

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. 3

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

Assistant to the Tribunal

Mr. Lukas Montoya

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

13 October 2023

I. PROCEDURAL BACKGROUND

1. On 1 September 2023, pursuant to Section 16 of Procedural Order No. 1 (“PO1”) and the revised Procedural Calendar of 15 May 2023, the Parties submitted *inter partes* their document production requests in the form of Redfern Schedules.
2. On 22 September 2023, the Parties produced non-objected documents *inter partes* and submitted *inter partes* their respective objections to certain document production requests.
3. On 29 September 2023, the Parties submitted their replies to the opposing Party’s objections and provided the Tribunal with the corresponding Redfern Schedules.
4. This Order addresses the Parties’ document production requests. The Tribunal will first determine the applicable standards and then issue its decision on the requests. The reasons for the Tribunal’s decisions are incorporated into the Redfern Schedules, which are annexed to and made an integral part of this Order (Annex A for the Claimant’s requests and Annex B for the Respondent’s requests).

II. APPLICABLE STANDARDS

5. This arbitration is governed by: (i) Chapter 10 of the Dominican Republic – Central America – United States Free Trade Agreement (“DR-CAFTA”); (ii) the 2006 ICSID Additional Facility Rules and ICSID Additional Facility Arbitration Rules (“AF Arbitration Rules”); and (iii) the procedural rules set out in PO1.
6. PO1 contains certain rules on document production of which the following are relevant to the present Order:

16.1 The Tribunal shall be guided but not bound by the 2020 IBA Rules on the Taking of Evidence in International Arbitration [(the “IBA Rules”)].

16.2 Within the time limit set in Annex A, each Party may request from the other Party the production of documents or categories of documents within the other Party’s possession, custody or control. Such a request for production shall identify each document or narrow category of documents sought with precision, in the form of a Redfern Schedule as attached in Annex C hereto, in both Word and .pdf format, specifying why the document sought is relevant to the dispute and material to the outcome of the case. Such a request shall not be copied to the Tribunal, the Secretary of the Tribunal or the Assistant.

[...]

16.7. On or around the date set forth in Annex A, the Tribunal will, at its discretion, rule upon the production of the documents or categories of documents having regard to the legitimate interests of the Parties and all the relevant circumstances, including applicable privileges and if appropriate the burden of proof.

16.8. Documents which the Tribunal orders to be produced shall be communicated directly to the requesting Party without copying the Tribunal, the Secretary of

the Tribunal or the Assistant. Documents so communicated shall not be considered to be on record unless and until the requesting Party subsequently files them as exhibits in accordance with §17 [of PO1].

[...]

7. In this regard, the following provisions of the IBA Rules are relevant:

i. Article 3.3:

A Request to Produce shall contain:

- (a) (i) a description of each requested Document sufficient to identify it, or
(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
- (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
- (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

ii. Article 3.4:

Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

iii. Article 3.5:

If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Articles 9.2 or 9.3, or a failure to satisfy any of the requirements of Article 3.3. If so directed by the Arbitral Tribunal, and within the time so ordered, the requesting party may respond to the objection.

iv. Article 3.7:

Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in timely fashion, consider the Request to Produce, the objection and any response thereto. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Articles 9.2 or 9.3 applies; and (iii) the requirements of Article 3.3 have

been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

v. Article 9.2:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:

- (a) lack of sufficient relevance to the case or materiality to its outcome;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below);
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

8. In addition, Article 41 of the AF Arbitration Rules grants the Tribunal the power to order the Parties to produce documents in the following terms:

The Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts.

9. Accordingly, the Tribunal will apply the following standards to rule on the requests for production of documents:

- i. Specificity: The request must identify each document or category of documents with precision.
- ii. Relevance: The request must establish the relevance of each document or category of documents to prove allegations made in the submissions. For purposes of this Order, the term “relevance” encompasses both relevance to the dispute and materiality to its outcome. At this stage of the proceedings, the Tribunal is only in a position to assess the *prima facie* relevance of the documents requested, having regard to the factual allegations made so far. This *prima facie* assessment does not preclude a different assessment at a later point of the arbitration with the benefit of a more developed record.
- iii. Possession, custody or control: The request must show that it is more likely than not that the requested documents exist, that they are not within the possession, custody or control of the requesting Party, and that they are within the possession, power or control of the other Party.
- iv. Balance of interests: Where appropriate, the Tribunal will balance the legitimate interests of the requesting Party with those of the requested Party, taking into account all relevant

circumstances, including any legal privileges applicable to certain types of communications, the need to safeguard confidentiality, and the proportionality between the convenience of revealing potentially relevant facts and the burden imposed on the requested Party.

III. ORDER

10. For the reasons set forth in the Redfern Schedule regarding the Claimant's document production Requests attached as Annex A and made an integral part of this Order, the Tribunal:
 - i. Takes note that no decision is required in respect of Requests No. 1-4, 8, and 16.
 - ii. Grants the Claimant's Requests No. 5-7, 14-15, 17-18, and 20, as indicated in the Redfern Schedule.
 - iii. Denies the other requests.
11. For the reasons set forth in the Redfern Schedule regarding the Respondent's document production Requests attached as Annex B and made an integral part of this Order, the Tribunal:
 - i. Takes note that no decision is required in respect of Requests No. 1-2, 4-10.
 - ii. Grants the Respondent's Request No. 3, as indicated the Redfern Schedule.
12. In Relation to both Annexes A and B:
 - i. In accordance with the Procedural Calendar and Section 16.8 of PO1, the Parties must produce the documents responsive to the Requests granted above by **10 November 2023**.
 - ii. Within the same timeframe, if a Party claims a right not to produce certain portions of a document on the grounds of confidentiality, privilege, and/or legal impediment, it shall produce a version of the document redacting the allegedly protected information, and list the document in a privilege log. If a Party claims the right not to produce a document in its entirety, it shall identify the document in the privilege log by referring to its type (email, letter, report, etc); date; subject matter (e.g. legal opinion on validity of contract of [date] between X and Y for [subject matter of contract]); author(s); and recipient(s)). In both scenarios, the Party must specify the legal basis of the claimed confidentiality or privilege (including the applicable law and the reasons why such right applies in the current instance).
 - iii. If the opposing Party believes that the other Party's invocation of confidentiality and/or privilege is unfounded, it must present reasoned objections no later than **17 November 2023**. The Party invoking confidentiality and/or privilege may respond to these objections no later than **24 November 2023**. Both the objections and replies must be set out in the privilege log.

Subsequently, the Tribunal will decide any disputed matter.

Seat of the arbitration: London, England.

On behalf of the Tribunal,

__[Signed]_____
Professor Gabrielle Kaufmann-Kohler
President of the Tribunal