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. 2

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

26 September 2022

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I. PROCEDURAL BACKGROUND

1. Section 24.1 of Procedural Order No. 1 ("PO1") provides that "the Tribunal will establish the transparency regime governing these proceedings in a subsequent procedural order, after having consulted the Parties".

2. On 28 July 2022, the Tribunal circulated a draft of this order ("Draft PO2") based on the Parties' comments on transparency made in the context of PO1 and during the first session of 14 July 2022.

3. On 9, 26, 29 August, and 1 September 2022, the Parties commented on Draft PO2, as well as on the transparency/confidentiality regime to govern these proceedings more generally.

4. Having considered the Parties' positions, the Tribunal issues the following order.

II. ANALYSIS

5. While they agree on some aspects of the transparency/confidentiality regime to govern these proceedings, the Parties diverge on others. In this order, the Tribunal will resolve these divergences and determine the rules on transparency and confidentiality applicable to this arbitration. For this purpose, it will first focus on the legal framework (A). Then it will review the divergences in respect of the elements of the proceedings to be disclosed (B) and of the exceptions to disclosure (C). The applicable transparency/confidentiality rules are reproduced in Annex I.

A. LEGAL FRAMEWORK

6. Article 44 of the ICSID Convention provides that "[i]f any question of procedure arises which is not covered by the [Convention] or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question". It is undisputed that the transparency/confidentiality of the proceedings are matters of procedure. Accordingly, the Tribunal has the power to set rules on transparency/confidentiality where the applicable legal framework contains no such rules and the Parties have not reached an agreement.[1]

7. The legal framework applicable to these proceedings is determined by the China-Sweden BIT (the "BIT"), the ICSID Convention, and 2006 ICSID Arbitration Rules. It is common ground between the Parties that the BIT is silent with respect to transparency/confidentiality, and its well established that neither the ICSID Convention nor the ICSID Arbitration Rules impose a general duty in favor or against transparency/confidentiality.[2]

8. This being so, the ICSID Convention and Arbitration Rules contain some provisions relevant to the case at hand. Article 48(5) of the ICSID Convention provides that the "Centre shall not publish the award without the consent of the parties". To that end, ICSID Arbitration Rule 48(4) states that "[t] he Centre shall not publish the award without the

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[1] Other tribunals have also held that setting the proceeding's transparency/confidentiality regime falls within the powers of the Tribunal. See *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010 ("*Abaclat v. Argentina*"), ¶¶ 73; *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 5, 29 August 2019 ("*Rand Investments v. Serbia*"), ¶ 27.

[2] See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006 ("*Biwater Gauff v. Tanzania*"), ¶ 121; *Abaclat v. Argentina*, ¶¶ 77-79; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, 12 May 2016, ¶¶ 80-83; *Rand Investments v. Serbia*, ¶ 27.

consent of the parties", adding that "[t]he Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal". For its part, ICSID Arbitration Rule 32(2) stipulates that "[u]nless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements". These provisions are addressed to ICSID and the Tribunal, not to the Parties. Be that as it may, here the Parties agree that ICSID may publish the Award (subject to the redaction of protected information)[3] and that the hearings will be closed to the public unless otherwise agreed by the Parties subsequently.[4]

9. By contrast, the relevant legal framework contains no rule on the publication of decisions and procedural orders, transcripts/recordings of the hearings,[5] written submissions, and supporting documents (i.e., exhibits, witness statements, and expert reports). This being so, the Parties concur to say that supporting documents shall not be made public, unless they agree otherwise.[6] Accordingly, there is neither a rule nor an agreement between the Parties in respect of the transparency/confidentiality of decisions and procedural orders, transcripts/recordings of hearings, and written submissions, with the result that the Tribunal must make a determination on the disclosure of these procedural categories.[7]

10. Doing so, the Tribunal must balance, on the one hand, the public interest in disclosing a given category of information, and, on the other, the extent to which said disclosure may affect the integrity of the proceedings, aggravate the dispute, or infringe on either Party's

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[3] Parties' joint comments to Draft PO1, 5 July 2022, § 24; Parties' joint comments to Draft PO2, 9 August 2022, ¶ 6 (with no objection by either Party); Respondent's email of 9 August 2022 ("Sweden [has] consented (subject to the process described in Section III of [Draft PO2]) to the publication of the Award[.]"); Claimant's communication of 26 August 2022, p. 2 ("The Claimant takes this opportunity to reiterate that [it] consents to the publication of the award.").

[4] Parties' joint comments to Draft PO1, 5 July 2022, § 21.2; PO1, § 21.2.

[5] The 2006 version of ICSID's Administrative and Financial Regulations ("(2006) Regulations") established, in Regulation 22(2)(c), that, "[i]f both parties to a proceeding consent[ed] to the publication of […] the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments". However, (2006) Regulation 22(2)(c) stopped being applicable once the 2022 version of the Regulations came into force on 1 July 2022 ("(2022) Regulations"). Notably, (2022) Regulation 25, which replaced (2006) Regulation 22, no longer conditions the publication of the transcripts/recordings by ICSID to the consent of the parties. Rather, (2022) Regulation 25 simply states that, "[w]ith a view to furthering the development of international law in relation to investment, the Centre shall publish: (a) information about the operation of the Centre; and (b) documents generated in proceedings, in accordance with the rules applicable to the individual proceeding".

[6] Parties' joint comments to Draft PO1, 5 July 2022, § 24; Parties' joint comments to Draft PO2, 9 August 2022, ¶ 11 (with no objection by either Party).

[7] The Claimant has sought to reiterate that "it does not consent, at this stage, to making public […] the Tribunal's decisions and orders, the Parties' written submissions, […] and the hearing transcripts or recordings" (Claimant's communication of 26 August 2022, p. 2). For the Claimant "nothing [should] be made public absent consent of both Parties" (Claimant's email of 9 August 2022). In turn, the Respondent "consent[s] to the publication of Award, of hearing transcripts and recordings, of orders and decisions, and of written submissions" (Respondent's email of 9 August 2022). For the Respondent the categories of documents in dispute ought to be published subject to the redaction process set out in Draft PO2 with which both Parties in principle agree (Respondent's communication of 1 September 2022, p. 4).

due process rights. This balancing test is well established[8] and, although in part implicitly, appears accepted by the Parties.[9]

B. CATEGORIES OF INFORMATION TO BE PUBLISHED OR NOT

11. Having weighed the relevant interests and subject to the redaction procedure set out in Section G of Annex 1, the Tribunal reaches the following conclusions for the reasons set out below:

    i. **Decisions**: The Parties have agreed on the publication of the Award and the Award will incorporate any decisions rendered in the course of the proceedings, with the result that one does not see the rationale for not publishing decisions. Further, like the Award, decisions will set out both Parties' positions, discuss the issues presented in an objective manner, and explain the reasons for the solution reached. There is thus no risk that one-sided information be published and that an incorrect or incomplete account of the dispute be given to the public, which could aggravate the dispute or affect the integrity of the proceedings. Moreover, the publication of decisions may serve the public interest of contributing towards the development of investment law.

    ii. **Procedural orders**: The reasons justifying the publication of the Tribunal's decisions apply here *mutatis mutandis* in favor of the publication of procedural orders.

    iii. **Written submissions**: Essentially, the reasons just set out in favor of the publication of decisions at the same time speak against the publication of written submissions. Submissions by definition advocate a position and do not give a balanced view of the dispute. They are not meant either to promote the development of the law. This being so, to the extent it is relevant to the resolution of the issues before the Tribunal, the content of the submissions will be addressed in the Award and in decisions.

    iv. **Transcripts/recordings of the hearings**: As already noted, the ICSID Convention requires the express consent of the Parties to hold open hearings and the Parties here agree that the hearings will be closed to the public.[10] It would thus be inconsistent to disseminate information about the content of closed hearings by way of the publication of transcripts or recordings. Similarly, since the Parties agree that witness statements and expert reports shall not be made public,[11] it would be contrary to that common intent to disclose the oral testimony of witnesses and experts whose written evidence is treated as confidential. Publication could also give a distorted reflection of the evidence as only the cross and redirect examinations would become public and the evidence in chief would remain shielded. Moreover, the prospect of dissemination of the hearing records could prevent witnesses and experts from being candid while answering questions. This would be so even if the transcripts/recordings were published only at the same time as the Award, thereby impeding the establishment of the facts and affecting due process.

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[8] See *Biwater Gauff v. Tanzania*, ¶¶ 112, 149-161; *Abaclat v. Argentina*, ¶¶ 90-105; *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 11, 21 February 2020, ¶¶ 17-21. See also (2022) Regulation 25, referring to the publication by ICSID of documents generated during the proceedings in accordance with the rules applicable thereto, "[w]ith a view to furthering the development of international law in relation to investment".

[9] See Claimant's communication of 26 August 2022, p. 2 ("It is well established that the interests of transparency in international arbitration must be balanced against the requirements of procedural integrity and the duty not to aggravate the dispute"); Respondent's communication of 26 August 2022, p. 6 ("For example, and unlike in past cases, Claimant has not contended that the publication of case documents would aggravate the dispute or undermine the proceeding.").

[10] *Supra*, ¶ 8.

[11] *Supra*, ¶ 9.

Finally, the relevant facts as established at a hearing and otherwise will be set out in the Award.

C. EXCEPTIONS TO PUBLICATION

12. Draft PO2 provided for exceptions to the publication of information otherwise subject to disclosure by identifying grounds for non-publication and specifying a redaction process. The Parties agree on the latter, but their views diverge with respect to the former.

13. Specifically, PO2 provided for the redaction of "[i]nformation protected from disclosure under the applicable domestic law of the Respondent, or under any law or rules determined by the Tribunal to be applicable to the disclosure of such information".[12] This wording was based on Article 7(2)(c) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

14. In its comments to Draft PO2, the Claimant proposed the inclusion of the phrase "or of the Claimant" after the words "domestic law of the Respondent".[13] It argued that the Respondent refused to agree to "characterize as 'protected' for the purposes of these proceedings information protected from disclosure under Chinese law".[14] This, so said the Claimant, was a matter of concern "given (i) the fact that it is a company incorporated in the People's Republic of China; and (ii) there are instances in which Chinese law may govern the disclosure of information".[15] For its part, the Respondent submitted that the Claimant's proposal "seemed nonsensical" because the Claimant had insisted that it was to be distinguished from the Chinese State.[16] Sweden added that there was "no such thing as the 'domestic law of the [company Huawei]'",[17] and it was unlikely that the Claimant would use the phrase 'or of the Claimant' to mean 'or of China'".[18]

15. In light of the Parties' positions, the Tribunal has reconsidered the wording suggested in Draft PO2. As a general matter and subject to there being a general principle of law or a transnational rule, the law applicable to the protection of information would be the one with the closest connection to the information at stake. In practice, this will most often be the law of the host State of the investment because the investment activities and the relevant actions of the State in relation to the investment are generally carried out there. However, there may be exceptions to this usual situation in which a closer connection exists to a jurisdiction other than the host State. Hence, rather than identifying a specific legal system, it seems preferable to frame the exception in more conceptual terms and leave it to the Tribunal to determine the applicable law considering all relevant circumstances. It goes without saying that the Parties would have an opportunity to present their views on the choice and content of the applicable law before the Tribunal makes a determination.

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[12] Draft PO2, ¶ 12.iii.

[13] Parties' joint comments to Draft PO2, 9 August 2022, ¶ 12.iii.

[14] Claimant's communication of 26 August 2022, p. 2.

[15] *Id.*

[16] Respondent's communication of 1 September 2022, p. 3.

[17] *Id.*

[18] *Id.*

III. ORDER

16. For the foregoing reasons, the Tribunal adopts the transparency/confidentiality rules set forth in Annex 1 to this procedural order.

[Signed]

Prof. Gabrielle Kaufmann-Kohler

President of the Tribunal

26 September 2022

ANNEX 1 TO PROCEDURAL ORDER NO. 2
TRANSPARENCY/CONFIDENTIALITY RULES

A. HEARINGS

1. The hearings shall not be open to the public, unless the Parties agree otherwise at the latest at the pre-hearing videoconference. If the Parties agree to open the hearings to the public, the Tribunal will give appropriate directions, including on the non-disclosure of protected information addressed during the hearings.

B. TRANSCRIPTS AND RECORDINGS OF HEARINGS

2. The transcripts and recordings of hearings shall not be made public, unless both Parties agree otherwise no later than 15 days from the time limit for corrections to the transcript.

C. AWARD

3. For purposes of Article 48(5) of the ICSID Convention and ICSID Arbitration Rule 48(4), the Parties confirm that they consent to the publication of the Award by ICSID, with any redactions agreed by the Parties or decided by the Tribunal in accordance with Section G below.

4. To that end, the Parties agree that the Tribunal shall not become *functus officio* until it has decided on any disputed redactions of the Award or of any post-award decision rendered in accordance with Article 49(2) of the ICSID Convention.

D. ORDERS AND DECISIONS

5. ICSID shall publish the orders and decisions of the Tribunal, with any redactions agreed by the Parties or decided by the Tribunal in accordance with Section G below.

E. WRITTEN SUBMISSIONS

6. The written submissions shall not be made public, unless both Parties agree otherwise no later than 15 days from the filing of a written submission.

F. SUPPORTING DOCUMENTS

7. Supporting documents, namely exhibits, legal authorities, as well as witness statements and expert reports (including annexes, appendices or exhibits thereto), shall not be made public unless both Parties agree otherwise no later than 15 days from the filing of the respective supporting documents.

G. NON-DISCLOSURE OF PROTECTED INFORMATION

8. Protected information, as defined below, shall not be made available to the public. Protected information means information that is:

   i. Deemed as such by agreement of the Parties;

   ii. Confidential business information or protected personal information;

   iii. Information protected from disclosure under the law or rules determined by the Tribunal to be applicable to the disclosure of such information;

   iv. Information the disclosure of which would impede law enforcement;

v. Information the disclosure of which would be contrary to the essential security interests of the Respondent; or

vi. Information the disclosure of which would aggravate the dispute between the Parties or jeopardize the integrity of the arbitral process.

9. Within 30 days from the issuance of the Award, a decision and order (Sections C and D above), a Party shall give notice to the Tribunal and the other Party that it requests the non-disclosure of protected information in that document. Such notice shall identify the part(s) of the document sought not to be disclosed in the form of proposed redactions. Absent such notice and unless the Tribunal determines that compelling interests require information to be protected in accordance with paragraph 8 of this Annex, the Tribunal will authorize ICSID to publish the document without redactions.

10. Within 30 days from such notice, the other Party may raise reasoned objections to the requested protection and:

i. If no objections are raised, ICSID will publish the document at issue with the requested redactions.

ii. If objections are raised, the Parties shall confer and seek to resolve the issue by agreement within 15 days. If the Parties reach an agreement, ICSID will publish the document at issue with the agreed redactions. The Parties shall cooperate in good faith in resolving any objections and it is the Tribunal's expectation that disputes will only be referred to it in exceptional circumstances.

iii. If objections remain unresolved, the disputed redaction requests and the objections thereto shall be submitted to the Tribunal in the form of the Transparency Schedule set out in Annex 2 to Procedural Order No. 2 (in both .docx and .pdf).

iv. The Tribunal will then decide whether the identified information is to be protected and ICSID will publish the Award, decision or order with any redactions agreed by the Parties or decided by the Tribunal.

11. If the Parties agree to publish materials addressed in Sections B, E and F above, the Tribunal will give directions on the process to determine whether information contained in those materials must be protected from disclosure.

ANNEX 2 OF PROCEDURAL ORDER NO. 2
TRANSPARENCY SCHEDULE

[insert Party]'s	Request [1]
Information sought to be protected	
Legal basis for protection	
Comments	
Reply by opposing Party	
Decision	