was a proprietary right under a contract associated with its investment in the pipeline in Egypt, the host State.[355]

295. Such a proprietary right arising under a contract may be distinguished from other contractual rights, which carry with them no such proprietary consequences, such as the procedural rights attendant on participation in a tender bidding process considered in *Emmis.* As the tribunal there observed:

> [A] property right is something quite different. It constitutes a right held by its owner to the exclusion of others. It is no answer to say that the rights acquired by bidders in the 2009 Tender were acquired for

[353] *Ampal-American Israel Corp v Egypt*, ICSID Case No ARB/12/11, Decision on Jurisdiction, 1 February 2016 [RL-144].

[354] ibid, [255], emphasis added.

[355] See further *Ampal-American Israel Corp v Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, [337]—[347].

> valuable consideration. That may have created a contractual relationship between each bidder and the ORTT. But each bidder did not thereby acquire a valuable asset, capable of being alienated.
>
> …
>
> Sláger's rights in the 2009 Tender were rights concerning participation in a process that would determine whether it could acquire ownership of an asset. Such rights could not, in the words of the Iran-US Claims Tribunal, be 'freely sold and bought, and thus ha[ve] a monetary value'.[356]

296. What, then, is the legal nature of such proprietary rights created under contract? They are properly treated as a form of intangible property or chose-in-action and thus in principle capable of being alienated or assigned to third parties as assets.[357]

297. Such a chose in action is, as a general rule, located in the country in which it is properly recoverable or can be enforced.[358]

298. In argument, the Parties have referred to a number of arbitral decisions. These are of some relevance as a guide to this Tribunal's decision.

299. *Almasryia v Kuwait*[359] is most on point. In that case, the claimant relied for its investment on a joint venture agreement, into which it had entered with a Kuwaiti national, for the development of a parcel of land in Kuwait. Its treaty claim was that the respondent had expropriated its investment by preventing it from taking ownership of the land. The tribunal held, citing *Emmis* with approval, that 'a promise between two private parties contained in a private instrument, which has not been sanctioned or recognized by the host state, cannot be the basis of a property title.'[360]

300. The Claimant in the present case pleads that this case is distinguishable as the seller had no title to the land in the first place that it could transfer.[361] This observation is correct so far as it goes; but, in the Tribunal's view, it does not answer the fundamental point about the distinction between private contractual rights and title to property.

---

[356] *Emmis*, [253]—[254], citing *Amoco International Finance Corp v Iran*, IUSCT Case No 56, Partial Award, 14 July 1987, [CL-139] [108].

[357] Accord: Douglas 'Property, Investment and the Scope of Investment Protection Obligations' in Douglas, Pauwelyn & Viñuales *The Foundations of International Investment Law* (OUP, 2014) Ch 12, 382-7.

[358] Lord Collins et al (eds), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 2012) Rule 129(1).

[359] *Almasryia v Kuwait*, ICSID Case No ARB/18/2, Award under ICSID Rule 41(5), 1 November 2019, [RL-142].

[360] ibid, [56].

[361] Rejoinder, [305]—[306].

301. In *Joy Mining v Egypt,*[362] the tribunal rejected the claimant's claim to found its investment claim on the alleged failure to release a bank guarantee that it had provided in connection with the financing of a project in Egypt. The relevant BIT contained language similar to that found in Art 1(a)(iii) in the present case, which included within the scope of the concept of investment 'claims to money or to any performance under contract having a financial value.' The tribunal held that: 'Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability.'[363]

302. In *Eureko v Poland,*[364] the claimant and the respondent had entered into an agreement pursuant to which the claimant had bought a shareholding in a state insurance company. Pursuant to that agreement, the claimant had obtained certain management rights in connection with the company. The respondent had subsequently committed to assist the claimant in exercising a right to acquire further shares. The tribunal had 'a measure of hesitation in finding that Eureko's corporate governance rights under the SPA, standing alone, qualify as an investment under the Treaty.' The critical element, in its view, was the critical connection between those rights and the making of Eureko's EUR700 million investment.[365] It held that the subsequent agreement evidenced 'a firm commitment of the State Treasury' which it had accepted constituted 'acquired rights' of the claimant.[366]

303. In that case, the contract in question had been entered into directly as between the claimant and an organ of the respondent State. In reliance on it, the claimant had made a substantial economic contribution in the respondent State. In these circumstances, the attendant rights that the claimant had obtained were an integral part of the investment.

304. In *Gavazzi v Romania,*[367] the claimants had completed their purchase of a 70% shareholding in the Romanian company that was being privatised by paying the agreed purchase price.[368] As a result, it is unsurprising that the tribunal was satisfied that they had made a qualifying investment.[369]

---

[362] *Joy Mining Machinery Ltd v Egypt,* ICSID Case No AB/03/11, Award on Jurisdiction, 6 August 2004, [RL-168].

[363] ibid, [47].

[364] *Eureko BV v Poland,* Partial Award, 19 August 2005[CL-178].

[365] ibid, [144].

[366] ibid, [152]—[160].

[367] *Gavazzi v Romania,* ICSID Case No ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015 [CL-200].

[368] ibid, [57].

[369] ibid, [94]—[95].

305. Pausing at this point in the analysis, the Tribunal arrives at the following findings of law:

a. The BIT and the ICSID Convention protect an 'investment' of a company of one Contracting Party in the territory of the other Contracting Party;

b. The term 'investment' denotes an 'asset' that belongs to the claimant, that is to say: property of the claimant. Each of the sub-paragraphs of the definition of investment, including Article 1(a)(iii), is to be so construed.

c. Such a proprietary interest may be created by contract, but this does not mean that all contractual rights are to be treated as proprietary. What matters is whether the particular right may properly be treated as a form of intangible property—a chose in action—i.e., something that is itself in principle capable of being bought and sold.

d. The BIT protects only those investments that are made 'in the territory of' the respondent state.

e. A chose in action is located in the territory of the country in which it is properly recoverable or can be enforced.

(4) Application of the law to the rights under the SPA

306. Applying these findings to the facts of the present case, the Tribunal has no difficulty in accepting that the Claimant's ownership of the shares in Koza-Ipek Holding would constitute the legal materialisation of its investment in Türkiye.

307. This would still leave open the question whether the Claimant did validly acquire the shares on 31 August 2015 upon signature and delivery of the Share Certificates—the issue that is the subject of the Respondent's Second Objection. It would also leave for determination the question of whether, and if so, what form of economic materialization on the part of the Claimant might be necessary. This question would include whether the issue of the Consideration Shares, which did not take place until 25 November 2016, forms an essential element of the investment.

308. However, the question that the Tribunal is currently considering is simply whether, on the assumption that the SPA was entered into on 7 June 2015 as the Claimant contends, the rights that it acquired pursuant to that document themselves constitute an investment of the Claimant in the territory of the Respondent sufficient to qualify for protection under the BIT.

309. The conclusion that the Tribunal has reached is that they did not so qualify. The SPA is, as its express terms state, an agreement to purchase shares in Koza-Ipek Holding on a future date. The date nominated for Closing in the SPA is 31 August 2015. The

Agreement further provides that the Closing Date may be changed if all Parties agree in writing. As at 7 June 2015, the Claimant had contractual rights vis-à-vis the Sellers to require Closing. It also had certain contractual rights vis-à-vis Koza-Ipek Holding as to After Closing Actions, with remedies against Koza-Ipek Holding in the event of non-performance. But the SPA expressly states that 'title shall be transferred' on Closing. The inescapable conclusion is that the Parties' intention was that the contract would produce proprietary effects only on Closing.

310. In the interim, the Parties had personal contractual obligations. These were not capable of assignment or transfer by the Claimant unless all Parties were to consent. The SPA does not create a chose in action as at 7 June 2015. Rather, it binds the Parties contractually to take certain actions subsequently that, if and when validly taken, would then give rise to a property interest in Türkiye.

311. The fact that the After Closing Actions are to take place in Türkiye supports this conclusion, rather than undermining it, since all of these actions are, in the SPA's terms to take place *after* title has been transferred at Closing.

312. Some reliance was also placed on clause 6.2.2 of the SPA by which the Claimant acquired a cause of action for the fair market value of the shares against Koza-Ipek Holding in the event that it were to fail in its obligations vis-à-vis After Closing Actions. The creation of this contractual claim does not constitute an investment by the Claimant in Türkiye.

313. Such a claim would, if it were capable of being pursued, require the Claimant to establish that—not the Sellers—but the very Company in which it was making its investment could be under a legally enforceable obligation to pay damages comprising its entire value to its own shareholder in the event that it were to fail to take the After Closing Actions, thus eviscerating the entire investment. Such a proposition needs only to be stated for it to be plain that this is the very opposite of the concept of investment. It would involve the outflow from the territory of the respondent State of the investment, not its inflow.

314. In any event, such a claim is, in accordance with clause 8.9 of the SPA, governed by English law and to be settled in the English courts. If it were capable of being construed as a chose in action, it would be situated in England where it is properly recoverable or to be enforced.

315. The result is that, in the Tribunal's view:

    a. The SPA did not itself constitute a qualifying investment for the purpose of jurisdiction under the BIT.

b. The earliest date upon which it could be said that the Claimant had an investment in Türkiye is 31 August 2015, being the date of endorsement of the Share Certificates and not before.

316. The Tribunal will now proceed to address the Respondent's Fourth Objection in light of these findings.

C. ABUSE OF PROCESS

317. The overall issue raised by the Respondent's fourth objection is whether the claim is an abuse of process, being an attempt to internationalise an otherwise domestic dispute at a point when the dispute was reasonably foreseeable.

(1) Legal test

318. The concept of abuse of process, as applied to the jurisdiction of an international investment tribunal is an aspect of the general principle of good faith. The underlying rationale was well explained by the tribunal in the seminal case of *Phoenix Action v Czech Republic* when it found that:

> The unique goal of the "investment" was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system.
>
> …
>
> If it were accepted that the Tribunal has jurisdiction to decide Phoenix's claim, then any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT. Such a transfer from the domestic arena to the international scene would *ipso facto* constitute a "protected investment" – and the jurisdiction of BIT and ICSID tribunals would be virtually unlimited. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. It is indeed the Tribunal's view that to accept jurisdiction in this case would go against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties. The Tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed to protect, because they are in essence domestic investments disguised as

> international investments for the sole purpose of access to this mechanism.[370]

319. The *Phoenix Action* tribunal speaks in terms of a 'pre-existing dispute'. It is now accepted that this term encompasses not only a dispute in which the parties are already engaged, but also one that is reasonably foreseeable. Indeed, this latter context may be the true context in which the doctrine is applicable. As was pointed out in *Levy v Peru*, '[i]f a claimant acquires an investment after the date on which the challenged act occurred, the tribunal will normally lack jurisdiction *ratione temporis* and there will be no room for an abuse of process.'[371] In that case, the investor was found to have acquired her investment slightly before the challenged measure and it was therefore relevant to determine whether such acquisition was abusive because the dispute was then reasonably foreseeable.

a. Reasonable foreseeability

320. As a matter of law, a distinction is to be drawn between the restructuring of an investment at a time:

a. when the investor seeks 'to protect itself from the general risk of future disputes with a host state',[372] which is a legitimate goal and no abuse of an investment protection treaty; and,

b. when a specific dispute was foreseeable, namely, 'when there is a reasonable prospect…that a measure which may give rise to a treaty claim will materialise.'[373]

321. The Tribunal asked the Parties: 'What is it that, as a matter of international law, must be reasonably foreseeable for the claim to constitute an abuse of process by reason of corporate restructuring that (it is alleged) made Claimant, rather than the members of the Ipek Family, the owner of Koza-Ipek Holdings?'[374]

322. In response, the Parties placed different emphases on the test:

[370] *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, [RL-23] [142], [144].

[371] *Levy v Peru*, ICSID Case No ARB/11/17, Award, 9 January 2015, [RL-5] [182].

[372] *Tidewater Inc v Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013, [RL-31] [184].

[373] *Philip Morris Asia Ltd v Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, [RL-81] [554].

[374] Tribunal's Questions for Closing Submissions, Qu 9.

a. The Respondent draws the conclusion from the test cited above that the Claimant 'did not need to foresee the specific measure that the Republic ultimately would enact or apply in alleged breach of the Treaty.'[375]

b. The Claimant emphasises that 'seeking protection from the general risk of future disputes with a host State is not sufficient for this purpose' and that what is needed is foreseeability of 'a specific future dispute as a very high probability and not merely as a possible controversy.'[376]

323. The Tribunal approaches the question on the basis that not much is to be gained by glossing the general test of reasonable foreseeability of a dispute. The important point is that actions taken by way of general protection from the risk of future disputes are not an abuse of process. At the same time, a test based on foreseeability must of its nature include instances in which the specific State measure has not yet been taken, such that the precise State powers or mechanisms to be used, and their effects on the investment, are not necessarily known to the investor.

324. The Tribunal agrees with the Claimant that the threshold for finding an abuse of process is high.[377] It cannot be presumed.[378] It is to be determined taking into account all the facts and circumstances of the case. At the same time, as the *Levy* tribunal observed: 'the closer the acquisition of the investment is to the act giving rise to the dispute, the higher the degree of foreseeability will normally be.'[379]

325. In the context of this case, the Tribunal proceeds on the basis that what must be reasonably foreseeable—that is: foreseeable to a reasonable person in the position of the investor—is the risk that the Republic would expropriate all or part of the business of Koza-Ipek Holding, which is the essence of the Claimant's claim in these proceedings.

b. Date of assessment

326. In view of the fact that each Party had referred in their written pleadings to a range of different dates as being potentially relevant for a determination of reasonable foreseeability, the Tribunal addressed the date of assessment specifically with counsel in closing submissions. In answer to the Tribunal's question:

a. *The Claimant* submits that the critical date is 7 June 2015, being 'the date of the intention to invest…the date when the Claimant entered into a binding legal

[375] Respondent's Closing Skeleton, [9].

[376] Claimant's Closing Skeleton, [69], citing *Pac Rim Cayman LLC v El Salvador*, ICSID Case No ARB/09/12, Decision on Jurisdiction, 1 June 2012, [CL-57] [2.99].

[377] *Pac Rim Cayman LLC* ibid.

[378] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (1926) PCIJ Ser A No 7 at 30.

[379] *Renée Rose Levy v Peru*, ICSID Case No ARB/11/17, Award, 9 January 2015, [RL-5] [187].

document to acquire the right—the shares in Koza-Ipek Holding.'[380] It explains that 'at that time the state of mind of the investor is essentially crystallised for purposes of determining whether it is acting in an abusive way.'[381]

b. *The Respondent* submits that the relevant date is not 7 June 2015 'because that simply didn't amount to an investment, that was just—if anything, it was an intention to invest, it was a putative investment, because the steps that needed to be undertaken to consummate that investment hadn't taken place…'[382] It posits October 2016, the date on which the Consideration Shares were issued, as the operative date.

327. In the Tribunal's view, the date upon which reasonable foreseeability is to be tested is the date on which a claimant acquires its investment in the respondent State. In *Tidewater*, the tribunal speaks of the time of 'the transfer to it' of the relevant business.[383] In *Philip Morris*, the tribunal states that 'the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights…*when an investor has changed its corporate structure* to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable.'[384]

328. The reason why this is the critical date is that, prior to that date, the Claimant does not own an investment that may qualify for treaty protection. It is only once it can establish a proprietary title to such an investment that it may potentially assert a treaty claim. This therefore is the relevant date on which to test reasonable foreseeability.

329. In light of its analysis in section B above, the Tribunal proceeds on the basis that the critical date upon which to make the assessment of reasonable foreseeability is 31 August 2015, being the date upon which Akin Ipek endorsed the Ipek Family's Koza-Ipek Holding share certificates in favour of the Claimant, being the earliest date on which the Claimant could be said to have acquired its investment in Koza-Ipek Holding and thus made an investment in Türkiye.

330. The Claimant pleads the following as the first two acts that it alleges constitute the Respondent's breaches of the BIT:

a. On 31 August 2015, a search warrant was issued against Akin Ipek for spurious trumped-up charges, including allegations of supporting terrorism.

[380] Hearing T9/126/21–127/5.

[381] Hearing T9/129/19–21.

[382] Hearing T8/58/8–13.

[383] *Tidewater v Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013, [RL-31] [148].

[384] *Philip Morris v Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, [RL-81] [554], emphasis added.

b. On 1 September 2015, the Turkish police raided the Koza Group headquarters as well as offices of the Koza Media Companies and Akin Ipek's home and seized documents.[385]

331. The Tribunal therefore analyses the evidence as to whether on 31 August 2015—being the day on which both the Claimant acquired its investment and the first alleged BIT breach was committed—the existence of the dispute was foreseeable to a reasonable person in the position of Akin Ipek, the Claimant's directing mind.

(2) The evidence

332. It is convenient to divide the evidence into three periods:

a. December 2013 – year 2014;

b. January–7 June 2015; and,

c. 10 June–31 August 2015.

a. December 2013 and 2014

333. The evidence on the arbitration record as to the significance of events from December 2013 to December 2014 presents a broadly consistent picture, the factual elements of which are not in dispute between the Parties, though the implications to be drawn from those events for the present issue are of course much in dispute.

334. There are two key developments on which the Respondent places reliance:

a. The Respondent's actions against Turkish nationals and companies with perceived Gülenist connections after the events of December 2013 (described by the Claimant as the '2013 Corruption Scandal' and by the Respondent as the '2013 Attempted Judiciary Coup') in particular in the media field; and,

b. The planned international expansion of the Koza Group in 2014 and in particular the incorporation of Koza Ltd and the transfer to it of £60 million on 31 March 2014.

(i) Turkish Government actions against media companies

335. The first development is widely documented by contemporary independent reports, notably the Report of Lord Woolf, Jowell & Garnier 'A report on the rule of law and

[385] Request, [8].

respect for human rights in [Türkiye] since December 2013' (July 2015).[386] Under the heading 'Political interference with media companies' that Report states:

> Koza Ipek Holding's chairman, Akin Ipek, who is known for his support for the Hizmet movement, stated in an interview that he was sent lists with names of journalists working for his media group who were to be fired and that people from government circles had called him several times concerning columns published by his media outlets.[387]

336. The Woolf Report adds under the heading 'Financial pressure on Hizmet-affiliated media companies':

> Critical media outlets have not only been exposed to political pressure, but also financial repercussions. Gold mining company Koza Altin A.Ş., the owner of *Bugün* and Kanal Türk TV station, had its activities halted on 31 December 2013 in Çukuralan goldfield, one of the company's five major gold mines, in a move that has been seen as an example of the government's exploitation of inspections to put pressure on those with critical views.[388]

337. The Claimant's witnesses confirmed these developments in their evidence before the Tribunal:

a. Akin Ipek (who acknowledges his links with Gülen) accepts that he was personally pressured and that President Erdoğan had sought to use regulatory pressure on the Koza mining companies 'as a pressure tactic against our media reporting'.[389]

b. Mr Yurttas says that '[o]ur relationship with the Government deteriorated irreparably after the Koza Media Group began investigating, in October 2013, reports that Turkish cabinet ministers had been bribed to participate in a money-laundering scheme'. He adds: 'We certainly paid a significant price for doing so', mentioning examples of investigations and raids on journalists.[390]

c. Witness 1 says that, after the December 2013 Corruption Scandal: 'the Erdoğan regime began to target and intimidate groups in the free media, which I understood the Koza Group to be'.[391] He/She adds that, although there had been

[386] Expert Report of Professor Sir Jeffrey Jowell KCMG KC in the Matter of an Extradition Request from Türkiye (RE: Mr Buyuk, Mr Celik and Mr Ipek), 22 June 2018, [C-42], Annex [III].

[387] ibid, [147].

[388] ibid, [150].

[389] First Witness Statement of Hamdi Akin Ipek, [13]—[18].

[390] First Witness Statement of Mr Ayhan Yurttas, [16]—[17].

[391] First Witness Statement of Witness 1, [12].

optimism that this would improve by late 2014, this did not happen. Instead 'the Turkish government had become more aggressive', bringing investigations against companies that had spoken out against the regime.[392] For this reason, he/she wished to be cautious in his/her dealings with Mr Ipek in order to protect himself/herself and his/her firm.

(ii) Incorporation of Koza Ltd—Koza's international mining expansion

338. The second development on which the Respondent places reliance in this period is the incorporation of Koza Ltd in March 2014 and the transfer of £60 million in capital to it. The Respondent alleges that the purpose of this was to remove assets from Türkiye.[393] The Claimant maintains that it was part of a planned internationalization of the Koza Group's mining business.

339. The Respondent relies on a witness statement of Akin Ipek in previous English proceedings.[394] Mr Ipek there states: 'As the Turkish government's campaign against the Koza Group gathered pace, I took steps to ensure that it would not be able to confiscate Koza Ltd's capital.'[395] However, read in context, this statement does not relate to the initial transfer to Koza Ltd in March 2014. Mr Ipek had already deposed that Koza Altin's capital had been initially paid into an account at BBVA London.[396] He then refers to the transfer of those funds to a Luxembourg account; the decision to transfer the funds back to London on 30 October 2015;[397] and the subsequent difficulties encountered in returning the funds to London. His statement about confiscation relates to this post-October 2015 period.

340. The Claimant's witness evidence on this issue was given by Akin Ipek and Tekin Ipek:

a. Akin Ipek describes the deteriorating mining climate in Türkiye as related to regulatory matters preceding and unrelated to the events of December 2013, leading to a decision to expand internationally through a UK subsidiary, Koza Ltd, with an initial capital of £60 million.[398]

b. Tekin Ipek gave detailed oral evidence on the reasons to 'carry our mining business abroad'; the decision to incorporate in London; and to transfer £60

[392] First Witness Statement of Witness 1, [14].

[393] Respondent's Closing Slide, [36].

[394] Respondent's Closing Slide, [37], citing Witness Statement of Mr Hamdi Akın İpek in Case No HC-2016-002407, *Koza Ltd v Akçil*, 16 August 2016, [R-14].

[395] Witness Statement of Hamdi Akın İpek in Case No HC-2016-002407, Koza Ltd v Akçil, 16 August 2016, [R-14], [74].

[396] ibid, [55].

[397] ibid, [56]—[57].

[398] Second Witness Statement of Mr Hamdi Akin Ipek, [20]—[25].

million in capital.[399] These decisions were a matter of public record at the time.[400] Tekin Ipek followed incorporation of the company with correspondence and meetings with the British Consul General in Istanbul between June–October 2014.[401]

341. The Turkish pool media speculated at the time that this might be a prelude to Koza Altin fleeing the country, following the 31 March 2014 victory of Mr Erdoğan's party AKP in local elections and, subsequently, the election of Mr Erdoğan as President.[402]

342. In light of these press articles, on 2 June 2014, the Turkish President requested MASAK to prepare a preliminary report on whether the monies raised from the mines could be transferred abroad.[403] The preliminary report from a MASAK finance specialist, Mr Akdag, dated 4 August 2014, identified a number of matters warranting further investigation.[404]

343. Ultimately MASAK addressed the incorporation of Koza Ltd as part of its larger investigation, in light of enquiries made in both Türkiye and the UK and of applicable legislation in both countries. MASAK reported its conclusions on 26 September 2016.[405] It noted that:

> Documents attached to the letter provided by Koza Altin on 13 August 2015 reveal that even though Koza Altin had been planning to internationalise the company for a long time, Koza Ltd was incorporated in the UK on 31 March 2014. Koza Altin submitted to the Public Disclosure Platform ("PDP") to this Inspection Office regarding this matter…[406]

344. MASAK found that the company had been properly incorporated in the UK in accordance with applicable UK law. The transfer of £60 million had been made in accordance with Turkish Decree No 32, which permitted free transfer of capital for the

[399] Hearing T4/64/19–68/25; Hearing T4/105/13–106/12.

[400] Koza Limited Incorporation Documents, 24 March 2014, [HAI-37]; Koza Altin, Board of Directors Resolution, Meeting No 2014/14, 31 March 2014, [R-44].

[401] Emails between UK Trade & Investment Department and Foreign Commonwealth Office and Koza Gold re meetings with Tekin Ipek, 13 June 2014 to 28 October 2018, [HAI-63]; Hearing T4/105/12–106/12.

[402] "The Great Escape", Turkish Daily Newspaper, *Takvim*, 2 April 2014, [R-45]; "Does Koza Altin Flee From This Country?", Turkish Daily Newspaper, Sabah, 2 April 2014, [R-46]; "Moving to London", Turkish Daily Newspaper Takvim, 2 April 2014, [R-47].

[403] August 2014 MASAK Report, [R-48], [1]; First Witness Statement of Mr Alpaslan Kumas, [14].

[404] August 2014 MASAK Report, [R-48].

[405] MASAK Memo No 10: Letter No 71198378-663.05.[2015-19]-10 with the findings regarding the acquisition of Koza Altın İşletmeleri A.Ş., acquisition of Kanaltürk TV, incorporation of Koza Ltd in the UK, matters regarding the Capital Market Law contained in the Analyses Report, and the effects of tax evasion lawsuit filed against Hamdi Akın İpek and insider trading lawsuit filed against Cafer Tekin İpek on money laundering, 26 September 2016, [R-318] (accepted by Mr Kumas of MASAK in cross-examination, Hearing T2/112/5–113/21).

[406] ibid, p [4].

purpose of establishing companies abroad 'to make investments or to carry out commercial activities abroad.' Accordingly, it concluded: 'the transaction is an investment made in the UK and carried out in accordance with the applicable legislation.'[407]

345. *Tribunal's assessment.* The Tribunal's conclusion on the significance of the evidence concerning events to end 2014 is that the Koza Group had experienced deteriorating conditions for its businesses in Türkiye during the course of 2014, in particular as a result of the actions taken by the Respondent against the free media in Türkiye, which undoubtedly had led to tension between the Ipek Family and the Respondent by year end. Partly as a result, and partly in order to seek to diversify its mining business outside Türkiye, Koza had established a UK subsidiary, Koza Ltd, in March 2014.

346. The latter action may be interpreted as a prudent step to protect part of the Koza business from the general risk of future disputes with the Respondent, but this does not make the dispute that is the subject matter of these proceedings—namely the confiscation of the assets of the Koza Group—reasonably foreseeable:

a. Koza continued to operate in Türkiye in both its media and mining businesses throughout 2014;

b. Although the Respondent reacted to pool media reports concerning the establishment of Koza Ltd and the transfer of £60 million, its own investigation agency, MASAK, found this transaction to be fully compliant with the law;

c. Although the Respondent took a number of steps against individuals and companies that it regarded as associated with the Gülenist movement in the course of 2014, these did not involve the confiscation of assets.

d. The Respondent's submission that the transfer of £60 million was made in order to place these funds out of reach of confiscation by the Turkish authorities is not supported by convincing evidence. The MASAK investigation, which was conducted and reported in 2016 confirms the lawfulness of the £60 million transfer according to Turkish law.

b. January–June 2015

347. The position up to and including the execution of the SPA on 7 June 2015 may be conveniently considered in three sub-sections: (i) developments January–April 2015; (ii) May 2015; and (iii) the preparation of the SPA of 7 June 2015.

(i) Developments January–April 2015

[407] idem.

348. In the first four months, there are two developments of note. The Parties differ in their characterisation of the significance of these developments:

    a. The management of Bank Asya is transferred to TMSF in February 2015.

    b. The efforts, led by Tekin Ipek, to consolidate Koza's position in London.

349. *Bank Asya*. The Respondent relies on the predictions of a Turkish pool media journalist, Cem Kucuk, beginning in late November 2014, that the assets of both the 'parallel bank and the parallel media' would be confiscated by the TMSF[408] as indicating that, once the assets of Bank Asya had been confiscated, it was foreseeable that the assets of the Koza media group would be as well.[409]

350. These articles were put to Mr Yurttas, former President of the Koza media companies, in cross-examination.[410] His evidence is that he had not read these articles and tweets before and that 'I do not think that anyone takes him seriously.'[411]

351. So far as concerns the transfer of Bank Asya, Reuters did report on 4 February 2015 that the Government's motive may be 'political'.[412] However, the same article goes on to note that: 'Shares in other companies linked to Gulen's followers fell initially after the regulator's move, but then rebounded. Gold miner Koza Altin rose 0.3 percent….'[413]

352. *Koza business in London*. In the same period, the Claimant relies on evidence concerning the efforts of the Koza Group and the Ipek Family to consolidate their position in London: Tekin Ipek's meeting with the British Consul-General in Istanbul on 4 March 2015;[414] his business trips to London in November 2014 and again from 21-23 March 2015;[415] and the purchase by Koza Altin and Koza Ltd of two flats in London, completed on 17 April 2015.[416]

[408] @cemkucuk55 tweet, 25 November 2014, [R-289]; "Pennsylvania will end up with in Silivri!", *Yeni Şafak*, 16 December 2014, [R-290]; "How the parallel media will be expropriated?", *Star*, 2 May 2015, [R-292].

[409] Respondent's Closing Slides, [40].

[410] Hearing T6/26/7–32/20.

[411] Hearing T6/32/3–4.

[412] "UPDATE 5-Türkiye takes over management control of Bank Asya", Reuters, 4 April 2015, [R-261].

[413] Idem.

[414] Email from Esra Anul to Yasemin Baser and Zeynep Oztekbas entitled "RE: Meeting with Mr Tekin Ipek", 27 February 2015, [C-216].

[415] Email from Z. Oztekbas to T Ipek and attachment, 1 March 2015, [HAI-45].

[416] Land Registry Extracts for Flats 40 and 50 Drake House, London, 22 December 2015, [HAI-53].

353. Tekin Ipek gave detailed testimony about this at the hearing.[417] He explains the reasons for this decision in the following terms:

> My brother is usually very diligent in the way he researches these things, and in those years – and he and I, we decided we should make London our base to grow the business internationally, because we thought that these obstacles that we were coming up against in the mining sector could be the case in other sectors, so when my brother asked me whether we should move the business to London, I agreed with him, because at the time, and as you can see in the documents, there were unfortunately some events taking place about our family….there was absurd news circulating about our family, and my brother was also very worried about this, and I just want to remind you of some of these press articles. There were suggestions that we were taking ten billion, seven billion dollars outside…and this had nothing to do with the truth…So instead of dealing with these false news, we wanted to move abroad and do our business, and in was a responsibility on our part: we wanted to grow the company and so it was a necessity for us to relocate to London.[418]

354. *Tribunal's assessment.* The Tribunal's assessment of the evidence in this period is that there was increasing risk in Türkiye for businesses that the Government perceived to be linked to Gülen. One of the Ipek brothers' key motivations for planning a move to London was concern to mitigate this risk. But the evidence up to this point does not on its own justify the conclusion that the expropriation of the business of Koza-Ipek Holding was reasonably foreseeable.

(ii) May 2015

355. There are two material sets of events in May 2015:

a. The commencement of the MASAK investigation into the Koza Group; and,

b. The incorporation of the Claimant and the proposed 10% SPA.

356. *MASAK Investigation*. On 18 May 2015, Koza Altin received a letter from MASAK requesting the production of documents in the context of an investigation under Law No 5549.[419]

357. The Respondent submits that this letter put the Koza Group on notice of a dispute with the Government. It says that Law No 5549 covers the financing of terrorism as well as

[417] Hearing T4/64/21–67/3; Hearing T4/72/5–73/17; Hearing T4/105/12–106/12 (questions from Arbitrator Lévy); Hearing T4/138/16–141/12 (questions from the President).

[418] Hearing T4/72/10–73/17.

[419] Letter from MASAK to Koza Altin entitled "Information Request", 13 May 2015, [R-49].

money laundering and that one of the powers conferred upon the court in a prosecution under the Law is the confiscation of assets. It refers to the fact that, prior to commencement of the investigation, a further article from Cem Kucuk in the pool media speculated that the assets of Bugün TV and newspaper could be seized under the terrorism financing legislation, with MASAK being the main authority in this field. The article was circulated amongst Koza staff.

358. Both Mr Yurttas (the Claimant's witness) and Mr Kumas (the Respondent's witness) confirmed at the hearing that MASAK's mandate extends to the financing of terrorism as well as money laundering. The MASAK letter was put to Akin Ipek at the hearing. He denied that this letter made it clear to him that his assets would be seized.

359. MASAK did not inform Koza Altin of the focus of its enquiry in May 2015. However, Mr Kumas accepted under cross-examination, and it is apparent from the MASAK 12 reports on the arbitration file which were written between March–September 2016, that the initial focus of the enquiry was into money laundering and included a number of the allegations that had earlier been made in the pool media. MASAK found no evidence of money-laundering as a result of its investigation in the period March–30 June 2016. It was only after Decree Laws Nos 667 and 668 had been promulgated in July 2016 (following the attempted coup), in which various Koza Group entities or related foundations were listed as affiliated to a terrorist group, that MASAK in turn concluded that there was a case to be referred to the public prosecutor that Koza had financed terrorism.

360. *Tribunal's assessment.* Notification of the commencement of the MASAK investigation, together with the prior press reports that were circulated within the Koza Group, would, in the Tribunal's view, have undoubtedly contributed to a higher sense that the assets of the Koza Group were at risk at the hands of the Republic. Yet, given that the initial focus of the enquiry, up to and including July 2016, was limited to allegations of money laundering that MASAK itself found to be groundless, the development does not on its own make it reasonably foreseeable that the assets of the Koza Group would be seized or other actions constituting a breach of the BIT would be taken. However, it would have accelerated the desire of the Ipek Family to take steps outside Türkiye to protect their business.

361. *Incorporation of the Claimant.* This is indeed what happened. Tekin Ipek made a business trip to London on 8 May 2015 and met Morgan Lewis, the London law firm.[420]

[420] Email from Morgan Lewis to Latham & Watkins entitled "Ipek - Strictly Private & Confidential", 23 December 2019, [C-266].

Akin Ipek was staying at the Park Tower Hotel Knightsbridge from 14 May–12 June 2015[421] and met Morgan Lewis on 19 May.[422]

362. Out of these initial meetings, Morgan Lewis developed its proposal for a transaction whereby the Ipek Family would transfer 10% of their shareholding in Koza-Ipek Holding to a newly incorporated British company: the Claimant in these proceedings (**the Proposed 10% SPA**).

363. In pursuance of this plan, the Claimant was incorporated on 26 May 2015.[423] Its Memorandum of Association lists each of the Ipek Family members, with shares in the Claimant in proportion to their respective shareholdings in Koza-Ipek Holding. The Memorandum was signed by each family member individually and presented to Companies House by Morgan Lewis.[424]

364. The proposal is summarised in a draft presentation document (the **Proposal Document**) dated 20 May 2015.[425] Successive drafts of the SPA itself are dated 27 May,[426] 28 May,[427] and 2 June 2015.[428] Integral to this proposal is the Shareholders' Agreement (**SHA**), a draft of which is dated 1 June 2015.[429]

365. *The Proposed 10% SPA*. The key features of this proposed transaction are as follows:

a. The parties to the transaction are the individual members of the Ipek Family identified as the 'Sellers' and Ipek Investment Ltd as the 'Purchaser'.

b. The transaction provides for the transfer of a proportion of the Ipek Family's shares in Koza-Ipek Holding (the 'Shares') to Ipek Investment Ltd, with Ipek Investment Ltd issuing shares in itself to the Ipek Family as consideration (the 'Consideration Shares') (cls 1.1, 2, and 3).

c. The Sellers' obligation on closing is to execute agreements, transfers, conveyances or other documents that may be required under local law to

[421] Park Tower Hotel Information Invoice No 464335, 16 January 2017, [HAI-103].

[422] Email from Morgan Lewis to Latham & Watkins entitled "Ipek - Strictly Private & Confidential", 23 December 2019, [C-266].

[423] IIL Certificate of Incorporation, 26 May 2015, [RfA-33].

[424] IIL Memorandum of Association, 26 May 2015, [HAI-48].

[425] Email from Mehmet Ali Erdogan to Okan Bayrak entitled "IPEK Investment Limited – Presentation.PPTX" with attachment, 23 May 2015, [R-50].

[426] Draft Share Purchase Agreement, 27 May 2015 Draft, 27 May 2015, [C-222].

[427] Draft Share Purchase Agreement, 28 May 2015 Draft, 28 May 2015, [C-223].

[428] Draft Share Purchase Agreement, 2 June 2015 Draft, 2 June 2015, [C-224].

[429] Email from Mehmet Ali Erdogan to İsmail Biçer entitled "IPEK shareholder agreement – KOZA IPEK HOLDINGS A.S." with attachment, 1 June 2015, [R-53].

implement the transfer of the Shares to the Purchaser, with title stated to be transferred through the local documents rather than by the SPA itself (cl 4.2).

d. The Purchaser's obligation, also on closing, is the issuance of Consideration Shares, and delivery of executed share certificates to the Sellers (cl 4.3).

e. The SPA, including non-contractual disputes or claims arising out of it, are to be governed by and construed in accordance with English law, with the parties irrevocably agreeing that the courts of England have jurisdiction to settle any disputes arising out of or in connection with the SPA (cl 6.10).

f. Although the relevant schedules listing the exact number of Shares and Consideration Shares issued by, and to, each member of the Ipek Family were not completed in any draft, the cover page for each iteration shows the transaction envisioned the transfer of 10% of Koza-Ipek Holding's shareholding to the Purchaser, as well as the 'Relevant Proportion' column of the Schedule in the second and third drafts.

366. Alterations are made with each iteration across the successive 10% Drafts. Notably:

a. The addition of a new clause clarifying that the closing obligations are triggered only where the Ipek Family sells the Koza-Ipek Holding shares (and Ipek Investment Ltd purchases them) simultaneously: 'The Purchaser shall not be obliged to purchase any of the Shares, and no Seller shall be obliged to sell his Shares, unless the sale and purchase of all of the Shares is completed simultaneously' (cl 2.2.3).

b. Clause 4.1 is tentatively amended: the provision that closing shall take place at such place as agreed between the parties to the transaction includes, in square brackets, closing at such place 'outside the United Kingdom', with a footnote explaining 'Note potential UK stamp duty risk if Closing occurs in the UK'.

c. The Sellers' obligation on closing is extended: as well as delivery to the Purchaser of the local transfer documents, the Sellers must also deliver to the Purchaser the share certificates in respect of the Shares in Koza-Ipek Holding sold to the Purchaser (cl 4.2.1).

367. The 10% Drafts also contain a series of provisions that Morgan Lewis notes would need to be reviewed by local (i.e., Turkish) counsel, relating to the transfer of the Koza-Ipek Holding shares from the Sellers to the Purchaser:

a. The definition of 'encumbrance' in cl 1.1. Clause 2.2.1 specifies the Sellers shall sell the Shares to the Purchaser free from any encumbrances.

b. The definition of 'Relevant Proportion' in cl 1.1 and cl 5.1.3, where each Seller warrants to the Purchaser that each Seller's Shares comprise the Relevant Proportion of the 'issued and allotted share capital of the Company, have been properly and validly issued and allotted and each are fully paid or credited as fully paid'.

c. The statement in cl 2.2.2 that the Sellers shall procure, on or prior to Closing, that any or all rights of pre-emption over the Shares are waived irrevocably by anyone entitled to such a right. Morgan Lewis notes 'we assume pre-emption rights will not apply here, however to be confirmed by local counsel'.

d. The Sellers' closing obligations to deliver the local transfer documents and share certificates (cl 4.2.1), and the clause stating the provisions of the SPA shall prevail to the extent a local transfer document is inconsistent with the SPA, and that in the case of such inconsistency the parties shall procure that the provisions of the local transfer document be adjusted to give effect to the SPA (cl 4.2.2).

368. *The Shareholder Agreement*. The 10% Drafts should be read in conjunction with the draft SHA, prepared by Morgan Lewis alongside the 10% Drafts. The Proposal Document, outlining the Proposed 10% SPA arrangement, notes that a key step is a 'Shareholder Agreement entered into between Ipek Investment Limited, Ipek Holdings A.S. and the Ipek Family entrenching Ipek Investment Limited's rights.'[430]

369. In his testimony before the Tribunal, Akin Ipek stated the SHA was an integral part of this proposed transaction: 'it wasn't just the 10%, by the way; there was also a shareholders' agreement which was involved in that deal, which also foresaw the movement of the headquarters to London.'[431] Mr Selman Turk states that, when he viewed and discussed one of the 10% Drafts with Mr Akin Ipek in late May or early June 2015, he was also shown a draft SHA that was bundled with the 10% Draft as a single file.[432]

370. Unlike the 10% Drafts, the arbitration record contains only one version of the draft SHA. The draft is dated 1 June 2015 and is attached to an email of the same date from Mehmet Ali Erdogan of Regnum Solicitors to Ismail Bicer of the Baycan Law Firm, where it is described as a 'first version' of the SHA with finalisation to take place in the following days after detailed discussion of the draft.

[430] Email from Mehmet Ali Erdogan to Okan Bayrak entitled "IPEK Investment Limited – Presentation.PPTX" with attachment, 23 May 2015, [R-50], attachment sl [4].

[431] Hearing T3/108/25–109/3.

[432] Hearing T6/115/19–116/1.

371. The key features of the SHA are that:

a. It was to be made on the same date as the SPA was entered into (cl 1.1 definition of 'Acquisition Agreement'), and at the venue of the SPA's completion (cl 3.1). It is a tripartite agreement between Koza-Ipek Holding, Ipek Investment Ltd, and Koza-Ipek Holding shareholders.

b. The SHA, by cl 7.1, would give Ipek Investment Ltd the power to appoint up to two non-executive Directors to the Board of Koza-Ipek Holding and the board of any Koza Group companies. By cl 7.3, the first of these Investor Directors (i.e., directors appointed in accordance with cl 7.1) were to be Akin Ipek and Tekin Ipek. By direction of either an Investor Director or Ipek Investment Ltd, the Claimant would be able to appoint and remove a person to the Koza-Ipek Holding Board to act as Chairman (cl 8).

c. By cl 4.1 of the SHA, Koza-Ipek Holding would undertake to Ipek Investment Ltd to comply with a series of positive (sch 3 pt 1) and negative (sch 3 pt 2) undertakings relating to the conduct of the business.

d. The positive undertakings include that Koza-Ipek Holding shall, and procure that each Koza Group company will: Procure that the expansion, development, or evolution of the business 'is effected only through [Koza-Ipek Holding] and its wholly-owned subsidiaries' (sch 3 cl 1.1), and comply with any direction given from time to time by either an Investor Director or Ipek Investment Ltd (sch 3 cl 1.7(c)).

e. The negative undertakings are that Koza-Ipek Holding will not (and shall procure that no Koza Group company will), in the absence of written consent by either Ipek Investment Ltd or an Investor Director: make changes to the company's accounting policies, business plans, or annual budgets (sch 3 cl 2.1); incur indebtedness beyond determined parameters (sch 3 cl 2.2); acquire or dispose of capital commitments other than in the ordinary course of business (sch 3 cl 2.3); enter into, vary, or terminate various agreements or arrangements (sch 3 cl 2.4); acquire or dispose of freehold or leasehold property (sch 3 cl 2.5); allot or issue shares or securities in any Koza Group company (sch 3 cl 2.7(a)).

f. As in the 10% Drafts, the SHA is governed by English law and disputes arising out of or in connection with the SHA are submitted to the exclusive jurisdiction of the courts of England and Wales (cl 22).

372. Morgan Lewis also advised in the Proposal Document as to the UK tax consequences of the proposed transaction, noting *inter alia* that:

> – No UK capital gains tax payable provided none of the shareholders are currently UK ta[x]payers
>
> – No UK stamp duty payable provided SPA executed outside UK
>
> …
>
> – Dividends paid by IPEK Investments Limited will be taxable in the UK if shareholders UK resident (whether or not UK domiciled)
>
> – UK inheritance tax of 40% of value of shares payable in the event of death of a shareholder.[433]

373. In view of the latter consideration, they proposed a future transfer of shares to an offshore Jersey trust so as to avoid inheritance tax.

374. The Proposal Document had also emphasised that: 'Consideration would need to be given to Turkish law and tax consequences of transfer'.[434] According to Akin Ipek, he had retained Mehmet Ali Erdogan (**Mehmet Ali**) of Regnum Solicitors in London to advise on the Turkish law aspects.[435]

375. Mehmet Ali sent the proposal document to Okan Bayrak, Investment Department Manager of Koza Gold on 25 May 2015 under cover of an email stating: 'Structure is attached; it is down to you to obtain the requisite opinions from [Türkiye]with regard to regulatory and tax aspects of potential share transfer in [Türkiye]. Let's discuss later.'[436]

376. He then sent the draft 10% SPA to Ismail Bicer, a partner of Baycan Law Firm in Türkiye on 28 May 2015 under cover of instructions that Mr Bicer prepare a power of attorney for Akin Ipek to authorise the applications before the trade registry and other authorities.[437]

377. Mr Bicer replied on an interim basis to Mehmet Ali on 29 May 2015, stating:

> We are still evaluating the "Proposed Transaction" stated in draft presentation prepared by Morgan Lewis and its effects as to the

[433] Email from Mehmet Ali Erdogan to Okan Bayrak entitled "IPEK Investment Limited – Presentation.PPTX" with attachment, 23 May 2015, [R-50] sl [3], [5].

[434] ibid, sl [3].

[435] Fourth Witness Statement of Mr Hamdi Akin Ipek, [22]—[28].

[436] Email from Mehmet Ali Erdogan to Okan Bayrak entitled "IPEK Investment Limited – Presentation.PPTX" with attachment, 23 May 2015, [R-50], p [1].

[437] Email from Mehmet Ali Erdogan to İsmail Biçer entitled "IPEK INVESTMENT LTD Share Purchase Agreement" with attachment, 28 May 2015, [R-51] (and see Mr Bicer's confirmation to King & Spalding: Email exchange between Ismail Bicer and King & Spalding entitled "HC-2016-002407 - Koza Limited and Hamdi Akin Ipek v Mustafa Akçil et al - Preservation of Documents", 5 February 2019 to 8 February 2019, [R-101]).

> Turkish Commercial Code, the Capital Market Law and relevant communiqués, the Competition Law and Direct Foreign Investments Law….
>
> …a deed of transfer and endorsement and delivery of such shares and interim certificates, as well as registration of share ledger upon approval of the Board of Directors should be realized for transfer.[438]

378. Mr Bicer proposed to prepare a memo on compliance with Turkish law by 4 June 2015.[439] He identified the need to obtain separate tax advice from Turkish tax advisor.

379. Mehmet Ali then sent him the first draft of the SHA on 1 June 2015 stating 'tomorrow we can go through this draft and discuss in detail. Finalisation of the draft agreement would take few days.'[440]

380. Mr Bicer delivered his legal opinion to (amongst others) Mehmet Ali and Mr Erdem (Secretary General of the Koza Altin Board) on 5 June 2015. His opinion included the advice that (a) Subject to the interpretation of the Capital Markets Board, there may be an obligation to make a tender offer; (b) 'the prior approval of the Board of Directors is required to be obtained in order to be able to transfer 10% privileged shares of the company to [the Claimant]'; and (c) an Information Form about the transaction would have to be delivered to the Directorate General of Incentive Implementation and Foreign Investment within one month.[441]

381. This is the last communication on file in respect to the Proposed 10% SPA. It will be necessary to return to Akin Ipek's explanation of his decision to dismiss Mehmet Ali and to reconfigure the transaction into a 100% SPA in the next section.

382. For present purposes, the following five key aspects of the Proposed 10% SPA should be noted:

a. The Proposed 10% SPA contemplated a closing in which all necessary steps to complete the transaction would take place simultaneously.

b. The transaction, if completed, would have enabled the Claimant, through its directors (Akin Ipek and Tekin Ipek) to control the key decisions to be made at the Board of Koza-Ipek Holding pursuant to the provisions of the SHA.

---

[438] Email exchange between Mehmet Ali Erdogan and İsmail Biçer entitled "IPEK INVESTMENT LTD Share Purchase Agreement" with attachment, 28 May 2015 to 1 June 2015, [R-52].

[439] ibid, [11].

[440] Email from Mehmet Ali Erdogan to İsmail Biçer entitled "IPEK shareholder agreement – KOZA IPEK HOLDINGS A.S." with attachment, 1 June 2015, [R-53], p [2].

[441] Email from İsmail Biçer to Okan Bayrak entitled "Revised – Additional Info Notes" with attachments, 10 June 2015, [R-56].

c. Nevertheless, only 10% of the shares would be owned by the Claimant, a British company. The remaining 90% of the shares would have remained owned by the Ipek Family members, all Turkish nationals.

d. The Turkish legal advisors (Regnum and Baycan) contemplated that approvals would be required in Türkiye and that the transfer would have to be registered in Türkiye.

e. The transaction presented significant potential UK tax disadvantages, especially if (i) the Ipek Family or some of them proposed to take up residence in England; and (ii) the transaction was executed in the UK.

383. Akin Ipek was asked about this last point. His evidence is that he did not plan to pay dividends from the Claimant as 'we usually withdraw as much money as necessary…[w]e put the dividends back into the companies'.[442] He added that he was later told orally by Tom Cartwright of Morgan Lewis that 'when a Turkish company is transferred in the UK there would be no stamp duty'.[443]

384. *Tribunal's assessment.* Taking these points together, it would have been apparent to any reasonable person in the position of Akin Ipek that the proposed 10% transaction would not present any real commercial advantages, nor would it mitigate regulatory risk in Türkiye, since it would have had to be notified to the Turkish authorities. Moreover, it might carry with it some real tax disadvantages under UK law, which at the least called for further formal tax advice. It would not protect the Ipek Family against a possible future dispute with the Republic, since 90% of the shareholding would remain with the Ipek Family members, *i.e.*, Turkish nationals.

(iii) Preparation of the SPA of 7 June 2015

385. It is at this point that the differences between the proposed 10% SPA and the 100% SPA of 7 June 2015, and the explanations for them, become of critical importance.

386. The 10% Drafts and the SPA dated on its face 7 June 2015 set out substantively different transactions.

387. In addition to the fact that the whole shareholding is now to be transferred, the main differences between the 10% transaction and the SPA dated 7 June 2015 include:

a. The SPA itself is a tripartite agreement between the members of the Ipek Family, Koza-Ipek Holding, and the Claimant, whereas the 10% Drafts only

[442] Hearing T4/162/16–19.

[443] Hearing T4/161/15–22.

had the Ipek Family and the Claimant as parties (with Koza-Ipek Holding as party only to the SHA).

b. The Closing, which across the 10% Drafts would take place at such place as may be agreed between the Parties, now takes place as such place as the Sellers may determine unilaterally (cl 4.1).

c. The language of the recitals and the Sellers' obligations on closing (cl 4.2.1) now refer specifically to Akin Ipek acting with authority on behalf of the other Sellers.

d. The Sellers' obligations, rather than referring generally to the execution of local transfer documents which then transfer title in the shares to the Purchaser, now consist of the endorsement of share certificates to Purchaser, with such endorsement stated to transfer title (cl 4.2.1). Failure of any Seller to sign and endorse the share certificates is stated to not affect the post-closing obligations of the Claimant and Koza-Ipek Holding (cl 4.2.2).

e. The obligations on the Claimant to issue Consideration Shares, previously an obligation on closing, is now a post-closing obligation which the Claimant must fulfil within three working days of written notification from the Sellers given at any time after closing (cl 5.1). If the Claimant fails to fulfil this obligation, the Ipek Family have the right to ask for compensation in the form of fair market value of the shares (cl 6.2.1).

f. Koza-Ipek Holding, now a party to the SPA, is under a post-closing obligation to approve the share transfer by Board resolution, register the Claimant as the new owner of the shares in the register, and convene a general assembly of the company in which its Board shall resign to be replaced by the Claimant's appointees. This obligation must also be fulfilled within three working days of written notification, given by the Claimant at any time after the issuance and delivery of the Consideration Shares to the Ipek Family by the Claimant (cl 5.2). If Koza-Ipek Holding fails to meet this obligation, the Claimant has the right to ask for compensation in the form of the fair market value of the shares (cl 6.2.2).

g. Two additional warranties are added: each member of the Ipek Family involved in the transaction warrants to the Claimant as to the validity of the share certificates (cl 7.1.4); and Koza-Ipek Holding warrants to the Claimant that it has the legal right and power to enter into the SPA (cl 7.3).

h. While not present in any of the 10% Draft exhibits, the Morgan Lewis logo and contact information appears on the cover page of the 7 June 2015 SPA.

388. The Tribunal received direct evidence from both Akin Ipek and Witness 1 as to the reasons for and process by which the 10% SPA was amended in the first week of June 2015 to form the 100% SPA.[444]

389. In summary, Mr Ipek maintains that he had sacked Mehmet Ali, because, contrary to his instructions, he had divulged details of the transactions to Koza staff in Türkiye and to Baycan, external lawyers to the Koza Group in Türkiye. He said:

> It was very frustrating for me that these people had become involved in the transaction since we had tried to keep the transaction confidential to avoid another campaign of black propaganda by the Turkish "pool media" about us supposedly running away from [Türkiye]….[445]

390. Instead, he instructed Witness 1, a Turkish lawyer 'who was in [Türkiye] to discuss the SPA and the transaction'.[446]

391. Mr Ipek says that he had always intended to transfer 100% of the shareholding to the Claimant, transferring 10% first and the remaining 90% within a few months. He had initially thought that the pool media 'would be less likely to report it and vilify us' if they learned of a 10% transaction.[447]

392. Witness 1 deposes that it was on his/her advice that the transaction was amended to a 100% transaction (omitting the SHA) and that he/she made the necessary changes in 'a couple of hours'.[448] He/She maintains that 'my amendments did not alter the basic obligations contained in the agreement'.[449] He/She maintains that he/she added cl 6 'to protect the purchaser in the event that the company, which is often controlled by the seller, does not perform its post-closing obligations'.[450] He/She says that he/she did not want his/her name on the document because, in view of 'the tension between the Ipek Family, Ipek Media Group and the government…I didn't want to appear as the lawyer who designed this'.[451]

[444] Fourth Witness Statement of Mr Hamdi Akin Ipek, [28]—[31]; Hearing T3/95–106; Second Witness Statement of Witness 1, [7]—[23]; Hearing T5/54–90.

[445] Fourth Witness Statement of Mr Hamdi Akin Ipek, [28].

[446] ibid, [29].

[447] ibid, [23].

[448] Second Witness Statement of Witness 1, [10].

[449] idem.

[450] ibid, [18].

[451] Hearing T5/100/5–8.

393. *Tribunal's assessment.* The Tribunal has a number of serious reservations about the process by which the SPA was apparently concluded on 7 June 2015 and the form that it took.

394. Mr Ipek's concerns about the manner in which Mehmet Ali had sought advice within the Koza Group are quite understandable. These concerns do not explain why he did not continue to consult Morgan Lewis about the transaction. They had raised significant issues about the UK tax consequences of even a 10% transfer of the shareholding and had also recommended that Turkish legal and tax advice be taken, yet no further written advice was taken and no explanation is offered for Mr Ipek's decision not to proceed further with Morgan Lewis at that stage.

395. The SPA was executed entirely by Mr Ipek on behalf of the Ipek Family, the Claimant and Koza-Ipek Holding, in contrast to the Claimant's Memorandum, which each member of the Ipek Family had signed personally.

396. The Turkish lawyers (both Baycan and Witness 1) had advised that approvals and public disclosure would be required for the transaction in Türkiye. Clause 5.2 itself required after Closing a Board resolution to approve the transfer and registration on the share ledger. Yet the SPA deferred the Closing itself to 31 August 2015 and converted both registration of the shares and the issue of the Consideration Shares into post-completion obligations. If Mr Ipek did intend to complete the transaction, it seems beyond doubt that various approvals and disclosure in Türkiye would be required. The adverse reaction (and potential for governmental intervention) that concerned him could be deferred but not avoided. The SPA as executed merely left all of these questions for another day.

397. Clause 6.2.2 imposed upon Koza-Ipek Holding an obligation to compensate the Ipek Family for the fair market value of the shares in the event that the post-completion actions were not taken. Witness 1 deposes that he/she included this 'common clause' in order to protect the purchaser, since the company 'is often controlled by the seller'. This explanation makes no commercial sense in the context of the transfer of the ownership structure within a family group that own and will continue to own 100% of the company, albeit now through their shares in the Claimant. However, it makes complete sense if the true purpose of the SPA was to protect the Ipek Family interest in the event that Koza-Ipek Holding were expropriated. It would give rise to the very cause of action that the Claimant now asserts based on a legal claim to "performance under [a] contract" under Art 1(a)(iii) of the BIT.[452]

398. These features of the SPA and the circumstances of its conclusion strongly suggest that the true purpose of the SPA was to serve in effect as an insurance policy in the event

[452] Rejoinder, [296]; Claimant's Closing Skeleton, [4].

that, in light of the concerns that Mr Ipek already had, the Koza Group lost its ability to operate in Türkiye and it was necessary instead to pursue a claim against the Republic.

c. 10 June–31 August 2015

399. In the third period, up to and including Akin Ipek's endorsement of the share certificates on 31 August 2015, the key events are the following: Mr Ipek returned to Türkiye on 12 August 2015. Koza-Ipek Holding held its AGM on 25 June 2015, with the Ipek Family members (and not the Claimant) participating as 'shareholders' and without mention of the 7 June 2015 transaction.[453]

400. The Chief Public Prosecutor Anti-Constitutional Crimes Investigation Bureau requested detailed financial information from Koza Altin on 15 July 2015.[454]

401. On 29 August 2015, Koza Group's *Bugün* newspaper reported on Fuat Avni's allegations made on Twitter that the assets of media and capital groups, such as the Ipek Group, 'will be seized'.[455] On the same day, Mr Ipek attended an engagement ceremony with 1000 guests for his son in Ankara.[456]

402. On 30 August 2015, Mr Ipek flew to London on a Koza private jet and stayed at the Park Tower Hotel.[457]

403. On 31 August 2015, Akin Ipek in London issued a public statement, in which he states:

> Certain claims and gossips relating to some press outlets and capital groups, including our group, appeared on the social media.
>
> I tried not to pay attention but it does not end, [and] my phone keeps ringing.
>
> Here's our situation:
>
> Our group has 27 companies carrying out business activities in different sectors. 30 of our companies are being examined. For

[453] Participant List for the General Assembly Meeting of 25 June 2015 [R-2]; Minutes of the 2014 Ordinary General assembly Meeting of Koza-Ipek holding A.Ş., 25 June 2015, [R-102].

[454] Letter from Office of Chief Public Prosecutor to Koza Altin, No 2014/119687 Investigation, 15 July 2015, [R-57].

[455] "Shocking allegations from parallel Fuat Avni: Operation to Media and Capital", *Bugün*, 29 August 2015, [R-104].

[456] Photographs of Mr Akin Ipek and family taken at his son's engagement party, 30 August 2015, [HAI-50]; Second Witness Statement of Mr Hamdi Akin Ipek, [48].

[457] Minute prepared by the Financial Branch Officer regarding documents seized from Koza Group, 19 May 2017, [R-105]; Park Tower Hotel Information Invoice No 472484, 16 January 2017, [HAI-104].

> approximately two years.…We are being examined and inspected by a total of eleven institutions.[458]

404. On the same day, he signed the Consent Document[459] and endorsed the Koza-Ipek Holding share certificates of the Ipek Family in favour of the Claimant.

405. Meanwhile, also on 31 August 2015, in Ankara, the 7th Criminal Peace Court issued a search warrant for Akin Ipek's house, foundations and company headquarters on the basis of the Chief Public Prosecutor's investigation into Mr Ipek 'for the crime of being a leader in FETÖ (Fethullah Terror Organisation)'.[460] The Court also issued a warrant for the arrest of Akin Ipek.[461]

406. *Tribunal's assessment.* The Tribunal cannot regard Akin Ipek's endorsement of the share certificates in London on 31 August 2015 as being simply the closing of a commercial transaction to restructure the Ipek Family's shareholdings in Koza-Ipek Holding under the umbrella of the Claimant, as the latter alleges.

407. Although the date of 31 August 2015 was the date that had been provided for Closing in the SPA, there was no obligation to close in London. Mr Ipek explains that he deemed it necessary to fly to London with the share certificates (which he had deposited in his safe in Türkiye) in order to endorse them in order to avoid paying stamp duty in Türkiye and to deliver the certificates to the Claimant in London.[462] But Morgan Lewis had advised him that endorsement of the share certificates in London would engage UK stamp duty. His only answer to this, when questioned about it at the hearing, was that he had received oral advice from Morgan Lewis to the contrary.[463]

408. On 29 August 2015, a Koza Group newspaper, *Bugün*, had reported the tweeted allegation that the assets of the Ipek Group would be seized. Mr Ipek maintained that such tweets 'should not be taken seriously' and that 'it [was] not surprising to me that Bugün newspaper would do so, however, because such topics were popularly and sensationally discussed in Turkish society.'[464]

---

[458] "Last minute disclosure of Akın İpek: Our thirty companies have been subject to investigation for last 2 years", Gundem T24 press news, 31 August 2015, [R-4].

[459] Written Consent of Hamdi Akin Ipek permitting the transfer of shares in Koza-Ipek Holding, 31 August 2015, [HAI-52].

[460] Search Warrant against Koza Group, 31 August 2015, [RfA-5].

[461] Second Witness Statement of Mr Hamdi Akin Ipek, [50].

[462] Fourth Witness Statement of Mr Hamdi Akin Ipek, [33].

[463] Hearing T4/161/15–22.

[464] Second Witness Statement of Mr Hamdi Akin Ipek, [74].

409. However, Akin Ipek's own press statement of 31 August 2015 indicates that he was aware of these allegations, that they related to the Koza Group, and that he had reached the view that they were sufficiently serious to merit a formal response.

410. Mr Ipek was cross-examined about his press statement at the Hearing. He confirmed that:

> I gave this press statement following a tweet by Fuat Avni. Fuat Avni, I think on 28th August—…—sent a tweet from his Twitter account and he said the 50% of the Turkish economy would be [confiscated/seized], and that there were steps being taken against these companies and their assets. So I was aware of these tweets. Because we had publicly traded companies, of course, I responded to this tweet.[465]

411. Questioned further on this by the President, Mr Ipek confirmed that, while the detail of the number of Koza companies referred to in the statement was not correct, 'this statement is correct'.[466]

412. Mr Ipek endorsed the share certificates on the same day as the Turkish court issued a search warrant for the search of his home and offices. The removal of the share certificates from his offices in Türkiye ensured that they could not be seized there and could instead be endorsed by him in London.

413. Despite the endorsement, Mr Ipek took no steps to complete the transaction by:

a. Issuing the Consideration Shares to the Ipek Family, which was not done until 17 October 2016 (over a year later);[467] and

b. Requesting Board approval and registration of the shares in Türkiye, which was not sought until 23 December 2016.[468] Instead Mr Ipek relied upon the Consent Document prepared by Witness 1 on 31 August 2015.

414. In his written witness statements, Akin Ipek denies that he had foreseen the search warrant, which was issued on 31 August 2015 and executed on 1 September 2015. He says that 'There was no forewarning of this raid, which came as a complete shock to all concerned.'[469] He adds that he would not have left his family in Türkiye had he known what was to happen, nor would he have left other assets in Türkiye in reach of the

[465] Hearing T3/75/25–76/10.

[466] Hearing T3/77/9.

[467] Ipek Investment Limited: Form SH01 - Return of Allotment of Shares, 17 October 2016, [R-68]; Request, [103].

[468] Letter from IIL to Koza-Ipek Holdings A.S., 23 December 2016, [RfA-14].

[469] Second Witness Statement of Mr Hamdi Akin Ipek, [50].

Erdoğan regime.[470] He says that: 'We did not think that the Koza Group would be seized, and any attempt to do so would have been unlawful and unconstitutional. In fact, even after the raids, Tekin continued with his business trips to further expand the Koza Group.'[471]

415. Akin Ipek was questioned at the Hearing about the significance of the raids for the Closing of the SPA:

> Q: Where was your press release on 31st August 2015 announcing the fact that you had transferred 100% of the shares in Koza-Ipek Holding Limited to IIL?
>
> A: How can that be? We woke up to a different world on the 1st. There was no way of announcing or issuing a press release at that point.[472]

416. He continued to deny any expectation of the raid, but accepted that he could not return to Türkiye on 1 September 2015, as there was an arrest warrant in his name effective immediately.[473]

417. Returning to the effect of the raid on the Closing of the SPA transaction, Akin Ipek deposed that he had spoken about this in September 2015 to Mr Cartwright of Morgan Lewis, informing him that:

> Well, it was obvious that we couldn't close because there had been a raid on 1st September, the police were at the head office, it was obvious that we couldn't do closing, and they said there were things to be done on the UK side.
>
> …
>
> I spoke with Tom after the raid happened on 1st September 2015, it was a mess already. And he—I said, "once the policeman leaves our head office and things get calm down, we'll do the closing. I said "we'll complete the part on the UK side", apologies, what I mean, what I refer to as "closing" is to take care of the procedures that we had to complete on the UK side.[474]

418. Asked why he did not issue the Consideration Shares until October 2016, Akin Ipek deposed:

[470] ibid, [68]—[70].

[471] Fourth Witness Statement of Mr Hamdi Akin Ipek, [43].

[472] Hearing T3/112/16–21.

[473] Hearing T3/116/4–23.

[474] Hearing T3/131/2–6; Hearing T3/131/13–20.

> Because there was a raid, of course, on 1st September, and then a new world had started for us. And since we were expecting for the police to leave, just then the trustees were appointed and they said this would be temporary. But after that, of course, Tekin was arrested, and then came the coup.[475]

419. Tekin Ipek gave testimony as to the nature and effect of the raid on 1 September 2015:

> There were 400–500 police and there were 10–15 policemen in every room, there were documents being seized…So it was a chaotic situation. Everyone, the staff were asked to leave…
>
> …
>
> From the date the raid took place until the appointment of the trustees, the police never left the company…[476]

420. Witness 1 added that the reason the SPA transaction was not consummated was because there was a raid the very next day and 'when the raid took place, the whole agenda changed.'[477]

(3) The Tribunal's conclusion on reasonable foreseeability

421. In the Tribunal's view, Akin Ipek's actions on 31 August 2015 are consistent with his desire to use the SPA, as restructured on 7 June 2015, in order to secure a claim against the Republic in the event that the assets of Koza-Ipek Holding were seized. Such an outcome was reasonably foreseeable on 31 August 2015. Indeed Mr Ipek's actions on that date indicate to the Tribunal that (despite his denials) this outcome was foreseen by him. The Tribunal can find no other credible explanation for his removal of the share certificates from Türkiye to London and their endorsement there on 31 August 2015. He took this step against the background of his knowledge of the allegation (reported in a Koza Group newspaper) that the Koza Altin assets were about to be seized. Mr Ipek regarded this allegation as sufficiently serious as to require the issue of a press statement in which he accepted that his companies were under investigation, but did not refer to the transfer of the family's shareholding to the Claimant.

422. This was the very day on which the Republic commenced the actions on which the Claimant itself relies as constituting breaches of the BIT. The Public Prosecutor's allegations in the search warrant and the raid the following day form the basis of the first grounds of complaint in the Request for Arbitration.[478] They are pleaded as

[475] Hearing T3/132/15–20.

[476] Hearing T4/120/18–20; Hearing T4/121/7–9 and Hearing T4/121/18–19.

[477] Hearing T5/92/12.

[478] Request [8(a), (b)], [41].

'deliberate wrongful acts against the Claimant's Investment in breach of the fundamental obligations [Türkiye]owed to the Claimant under the BIT'.[479]

423. The Claimant pleads that: '*These allegations of criminal conduct were fabricated to facilitate the seizure of the Koza Group Companies'*[480] and states that, following the search, on 26 October 2015, Peace Criminal Judge Süer appointed interim trustees to 22 companies in the Koza Group, pending the conclusion of the criminal investigation.[481] The Request adds that 'the Respondent has committed measures (*from 2015 onwards*) having the effect of expropriation.'[482]

424. The conclusion that the Tribunal draws, in the light of the totality of the events up to and including 31 August 2015, is that at the latest on that date, being the earliest date on which the Claimant could be said to have made an investment in the territory of the Respondent, the existence of a dispute between the Parties concerning that investment was reasonably foreseeable, indeed foreseen.

425. In reaching this conclusion, the Tribunal does not neglect the Claimant's case that the dispute only crystallised on 1 September 2016, with the entry into force of Decree Law No 674 (enacted on 15 August 2016),[483] which provided for the permanent appointment of the SDIF to replace the trustees originally appointed to the Koza Group companies' boards pursuant to art 133 of the Turkish Criminal Procedure Code on 26 October 2015.[484] The Claimant argues it 'was at that point that a State entity was installed in place of the shareholders of the Koza Group companies and the deprivation of the Claimant's investment became permanent'.[485]

426. The Respondent submits a much earlier date for crystallisation, of either 13 May 2015 or July 2015.[486] For the reasons already given above, the Tribunal rejects the 13 May 2015 date and treats the events of July 2015 as part of the evidence on reasonable foreseeability as at 31 August 2015.

427. However, as already discussed,[487] the question of law for the Tribunal is not when the dispute between the Parties had crystallised, but when it was reasonably foreseeable, such that an attempt to seize an ICSID Tribunal on the basis of claim advanced by a

[479] ibid, [8].

[480] ibid [42].

[481] ibid [44]; Judgment of Yunus Süer at the Ankara 5th Civil Court of First Instance, 26 October 2015, [RfA-6].

[482] Request, [113] (emphasis added).

[483] Decree Law No.674 on certain measures to be taken under the state of emergency, 15 August 2016, [C-234].

[484] Judgment of Yunus Süer at the Ankara 5th Civil Court of First Instance, 26 October 2015, [RfA-6].

[485] Rejoinder, [510]; see also Defence, [153] and [160].

[486] Reply, [8], citing Letter from MASAK to Koza Altin entitled "Information Request", 13 May 2015, [R-49]. See also Reply, [344]; Memorial, [222] and [225]; and Hearing T1/41/13–21, citing letter from Chief Public Prosecutor to Koza Altin, 15 July 2015, [R-57]. See also Reply, [143].

[487] Above [319]—[325].

claimant whose legal interest had only been interposed as a result of a restructuring of the corporate group at that point would be inadmissible as an abuse of process.

428. Although the permanent appointment of the SDIF over the Koza Group assets took place over a year after the raid on 1 September 2015, the Tribunal concludes that the events form a continuum, such that the seizure of the assets was reasonably foreseeable on 31 August 2015. This is indeed what the Claimant pleads in its Request for Arbitration. All of the witnesses who gave evidence as to the raid on 1 September 2015, including Akin Ipek himself, were in no doubt as to its significance. It was 'a different world' in which the agents of the Republic had effectively taken control of the Group. Its employees had to leave; the police remained in place; and it was impossible for Mr Ipek to continue with his plans for the restructuring. The precise sequence of State measures that would follow may not have been known, but the effect of the measures already ordered on 31 August 2015 and taken the following day was clear enough. This is indeed the Claimant's own case, when it pleads that the allegations of criminal conduct made in the search warrant of 31 August 2015 'were fabricated to facilitate the seizure of the Koza Group Companies.'

429. The necessary consequence of this finding is that the Claimant's claim before this Tribunal is inadmissible: it being an abuse of the process of international arbitration under the BIT and the ICSID Convention for the members of the Ipek Family, all Turkish nationals, to seek to restructure their shareholding in Koza-Ipek Holding under a British company, and thereby to obtain the protections of the UK–Türkiye BIT at a time when the present dispute was reasonably foreseeable.

D. OTHER OBJECTIONS

430. In light of its findings above, the Tribunal decides that it is unnecessary for it to determine the Respondent's first objection—that the SPA is a sham—or second objection—as to the effect of Turkish law on the purported transfer.

431. By its Rejoinder, the Claimant also seeks a declaration that the Respondent has violated Article 47 of the ICSID Convention by its failure to comply with the Tribunal's provisional measures orders.[488] Having determined that the Claimant's claim under the BIT is inadmissible, the Tribunal has no separate jurisdiction to determine this claim for relief.

VII. COSTS

432. Article 61(2) of the ICSID Convention provides:

[488] Rejoinder, [568](c).

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

433. ICSID Arbitration Rule 28(2) adds that 'each party shall submit to the Tribunal a statement of costs *reasonably incurred* or borne by it in the proceeding.'[489]

434. At the conclusion of the Hearing, the President directed the Parties to submit statements of costs, together with any submissions that they wished to advance thereon. He required these statements divide the costs between the **Initial Phase**, which had been primarily concerned with the application for provisional measures and related matters, and those costs strictly referable to the jurisdictional objection: the **Preliminary Objections Phase**.[490]

435. In accordance with these directions, both Parties submitted written observations and schedules of costs on 1 November 2021.

436. On 2 November 2021, the Claimant wrote to the Tribunal asking that it strike certain portions of the Respondent's submissions on the ground that they sought to reargue matters pertaining to the merits of the jurisdictional objections.

437. On 9 November 2021, the Respondent replied, arguing that the impugned portions of its submissions did not advance any new evidence or arguments on the question of jurisdiction. Rather they were directed at explaining why, in its view, the Claimant's conduct had needlessly increased the Respondent's fees and expenses. It submitted that, if the Tribunal were minded to strike the paragraphs from its costs submissions, it should do the same in relation to the like portions of the Claimant's costs submissions.

438. On 10 November 2021, the Tribunal informed the Parties that it had taken note of both Parties' communications.

439. The Tribunal has now considered both Parties' Costs Submissions. It finds that neither Party had exceeded the permissible scope of such submissions. So it declines to strike out any portion of either Costs Submission. The Tribunal will consider the weight to be attached to any particular point made as to the conduct of the proceedings in light of its own appreciation of the process to date.

[489] Emphasis added.

[490] Hearing T9/161/16–162/2.

A. THE CLAIMANT'S COST SUBMISSIONS

440. In total the Claimant has submitted claims for legal and other costs (excluding advances made to ICSID), totalling £9,556,915.40 (or US$11,668,445.83 at present exchange rates)[491].

441. In its submission on costs, the Claimant argues that, in the event that the Tribunal were to decide that it does not have jurisdiction, the Respondent should in any event bear the arbitration costs incurred by the Claimant up to 5 September 2019, totalling £5,494,206.79, on the basis that the majority of time spent in this first period was devoted to the Claimant's applications for provisional measures and for witness anonymity and the Respondent's application for security for costs, on each of which the Claimant substantially prevailed.

442. It further submits that, in the event that it does not prevail, there ought to be no costs order against the Claimant for the period after 5 September 2019 on the grounds that: the Respondent failed to comply with the Tribunal's provisional measures order; pressured the Claimant's witnesses; refused to comply with the Tribunal's order as to witness anonymity; and otherwise failed to participate in the proceedings in good faith.

B. THE RESPONDENT'S COST SUBMISSIONS

443. In its submission on costs, the Respondent submits that the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totalling US$12,207,786.99 (excluding advances made to ICSID). Of that, the Respondent apportions US$3,565,024.29 to the initial phase.

444. Putting to one side the Respondent's contributions to advances in respect of the fees and expenses of the Tribunal and the Centre (which amount to US$775,000 for each Party), the total claimed by the Respondent in respect of the Preliminary Objections phase amounts to US$8,642,762.70.

445. The Respondent argues that a finding in its favour on abuse of process justifies an award of costs. It further submits that the Claimant failed to produce witnesses and documents and otherwise refused to engage in the proceedings in a manner that was conducive to proper determination of the issues.

C. THE TRIBUNAL'S DECISION ON COSTS

446. Article 61(2) of the ICSID Convention, read in conjunction with ICSID Arbitration Rule 28(2), gives the Tribunal discretion to allocate the costs reasonably incurred in the conduct of the arbitration, including attorneys' fees and other costs, together with the

[491] https://www.xe.com/currencyconverter/ (visited on 7 December 2022).

fees and expenses of the Tribunal and the charges of the Centre, between the Parties as it deems appropriate.

447. While, as a general rule, 'a finding of abuse of process justifies an award of costs against the unsuccessful party,'[492] at the same time, the Tribunal, in the exercise of its discretion, must take account of all of the facts and circumstances of the case, including the conduct of the Parties in the course of the arbitration. It must also determine whether, in respect of any allowed head of costs, the sum claimed is 'reasonable'.

448. In the present case, the Tribunal takes into account in particular that the Initial Phase itself involved considerable time and expense. In that Phase, while it did not prevail on every point, the Claimant did substantially succeed, both in its own applications for provisional measures and in resisting the Respondent's application for security for costs.

449. Furthermore, during the course of the preparations for the Preliminary Objections Phase, there were numerous contested applications for directions, which increased the Parties' costs. The Tribunal ruled in PO No 20 that the costs occasioned by that application were to be borne by the Respondent in any event.

450. The manner in which the Parties have chosen to present their costs breakdowns precludes exact computation of the costs incurred in respect of each Phase: the Claimant has applied a cut-off date of 5 September 2019 (which includes its costs incurred in filing its Defence on Preliminary Objections on that date), while the Respondent apportions a much lesser sum to the Initial Phase.

451. In circumstances in which each Party substantially prevailed respectively on the Initial Phase and the Preliminary Objections Phase, the Tribunal has decided that the most just and equitable solution is for each Party to bear its own costs and expenses of the proceeding.

D. THE FEES AND EXPENSES OF THE TRIBUNAL AND THE CENTRE

452. The fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Campbell McLachlan	499,480.32
The Hon. L. Yves Fortier	267,507.73
Laurent Lévy	264,403.45

[492] *Renée Rose Levy v Peru*, ICSID Case No ARB/11/17, Award, 9 January 2015, [RL-5] [201]; *Transglobal Green Energy LLC v Panama*, ICSID Case No ARB/13/28, Award, 2 June 2016, [RL-7] [126].

ICSID's administrative fees	210,000.00
Direct expenses	301,404.39
Total	**1,542,795.89**

453. The above costs have been paid out of the advances made by the Parties in equal parts.[493] As a result, each Party's share of the costs of arbitration amounts to USD 771,397.95.

454. The Tribunal considers that, as a result of the considerations that it has taken into account above in relation to the apportionment of the Parties' costs, the proper order in relation to the fees and expenses of the Tribunal and the charges of the Centre for the proceedings is that each Party shall bear such costs in equal shares.

455. The Tribunal also takes into account the more general point that the present Award is in no sense a vindication of the Respondent's position on the merits. Rather, the decision turns solely on the proper interpretation of the limited basis for jurisdiction afforded to the Tribunal under the ICSID Convention and the BIT. The Respondent's jurisdictional objections are, as the English Court of Appeal perforce accepted,[494] a matter that the present Tribunal has competence to determine. Ensuring a fair trial of those objections posed substantial evidentiary challenges, which cannot be laid wholly at the door of either Party.

VIII. AWARD

456. For the reasons set forth above, the Tribunal decides that:

(1) The claims raised in this arbitration are inadmissible; as a result they are not within the jurisdiction of the Centre and the competence of this Tribunal;

(2) Pursuant to its discretion under Article 61 of the ICSID Convention:

a. Each Party shall bear in equal shares the fees and expenses of the Tribunal and the charges of the Centre for the proceedings; and

[493] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

[494] *Koza Ltd and Hamdi Akin Ipek v Akcil and Others*, EWCA Civ 891, 2019, [RL-114] [39].

b. Each Party shall bear its own expenses incurred in connection with the proceedings.

(3) The provisional measures recommended by the Tribunal in its Procedural Order No 5 dated 19 September 2019 pending the outcome of the Respondent's Preliminary Objections now cease to have effect.

The Hon. L. Yves Fortier PC, CC, OQ, KC
Arbitrator

Date: 6 December 2022

Dr Laurent Lévy
Arbitrator

Date:

Professor Campbell McLachlan KC
President of the Tribunal

Date:

The Hon. L. Yves Fortier PC, CC, OQ, KC
Arbitrator

Date:

Dr Laurent Lévy
Arbitrator

Date: December 7, 2022

Professor Campbell McLachlan KC
President of the Tribunal

Date:

The Hon. L. Yves Fortier PC, CC, OQ, KC
Arbitrator

Date:

Dr Laurent Lévy
Arbitrator

Date:

C. A. McLachlan

Professor Campbell McLachlan KC
President of the Tribunal

Date: December 6, 2022