



US court wants clarity on Turkey's discovery bid for ICSID case

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A New Jersey court has ordered Turkey to provide further details about its discovery request to support its defence of an ICSID claim over the alleged expropriation of an anti-government newspaper – including whether the tribunal is receptive to admitting the evidence.

In a [letter order](#) on 16 March, the US District Court for the District of New Jersey told Turkey to provide a declaration within 14 days stating that the tribunal is receptive to receiving documents and testimony from Hamit Çiçek, a Turkish former shareholder in the CMD media group.

The state must also detail the safeguards, if any, it proposes to ensure the documents are used solely in the ICSID arbitration – and not in any pending criminal case against Çiçek.

Turkey is seeking the discovery to support its defence of a pending [ICSID claim](#) filed by Belgium's Cascade Investments in 2018, under an investment treaty between Belgium, Luxembourg and Turkey.

An ICSID tribunal chaired by **Jean Kalicki** of Arbitration Chambers in New York is hearing the case, sitting alongside the Netherlands' [Albert Jan van den Berg](#) of Hanotiau & van den Berg in Brussels and Three Crowns partner **Jan Paulsson**.

In that claim, Cascade alleges that a crackdown on press freedom by Turkish President Recep Tayyip Erdoğan led to its investment in Zaman – once one of Turkey's largest newspapers – being unlawfully expropriated by the state.

Cascade had acquired its investments in Zaman from CMD, after Çiçek sold his 90% holding shareholding in the Turkish media group to Cascade for €1.3 million in 2015.

According to documents in the New Jersey court, Turkey says that Cascade knew of CMD's dispute with the state and deliberately acquired its investments in Zaman to bring a treaty claim and circumvent the jurisdiction of the Turkish courts. The ICSID claim should be dismissed as Cascade is not a good-faith investor under the treaty, it argues.

In the arbitration, Cascade objected to producing documents requested by Turkey regarding its purchase of CMD from Çiçek. The Belgian company says it did not have custody of the documents – which were held by Çiçek.

The New Jersey court granted Turkey ex parte permission in December 2019 to issue subpoenas to Çiçek regarding his purchase and sale of CMD, under section 1782 of the United States Code.

Çiçek filed a motion to vacate submitting that the state failed to disclose his prosecution in Turkey over "politically motivated allegations that he is a terrorist" based on Zaman's links to Fethullah Gülen, an exiled former ally-turned political rival of Erdoğan. The president accused Gülen of supporting a swiftly suppressed military coup in Turkey in July 2016 – an accusation Gülen denies.

According to Çiçek, the Turkish proceedings should preclude statutory relief in the US which, if granted, would also violate his rights under the Turkish Constitution and the laws of New Jersey.

In his latest letter order, **Magistrate Judge Steven Mannion** found the court did have authority to assist foreign judicial proceedings, following the US Supreme Court's 2004 decision in *Intel*.

Although Turkey said it had informed the ICSID tribunal about its US discovery request, it had not told the court about the tribunal's response, Judge Mannion said.

Turkey had previously told the court that CMD and Cascade both possess copies of the records it seeks from Çiçek, but has not made clear whether it has completed its search of CMD and located any of the requested records there.

Judge Mannion ordered Turkey to make clear the extent of its prior efforts to obtain discovery from CMD and Cascade; and ordered Çiçek to declare whether the documents were in the companies' possession.

Turkey had also not made clear whether it was amenable to a protective order or other safeguard to limit production of the documents to the ICSID arbitration – and not in any foreign criminal proceeding in which Çiçek has been charged.

Judge Mannion ordered the state to propose safeguards to ensure any evidence be "used exclusively" in the ICSID proceeding.

Çiçek, who is resident in New Jersey, has instructed local firm Weiner in the court proceedings while King & Spalding in New York act for Turkey.

King & Spalding also act in the arbitration while Hogan Lovells represents Cascade in the ICSID proceedings. The firms were contacted for comment.

Ronald Berutti, partner at Weiner, says: "We believe that Turkey's efforts are ultimately an attempt to compel Mr. Çiçek to provide evidence against himself in order to attempt to prosecute him for politically-motivated criminal charges being pursued

against him in Turkey. Our team will continue our zealous and aggressive representation of Mr. Çiçek, as he seeks to vindicate his rights.”

In the ICSID arbitration, Turkey filed its reply on jurisdiction and a rejoinder on the merits earlier this month.

Known for its criticism of the government, Zaman was seized by the Turkish government in 2016 hours after a court ruled that it should enter state control.

Cascade alleges that the government's seizure of the paper three months before a failed coup amounts to unlawful expropriation of its investment and a breach of the fair and equitable treatment provisions in the BIT.

Turkey is also facing a [US\\$5 billion ICSID claim](#) brought by Hamdi Akin Ipek and two family members over the alleged seizure by Erdoğan’s regime of 18 companies of Ipek’s Koza media and mining group.

In the US District Court for the District of New Jersey

Bench

- **Judge Esther Salas**
- **Magistrate Judge Steven Mannion**

Counsel to Turkey

- King & Spalding

Partners **David Kiefer**, **James Berger** and **Viren Mascarenhas** in New York

Counsel to Hamit Çiçek

- Weiner

Partner **Ronald Berutti** in New Jersey

Cascade Investments NV v Republic of Turkey (ICSID Case No. ARB/18/4)

Tribunal

- **Jean Kalicki** (US) (chair) (appointed by co-arbitrators)
- **Albert Jan van den Berg** (the Netherlands) (appointed by Cascade)
- **Jan Paulsson** (France, Sweden) (appointed by Turkey)

Counsel to Cascade

- Hogan Lovells

Partner **Markus Burgstaller** and associate **Scott Macpherson** in London.

Counsel to Turkey

- King & Spalding in London
- Lexist in Istanbul