

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Sargeant Petroleum, LLC

Claimant

v.

Dominican Republic

Respondent

(ICSID Case No. ARB(AF)/22/1)

PROCEDURAL ORDER No. 2

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. David R. Haigh, K.C., Arbitrator
Mr. Alexis Mourre, Arbitrator

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

Assistant to the Tribunal

Mr. Lukas Montoya

22 December 2022

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I. INTRODUCTION

1. This proceeding is conducted in accordance with the ICSID Additional Facility Rules and the ICSID Arbitration (Additional Facility) Rules in force as of 10 April 2006, except to the extent modified by Section B of Chapter 10 (Investment) of the Dominican Republic – Central America – United States Free Trade Agreement signed on 5 August 2004, in force between the United States and the Dominican Republic since 1 March 2007 (“**DR-CAFTA**”).¹
2. Article 10.21 of DR-CAFTA establishes the transparency regime applicable to arbitral proceedings instituted under DR-CAFTA.
3. On 12 December 2022, the Tribunal circulated a draft Procedural Order No. 2 (“**PO2**”), addressing the details of the transparency regime applicable to this proceeding, in light of Article 10.21 of DR-CAFTA.
4. The Parties provided their comments to the draft PO2 on 16 December 2022. The draft PO2 was also addressed at the first session held on 20 December 2022.
5. Having considered the Parties’ comments and having regard to the provisions of Article 10.21 of DR-CAFTA, the Tribunal now issues the present Order to govern the transparency regime applicable to this arbitration.

II. DOCUMENTS

6. In accordance with Article 10.21(1) of DR-CAFTA, and subject to the redaction of information designated as “protected information” pursuant to Section IV *infra*, the

¹ In this Order, the term “Parties” is used to refer to the Claimant and the Respondent in this proceeding, and the term “Party” is used to refer to either the Claimant or the Respondent. (The Tribunal is mindful that Chapter 10 of DR-CAFTA refers to the Claimant and the Respondent together as the “disputing parties” and to either of them as a “disputing party.”) In this Order, for further clarity, the State signatories of DR-CAFTA will be referred to as “DR-CAFTA Party” or the “DR-CAFTA Parties.” (The Tribunal is mindful that DR-CAFTA refers to the States signatories to the FTA as “Party.”)

following documents shall be publicly available: (i) “the notice of intent”; (ii) “the notice of arbitration”; (iii) “pleadings, memorials and briefs” submitted to the Tribunal by either Party; (iv) any written submissions submitted pursuant to Article 10.20(2) of DR-CAFTA (submissions by a non-disputing DR-CAFTA Party regarding the interpretation of the Treaty), Article 10.20(3) of DR-CAFTA (*amicus curiae* submissions from a person or entity that is not a disputing Party) and Article 10.25 of DR-CAFTA (Consolidation); (v) “minutes or transcripts of hearings of the Tribunal, where available”; and (vi) “orders, awards and decisions of the Tribunal.”

7. For the avoidance of doubt, it is understood that the publication of “pleadings, memorials and briefs” does not include the supporting materials attached to them (witness statements, expert reports, exhibits and legal authorities).
8. Without prejudice to the Respondent’s obligations under Article 10.21 of DR-CAFTA, the Parties agree that the ICSID Secretariat shall serve as Repository of published information, subject to the provisions of Sections IV and V *infra*.

III. HEARINGS

9. In accordance with Article 10.21(2) of DR-CAFTA, hearings shall be open to the public.
10. Pursuant to the above-mentioned provision, the Tribunal “shall determine, in consultation with the [Parties], the appropriate logistical arrangements” as well as the “appropriate arrangements to protect the information [designated as protected information] from disclosure” at the hearing.
11. The following logistical arrangements will be made to facilitate public access to hearings, and to protect information designated as “protected information” from disclosure at the hearing:
 - (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 the hearings. A non-disputing DR-CAFTA Party

may attend hearings in-person or virtually (if the hearing is held remotely), subject to the procedures for protection of information designated as “protected information”.

- (ii) The ICSID Secretariat will make the necessary technical arrangements to broadcast the hearings through video link.
- (iii) 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 “protected information” be excluded from the broadcast. Each Party is obliged to inform the Tribunal before raising topics where “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 portions of the hearing marked “confidential” shall be redacted from the transcript by the Parties prior to publication of the transcript by the Repository.
- (iv) The Tribunal may revisit these protocols or establish further protocols for the conduct of the public hearing and to protect the information designated as “protected information” at a later stage, in consultation with the Parties.

IV. NON-DISCLOSURE OF “PROTECTED INFORMATION”

- 12. Any “protected information” that is submitted to the Tribunal shall be protected from disclosure and publication in accordance with the procedures set out in Article 10.21(4) of DR-CAFTA, supplemented as further specified in this Section.
- 13. Pursuant to Article 10.28 of the DR-CAFTA, the term “protected information” means “confidential business information or information that is privileged or otherwise protected from disclosure under a [DR-CAFTA] Party’s law.” Pursuant to Article 10.21(3) of DR-

CAFTA, it is understood that “protected information” further includes “information that [the Respondent] may withhold in accordance with Article 21.2 (Essential Security) or Article 21.5 (Disclosure of Information)” of DR-CAFTA.

14. Pursuant to Article 10.21(4) of DR-CAFTA:

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal’s determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

15. The Parties agree to the following specifications:

(1) For Documents Other than the Award

16. For the purposes of Article 10.21(4) of DR-CAFTA, each Party shall give notice within 15 days from the filing or issuance of a document referred to at Section II *supra* that it requests

that information in that document be deemed “protected information” prior to publication.² All information in that document shall remain confidential pending the expiry of the 15 days mentioned in the preceding sentence. The notice shall specifically identify the part(s) of the document sought to be designated as “protected information,” and it shall be submitted in the form attached as **Annex A** (in word and .pdf format). In the absence of such notice, the Tribunal will authorize the publication of any document mentioned at Section II *supra* unredacted.

17. The other Party may raise reasoned objections to the requested protection within 15 days of the notice in paragraph 16 *supra*, in the form attached as **Annex A** (in word and .pdf format).
18. In the absence of an objection, the information identified in the notice under paragraph 16 *supra* will be treated as “protected information;” and the Tribunal will not authorize the publication of the information for which protection is requested.
19. If an objection is raised, the Parties shall confer and seek to resolve it by agreement within 8 days.
20. If the objection remains unresolved within the specified period, the notice and the objections shall be submitted to the Tribunal in a “Transparency Table,” in the form attached as **Annex A** both in word and .pdf format. The Tribunal will then decide whether the identified information is to be treated as “protected information.”
21. If information is to be treated as “protected information” by operation of paragraph 18 *supra*, an agreement under paragraph 19 *supra*, or an affirmative decision by the Tribunal under paragraph 20 *supra*: (i) the Party that filed the protected document shall provide a redacted version of the document within 8 days of the Tribunal’s decision (paragraph 18 and 20 *supra*) or the Parties’ agreement (paragraph 19 *supra*), or (ii) for documents

² The Parties agree that a notice so given satisfies the requirement of Article 10.21(4)(b) and (c) of DR-CAFTA.

emanating from the Tribunal, the Tribunal will issue a redacted version. The Tribunal will thereafter transmit that document to the Repository for publication.

22. If the Tribunal decides that information for which protection is sought is not “protected information” 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 8 days of the Tribunal’s decision.
- (i) Absent a withdrawal, the Tribunal will authorize the publication of the document unredacted.
 - (ii) If the entire document is withdrawn from the record, the Tribunal will not authorize the publication of the document.
 - (iii) If the document is withdrawn from the record only in part, the withdrawing Party shall provide a version of the document removing the withdrawn parts, which shall then be published.

(2) For the Award

23. For the purposes of Article 10.21(4) of DR-CAFTA, a Party shall give notice of a request to redact “protected information” contained in the Award within 30 days from the date of dispatch of the Award. The procedure set out in paragraphs 16 to 21 above otherwise applies to the protection of confidential information in the Award.
24. Absent a notice from the Parties pursuant to paragraph 23 *supra*, the Award will be published unredacted by the Repository.
25. In light of Article 10.21(4)(d) of DR-CAFTA, which establishes that “*the tribunal shall decide any objection regarding the designation of information claimed to be protected information,*” the Parties agree that the Tribunal shall only become *functus officio* after disputes over redaction of “protected information” of the Award, if any, have been resolved by the Tribunal. Subject to this and to the resolution of disputes over protected information arising in connection with any proceedings listed below, the Tribunal will be released of

its responsibility under Article 10.21(4) of DR-CAFTA and this Order upon completion of its mandate under the ICSID Additional Facility Rules and the ICSID Arbitration (Additional Facility) Rules, being specified that such mandate extends to any proceedings under Article 55 (Interpretation), Article 56 (Correction) and Article 57 (Supplementary Decision) of the ICSID Arbitration (Additional Facility) Rules.

26. The members of the Tribunal will be compensated for time spent in the resolution of any disputes in connection with redaction of “protected information” in the Award in accordance with Section 3 of Procedural Order No. 1.

V. REPOSITORY OF PUBLISHED INFORMATION

27. Without prejudice to the Respondent’s obligations under Article 10.21 of DR-CAFTA, the Parties agree that the ICSID Secretariat shall serve as Repository of published information, subject to the provisions of Section IV *supra*.
28. 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 Repository shall make documents available to the public by uploading them on the ICSID website, subject to the provisions of this Order and the Tribunal’s instructions.
 - (iii) Any administrative costs of making documents available to a 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 17.
 - (iv) The Repository will publish information and documents in the form and language in which it receives it. The Repository will publish a document in searchable electronic format (.pdf format), if received in that manner.

- (v) Upon completion of this arbitration, documents referred to in Section II *supra* shall continue to be made available to the public on the ICSID website.
29. Pursuant to Section II *supra*, this Order is hereby communicated to the Repository to be published upon issuance.

On behalf of the Tribunal,

_[Signed]_____

Professor Gabrielle Kaufmann-Kohler

President of the Tribunal

Date: 22 December 2022

ANNEX A: TRANSPARENCY TABLE

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