

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Discovery Global LLC

Claimant

v.

Slovak Republic

Respondent

(ICSID Case No. ARB/21/51)

PROCEDURAL ORDER NO. 2

Transparency

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. Stephen L. Drymer, Arbitrator
Professor Philippe Sands, Arbitrator

Secretary of the Tribunal
Ms. Jara Minguez Almeida

Assistant to the Tribunal
Dr. Magnus Jesko Langer

22 April 2022

I. Procedural background

1. During the first session held on 25 March 2022, the Tribunal and the Parties discussed and agreed on transparency rules applicable to the present proceedings, including on the applicability of the UNCITRAL Rules on Transparency in treaty-based Investor-State Arbitration (“Transparency Rules”) as adjusted to ICSID proceedings, following which the Tribunal advised the Parties that it would prepare and circulate a draft procedural order on which the Parties could comment.
2. On 7 April 2022, the Centre, acting on behalf of the Tribunal, circulated a draft of this procedural order and the Parties provided their comments thereon on 21 April 2022.
3. The present Order addresses the transparency regime applicable to the present arbitration.

II. Transparency regime

4. Although elaborated in the framework of UNCITRAL, the Transparency Rules are available for use in non-UNCITRAL arbitrations such as this ICSID arbitration (Article 1(9)). Where the Contracting States to an investment treaty have not provided for the application of the Transparency Rules, the disputing parties (in the present case: the “Parties”) may agree to apply the Transparency Rules (Article 1(2)(a) by analogy and combined with Article 1(9)). The ICSID legal framework allows the Parties to agree on a degree of transparency that is greater than the one required by the ICSID Convention and Arbitration Rules.
5. In the present case, the Parties have agreed on the application of the Transparency Rules, as adjusted to ICSID proceedings, subject to certain specifications or amendments. In the event of discrepancy between the Transparency Rules and this Order, this Order will govern and supersede the Transparency Rules. ICSID has confirmed its willingness to administer this arbitration in accordance with the rules set forth in this Order and to act as repository as defined in the Transparency Rules and in this Order (the “Repository”).

6. On the basis of the foregoing, the Transparency Rules shall apply to the present proceedings, except that Articles 1(1)-(2), 1(3)(a), and 2 are not applicable and that Article 1(5) is modified to the extent that the Tribunal may exercise its authority to promote transparency in this case.
7. In addition, the Tribunal gives the following directions in respect of the transparency of this arbitration. Unless otherwise specified, references to “Article(s)” designate article(s) of the Transparency Rules.
8. For the avoidance of doubt, any request made during this arbitration and/or after the Award is issued by the Tribunal, to any public authority in the Slovak Republic for the disclosure of information under freedom of information act or any other relevant laws of the Slovak Republic pertaining to transparency and open government, including documents submitted or produced in these proceedings, shall be wholly governed by the applicable laws of the Slovak Republic and nothing in this Order shall be interpreted as amending the scope of disclosure obligation of the Slovak public authorities under such laws.

III. Documents

9. Subject to Article 7, the following documents shall be made available to the public: the Claimant’s request for arbitration, the Claimant’s memorial, the Respondent’s counter-memorial, the Claimant’s reply, the Respondent’s rejoinder and the Parties’ post-hearing briefs, if any, the lists of exhibits and legal authorities, the lists of witness statements and expert reports, any non-disputing party submissions and written observations thereon by the Parties, transcripts of hearings, procedural orders, decisions, and the award of the arbitral tribunal.
10. Subject to Article 7, the Tribunal may decide, on its own initiative or upon request from any person, and after consultation with the Parties, whether and how to make available to the public any documents provided to, or issued by, the Tribunal not falling within paragraph 9 above.
11. The documents to be made available to the public pursuant to paragraph 9 above shall be communicated by the Tribunal to the Repository, subject to Section VI below. The

documents to be made available pursuant to paragraph 10 above shall be communicated by the Tribunal to the Repository as they become available and, if applicable, in a redacted form in accordance with Article 7. The Repository shall make all documents available to the public in a timely manner, in the form and in the language in which it receives them.

12. Any administrative costs of making those documents available to a person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the Repository (on the ICSID website), shall fall under ICSID Administrative and Financial Regulation 15.
13. As a result of the foregoing, for purposes of Article 48(5) of the ICSID Convention and ICSID Arbitration Rule 48(4), the Parties consent to the publication of the Award subject to Article 7.

IV. Hearings

14. Pursuant to Article 6(3), the following logistical arrangements will be made to facilitate public access to the hearings:
 - (i) If technical or logistical constraints allow it, the hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings. Physical attendance by third persons at the hearings is not permitted.
 - (ii) At any time during the hearings, a Party may request that a part of the hearing be held in private, and that the broadcast of the hearing be temporarily suspended such that confidential or protected information be excluded from the broadcast. Each Party is obliged to inform the Tribunal before raising topics where confidential or protected information could reasonably be expected to arise. The Tribunal will then consult the Parties. Such consultations shall be held *in camera* and the transcript shall be marked “confidential”. After consultation with the Parties, the Tribunal will decide whether to exclude the information in question from the broadcast and the relevant portion of the transcript shall be marked “confidential”. The

transcript made public by the Repository shall redact those portions of the hearing marked “confidential”.

- (iii) The ICSID Secretariat will make the necessary technical arrangements to broadcast the hearings through video link.

V. Non-disclosure of confidential information

15. Confidential information, as defined below and identified pursuant to this Section, shall not be made available to the public. Confidential information means information that is:
 - (i) Confidential business information;
 - (ii) Information protected from disclosure under the applicable domestic law of the Respondent;
 - (iii) Financial, commercial, scientific or technical information supplied by or relating to a third party that has been treated as confidential information by that third party;
 - (iv) Information the disclosure of which would be contrary to the essential security interests of the Respondent; or
 - (v) Information the disclosure of which would jeopardize the integrity of the arbitral process.
16. Pursuant to Article 7(3)(a), each Party shall give notice within 30 days from the filing or issuance of a document that it requests protection for confidential information in that document. Pursuant to Article 7(3)(b), such notice shall specifically identify the part (or parts) of the document sought to be designated as confidential. In the absence of such notice, the Tribunal will authorize the publication of any document mentioned in Section III above.

17. The other Party may raise reasoned objections to the requested protection within 30 days. In the absence of an objection, the Tribunal will not authorize the publication by the Repository of the information for which protection is requested.
18. If an objection is raised, the Parties shall confer and seek to resolve it by agreement within 15 days.
19. If the objection remains unresolved, the notice and the objections shall be submitted to the Tribunal in the form of a “Transparency Table”, in the form attached as **Annex A** both in word and .pdf format.
20. The Tribunal will then decide whether the identified information is to be treated as confidential. In the affirmative, (i) the Party that filed the protected document shall provide a redacted version of the document within 15 days of the Tribunal’s decision, or (ii) for documents emanating from the Tribunal, the Tribunal will issue a redacted version. The Tribunal will thereafter transmit that document to the Repository for publication.
21. If the Tribunal decides that information for which protection is sought is not confidential and should be made available to the public, the Party that filed the document shall be permitted to withdraw all or part of the document from the record within 15 days of the Tribunal’s decision.
22. With respect to the Award, the Parties agree that the Tribunal shall only become *functus officio* after the confidentiality objections, if any, have been resolved.
23. The time limit for giving notice of a request to protect confidential information contained in the Award shall be 30 days from the date of dispatch of the Award. The procedure set out in paragraphs 15 to 19 above otherwise applies to the protection of confidential information in the Award.
24. Absent a notice from the Parties pursuant to paragraph 23 above within 30 days from the date of the dispatch of the Award, the Award will be published unredacted by the ICSID Secretariat pursuant to paragraph 25.1 of Procedural Order No. 1.
25. ICSID will close the case fund only after the publication of the Award.

VI. Repository of Published Information

26. With reference to paragraph 5 above, ICSID shall act as Repository of published information.
27. The following rules shall apply in connection with the Repository:
- (i) The Tribunal will submit the documents for publication (in redacted form if applicable) to the Repository.
 - (ii) The Secretary of the Tribunal will ensure publication in searchable electronic format (.pdf format).
 - (iii) The Repository will publish information and documents in the form and language in which it receives it.
 - (iv) Subject to paragraph 21, the Tribunal will be released of its responsibility under the Transparency Rules and this Order upon completion of its mandate under the ICSID Convention and Arbitration Rules, being specified such mandate extends to any interpretation or revision proceedings.
 - (v) Upon completion of this arbitration, documents referred to in Section III above shall continue to be made available to the public on the ICSID website.
28. Pursuant to Section III above, this Order which is hereby communicated to the Repository shall be published upon issuance.

On behalf of the Tribunal,

[signed]

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 22 April 2022

Annex A

Transparency Table

Claimant/Respondent [Party filing objections against publication]	Objection 1 [use one sheet per document/category of documents]
Identification of document and parts sought to be protected	
Legal basis for protection	
Comments	
Reply by opposing party	
Decision	