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. 5

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

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2 February 2024

I. PROCEDURAL BACKGROUND

1. On 27 July 2022, the Tribunal issued Procedural Order No. 1 ("PO1") together with the Procedural Timetable, last revised on 21 July 2023.

2. On 26 September 2022, the Tribunal issued Procedural Order No. 2 ("PO2") setting out in its Annex 1 the Transparency/Confidentiality Rules ("TCR") governing these proceedings.

3. On 4 December 2023, pursuant to Section 16 of PO1 and the revised Procedural Timetable, the Parties submitted their Document Production Requests ("Request(s)") in the form of Redfern Schedules (Annex A for the Claimant and Annex B for the Respondent).

4. On 22 December 2023, the Parties initiated the voluntary production of Requests not subject to an objection and submitted their objections to the remaining Requests. By letter of the same date addressed to the Respondent, the Claimant raised concerns that the TCR did not appear to protect from disclosure documents exchanged between the Parties during the document production phase but not subsequently filed as exhibits ("Production Documents"). On this basis, the Claimant sought an undertaking from the Respondent ensuring that Production Documents would remain confidential.

5. On 10 January 2024, each Party submitted its replies to the opposing Party's objections to the Requests and provided the Tribunal with the corresponding Redfern Schedules for determination. By letter of the same date addressed to the Claimant, the Respondent declined to provide the confidentiality undertaking sought by the Claimant concerning Production Documents. The Respondent nevertheless proposed wording for an amendment to the TCR aimed at protecting Production Documents from disclosure.

6. On 13 January 2024, the Tribunal referred to the Parties' communications regarding Production Documents. It confirmed that, while the TCR protected "supporting documents" (defined as "exhibits, legal authorities, as well as witness statements and expert reports" including "annexes, appendices or exhibits thereto"),[1] they contained no provisions on Production Documents, which represented a loophole. However, the Tribunal considered that it was "in the spirit" of the TCR that Production Documents be "treated as confidential",[2] noting that in essence the Parties seemed to share the same understanding. As a result, the Tribunal incorporated the following provision into Section F of the TCR by way of amendment:

> 7a. Documents produced by one Party to the other Party pursuant to paragraph 16 of Procedural Order No. 1 and not filed as exhibits shall not be made public unless both Parties agree otherwise no later than 15 days from the production of those documents

7. By letter of 25 January 2024, the Claimant argued that the Respondent impermissibly made new requests in the reply column of its Redfern Schedule.

8. On 30 January 2024, the Respondent answered the Claimant's new requests allegation.

9. The present Order deals with the Parties' Requests. The Tribunal will first determine the applicable standards **(II)**. It will then address certain general and recurring objections raised by the Parties **(III)**, before deciding on the Requests in the Redfern Schedules attached as Annexes A and B and in the operative part (**IV**).

[1] TCR, ¶ 7.

[2] Tribunal's communication of 13 January 2024.

II. APPLICABLE STANDARDS

10. This arbitration is governed by: (i) the China-Sweden ("BIT" or "Treaty"); (ii) the ICSID Convention; (iii) the 2006 ICSID Arbitration Rules ("Arbitration Rule(s)"); and (iii) the procedural rules set out in PO1.

11. While the BIT contains no provisions on document production, the ICSID Convention and the Arbitration Rules accord the Parties and the Tribunal with ample discretion in this respect. Where the Parties have not agreed a rule on the taking of evidence, Article 43 of the ICSID Convention grants the Tribunal the power to order the Parties to produce documents in the following terms:

> Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, […] call upon the parties to produce documents or other evidence[.][3]

12. This power is confirmed by Arbitration Rule 34(2) as follows:

> The Tribunal may, if it deems it necessary at any stage of the proceeding[,] call upon the parties to produce documents, witnesses and experts.[4]

13. This being so, PO1, issued in consultation with the Parties, contains certain rules on document production, of which the following are relevant for the present Order:

> 16.1 The Tribunal and the Parties shall be guided by the 2020 IBA Rules on the Taking of Evidence in International Arbitration [("IBA Rule(s)")]. They all understand that the document production phase is not designed to be a burdensome and expensive exercise.
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> 16.2 Within the time limit set in Annex B, each Party may request from the other Party the production of documents or categories of documents within the other Party's possession, custody or control. Such a request for production must (i) identify with precision each document or narrow category of documents being requested; (ii) explain why such documents are relevant to the dispute and material to the outcome of the case; and (iii) be submitted in the form of a Redfern Schedule[.]
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> 16.3 Within the time limit set forth in Annex B, the other Party shall either produce the requested documents or, using the Redfern Schedule provided by the first Party, submit its objections. […]
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> 16.4 Within the time limit set forth in Annex B, the requesting Party may seek an order for the production of the documents sought and not produced, in which case it shall reply to the other Party's objections in that same Redfern Schedule. At the same time, it shall submit […] copies of the Redfern Schedule to the Tribunal. […]
>
> 16.6. On or around the date set forth in Annex A, the Tribunal will, at its discretion, rule upon the production of the documents or categories of documents having regard to the legitimate interests of the Parties and all the relevant circumstances, including applicable privileges and if appropriate the burden of proof.

[3] ICSID Convention, Article 43.

[4] Arbitration Rules, Rule 34(2).

14. In view of these rules, the Tribunal may look to the following provisions of the IBA Rules for guidance:

i. Article 3.3:

> A Request to Produce shall contain:
>
> (a) (i) a description of each requested Document sufficient to identify it, or
> (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
> (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
> (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
> (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

ii. Article 3.4:

> Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

iii. Article 3.5:

> If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Articles 9.2 or 9.3, or a failure to satisfy any of the requirements of Article 3.3. If so directed by the Arbitral Tribunal, and within the time so ordered, the requesting party may respond to the objection.

iv. Article 3.7:

> Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in timely fashion, consider the Request to Produce, the objection and any response thereto. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that *(i)* the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; *(ii)* none of the reasons for objection set forth in Articles 9.2 or 9.3 applies; and *(iii)* the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

v. Article 9.2:

> The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;
(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below);
(c) unreasonable burden to produce the requested evidence;
(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

15. Accordingly, the Tribunal has applied the following standards to decide on the Requests:

i. **Specificity**: The Request must identify each document or category of documents with precision.

ii. **Relevance**: The Request must establish the relevance of each document or category of documents to prove allegations made in the submissions. For the purposes of this Order, the term "relevance" encompasses both relevance to the dispute and materiality to its outcome. At this stage of the proceedings, the Tribunal may only assess the *prima facie* relevance of the documents requested, having regard to the factual allegations made so far. This *prima facie* assessment does not preclude a different assessment at a later point of the arbitration with the benefit of a more developed record.

iii. **Possession, custody or control**: The Request must show that it is more likely than not that the requested documents exist, that they are not within the possession, custody or control of the requesting Party, and that they are within the possession, power or control of the other Party.

iv. **Balance of interests**: Where appropriate, the Tribunal has balanced the legitimate interests of the requesting Party with those of the requested Party, taking into account all relevant circumstances. This includes any legal privileges applicable to certain types of communications; the need to safeguard confidentiality when applicable; the proportionality between the convenience of revealing potentially relevant facts and the burden imposed on the requested Party.

III. GENERAL AND RECURRING OBJECTIONS

16. In addition to individual objections to a given Request, each Party has raised a number of general and recurring objections to the opposing Party's Requests. While the Tribunal has considered all of the Parties' arguments to decide on document production, this section briefly addresses three main general/recurring issues that warrant particular attention in the interest of the efficiency of the proceedings.

17. This section thus aims at informing the Tribunal's decisions on the individual Requests while providing guidance to the Parties on the implementation of those decisions.

A. Domestic law and legal impediment/privilege, confidentiality, and political/institutional sensitivity

18. To substantiate its refusal to disclose certain requested documents, each Party invokes its domestic law to object to the opposing Party's Requests on grounds of legal privilege/impediment (IBA Rule 9(2)(b)), technical or commercial confidentiality (IBA Rule 9(2)(e)), and/or political/institutional sensitivity (IBA Rule 9(2)(f)). More specifically, the Claimant refers to the Chinese Personal Information Protection Law, while the Respondent primarily invokes the FPA,

the Swedish Protective Security Act, and the Swedish Public Access to Information and Secrecy Act.

19. As a general matter, the invocation of protections from disclosure existing under domestic law does not necessarily preclude the production of documents responsive to a Request. IBA Rule 9(2)(b) shields from production information privileged under the "legal or ethical rules determined by the Arbitral Tribunal to be applicable". When making its assessment, the Tribunal may take into account *inter alia* "the expectation of the Parties […] at the time the legal impediment or privilege is said to have arisen".[5] More importantly, the Tribunal may also consider "the need to maintain fairness and equality as between the Parties".[6] In turn, IBA Rules 9(2)(e) and 9(2)(f) condition the protection of confidential or sensitive information from production to "grounds […] that the Arbitral Tribunal determines to be compelling". In any event, "where appropriate", the Tribunal may "make necessary arrangements to permit [d]ocuments to be produced, and evidence to be presented or considered subject to suitable confidentiality protection".[7] By way of illustration, these arrangements may consist in production with redactions; production accessible only to certain participants in the arbitration; production under specific confidentiality undertakings; or production to a confidentiality advisor.

20. This being so, in principle the determination of whether and to what extent a Party's reliance on domestic law justifies withholding documents from production requires a case-by-case analysis of the description of each document allegedly containing protected information, subject to one exception. That exception covers documents containing specific or individual security assessments that, as such, are classified and shared only (i) within SÄPO, or (ii) within the Armed Forces, or between these bodies. The reason for this exception is that such documents are highly likely to contain information concerning essential security interests of the State. In those cases, the Tribunal has denied the Request. In all other cases in which a Party claimed that a document was protected, the Tribunal did not deny a related Request on this sole basis. Rather, where all other document production requirements were deemed met, the Tribunal has granted the Requests (fully, partially, or as narrowed down), and the Parties are directed to complete a privilege log in accordance with the instructions set out in the dispositive section below

21. However, the Tribunal deems it useful to give some indications on the general considerations that will guide its case-by-case analysis on the basis of the privilege log. It does so with a view to facilitating the document production process going forward and providing guidance in framing claims for protection against disclosure.

22. In this context, the Tribunal notes that the bulk of the Respondent's objections to production rely on national security. It also notes that, in certain cases, the Respondent asserts not being in a position to even complete a privilege log, because "even confirming or denying the existence of certain documents and records can amount to classified information".[8] As a result, says the Respondent, "[a]ny individual who divulges information or documents that they are required by law to keep secret would face grave professional repercussions (including the termination of their employment), as well as potential criminal liability".[9]

23. These submissions are noted. Yet, whereas mandatory protective rules of the host State should be complied with whenever possible, an international tribunal such as the present one, may be bound by mandatory rules of international law which are in conflict with the relevant domestic law. More particularly, it is this Tribunal's duty to comply with fundamental principles of procedure such as due process, which includes a disputing party's right to present and prove its case. Where a conflict

[5] IBA Rule 9(4)(c).

[6] IBA Rule 9(4)(e).

[7] IBA Rule 9(5).

[8] Annex A, § 1.a.

[9] Annex A, § 1.a.

of rules occurs, it is the Tribunal's task to weigh the competing interests at stake and find a solution that is as fair and reasonable as possible.

24. This balancing act may involve multiple considerations, including, for instance, the existence and degree of discretion granted to Swedish public officials regarding the disclosure of protected information. Another factor may turn on sanctions for disclosure, including whether Swedish law penalizes only the intentional or negligent release of such information by competent officials as opposed to disclosure mandated by an international court or tribunal. The Tribunal may also take into account whether the Claimant has other means of proving a given fact, the importance of that fact in the overall assessment of the claim, and similar elements.

25. *Mutatis mutandis*, the same rationale may apply to the Claimant's reliance on Chinese legislation protecting personal data.

B. FPA and court decisions

26. The Respondent requests the Tribunal to deny the Claimant's Requests that duplicate already decided requests made under the FPA or in judicial proceedings. According to the Respondent, holding otherwise would render this document production exercise unreasonably burdensome.

27. The Tribunal distinguishes between two categories of the Claimant's Requests that have already given rise to determinations by agencies or courts. First, there are Requests aiming at documents of which redacted versions were produced following the earlier decisions. In those cases, the Tribunal understands that the Claimant is looking for unredacted versions. It also understands that the Claimant has not specified which precise documents fall in this category.

28. In this respect, the Tribunal agrees with the Respondent that it would be unreasonably burdensome for it to identify redacted documents responsive to the Claimant's Requests, which are already in the Claimant's possession. Accordingly, Requests which are granted (fully, partially, or as narrowed down) do not extend to documents already disclosed to the Claimant in a redacted form further to an FPA request or a judicial decision, unless and until the Claimant identifies these documents with precision to the Respondent by **14 February 2024**. The Respondent shall then produce the unredacted document or supplement its privilege log by **28 February 2024**, to which the Claimant may answer by **6 March 2023**.

29. The second category of documents sought that were already addressed in domestic administrative or judicial decisions are documents the disclosure of which was denied by the competent Swedish authorities. The decisions of these authorities cannot preempt the determination to be made by this Tribunal as the reasons underlying the domestic decisions only partially overlap, if at all, with the grounds for granting or denying production in the present proceedings. Hence, where production of a document falling in this category is ordered, the Respondent shall either produce it or complete the privilege log.

C. The confidentiality undertaking

30. The Claimant has agreed to produce documents responsive to some of the Respondent's Requests, subject to the Respondent providing a confidentiality undertaking concerning Production Documents.[10] The Tribunal understands that the 13 January 2024 amendment to the TCR has rendered superfluous the need to require such a confidentiality undertaking from the Respondent. Therefore, it has made no decision with respect to the entirety or parts of Requests No. 1, 9, 11, 13-15, 17-22, 26, 28, 29, 33 in Annex B.

[10] *See supra*, ¶¶ 4-5.

IV. ORDER

31. In light of the foregoing:

i. Regarding the Claimant's Requests in Annex A attached to and made an integral part of this Order, the Tribunal:

a. Decides the Claimant's Requests in the manner set out in Column 6 of Annex A.

b. Orders the Parties to follow the procedure set out in Paragraph 28 *supra*, notwithstanding the procedure set out in Paragraph 31.iii *infra*.

ii. Regarding the Respondent's Requests in Annex B attached to and made an integral part of this Order, the Tribunal decides the Respondent's Requests in the manner set out in Column 6 of Annex B.

iii. Regarding both Annexes A and B:

a. The Parties shall produce ordered documents by **14 February 2024**.

b. Within the same timeframe, if a Party objects against the production of a document or portions of it on the grounds of privilege, legal impediment, confidentiality, and/or institutional/political sensitivity (generally "privilege"), it shall:

(i) If the objection is limited to one or several points of the document, produce a version of the document redacting the allegedly privileged information.

(ii) in all cases, identify the document in the privilege log by referring to its type (e.g., email, letter, minutes of meeting, notes, memoranda, report, etc.); date; subject matter (e.g., legal opinion on validity of contract of [date] between X and Y for [subject matter of contract]); author(s); recipient(s) and addressee(s), including persons copied; type of privilege claimed, including applicable law and legal basis, and the reason why the privilege applies to the document at issue.

(iii) If the opposing Party considers that the privilege claim is unfounded, it shall present reasoned objections no later than **28 February 2024**, after which the Party invoking the privilege may reply by **6 March 2024**. Both the objections and replies must be set out in the privilege log. Subsequently, the Tribunal will decide any disputed matter.

On behalf of the Tribunal,

[Signed]

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Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal