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. 6

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. Jara Mínguez Almeida

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26 June 2024

I. PROCEDURAL BACKGROUND

1. On 16 April 2024:

   i. The European Commission ("**EC**") filed an application to intervene in these proceedings as a non-disputing Party ("**Application**").

   ii. The Tribunal invited the Parties to submit simultaneous comments on the Application by 31 May 2024.

2. On 9 May 2024, the Parties informed the Tribunal that they had agreed to extend the deadline for their comments on the Application until 5 June 2024, which the Tribunal approved.

3. On 5 June 2024, the Claimant and the Respondent filed their comments on the Application ("**C-Comments**" and "**R-Comments**", respectively). The Claimant objects to the Application,[1] while the Respondent endorses it.[2]

4. This Order decides the Application. The Tribunal has considered all of the Parties' and the EC's arguments even if specific reference is not made to a given argument.

II. ANALYSIS

5. The EC seeks to address two matters as a non-disputing party ("**NDP**"): the European Union ("**EU**") rules and policy on security of 5G networks ("**Security Regulation Matter**");[3] and the margin of appreciation enjoyed by EU Member States under EU law in defining and ensuring their essential security interests in relation to 5G networks ("**Margin of Appreciation Matter**").[4]

6. To that end, the EC seeks leave from the Tribunal to file a "written *amicus curiae* submission" **(A)**;[5] to access the documents in the record "to the extent necessary for its intervention" **(B)**;[6] and to "attend" the hearing "in order to present oral argument and [answer] questions" **(C)**.[7] The EC also "recalls", but does not expressly request, that the Tribunal could invite it to attend the hearing as an "expert on EU law", rather than as a NDP **(D)**.[8]

7. The Tribunal addresses each of these points below.

A. Written *amicus curiae* submission

8. ICSID Arbitration Rule 37(2) gives the Tribunal broad discretion to allow a NDP to "file a written submission". To assess whether such a filing is appropriate, however, the provision puts forward three factors for the Tribunal to "consider": First, the extent to which the submission would assist the Tribunal in determining a factual or legal issue "related" to the proceedings and "within the scope of the dispute" **(1)**; second, the extent to which the submission would bring a "perspective, particular knowledge, or insight different from that" of the Parties **(2);** and, third, the extent to which the NDP has a "significant interest" in the instant proceedings **(3)**. In addition, ICSID Arbitration Rule 37(2) requires the Tribunal to "ensure" that the NDP submission "does not disrupt the

[1] C-Comments, p. 9 ("Huawei respectfully requests the Tribunal to deny the […] Application in full").

[2] R-Comments, ¶ 35 ("Sweden respectfully submits that the Tribunal should permit the European Commission to file a non-disputing party submission on the matters outlined in the [Application]").

[3] Application, ¶¶ 19, 20ss.

[4] Application, ¶¶ 19, 30ss.

[5] Application, ¶¶ 37. a-b.

[6] Application, ¶ 37.c.

[7] Application, ¶ 37.d.

[8] Application, ¶ 37.d.

proceeding or unduly burden or unfairly prejudice" either Party **(4)**, and that both Parties are given an opportunity to comment on the NDP submission **(5)**.

1. Factual or legal issues related to the proceedings and within the scope of the dispute

9. The Security Regulation Matter would assist the Tribunal in determining factual and legal issues that relate to these proceedings and fall within the scope of the dispute. The Parties' main scheduled submissions refer to EU rules and policy on 5G network security. Specifically, the Claimant argues that Huawei's exclusion from Sweden's 5G rollout was inconsistent with the content and purpose of the EU Toolbox on 5G Cybersecurity, which in turn sought to detail a broader set of EU directives and policy documents on the security of mobile communication networks. The Claimant raises this argument in part to show that the exclusion was arbitrary and disproportionate, in breach of the BIT's FET standard,[9] while the Respondent argues consistency between the exclusion and the toolbox to defend against the FET claim.[10]

10. With respect to the Margin of Appreciation Matter, the situation is different. Indeed, the Parties dispute whether Huawei's exclusion was a disproportionate outlier in the EU, by pointing to how other EU Member States have taken different approaches in terms of 5G security protection.[11] According to the Respondent, this "directly implicates" the margin of appreciation enjoyed by Member States under EU law to decide on how best to protect their national security interests, including in relation to their telecommunication networks.[12] Yet, as the Claimant rightly points out, Sweden's margin of appreciation under EU law is not dispositive of the case at hand.[13] While it may play a role in the assessment of the factual matrix, the Tribunal's task is to determine whether and to what extent Sweden is owed deference in the definition and implementation of State measures as a matter not of EU law, but international law including the BIT.

11. The Tribunal therefore considers that, by briefing the Margin of Appreciation Matter, the EC would not assist it in determining issues sufficiently within the scope of the dispute. This being so, the EC's submission would be limited to the Security Regulation Matter.

2. Perspective, knowledge, or insight different from that of the Parties

12. It is undisputed that the EC has played a leading role in the development and coordination of EU law and policy on the security of electronic communications and the development of 5G networks across Europe, including the toolbox. Therefore, the Security Regulation Matter is likely to bring a perspective, knowledge, or insight different from that of the Parties.

3. The EC's significant interest in the proceedings

13. It is equally undisputed that the EC has a central role in relation to the interpretation and application of EU law. Moreover, as just noted, the EC also led the development of several EU legal and policy instruments on the security of electronic communications, which to some extent form part of the

[9] *See generally* Statement of Reply, 16 May 2024 ("**Reply**"), §§ III.D.3, V.C.2.

[10] *See generally* Counter-Memorial, 3 November 2023 ("**Counter-Memorial**"), §§ IV.B.2(a) and (c).

[11] Counter-Memorial, ¶¶ 392ss and Appendix 1; Reply, ¶¶ 794ss and Appendix 1.

[12] R-Comments, ¶ 24.

[13] C-Comments, p. 7.

dispute. The Tribunal finds this sufficient to conclude that the EC has a significant interest in the proceedings.

4. Disruption, burden, or prejudice

(i) No disruption of the proceedings

14. The Claimant submits that the Application is belated and for that reason alone should be dismissed.[14] The Tribunal disagrees.

15. It is possible that the EC could have filed the Application earlier. Certainly, that would have been preferable. Be that as it may, there is no preclusive time limit for NDP applications. The only requirement in this respect is that NDP submissions do not disrupt the proceeding, which is not the case here. The current procedural calendar can accommodate a parallel briefing schedule without causing any disruption to the proceeding. The deadline for the Respondent's Rejoinder (30 September 2024) and the hearing dates (25 November to 6 December 2024) would remain unchanged.

16. Specifically, it is appropriate to allow the EC to file its submission within one month of receiving a copy of this Order from ICSID and invite the Parties to file simultaneous comments one month thereafter.[15] This would conclude the parallel briefing schedule well before the hearing, giving the Parties appropriate time to prepare for oral argument and witness/expert examination.

(ii) No undue burden

17. The filing of any NDP submission inevitably requires the parties to expend additional time and effort in reviewing and responding to its contents, and the EC's submission would be no exception. Still, the Security Regulation Matter involves issues in dispute between the Parties. It follows that a submission by the EC limited to addressing this point would not impose an undue burden on the Parties. To further limit any potential burden, however, the Tribunal will set a 20-page limit on the EC's submission and the Parties' comments.

18. In these circumstances, requesting the EC to furnish an undertaking agreeing to bear the Parties' costs arising from its intervention, as the Claimant suggests,[16] appears disproportionate. In all likelihood, such a request will cause procedural difficulties, time inefficiencies, and even preclude the EC from participating as a NDP.

(iii) No unfair prejudice

19. On 15 June 2023, the EC made several statements concerning Huawei and ZTE, another Chinese company. It stated that "Huawei and ZTE represent in fact materially higher risks than other 5G suppliers",[17] and therefore that it would "take measures to avoid exposure of its corporate communications to mobile networks using Huawei and ZTE".[18] The EC also broadly endorsed the exclusion of Huawei by affirming that "decisions adopted by Member States to restrict or exclude Huawei and ZTE" from their 5G networks for being "high-risk suppliers" were "justified and

[14] C-Comments, pp. 4-5.

[15] *See infra*, ¶ 21.

[16] C-Comments, pp. 4-5.

[17] **C-331**, Communication from the European Commission – Implementation of the 5G cybersecurity Toolbox, 15 June 2023, p. 3 (of the PDF).

[18] **C-331**, Communication from the European Commission – Implementation of the 5G cybersecurity Toolbox, 15 June 2023, p. 4 (of the PDF).

compliant with the […] Toolbox".[19] Later, in a reasoned communication addressed to Huawei dated 6 October 2023, the EC concluded that the exclusion was consistent with EU law.[20]

20. It is therefore evident that the EC is not a neutral party. Yet, it is standard that NDPs advocate for interests and causes that may conflict with the positions of one of the disputing parties. This appears to be a feature that is built into the mechanism of NDP submissions and the conditions for their admission. Indeed, the condition that a NDP have "a significant interest" implies that it need not be neutral, independent, or objective. This being so, the EC's intervention would not entail an unfair prejudice to the Claimant, especially considering that NPD submissions do not constitute evidence. Moreover, the Tribunal would critically assess the content of the EC's submission in light of the Parties' comments and accounting for the fact that it comes from an NDP which has taken positions adverse to the Claimant's interests.

5. Opportunity to comment

21. It is sufficient to allow the Parties to present their observations on the EC's submission through simultaneous comments. There is no reason to adopt a consecutive sequence, as the Respondent suggests.[21] Simultaneous submissions will be time-efficient and ensure equality between the Parties. To maintain that equality throughout the briefing process, however, it is necessary to preclude the Respondent from using its forthcoming Rejoinder (due on 30 September 2024) to address either the EC's submission or the Claimant's corresponding comments.

B. Access to the record to the extent necessary

22. The Claimant submits that, at a later stage, the Tribunal will need to determine, in consultation with the Parties, the scope and modalities of the EC's intervention, including whether the EC should be granted access to the record.[22] For now, the Claimant simply "flags its grave reservations" about giving the EC access to the record, invoking the EC's lack of neutrality and stating that any disclosure of documents would contravene the confidentiality regime in Procedural order No. 2 ("**PO2**").[23] On the other hand, the Respondent does not comment on the EC's access to the record.

23. The Application included the EC's request to access the record and the opportunity for the Parties to comment on the Application has elapsed. Therefore, this request is ripe for decision.

24. In the Tribunal's view, the EC need not access the record to prepare a submission on the Security Regulation Matter. The submission is not meant to comment on the facts or the evidence of the case, nor on the Parties' positions. Therefore, the Tribunal denies the access request, noting that the EC has, in any event, at least a general understanding of the relevant issues in dispute, as it has opined

[19] **C-331**, Communication from the European Commission – Implementation of the 5G cybersecurity Toolbox, 15 June 2023, p. 3 (of the PDF).

[20] *See generally* **R-513**, Letter from European Commission to Mr. Alexandre Verheyden, Jones Day (Counsel for Huawei Technologies AB Sweden), 6 October 2023.

[21] R-Comments, ¶ 33.

[22] C-Comments, p. 5.

[23] C-Comments, fn. 16.

outside this arbitration that Sweden's conduct *vis-à-vis* Huawei is consistent with EU law and policy in matters of security of 5G networks.[24]

C. Attendance at the hearing

25. ICSID Arbitration Rule 37(2) only refers to the possibility of a NDP "fil[ing] a written submission". More importantly, the Parties have agreed from the outset that hearings would be closed to the public unless they agreed otherwise subsequently,[25] and there is no such agreement to date.

26. Similarly, under ICSID Arbitration Rule 32(2), the Tribunal may allow "other persons" such as the EC to attend the hearing, "[u]nless either [P]arty objects". However, the Claimant requests that the Application be denied "in full",[26] meaning that in principle it objects to the EC's intervention at the hearing.

27. Alternatively, the Claimant submits that, if the Tribunal were to allow the EC to file a submission, the corresponding EC representatives would have to appear at the hearing for examination.[27] Yet, ICSID Arbitration Rule 37(2) only mandates that the Parties be given an opportunity to present their observations on the EC's submission, and their written simultaneous comments satisfy that requirement.

28. As a result, the Tribunal will not allow EC representatives to attend the hearing.

D. EC as EU law expert

29. As noted above, the EC has contemporaneously taken views against Huawei regarding the consistency between Huawei's exclusion from Sweden's 5G rollout and EU law.[28] This issue being part of the matrix of the dispute, the EC cannot qualify as an independent EU law expert in this arbitration.

[24] *See supra*, ¶ 19.

[25] PO2, ¶ 8 and Annex 1, ¶ 1.

[26] C-Comments, p. 9.

[27] C-Comments, p. 5.

[28] *See supra*, ¶ 19.

III. ORDER

30. For the above reasons, the Tribunal:

i. Admits the EC as a NDP.

ii. Allows the EC to file a submission limited to addressing the Security Regulation Matter, which may be supported by legal authorities and must not exceed 20 pages, within 30 days of being notified a copy of this Order.

iii. Invites the Parties to submit simultaneous comments on the EC's submission, which may include supporting authorities and may not exceed 20 pages, within 30 days of the EC filing its submission.

iv. Orders the Respondent not to address either the EC's submission or the Claimant's comments thereto in its Rejoinder.

v. Denies the EC's other requests.

vi. Invites ICSID to notify a copy of this Order to the EC.

On behalf of the Tribunal,

[Signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal