INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Huawei Technologies Co., Ltd.
Claimant

v.

Kingdom of Sweden
Respondent

(ICSID Case No. ARB/22/2)

PROCEDURAL ORDER No. 3

Members of the Tribunal
Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Prof. Jane Willems, Arbitrator
Prof. Zachary Douglas KC, Arbitrator

Assistant to the Tribunal
Mr. Lukas Montoya

Secretary of the Tribunal
Ms. Martina Polasek

28 April 2023

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I. PROCEDURAL BACKGROUND

1. On 27 July 2022, the Tribunal issued Procedural Order No. 1 ("PO1") along with the Procedural Calendar.

2. On 13 February 2023, on the date provided in the Procedural Calendar, the Respondent filed its Notice of Intended Objections and Request for Bifurcation (the "Request").

3. On 27 February 2023, the Claimant filed its Response to the Request (the "Response").

4. On 13 March 2023, having considered the Parties' positions, the Tribunal denied the Request and informed the Parties that it would provide the reasons for its decision in due course, as anticipated in the Procedural Calendar. It also noted that the proceedings would continue under Scenario 2(b) of the Procedural Calendar.

5. This Procedural Order sets out the reasons underlying the Tribunal's decision denying bifurcation.

II. PARTIES' POSITIONS

A. RESPONDENT'S POSITION

6. According to the Respondent, the "overarching consideration" to decide on bifurcation is procedural efficiency.[1] It notes that, to assess efficiency, tribunals have typically reviewed factors such as: (i) whether the jurisdictional objections are serious (as opposed to frivolous);[2] (ii) whether such objections, if granted, have the potential of disposing or materially reducing the scope of the proceedings;[3] and (iii) whether or not the issues that the objections raise are too intertwined with the merits.[4]

7. In this regard, the Respondent submits that the Claimant cannot establish the "basic threshold point" of having made a protected investment in Sweden.[5] The Respondent further argues that, even if the Claimant could identify a protected investment, its case "turns on the notion that it was ousted improperly from the 'Swedish 5G market'".[6] Yet, the Respondent contends, the Claimant has not demonstrated that it holds any rights in respect of Sweden's 5G networks, nor

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[1] Request, ¶ 37, quoting **RL-7**, *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶ 37(2); and **RL-8**, *The Carlyle Group L.P. and others v. Kingdom of Morocco*, ICSID Case No. ARB/18/29, Procedural Order No. 4: Decision on Bifurcation, 20 January 2020, ¶ 66.

[2] Request, ¶ 37.

[3] Request, ¶ 37.

[4] Request, ¶ 37.

[5] Request, ¶ 15.

[6] Request, ¶ 15.

has it shown, as the Sweden-China BIT ("BIT" or "Treaty") requires, that it was authorized to make 5G-related investments in Sweden.[7]

8. The Respondent therefore requests the bifurcation of the following two "preliminary questions":

> […] whether or not Claimant has proven that it had any protected investment in Sweden at the time of the injury that the Claimant alleges; and
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> […] if so, whether or not Claimant has proven that any such investment included the rights underlying its claims.[8]

9. For the Respondent, these questions involve serious defects in the Claimant's case on jurisdiction[9] and are "cleanly separable from the merits".[10] Moreover, answering either question in the negative would dispose of the entire case[11] and, hence, reduce the duration and cost of the arbitration.[12]

10. Regarding the first preliminary question on the lack of a protected investment in Sweden, the Respondent alleges that the Claimant's "purported 'investment' in Sweden is a structured one".[13] While the Claimant itself is a Chinese entity (Huawei Technologies Co., Ltd or "Huawei"), it owns its alleged investment in Sweden (shares in Huawei Technologies Sweden AB or "Huawei Sweden") indirectly through a Dutch entity (Huawei Technologies Coöperatief U.A or "Huawei NL").[14]

11. The Respondent argues that the Treaty does not protect indirect investments by Chinese investors,[15] and notes that the definition of "investor" in Article 1(2) of the BIT varies depending on the investor's nationality.[16] A Swedish investor is defined as "any individual who is a citizen of Sweden according to Swedish law as well as any legal person with its seat in Sweden or with a predominating Swedish interest",[17] and a Chinese investor as "any company, other legal person or citizen of China authorized by the Chinese Government to make an investment".[18]

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[7] Request, ¶ 17.

[8] Request, ¶ 11.

[9] Request, ¶¶ 38-39

[10] Request, ¶ 11. *See also*, Request, ¶ 42.

[11] Request, ¶ 11. *See also*, Request, ¶ 41.

[12] Request, ¶¶ 43-44.

[13] Request, ¶ 24.

[14] Request, ¶ 24, fn. 40.

[15] Request, ¶¶ 22, 24.

[16] Request, ¶¶ 20-23.

[17] Request, ¶ 20, fn. 38, quoting Article 1(2) of the BIT.

[18] Request, ¶ 22, quoting Article 1(2) of the BIT.

12. It is the Respondent's argument that, by leaving out the notion of "predominant" ownership in the definition of Chinese investors, which appears in the definition of Swedish investors,[19] the Treaty excludes Chinese investors from "own[ing] a protected investment indirectly".[20] As such, the "BIT does not extend to any assets that a Chinese entity […] purports to own in Sweden indirectly".[21] Differently stated, for a Chinese investor, the "only permitted investment structur[e]" is a direct investment,[22] which is not the situation here.[23]

13. In connection with the second preliminary question on the existence of the alleged rights underlying the claims, the Respondent stresses that the "Claimant's case rests on the premise that it owned a very specific protected investment: a bundle of assets that included the categorical right for Huawei products to form part of the architecture of the New 5G Networks".[24] In this regard, the Respondent raises two arguments:

    i. The Claimant has not established that such a right exists.[25] During the past decade, Huawei Sweden allegedly entered into supply contracts for 3G and 4G with Swedish mobile network operators ("MNOs").[26] Although 5G constitutes a marked evolution from its predecessor technologies, the Claimant has not filed the frame contracts that it allegedly concluded with certain MNOs concerning the 5G networks.[27] In any event, even if the Claimant were to adduce these contracts, "it seems highly unlikely that the 'frame contracts' would contain any unqualified right for Claimant's products to be used as construction materials in the New 5G Networks".[28] MNOs could only deploy 5G network services after undergoing a licensing process within the exclusive control of the State.[29]

    ii. There is no evidence showing that the Claimant has met the requirement set in Article 1(2) of the BIT, according to which the Chinese Government must have authorized the Claimant to make a 5G-related investment in Sweden.[30]

14. Therefore, the Respondent argues that there is no "proof that Claimant had a protected investment in relation to 5G at the time of its alleged 'ouster' from the

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[19] Request, ¶¶ 20-21, 25

[20] Request, ¶ 22.

[21] Request, ¶ 27.

[22] Request, ¶ 23.

[23] Request, ¶¶ 24, 27.

[24] Request, ¶ 28.

[25] Request, ¶ 29.

[26] Request, ¶ 30.

[27] Request, ¶ 32.

[28] Request, ¶ 33.

[29] Request, ¶ 33.

[30] Request, ¶¶ 34-35.

'Swedish 5G market'".[31] Hence, there are no grounds on which the present case could proceed to the merits.[32]

15. For these reasons, the Respondent requests that the Tribunal bifurcate this arbitration and suspend the proceeding on the merits, so that the questions/objections raised can be addressed in a preliminary phase.[33]

B. CLAIMANT'S POSITION

16. According to the Claimant, the Tribunal has full discretion to bifurcate under the ICSID Convention and the 2006 ICSID Arbitration Rules.[34] However, it should exercise such discretion in conformity with the principles of fairness and procedural efficiency.[35] To that effect, the Claimant submits that the Tribunal ought to consider the following factors:[36] (i) whether the jurisdictional objection is *prima facie* serious and substantial, i.e., whether the objection has a significant likelihood of success, and not simply, as the Respondent argues, whether the objection is not frivolous;[37] (ii) whether the jurisdictional objection is so intertwined with the merits that it is unlikely that bifurcation will bring about savings in cost or time;[38] and (iii) whether the jurisdictional objection, if successful, would dispose of the case or materially reduce its scope.[39]

17. On this footing, the Claimant argues that the Respondent's preliminary questions/objections rely on a misreading of both the BIT and the Claimant's case, and overall are not suited for bifurcation.

18. As a threshold matter, the Claimant notes that the Respondent has reserved an undisclosed number of additional jurisdictional and/or admissibility objections, to be raised if necessary later in the proceedings.[40] For the Claimant, this alone

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[31] Request, ¶ 35.

[32] Request, ¶ 35.

[33] Request, ¶ 45.

[34] Response, ¶ 7.

[35] Response, ¶ 8.

[36] Response, ¶¶ 8ss.

[37] Response, ¶¶ 9-11 quoting **CL-96**, *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No 2016-39, Procedural Order No. 2: Decision on Bifurcation, 31 January 2018, ¶ 42; **CL-97**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2: Decision on Bifurcation, ¶ 51; **CL-103**, *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, 3 August 2020, ¶ 42; and **CL-102**, *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation), 17 January 2020, ¶ 27.

[38] Response, ¶¶ 12-13.

[39] Response, ¶¶ 14-17 quoting **CL-100**, *Rand Investments et al v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3, 24 June 2019, ¶ 18(a); **CL-107**, *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Procedural Order No. 3: Decision on Bifurcation, 7 June 2022, ¶ 64; and **CL-113**, ICSID Secretariat, "Proposals for Amendment of the ICSID Rules – Working Paper, Working Paper No. 1, Vol. 3, Schedule 9: Addressing Time and Cost in ICSID Arbitration, 2 August 2018, ¶¶ 11-12.

[40] Response, ¶ 19, referring to Request, ¶ 12, fn. 24.

warrants the dismissal of the Respondent's bifurcation request:[41] Sweden should have given notice of all of its intended objections, allowing the Tribunal to then decide on bifurcation.[42] The Claimant argues that the piecemeal advancement of objections is abusive and runs contrary to ICSID Arbitration Rule 41(1), which requires objections to jurisdiction to be made as early as possible.[43] Moreover, it is inconsistent with the purpose of bifurcation to promote the efficiency of arbitral proceedings, as the Tribunal would be forced to revisit questions of jurisdiction in conjunction with the merits.[44]

19. In respect of the first preliminary objection on the alleged lack of a protected investment, the Claimant submits that, in reality, the Respondent's objection concerns not whether Huawei has an investment but rather whether Huawei is an investor under the Treaty.[45] This is so because the objection is premised on Article 1(2) of the BIT, which defines a protected investor, and not on Article 1(1) of the BIT, which defines a protected investment.[46] Regardless, the Claimant argues that the objection is not serious and substantial and is intertwined with the merits.[47]

20. As to Article 1(2) of the BIT, the Claimant stresses that it is silent on whether only direct or also indirect investments are protected.[48] The reference in Article 1(2) to legal entities with a predominating Swedish interest intends to allow non-Swedish entities controlled by Swedish nationals to bring claims in their own right. In turn, Chinese investors are only required to fulfil one requirement under Article 1(2) BIT, namely that they be a company, legal person, or citizen of China, authorized by the Chinese government to make an investment in Sweden. The Claimant posits that it plainly meets this requirement.[49] It adds that the exclusion of investors with indirect investments from the scope of the Treaty needs explicit language, which is missing in this case.[50]

21. Turning to the definition of investment in Article 1(1) of the BIT, the Claimant emphasizes that it is broad. It covers "every kind of asset", including all of Huawei's specific investments in Sweden, in particular: (i) Huawei's shareholding in Huawei Sweden, which is protected under Article 1(1)(b) referring to "[s]hares or other kinds of interests in companies"; (ii) contractual

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[41] Response, ¶¶ 25-26 quoting **CL-99**, *MetLife, Inc., MetLife Servicios SA and MetLife Seguros de Retiro SA v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order No 2, 21 December 2018, ¶ 20.

[42] Response, ¶ 23.

[43] Response, ¶¶ 19-22 quoting **CL-94**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, ¶ 5.42.

[44] Response, ¶¶ 24-25 quoting **CL-99**, *MetLife, Inc., MetLife Servicios SA and MetLife Seguros de Retiro SA v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order No 2, 21 December 2018, ¶ 20.

[45] Response, ¶ 27.

[46] Response, ¶¶ 27, 38.

[47] Response, ¶ 27.

[48] Response, ¶ 28-30.

[49] Response, ¶¶ 31-33, 53-55.

[50] Response, ¶¶ 34-37 quoting **CL-91**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, 19 June 2009, ¶¶ 106-107.

rights benefiting Huawei, protected under Article 1(1)(c) referring to "[t]itle[s] to money or any performance having an economic value"; and (iii) Huawei's direct contributions to the Swedish economy, including in the form of transfer of intellectual property, protected under Article 1(1)(d) referring to "[c]opyrights, industrial property rights, technical processes, trade-names and goodwill".[51] According to the Claimant, such a broad definition does not support the suggestion that the Treaty parties intended to exclude indirect investments from the scope of protection.[52]

22. The Claimant argues that, in any event, the nature of its investments will be examined in the context of its case on the merits and the claims for damages. Therefore, bifurcating the Respondent's first objection would be inconsistent with the principles of procedural efficiency, as that would entail the risk of having to review evidence twice.[53]

23. Regarding the Respondent's second preliminary objection on the rights underlying the claims, the Claimant asserts that the Respondent misrepresents Huawei's investments and claims.[54] It stresses that Huawei Sweden entered into contracts to provide equipment and services to Sweden's MNOs, including with respect to the upcoming 5G networks. Sweden's actions in breach of the Treaty prevented Huawei Sweden from performing those contracts, thereby destroying Huawei Sweden's carrier network business and affecting the value of Huawei's shareholding in Huawei Sweden (held through Huawei NL).[55]

24. The Claimant insists that its claims are not limited to the provision of 5G equipment and services. They also encompass the unlawfully mandated removal of Huawei's "3G and 4G infrastructure from the 2.3 and 3.5 GHz bands, the negative effects on the provision of equipment for mobile networks operating on other frequencies as well as fixed line networks, and Huawei's exclusion from the future 6G and 7G markets".[56] Consequently, says the Claimant, Sweden's second objection is unfounded.[57]

25. Moreover, the Claimant submits that an assessment of the Respondent's second objection requires a close analysis of multiple elements that constitute the basis of its claims[58] Therefore, the objection is inherently intertwined with the merits of the dispute, making it unsuitable for bifurcation.[59]

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[51] Response, ¶¶ 38, 40 quoting Article 1(1) of the BIT.

[52] Response, ¶ 38.

[53] Response, ¶ 40.

[54] Response, ¶¶ 41-43.

[55] Response, ¶ 44.

[56] Response, ¶ 45.

[57] Response, ¶ 46.

[58] Response, ¶¶ 48-49.

[59] Response, ¶ 51.

26. With respect to the Respondent's argument that Huawei lacked the authorization of the Chinese Government to invest in Sweden pursuant to Article 1(2) BIT, the Claimant submits that the BIT only requires that the Chinese investor be authorized to make "an investment," not a "specific investment".[60] For the Claimant, the record clearly shows that Huawei did obtain the required authorization to invest in Sweden.[61] As a result, the Respondent's objection is neither serious nor substantial.[62]

27. On this basis, the Claimant requests the Tribunal to deny the Respondent's request for bifurcation and to order that the proceedings continue in accordance with Scenario 2(b) of the Procedural Calendar in PO1.[63]

III. ANALYSIS

28. To address the Respondent's request for bifurcation of two preliminary objections, the Tribunal will first set out the legal framework and the relevant bifurcation factors **(A)**. It will then apply those factors to the Respondent's first **(B)** and second **(C)** preliminary objections.

A. LEGAL FRAMEWORK

29. The Treaty is silent on preliminary objections. The applicable rules are thus to be found in the ICSID Convention and the ICSID Arbitration Rules. Article 41(2) of the ICSID Convention provides that tribunals can deal with preliminary objections separately or with the merits:

> Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered **by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.**[64]

30. ICSID Arbitration Rule 41(4) restates that rule:

> The Tribunal […] **may** deal with the objection as a preliminary question or join it to the merits of the dispute. […].[65]

31. These provisions grant tribunals ample discretion to determine whether preliminary objections should be decided in a bifurcated phase of the proceedings or joined to the merits. In particular, they do not specify in which circumstances a tribunal should adopt one or the other of these two options.

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[60] Response, ¶¶ 52-54, 58.

[61] Response, ¶ 55.

[62] Response, ¶ 62.

[63] Response, ¶ 65.

[64] Emphasis added.

[65] Emphasis added.

32. It is common ground between the Parties that the exercise of the Tribunal's discretion should be guided by considerations of procedural fairness and efficiency. The Parties also agree that investment tribunals have considered the following factors to assess whether bifurcation would be procedurally fair and efficient:

    i. Is the objection *prima facie* serious and substantial[66] in the sense that it has some likelihood of success or at least is not frivolous or vexatious?[67]

    ii. Can the objection be assessed without going into the merits of the dispute?[68]

    iii. If successful, would the objection put an end to the proceedings or at least materially narrow the dispute?[69]

33. The second and third criteria indeed appear helpful to determine whether bifurcation would serve efficiency. As for the first one, it is striking to see that tribunals have struggled trying to articulate its content, oscillating between serious and substantial in the sense of likely to succeed and not frivolous or vexatious. The difficulty with the first of those approaches is that, at this early stage of an arbitration, the Tribunal is in no position to assess the likelihood of success of the objections. This is particularly true here, as the objections have merely been outlined to support the request for bifurcation, but have not been briefed yet. The difficulty with the second of these approaches is that labelling an objection as vexatious or frivolous casts aspersions on the party raising the objection, implying that the objection is brought for an improper purpose. It appears more neutral to assess whether, on the basis of the record as it stands, an objection raises a serious issue requiring consideration in a separate procedural phase on the force of the fact allegations and legal arguments as currently formulated.

34. By assessing the seriousness of an issue for purposes of bifurcation, the Tribunal merely makes a procedural determination about the most efficient

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[66] *E.g.*, **CL-40,** *Carlos Sastre and others v. United Mexican States*, UNCITRAL, ICSID Case No. UNCT/20/2, Procedural Order No 2: Decision on Bifurcation, 13 August 2020, ¶ 40; **CL-106**, *Orazul International España Holdings SL v. Argentine Republic*, ICSID Case No. ARB/19/25, Decision on the Respondent's Request for Bifurcation, 7 January 2021, ¶ 31(a).

[67] *E.g.*, **CL-106,** *Orazul International España Holdings SL v. Argentine Republic*, ICSID Case No. ARB/19/25, Decision on the Respondent's Request for Bifurcation, 7 January 2021, ¶ 31(a); **RL-7**, *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶ 37(2)(a).

[68] **RL-8,** *The Carlyle Group L.P. and others v. Kingdom of Morocco*, ICSID Case No. ARB/18/29, Procedural Order No. 4: Decision on Bifurcation, 20 January 2020, ¶ 66; **CL-105**, *Patel Engineering Limited v. The Republic of Mozambique*, PCA Case No. 2020-21, Procedural Order No. 3: Decision on Motion for Bifurcation, 14 December 2020, ¶ 65.

[69] **RL-9**, *Lighthouse Corp. Pty LTD and Lighthouse Corp. Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 3: Decision on Bifurcation and Related Requests, 8 July 2016, ¶¶ 19, 20(b); **CL-100**, *Rand Investments et al v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3, 24 June 2019, ¶ 18(a).

management of an arbitration. In no way does it assess the merits or demerits of an objection, which is a matter for a later decision.

35. Before considering the three factors just outlined in relation to the Respondent's two preliminary objections, the Tribunal notes that the Respondent has reserved its right to pursue additional objections later in the proceedings,[70] and that the Claimant contends that this approach is abusive or contrary to either ICSID Arbitration Rule 41(1) or the purpose of bifurcation requests more generally.[71]

36. ICSID Arbitration Rule 41(1) provides in relevant part that "[a]ny objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal[,] shall be made as early as possible [and] no later than the expiration of the time limit fixed for the filing of the counter-memorial". That time limit has not elapsed and the Respondent filed the Request within the time limit fixed by the Procedural Calendar. Moreover, the applicable rules do not require that a bifurcation request necessarily cover all the preliminary objections. Hence, the Respondent's approach of raising some objections now and reserving others for later is not contrary to ICSID Arbitration Rule 41(1) nor is it abusive. In any event, the Respondent has confirmed that it will not request bifurcation of its possible subsequent objections,[72] which it would in any event be barred from doing on the basis of the agreed calendar. Therefore, in terms of efficiency and procedural fairness, the Tribunal can see no drawback in the Respondent's approach.

B. FIRST PRELIMINARY OBJECTION: THE EXISTENCE OF A PROTECTED INVESTMENT

37. The Respondent's first preliminary objection is that the "Claimant has [not] proven that it had any protected investment in Sweden at the time of the injury that the Claimant alleges".[73] While this objection could be examined without going into the merits and its success would put an end to the proceedings, it does not disclose a serious issue that would justify a preliminary determination based on the materials currently before the Tribunal.

38. Article 1(1)(b) of the BIT defines "investment" as "every kind of asset invested by investors of one Contracting State in the territory of the other Contracting State […] and more particularly, though not exclusively, […] shares or other kinds of interest in companies". It is undisputed at this stage that the Claimant is a Chinese entity, wholly owning Huawei NL, which in turn wholly owns Huawei Sweden.[74]

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[70] Request, fn. 24.

[71] *Supra*, ¶ 18.

[72] *See* Request, fn. 24 ("Although Sweden reserves its right to pursue additional objections in due course (as necessary), it hereby covenants not to seek the bifurcation thereof").

[73] Request, ¶¶ 11, 45(a).

[74] *See* Request, ¶ 24; Response, ¶ 43. *See also inter alia* **C-10**, Shareholder structure of the relevant entities within the Huawei Group of Companies; **C-8**, Register of membership in Huawei Technologies Coöperatief UA; **C-16**,

39. The Respondent's first objection does not contest that in principle the Claimant's indirect shareholding in Huawei Sweden is a protected asset under Article 1(1)(b) of the BIT. The Request does not mention the definition of investment in Article 1(1). Nor does the Respondent question whether the Claimant held its indirect shareholding in Huawei Sweden at all relevant times. Rather, the Respondent's objection is that, overall, the Treaty does not protect investments indirectly held by Chinese investors through intermediate companies incorporated in third States, like the Netherlands.

40. For bifurcation purposes, it suffices to note that the Treaty's plain text does not appear to limit its applicability or scope to a particular investment structure. To substantiate its objection, the Respondent relies chiefly on Article 1(2) of the BIT. In relevant part, this provision states that, "in respect of the People's Republic of China", the term investor shall mean "any company, other legal person or citizen in China authorized by the Chinese Government to make an investment". This language makes no reference to the notion of investment, be it direct or indirect, a silence that is unsurprising. Indeed, Article 1(2) defines the notion of investor, not investment, and relates to *ratione personae* not *ratione materiae* jurisdiction.

41. It is true that the substantive obligations in Articles 2(1), 2(2) and 3(1) of the BIT, which the Claimant invokes, only apply to "investments by investors". However, these provisions do not appear to regulate the manner in which an investor holds its investment for purposes of jurisdiction.

42. For these reasons, the Tribunal denies the Respondent's request to bifurcate its first preliminary objection.

C. SECOND PRELIMINARY OBJECTION: THE RIGHTS UNDERLYING THE CLAIMS

43. The Respondent's second preliminary objection is that the "Claimant has [not] proven that [its] investment included the rights underlying its claims".[75] In particular, according to the Respondent, the Claimant has not established any rights with respect to Sweden's 5G networks, the alleged violation of which constitute the basis for its claims.[76]

44. As a threshold matter, on the record as it currently stands, the Tribunal understands that the Claimant's case is mainly premised on the allegation that Huawei Sweden concluded long-term contracts with certain Swedish MNOs (i.e., Hi3G, N4M and Telia)[77] to provide equipment and services in Sweden's telecommunications sector.[78] It is common ground that those contracts are not

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Overseas Investment Certificate for Enterprises concerning Huawei Technologies Co, Ltd, 24 July 2020; **C-17**, Swedish Companies Registration Office's Certificate of Registration for Huawei Technologies Sweden AB, 24 December 2021; **C-9**, Share Registry of Huawei Technologies Sweden AB.

[75] Request, ¶¶ 11, 45(b).

[76] Request, ¶¶ 15-17, 29-31.

[77] *See e.g.,* SoC, Appendix 1.

[78] Response, ¶ 44-45.

yet part of the record.[79] However, contrary to the Respondent's suggestion, the Claimant's case is not limited to claims concerning Sweden's 5G networks. The claims extend to the alleged effects of Sweden's measures on the Claimant's current and/or future undertakings in Sweden regarding *inter alia* 4G, 6G, and 7G technologies, as well as fixed-line networks.[80]

45. Therefore, it is unclear at this juncture whether and to what extent bifurcating the Respondent's second objection, which focuses on the Claimant's alleged 5G rights, would efficiently streamline the adjudication of the dispute. This remains the case irrespective of the Respondent's subsidiary argument under Article 1(2) of the BIT that Huawei allegedly lacks authorization by the Chinese Government to make 5G-related investments in Sweden.[81]

46. Indeed, as was already mentioned,[82] Article 1(2) of the BIT requires that a protected Chinese investor be "authorized by the Chinese Government to make **an** investment".[83] As the Claimant points out,[84] this language does not seem to require that the investment at issue be tied to a particular purpose. Hence, whether or not the Chinese Government authorized Huawei to invest in Sweden's *5G network* specifically may or may not be dispositive.

47. This being so, on 8 January 2004, the Bureau of Foreign Trade and Economic Cooperation of Shenzhen Municipality ("Shenzhen Bureau") approved Huawei's application for the establishment of Atelier Telecom AB ("Atelier") in Sweden, by "Huawei Tech. Investment Co., Limited (Hong Kong)" ("Huawei Hong Kong"),[85] an entity owned by Huawei.[86] In 2004, Atelier was renamed Huawei Sweden.[87] The record further suggests that, in 2008, Huawei NL (wholly owned by Huawei)[88] replaced Huawei Hong Kong as shareholder in Huawei Sweden.[89] Huawei's "business scope" in Sweden as authorized by the Shenzhen Bureau covered "3G mobile communications" as well as "wireless technologies" more

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[79] According to the Claimant, while the MNO contracts are of "a confidential nature", it "would be willing to seek its contractual counterparties' consent to the disclosure of those contracts" (SoC, fn. 725). The Claimant further states that "it has no objection to disclosing the contracts if ordered to do so" (Response, ¶ 50).

[80] *See* Response, ¶ 45. *See also,* SoC, ¶¶ 275-280.

[81] *See supra*, ¶ 13.ii. Contrary to the Claimant's understanding (*see* Response, ¶¶ 27, 52), this argument does not form a third and separate preliminary objection that the Respondent seeks to bifurcate. It is clear that the Respondent invokes Article 1(2) of the BIT in such a manner only to buttress the second preliminary objection (*see* Request, § B.2)

[82] *Supra*, ¶ 40.

[83] Emphasis added.

[84] Response, ¶ 54.

[85] **C-12**, Letter from the Bureau of Foreign Trade and Economic Cooperation of Shenzhen Municipality to Huawei Technologies Co., Ltd, 8 January 2004.

[86] **C-11**, Annual Return of Huawei Tech Investment Co, 2001, p. 6.

[87] **C-17**, Swedish Companies Registration Office's Certificate of Registration for Huawei Technologies Sweden AB, 24 December 2021, p 2.

[88] *Supra*, ¶ 38.

[89] *See generally* **C-9**, Share Registry of Huawei Technologies Sweden AB, undated.

broadly.[90] Accordingly, the authorization which the Shenzhen Bureau granted to Huawei in 2004 seemingly included 5G-related investments in Sweden.

48. The second objection is, therefore, likely to require the Tribunal to address matters pertaining to the merits of the dispute. As the Claimant argues, the assessment of the second objection potentially requires an analysis of *inter alia*: (i) the regulatory framework of Sweden's telecommunications sector; (ii) the scope, nature, and significance of the purported rights resulting from Huawei Sweden's alleged contracts with MNOs in Sweden; and (iii) the measures taken by Sweden allegedly in contravention of the said rights and the Treaty.[91] These elements and their factual and technical underpinnings may also be relevant to the success of the Claimant's substantive claims. It is also possible that the Respondent might be partially successful in respect of the second objection such that it would not dispose of the case in its entirety. Accordingly, the preliminary determination of the second objection does not appear to be procedurally efficient.

49. On this basis, the Tribunal denies the Respondent's request to bifurcate the second preliminary objection.

IV. ORDER

50. For the reasons set out above, the Tribunal:

    i. Denies the Respondent's bifurcation request.

    ii. Determines that the proceedings shall continue under Scenario 2(b) of the Procedural Calendar.

On behalf of the Tribunal,

[signed]

Prof. Gabrielle Kaufmann-Kohler
President

[90] **C-12**, Letter from the Bureau of Foreign Trade and Economic Cooperation of Shenzhen Municipality to Huawei Technologies Co., Ltd, 8 January 2004.

[91] *See* Response, ¶ 48.