

**IN THE MATTER OF AN ARBITRATION UNDER
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF BELARUS
AND THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA ON THE PROMOTION AND
PROTECTION OF INVESTMENTS**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL
TRADE LAW 1976**

- between -

OPEN JOINT STOCK COMPANY “BELARUSKALI”

(the “Claimant”)

and

THE REPUBLIC OF LITHUANIA

(the “Respondent” and, together with the Claimant, the “Parties”)

(PCA Case No. 2024-03)

PROCEDURAL ORDER NO. 5

Transparency / Confidentiality

Tribunal

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Professor Azzedine Kettani (Arbitrator)

Professor Zachary Douglas KC (Arbitrator)

Tribunal Secretary: Dr Johannes Fahner

Registry: Permanent Court of Arbitration

16 October 2024

I. PROCEDURAL HISTORY

- 1.1 In the draft Terms of Appointment circulated on 17 January 2024, the Tribunal proposed to adopt the UNCITRAL Rules on Transparency in this arbitration. In a mark-up circulated on 26 January 2024, the Claimant agreed to this suggestion, while the Respondent disagreed.
- 1.2 The matter was discussed during the procedural conference on 8 February 2024. It was agreed that the Tribunal would circulate a draft order in due course.
- 1.3 The circulation of this order was delayed by various developments, including the temporary suspension of the proceedings. Upon resumption of the proceedings, the need for a transparency/confidentiality regime was taken up again.
- 1.4 On 4 September 2024, the Respondent sent a letter to the Tribunal, underlining “*the importance of all participants in this arbitration respecting the confidentiality of these proceedings pending the Tribunal’s decision on the confidentiality and transparency regime*”. The Respondent also proposed that the PCA issue a press release with information about the arbitration, in order to keep “*the public appropriately informed of the existence and progress of these proceedings*”.
- 1.5 On 6 September 2024, the Claimant responded, noting that it did not “*in principle object to the Respondent’s proposal to issue the press release*”. At the same time, the Claimant emphasized “*the necessity of establishing [a] more transparent regime of the present proceedings*”. The Claimant pointed out that the measures at issue in this arbitration had already been the subject of debate in national and international fora. It also noted the potential financial impact of a prospective award on Lithuania and its citizens. For these reasons, the Claimant argued that “*the present arbitration should be carried out in a transparent manner (...) subject to certain confidentiality restrictions, such as, for example, confidential business information of the Parties*”.
- 1.6 The Respondent replied to the Claimant’s letter on 11 September 2024, advocating that a balance be struck between the public interest in disclosure and competing interests in confidentiality, giving “*due regard to the special sensitivities surrounding the matters of national security involved in this case*”. The Respondent suggested that the transparency/confidentiality regime adopted in *Huawei v. Sweden* should be applied in a somewhat adapted form. This would entail the publication of awards and procedural orders (subject to requests for redactions), but not of other documentation filed in the proceedings, nor should the hearing be accessible to the public.
- 1.7 The Claimant responded on 13 September 2024. It agreed to the publication of awards and procedural orders (subject to requests for redactions). In addition, the Claimant proposed that “*any other documents (including exhibits, witness statements, expert reports, and hearing transcript)*” should be published, which the Tribunal understands to essentially refer to written submissions.

- 1.8 Following the submission to the Parties of a draft press release and website entry, the Parties' comments on such drafts, and the Tribunal's decision on the final wording of the press release and website entry, on 16 September 2024, the PCA published the press release and uploaded the entry on its website. The information so published covered (i) the existence of the arbitration; (ii) the names of the Parties, of counsel, of the arbitrators and secretary; (iii) the applicable investment treaty; and (iv) the nature of the dispute.
- 1.9 On 25 September 2024, a draft of this PO5 was shared with the Parties, who were invited to submit any compelling comments by 2 October 2024 at the latest. The Claimant submitted comments on 30 September 2024. It agreed to the draft PO5, except in respect of the publication of the Parties' written submissions, which it would prefer to occur immediately after filing, rather than after the hearing as stipulated in the draft. The Respondent provided comments on 2 October 2024, objecting to the publication of the Parties' written submissions and proposing various additions to the definition of "Protected Information".
- 1.10 Taking the Parties' comments into account, the Tribunal issues this Procedural Order No. 5.

II. ANALYSIS

- 1.11 Pursuant to the Terms of Appointment, the procedural rules applicable to this arbitration are, in order of priority:
- a) the BIT;
 - b) the Terms of Appointment and PO1; and
 - c) the 1976 UNCITRAL Rules;
- subject to any mandatory rules of the law on international arbitration applicable at the seat of the arbitration, *i.e.*, the Swiss Private International Law Act ("**PILA**").
- 1.12 The BIT does not contain any provisions on the transparency/confidentiality regime that applies to arbitration proceedings conducted pursuant to its Article 8.
- 1.13 The Swiss Private International Law Act (PILA) is equally silent on the transparency and confidentiality of Swiss-seated arbitration proceedings. At the same time, Swiss legal commentators consider that transparency may be warranted in investment arbitrations because they involve the public interest.¹
- 1.14 More generally, Article 182(1) PILA provides that "[t]he parties may determine the arbitral procedure, either themselves or by reference to arbitration rules (...)", while Article 182(2) provides that "[w]here the parties have not determined the procedure, the arbitral tribunal

¹ Berger and Kellerhals, *International and Domestic Arbitration in Switzerland* (Hart 4th ed. 2021) para. 1230.

shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules”.

- 1.15 It follows from the legal framework just set out that the Parties may agree on the transparency/confidentiality regime that applies to this arbitration, and that they may do so by submitting to arbitration rules that contain relevant provisions or by agreeing on a specific rule. In the absence of an agreement between the Parties, it falls within the Tribunal’s powers to decide these matters.
- 1.16 Here, the Parties have submitted to the 1976 UNCITRAL Rules. Articles 25(4) and 32(5) of such Rules provide that “[h]earings shall be held in camera unless the parties agree otherwise” (Article 25(4)) and that “[t]he award may be made public only with the consent of both parties” (Article 32(5)). In all other respects, the 1976 UNCITRAL Rules are silent on issues of transparency and confidentiality.
- 1.17 Subsequently, the Parties also agreed to the publication of specific information about the proceedings through a PCA press release and on the PCA website. In addition, in their letters of 11 and 13 September 2024 respectively, both consented to the publication of awards and procedural orders (subject to redactions).
- 1.18 Accordingly, it remains for the Tribunal to decide on those matters linked to transparency and confidentiality which are not covered by the Parties’ agreements, namely publication of written submissions, supporting documentation, transcripts and recording of hearings, and the protection of confidential information contained in materials to be published.
- 1.19 When deciding issues of transparency/confidentiality, the Tribunal takes account of the prevailing trend towards transparency in investment arbitration,² which is in particular evidenced by the adoption of transparency rules in a growing number of institutional rules and new investment treaties.³ That trend recognises that investor-state disputes often involve matters of public policy and may have a significant impact on a state’s budget. Transparency is also commonly considered to contribute to good governance and to enhance the quality of investor-state dispute settlement, by strengthening the accountability of tribunals, institutions, and other participants in investment arbitration. In these various ways, transparency is seen as reinforcing confidence in investor-state dispute settlement and improving the legitimacy of the system.⁴

² International Bar Association, ‘Consistency, efficiency and transparency in investment treaty arbitration’ (November 2018, **Exh. CL-3**, p. 53; *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 2 of 12 February 2019, para. 6.

³ Kalnina and Godbole, ‘Publication, Access to Proceedings and Non-Disputing Party Submissions’ in Happ and Wilske (eds), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (Beck 2022) p. 617.

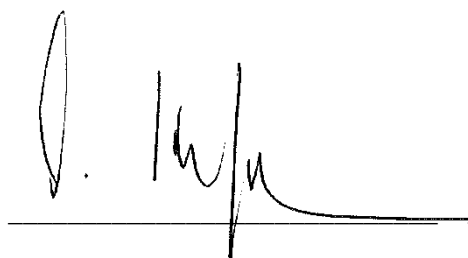
⁴ See e.g. *Abaclat and others (formerly Giovanna a Beccara and others) v. the Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order) of 27 January 2010, para. 72; Shirlow and Caron, ‘The Multiple Forms of Transparency in International Investment Arbitration: Their Implications, and Their Limits’ in Schultz and Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) p. 469ff.

1.20 In the present proceedings, several factors weigh in favour of transparency. In particular, it cannot be denied that this arbitration concerns matters of public interest, both at the national and international level. The Claimant has pointed out that the impugned measures have triggered significant public debate, and that the authorities of Belarus and Lithuania have made public statements related to the subject matter of this arbitration.⁵ Moreover, several authorities within the United Nations have issued statements about the challenged measures.⁶

1.21 At the same time, the Tribunal acknowledges that the demand for transparency must be balanced against the legitimate interests of the Parties in protecting the confidentiality of certain categories of information. In addition, disclosures should not result in an aggravation of the dispute or an infringement of due process.⁷

III. ORDER

1.22 On the basis of the considerations set out above, the Tribunal adopts the transparency/confidentiality rules set out in Annex I to this PO.

A handwritten signature in black ink, consisting of a large, stylized initial 'G' followed by a series of loops and a long horizontal stroke extending to the right.

Gabrielle Kaufmann-Kohler
(Presiding Arbitrator)

On behalf of the Tribunal

⁵ 'Statement by the Belarusian Foreign Ministry in connection with the illegal decision of the Government of Lithuania on termination of the transit of potash fertilizers', 2 February 2022, **Exh. C-5**; 'Foreign Minister says ready to step down amid Belaruskali scandal', Delfi article of 9 December 2021, **Exh. C-6**.

⁶ 'Mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights' of 4 May 2022, **Exh. C-14**; 'UN Committee urges Lithuania to review sanctions on Belarusian potash', LRT article of 28 March 2023, **Exh. C-15**; 'UN's Guterres wants EU to ease Belarus sanctions. The EU isn't so sure', Politico article of 22 March 2023, **Exh. C-16**.

⁷ See e.g. *Huawei Technologies Co., Ltd. v. the Kingdom of Sweden*, ICSID Case No. ARB/22/2, Procedural Order No. 2 of 26 September 2022, para. 10.

ANNEX I: TRANSPARENCY / CONFIDENTIALITY RULES

A. Press releases

1. The PCA will issue a press release after the hearing and another one after the final award.

B. Decisions and Awards

2. Decisions and awards shall be published on the PCA website, subject to the redaction process provided in Section H.

C. Procedural Orders

3. Procedural orders, including this one, shall be published on the PCA website, subject to the redaction process provided in Section H.
4. The time limit to request redactions, if any, of information contained in Procedural Orders 1, 2, 3, and 4, shall run from the issuance of the present Order.

D. Written Submissions

5. The Parties' written submissions shall be published on the PCA website, subject to the redaction process provided in Section H, if the Parties so agree.

E. Supporting Documents

6. Supporting documents, namely factual exhibits, legal authorities, witness statements and expert reports (including annexes, appendices, or exhibits thereto), PowerPoints or other presentations made at the hearing, shall not be made public, unless otherwise agreed by the Parties.
7. For the avoidance of doubt, documents produced by one Party to the other Party pursuant to Section 4 of Procedural Order No. 1 (and not filed as exhibits) shall not be made public, unless otherwise agreed by the Parties.

F. Hearings, Transcripts and Recordings

8. Hearings shall not be accessible to the public, unless the Parties agree otherwise no later than one month before the relevant hearing, in which case the Tribunal will give appropriate directions, including about the protection of confidential information.
9. Transcripts and recordings of hearings (other than of procedural conferences) shall be published on the PCA website if the Parties so agree no later than one month before the hearing and inform the Tribunal of such agreement.

G. Correspondence

10. Correspondence between the Parties and the Tribunal shall not be made public, unless otherwise agreed by the Parties.

H. Redaction and Non-Disclosure of Protected Information

11. Publication of any information pursuant to this Procedural Order shall be subject to the redaction of Protected Information.
12. "Protected Information" means information that is not already in the public domain and:
 - i. that is deemed protected information by agreement of the Parties, including as a result of the process set out below;
 - ii. that contains or refers to any of the categories of information mentioned in para. 6 and 7 above;
 - iii. the disclosure of which would impede law enforcement;
 - iv. that is protected from disclosure under the law or rules determined by the Tribunal to be applicable to the disclosure of such information, including in respect of confidential business information, protected personal information, and confidential governmental information; or
 - v. that the Tribunal in its discretion may determine to be protected information upon a Party's written request.
13. A Party shall designate any Protected Information and give notice to the Tribunal and the other Party that it requests the non-disclosure of such information within 30 days of:
 - i. the issuance of any Decision, Award or Procedural Order;
 - ii. the Parties' communication to the Tribunal of their agreement to publish a written submission; and
 - iii. the distribution of final transcripts to the Parties, if the Parties have agreed on the publication thereof.
14. The notice referred to in para. 13 above shall identify the part(s) of the document sought not to be disclosed in the form of proposed redactions (in a separate copy of the document attached to the notice). It shall also specify the reasons for each redaction sought.
15. Absent such notice, and unless the Tribunal otherwise determines that compelling interests require information to be protected in accordance with this Section H, the PCA will publish the document without redactions.

16. Within 30 days from a notice referred to in para. 13 above, the other Party may raise reasoned objections to the designation with the following consequences:
 - i. If no objections are raised, the PCA will publish the document at issue with the requested redactions;
 - ii. If objections are raised, the Parties shall confer and seek to resolve the disagreement within 15 days. If the Parties reach an agreement, the PCA 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 at the expiration of the 15-day time limit, the disputed redaction requests and the related objections shall be submitted to the Tribunal in the form of the Transparency Schedule set out in Annex II to this Procedural Order No. 5 (in both .docx and .pdf formats);
 - iv. The Tribunal will then decide whether the designated information is to be protected and the PCA will publish the document with any redactions as directed by the Tribunal.
17. If the Parties agree to publish supporting documents, correspondence, transcripts or recordings of hearings, the Tribunal will give directions on the process to determine whether information contained in those materials must be protected from disclosure.
18. The Parties agree that the Tribunal shall not become *functus officio* until it has decided any disputed redactions in the final award or in any interpretation, correction, or additional award issued pursuant to Articles 35, 36, or 37 of the 1976 UNCITRAL Arbitration Rules.

ANNEX II: TRANSPARENCY SCHEDULE

[Party]'s Protected Information Request No. [#]	
Information sought to be protected	
Legal basis for protection	
Comments from requesting Party	
Objection to Request from opposing Party	
Decision	