

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Koch Industries, Inc. and Koch Supply & Trading, LP

v.

Canada

(ICSID Case No. ARB/20/52)

PROCEDURAL ORDER NO. 1

Members of the Tribunal

Mr. Eduardo Zuleta, President of the Tribunal

Mr. Henri C. Alvarez QC, Arbitrator

Prof. Andrea K. Bjorklund, Arbitrator

Secretary of the Tribunal

Dr. Randi Ayman

29 June 2021

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Introduction

The first session of the Tribunal was held on 24 June 2021, at 11:00 a.m. (Washington, D.C. time), by video conference. The session was adjourned at 11:25 a.m.

Participating in the conference were:

Members of the Tribunal

Mr. Eduardo Zuleta, President of the Tribunal

Mr. Henri C. Alvarez QC, Arbitrator

Prof. Andrea K. Bjorklund, Arbitrator

ICSID Secretariat:

Dr. Randi Ayman, Secretary of the Tribunal

In view of the parties' agreement on all procedural items except two, as well as their written submission on these two items, and considering costs and efficiency, the Tribunal decided, in consultation with the parties, to hold the first session without the presence of the parties.

The Tribunal considered the following:

- The Draft Procedural Order circulated by the Tribunal Secretary on 24 May 2021;
- The parties' comments on the Draft Procedural Order received on 9 June 2021, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree; and
- The parties' written submissions regarding transparency in this matter, namely whether or not hearings will be open to the public (§20.7), and the publication of hearings transcripts and the award (§23.2), filed by Respondent on 16 June 2021 and by Claimants on 21 June 2021.

Following the session, the Tribunal now issues the present Order:

Order

Pursuant to ICSID Arbitration Rules 19 and 20, this first Procedural Order sets out the Procedural Rules that govern this arbitration. The timetable is attached as **Annex B**.

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1. Applicable Arbitration Rules

Convention Article 44; NAFTA Article 1120

- 1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006, except to the extent that they are modified by Section B of NAFTA Chapter Eleven.

2. Constitution of the Tribunal and Tribunal Members' Declarations

Arbitration Rule 6; NAFTA Article 1123

- 2.1. The Tribunal was constituted on 27 April 2021, in accordance with Article 1123 of NAFTA, the ICSID Convention and the ICSID Arbitration Rules. The parties confirmed that the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal.
- 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the parties by the ICSID Secretariat on 27 April 2021.
- 2.3. The Members of the Tribunal confirmed that they have sufficient availability during the next 24 months to dedicate to this case.

3. Fees and Expenses of Tribunal Members

Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees

- 3.1. The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.
- 3.2. Under the current Schedule of Fees, each Tribunal Member receives:
 - 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
 - 3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
- 3.3. Each Tribunal Member shall submit his/her claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
- 3.4. Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.

4. Presence and Quorum

Arbitration Rules 14(2) and 20(1)(a)

- 4.1. The presence of all Members of the Tribunal constitutes a quorum for its sittings, including by any appropriate means of communication.

5. Rulings of the Tribunal

Convention Article 48(1); Arbitration Rules 16, 19 and 20

- 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
- 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence, except that where the matter is urgent, the President may decide procedural matters without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.
- 5.3. The Tribunal will draft all rulings, including the award, within a reasonable time period. If a ruling has not been issued within three months (six months in the case of an Award) after the final submission on a particular matter, the Tribunal will provide the parties with status updates every month thereafter.
- 5.4. The President is authorized to issue Procedural Orders on behalf of the Tribunal.
- 5.5. The Tribunal's rulings on procedural matters may be communicated to the parties by the Tribunal Secretary electronically in the form of a letter or email.
- 5.6. Any ruling of the Tribunal, including the certified copy of the award, will be dispatched electronically to the parties.
- 5.7. Procedural orders made by the Tribunal shall remain in force unless expressly amended or terminated.

6. Power to Fix Time Limits

Arbitration Rule 26(1)

- 6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.
- 6.2. In exercising this power, the President shall consult with the other Members of the Tribunal. If the matter is urgent, the President may fix or extend time limits without

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consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.

7. Secretary of the Tribunal

Administrative and Financial Regulation 25

7.1. The Tribunal Secretary is Ms. Randi Ayman, Legal Counsel, ICSID, or such other person as ICSID may notify the Tribunal and the parties from time to time.

7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Ms. Randi Ayman
ICSID
MSN C3-300
1818 H Street, N.W.
Washington, D.C. 20433
USA
Tel.: + 1 (202) 458-8287
Fax: + 1 (202) 522-2615
Email: rbdelfattah@worldbank.org; mpolasek@worldbank.org
Paralegal name: Ekaterina Minina
Paralegal email: eminina@worldbank.org

7.3. For local messenger deliveries, the contact details are:

Ms. Randi Ayman
ICSID
1225 Connecticut Ave. N.W.
(World Bank C Building)
3rd Floor
Washington, D.C. 20036
USA
Tel. 202-458-1534

8. Representation of the Parties

Arbitration Rule 18

8.1. Each party shall be represented by its counsel (below) and may designate additional agents, counsel, or advocates by notifying the Tribunal and the Tribunal Secretary promptly of such designation.

For Claimants

Mr. Christophe Bondy
Mr. Matthew Coleman
Ms. Chloe Baldwin
Mr. Alexandre Genest
Mr. Tom Innes
Ms. Claire Schacter
Mr. Eliot Letts (Trainee Solicitor)
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TInnes@Step toe.com
cschachter@Step toe.com
eletts@step toe.com

For Respondent

Ms. E. Alexandra Dosman, Counsel
Mr. Mark Luz, Counsel
Ms. Maria Cristina Harris, Counsel
Ms. Michelle Hoffmann, Counsel
Mr. Dmytro Galagan, Counsel
Mr. Stefan Kuuskne, Counsel
Ms. Shawna Lesaux, Paralegal
Ms. Krystal Girvan, Paralegal
Trade Law Bureau | Direction générale du
droit commercial
international - JLTB
Lester B. Pearson Building
125 Sussex Drive
Ottawa, ON K1A 0G2
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Tel. +1 343 549 8977
Email:
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Mark.Luz@international.gc.ca
MariaCristina.Harris@international.gc.ca
Michelle.Hoffmann@international.gc.ca
Dmytro.Galagan@international.gc.ca
Stefan.Kuuskne@international.gc.ca
Shawna.Lesaux@international.gc.ca
Krystal.Girvan@international.gc.ca

9. Apportionment of Costs and Advance Payments to ICSID
Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28

- 9.1. The parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.
- 9.2. By letter of 29 April 2021, ICSID requested that each party pay US\$150,000 to cover the initial costs of the proceeding. ICSID received Claimants' payment on 4 June 2021 and the Respondent's payment on 27 May 2021.
- 9.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.

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10. Place of Proceeding

Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3); NAFTA Article 1130

- 10.1. Washington, D.C. shall be the place of the proceeding.
- 10.2. The Tribunal may hold in-person hearings at any other place that it considers appropriate, taking account of the international situation and applicable travel restrictions.
- 10.3. The Tribunal may hold hearings by videoconference, except that the hearing on the merits shall be held by videoconference only where the international situation or applicable travel restrictions make an in person meeting impracticable. Moreover, to the extent a videoconference hearing including witness evidence may be organised, the Tribunal shall in advance of any such hearing and in consultation with the disputing parties establish a videoconference hearing protocol.
- 10.4. The Tribunal members may deliberate at any place and by any appropriate means it considers convenient.

11. Procedural Language(s), Translation and Interpretation

Administrative and Financial Regulation 30(3) and (4); Arbitration Rules 20(1)(b) and 22

- 11.1. English is the procedural language of the arbitration.
- 11.2. Documents filed in any other language must be accompanied by a translation into English.
- 11.3. If the document is lengthy and relevant only in part, it is sufficient to translate only relevant parts, provided that the Tribunal may require a fuller or a complete translation at the request of any party or on its own initiative.
- 11.4. Translations need not be certified unless there is a dispute as to the content of a translation provided and the party disputing the translation specifically requests a certified version.
- 11.5. Documents exchanged between the parties in a language other than English under §15 below (Production of Documents) need not be translated.
- 11.6. The testimony of a witness called for examination during the hearing who prefers to give evidence other than in the English language shall be interpreted, simultaneously if possible.

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- 11.7. The parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting (see §19 below), which witnesses or experts require interpretation.
- 11.8. The costs of the interpreter(s) will be paid from the advance payments made by the parties, without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs.

12. Routing of Communications
Administrative and Financial Regulation 24

- 12.1. The ICSID Secretariat shall be the channel of written communications between the parties and the Tribunal.
- 12.2. Each party's written communications shall be transmitted by email or other electronic means to the opposing party and to the Tribunal Secretary, who shall send them to the Tribunal.
- 12.3. Electronic versions of communications ordered by the Tribunal to be filed simultaneously shall be transmitted to the Tribunal Secretary only, who shall send them to the opposing party and the Tribunal.
- 12.4. The Tribunal Secretary shall not be copied on direct communications between the parties when such communications are not intended to be transmitted to the Tribunal.

13. Number of Copies and Method of Filing of Parties' Pleadings
Administrative and Financial Regulation 30; Arbitration Rules 20(1)(d) and 23

- 13.1. By the relevant filing date, the parties shall submit by email to the Tribunal Secretary and the opposing party an electronic file of the pleading with witness statements, expert reports and an index of all the supporting documentation attached to the pleading.¹
- 13.2. Within two working days following submission by email to the Tribunal Secretary and the opposing party of the documents listed in §13.1, the parties shall upload the pleading, with all the supporting documentation (including exhibits) and updated index to the file sharing platform that will be created by ICSID for purposes of this case.

¹ Please note that the World Bank server does not accept emails larger than 25 MB. In the event that files are too large to be submitted by email, they shall be uploaded to the file sharing platform created by ICSID for purposes of this case.

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- 13.3. Electronic files of pleadings, witness statements, expert reports, exhibits and legal authorities shall be text searchable (i.e., OCR PDF or Word). The Tribunal would also appreciate receiving a Word version of pleadings.
- 13.4. All pleadings shall be accompanied by a cumulative index to all the supporting documentation that the party has submitted up to the date of the pleading. The index shall indicate the document number and the pleading with which it was submitted. (Please follow the naming conventions contained in **Annex A**).
- 13.5. At the conclusion of the written phase of the proceeding, on a date to be determined by the Tribunal, or at any other time the Tribunal or the Secretariat so requests, the parties shall provide a consolidated hyperlinked index.
- 13.6. After receipt of the consolidated hyperlinked index, the Tribunal Secretary shall courier to each Member of the Tribunal at the addresses indicated at §13.7 below a USB drive containing an electronic copy of the entire case file (including pleadings, witness statements, expert reports, exhibits, legal authorities and Tribunal decisions and orders to date) with a consolidated hyperlinked index of all documents.
- 13.7. The addresses of the Tribunal Members are as follows:
- | | | |
|---|--|---|
| Mr. Eduardo Zuleta
Zuleta Abogados Asociados
Calle 87 # 10 -93, Oficina
302
Bogotá 110221
Colombia | Mr. Henri Alvarez
Vancouver Arbitration
Chambers
34424 Rockridge Place,
Mission, B.C., V2V 7N3
Canada | Prof. Andrea K. Bjorklund
McGill University Faculty of
Law
3644 rue Peel
Montreal, QC H3A 1W9
Canada |
|---|--|---|
- 13.8. The official date of receipt of a pleading or communication shall be the day on which the electronic file is sent to the Tribunal Secretary by email.
- 13.9. A filing shall be deemed timely if sent by a party by midnight, Washington, D.C. time, on the relevant date.
- 13.10. Extensions may be (a) agreed between the parties on the basis of professional courtesy, provided that such extensions are confirmed by the Tribunal and do not affect the dates fixed for any hearing or meeting; or (b) granted by the Tribunal for justifiable reasons, after appropriate consultation with the parties. A request for an extension shall be submitted as soon as practicable after a party becomes aware of the circumstances which prevent it from complying with the deadline.

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13.11. An accidental error in any document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.

14. Number and Sequence of Pleadings

Arbitration Rules 20(1)(c), 20(1)(e), 29 and 31

14.1. The parties shall submit their written pleadings in accordance with the Procedural Calendar set out in **Annex B** and with the rules set out below. The parties may at any stage of the proceedings seek further directions from the Tribunal regarding procedural steps relating to and/or in addition to those set out in the Procedural Calendar.

15. Production of Documents

Convention Article 43(a); Arbitration Rules 24 and 33-36

15.1. Each party may request the production of documents from the other party.

15.2. Each party will be permitted to file requests in accordance with the Procedural Timetable set out in **Annex B** to this Order. The requests, responses or objections to a request, the reply to the responses or objections to the requests, and the Tribunal's decisions regarding objected requests shall be recorded in a Stern schedule in the form of the table provided at **Annex C**.

15.3. Requests for the production of documents shall identify in sufficient detail (including subject matter) particular documents or a narrow and specific category of documents that are reasonably believed to exist; and shall set forth, in respect of each document or category of documents requested, a statement as to why such materials are considered relevant to the case and material to its outcome.

15.4. The parties shall not copy the Tribunal or the ICSID Secretariat on their correspondence or exchanges of documents in the course of the document production phase.

15.5. Unless the requested party objects to production, it shall produce the documents in electronic form (rather than by hard copy).

15.6. Articles 3 and 9 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2020) ("**IBA Rules**") shall guide the Tribunal and the parties regarding document production in this case.

15.7. Each disputing party may withhold from production documents that it considers not subject to production based on a legal impediment or privilege or grounds of special political or institutional sensitivity, as set out in Article 9 of the IBA Rules. If a party withholds documents on one of these bases, it shall submit to the other party either: (a) a log identifying such documents (or categories of documents) and the

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grounds for withholding; or (b) redacted versions of such documents identifying the grounds for withholding. Any such withholding shall be subject to challenge by the other party. The challenge shall as required be submitted for a decision by the Tribunal.

- 15.8. Documents produced according to the above procedure shall not be considered part of the evidentiary record unless and until a party subsequently submits them to the Tribunal in accordance with the Procedural Timetable.
- 15.9. The Tribunal may also, on its own motion, request the production of documents.
- 15.10. Should a party fail to produce documents as ordered by the Tribunal, the Tribunal may draw the inferences it deems appropriate in relation to the documents not produced, taking into account all relevant circumstances, after seeking and taking into consideration explanations provided by the parties.

16. Submission of Documents

Convention Article 44; Administrative and Financial Regulation 30; Arbitration Rule 24

- 16.1. The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, including exhibits and legal authorities. Further documentary evidence relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder.
- 16.2. The documents shall be submitted in the manner and form set forth in §13 above.
- 16.3. Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party.
 - 16.3.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.
 - 16.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.
- 16.4. The Tribunal may call upon the parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).
- 16.5. The documents shall be submitted in the following form:

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- 16.5.1. The number of each Exhibit containing a document produced by Claimant shall be preceded by the letter “C-” for factual exhibits and “CL-” for legal exhibits containing authorities etc. The number for each Exhibit containing a document produced by Respondent shall be preceded by the letter “R-” for factual exhibits and “RL-” for legal exhibits containing authorities etc.
- 16.5.2. Exhibits and legal authorities shall be numbered consecutively throughout these proceedings, commencing with “C-0001” and “R-0001,” and “CL-001” and “RL-001” respectively. The number of the exhibit or legal authority shall appear on the first page of the document, and shall be incorporated into the file name in accordance with §16.5.4.
- 16.5.3. A party may produce several documents relating to the same subject matter within one Exhibit, numbering each page of such Exhibit separately and consecutively.
- 16.5.4. Electronic files and the accompanying indexes shall follow the naming conventions contained in **Annex A**.
- 16.6. All evidence submitted to the Tribunal shall be deemed to be authentic and complete and as having originated from the source indicated in the document, including evidence submitted in the form of copies, unless a party disputes within a reasonable time its authenticity or completeness, or the party submitting the relevant evidence indicates the respects in which any document is incomplete. Likewise, any letter, telefax, e-mail or other communication shall be deemed to have been dispatched on the date or time stated on its face and shall be deemed to have been received by the addressee, unless a party disputes any such matter within a reasonable time, or the party submitting the relevant evidence indicates otherwise. In case of incomplete, illegible or otherwise unclear copies, the opposing party may request directly, and the Tribunal may require, the producing party to provide improved copies or originals.
- 16.7. The parties shall file all documents only once by submitting them with their pleadings. Documents need not be resubmitted with witness statements even if referred to in such statements.
- 16.8. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The party submitting such exhibits shall provide them in electronic and, if requested, hard copy to the other party, the Tribunal Members, the Tribunal Secretary, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.

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17. Witness Statements and Expert Reports

Convention Article 43(a); Arbitration Rule 24

- 17.1. Witness statements and expert reports shall be filed together with the parties' pleadings. Any person may present evidence as a witness, including a party or a party's officer, employee or other representative.
- 17.2. Each witness statement shall contain at least the following:
 - 17.2.1. the name, date of birth, and present address of the witness;
 - 17.2.2. a description of the witness's position and qualifications, if relevant to the dispute or to the contents of the statement;
 - 17.2.3. a description of any past and present relationship between the witness and the parties, counsel, or members of the Tribunal;
 - 17.2.4. a description of the facts on which the witness's testimony is offered and, if applicable, the sources of the witness's knowledge; and
 - 17.2.5. the signature of the witness, and the date.
- 17.3. Neither party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party (following the procedure outlined in §16.3).

18. Examination of Witnesses and Experts

Arbitration Rules 35 and 36

- 18.1. The IBA Rules shall guide the Tribunal and the parties regarding examination of witnesses and experts in this case.
- 18.2. Each witness and expert shall be available for examination at the hearing, subject to the provisions of this Procedural Order.
- 18.3. On the date indicated in Annex B, each party shall notify the other party, with a copy to the Tribunal, which witnesses and experts of the opposing party it wishes to cross-examine at the hearing. A failure by any party to call a witness or expert for cross-examination, or to put questions to a witness or expert on any particular topic, shall not be taken as an admission by that party of the veracity of the evidence of that witness or expert.
- 18.4. Shortly (and in any event no more than two weeks) after the parties' notifications, the Tribunal will indicate the witnesses or experts not called by the parties whom it

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wishes to question, if any. Should a party wish to present any of its own witnesses or experts for examination at the hearing who have not been called by the Tribunal or the other party, it shall request leave from the Tribunal.

- 18.5. The Tribunal may, on its own initiative or at the request of a party, summon any other witness to appear.
- 18.6. The procedure for examining witnesses and experts at the hearing shall be the following:
 - 18.6.1. Before giving evidence, witnesses shall make the declaration in ICSID Arbitration Rule 35(2), and experts shall make the declaration in ICSID Arbitration Rule 35(3).
 - 18.6.2. Witnesses giving oral testimony may first be examined in a direct examination, subject to time limits to be established by the Tribunal at the pre-hearing organizational meeting in §19.1 below.
 - 18.6.3. As a general matter, although direct examination will be given in the form of witness statements and expert reports, the party presenting the witness may conduct a brief direct examination. Generally, direct examination of a factual witness shall not exceed 10 minutes, unless otherwise ordered by the Tribunal upon prior application by the party call that witness. The direct examination shall be limited to correcting, if necessary, any errors in the witness statement and to addressing matters raised in the pleadings, witness statements, documents that have been produced (including those by order of the Tribunal), and/or oral evidence of the other party's witnesses, only to the extent the witness is competent to testify on these statements and materials, and only with respect to relevant matters that may have come into the record after the witness last had an opportunity to submit a witness statement.
 - 18.6.4. Experts giving oral evidence may give a brief summary of their report generally not exceeding 30 minutes, unless otherwise ordered by the Tribunal upon prior application by the party that calls the expert witness. The expert shall not introduce new expert testimony during this presentation.
 - 18.6.5. The direct examination of witnesses and experts is followed by examination by the other party ("cross-examination"), on relevant matters that were addressed or presented in the witness statement or during direct examination, or that are demonstrably within the scope of the witness' knowledge, such as – for example – based on documents in the record that the witness authored or received.

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- 18.6.6. The party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination (“re-direct examination”).
- 18.6.7. The Tribunal may examine the witness at any time, either before, during or after examination by any of the parties.
- 18.7. Unless the parties and the Tribunal agree otherwise, witnesses – other than a designated party representative – shall not be allowed in the hearing room before giving their testimony, shall not discuss the testimony of any other witness, and shall not be permitted to read the transcript before testifying. Experts shall be allowed in the hearing room at any time.
- 18.8. The designated party representative referred to in §18.7 means the individual designated by a party to act as its agent and give instructions to counsel at the hearing. The Government of Canada and the Government of Ontario may both designate a party representative.
- 18.9. Each party shall be responsible for summoning its own witnesses and experts to the applicable hearing, except when the other party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance. If a witness or expert fails to appear at the hearing without justification, the Tribunal shall order the witness statement of such witness or report of such expert to be struck from the record, unless the Tribunal determines that a valid reason has been provided for failing to appear. In such case, the Tribunal may summon the witness or expert to appear a second time if satisfied that the testimony of the witness is relevant and material.
- 18.10. Upon application made prior to the pre-hearing organizational meeting in §19.1, examination by video-conference may be permitted for justified reasons at the discretion of the Tribunal.
- 18.11. The Tribunal shall determine the order in which the witnesses and experts will be called after consultation with the parties during the pre-hearing organizational meeting in § 19.1 below.
- 18.12. The Tribunal shall, at all times, have complete control over the procedure for hearing a witness. The Tribunal may in its discretion:
- (a) refuse to hear a witness if it considers that the facts with respect to which the witness will testify are either proven by other evidence or are irrelevant;
 - (b) limit or refuse the right of a party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or

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- (c) direct that a witness be recalled for further examination at any time.
- (d) These provisions apply *mutatis mutandis* to the evidence of experts.

18.13. It shall not be improper for counsel to meet with witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations.

19. Pre-Hearing Organizational Meetings
Arbitration Rule 13

- 19.1. A pre-hearing organizational meeting shall be held at least four weeks before the hearing as scheduled in Annex B. It shall comprise a teleconference between the Tribunal, or its President, and the parties and should resolve any outstanding procedural, administrative, and logistical matters (including modality of interpretation and transcription) in preparation for the hearing.
- 19.2. At a date to be determined by the Tribunal, and in any event no later than the date of the pre-hearing conference, the parties shall submit to the Tribunal jointly – or, where they are unable to agree, separately – a proposal regarding a daily schedule for the hearing.
- 19.3. The Tribunal shall make best efforts to provide to the parties, 30 days in advance of the hearing, a list of potentially relevant issues that it wishes the parties to address in their oral submissions.

20. Hearings
Arbitration Rules 20(1)(e) and 32

- 20.1. After consultation with the parties, the Tribunal shall issue, for each hearing, a procedural order convening the meeting, establishing its place, time, agenda, and all other technical and ancillary aspects.
- 20.2. The oral procedure shall consist of a hearing for examination of witnesses and experts, if any, and for oral arguments. No new evidence may be presented at the hearing except with leave of the Tribunal.
- 20.3. The hearing may be held in-person or by any other means of communication as determined by the Tribunal after consultation with the parties. An in-person hearing shall be held at a place to be determined in accordance with §10 above.
- 20.4. The hearing shall take place on the dates set out in Annex B.
- 20.5. The Members of the Tribunal shall endeavor to reserve at least one day after the hearing to determine the next steps and to hold deliberations.

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- 20.6. As a general principle, subject to both the Tribunal’s overriding duty to ensure a fair hearing for all parties and all orders of the Tribunal made at any time (including the present order), the overall time available to the parties at the hearing shall be allocated equally, using an appropriate method of timekeeping.
- 20.7. In accordance with ICSID Arbitration Rule 32(2), the hearings shall be closed to the public, unless both parties agree otherwise.
- 20.8. At a date to be determined by the Tribunal, and in any event no later than two weeks prior to the hearing, the parties may each submit to the Tribunal separately (or, upon agreement of the parties, jointly):
- 20.8.1. A chronology of relevant facts in tabular form;
- 20.8.2. A list and brief description of the individuals and entities who/which are part of the relevant factual background (“*dramatis personae*”); and
- 20.8.3. A list of the substantive issues required to be determined by the Tribunal.
21. Records of Hearings and Sessions
Arbitration Rules 13 and 20(1)(g)
- 21.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Tribunal Members.
- 21.2. Verbatim transcript(s) in the procedural language(s) shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Tribunal, the verbatim transcripts shall, if possible, be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the parties and the Tribunal on a same-day basis.
- 21.3. The parties may communicate any proposals for corrections to the transcripts within 14 days of the receipt of the final transcript from the court reporter. The agreed corrections may be entered by the [court reporter] in the transcripts (“revised transcripts”). The Tribunal shall decide upon any disagreement between the parties and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.
22. Post-Hearing Memorials and Statements of Costs
Convention Article 44; Arbitration Rule 28(2)
- 22.1. At the conclusion of any hearing, the Tribunal shall decide, after consulting the parties, whether the parties will file Post-Hearing Memorials and Reply Post-

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Hearing Memorials as well as when and in what form the parties shall file evidence regarding the allocation and quantification of costs.

23. Publication

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4)

23.1. The parties shall negotiate a Confidentiality Order to govern the treatment of information in these proceedings. Any elements of the Confidentiality Order that cannot be agreed as between the parties shall be resolved by the Tribunal.

23.2. In accordance with Annex 1137.4 of the NAFTA, the Note of Interpretation of the NAFTA Free Trade Commission of 31 July 2001, and subject to the Confidentiality Order, ICSID shall publish redacted, public versions of: the request for arbitration; memorials; submissions made pursuant to NAFTA Article 1128 and any comments on those submissions; requests for leave to file non-disputing third party submissions and any comments on those submissions; procedural rulings; and orders. The ICSID Secretariat will publish the hearings transcripts, any documents used in the hearings, and the award in the present case where both parties consent to publication. Otherwise, ICSID will publish excerpts of the award pursuant to Arbitration Rule 48(4) and include bibliographic references to rulings made public by other sources on ICSID's website and in its publications. Pursuant to Annex 1137.4 of the NAFTA, either disputing party may make the award public. The parties also authorize ICSID to publish, on its website, the case details of the case, including the instrument involved and procedural details updates.

24. Non-Disputing NAFTA Parties

NAFTA Article 1128, NAFTA Article 1129

24.1. The Governments of Mexico and the United States may make submissions to the Tribunal pursuant to the procedure and requirements set forth in NAFTA Article 1128 and in accordance with the schedule set out in Annex B. The Governments of Mexico and the United States are entitled to receive a copy of the evidence and written argument from Canada in accordance with the procedure and requirements in NAFTA Article 1129 and the Confidentiality Order. Responses to the NAFTA 1128 submissions by the parties shall be limited to the argument presented in those submissions.

25. Non-Disputing Third Parties

NAFTA Free Trade Commission Statement on Non-Disputing Party Submissions

25.1. Any non-disputing party, other than a NAFTA Party referred to in Article 1128 of the NAFTA, that wishes to file a written statement to the Tribunal shall apply for leave from the Tribunal to file such a submission in accordance with the calendar

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set out in Annex B. The Tribunal shall consider non-disputing party submissions in a manner consistent with the recommendations of the North American Free Trade Commission on Non-Disputing Party Participation, issued on 7 October 2003. As recognized therein, the parties shall have the right to respond to all applications and submissions by non-disputing parties.

[signed]

Eduardo Zuleta
President of the Tribunal
Date: 29 June 2021

ANNEX A

ELECTRONIC FILE NAMING GUIDELINES

Please follow these guidelines when naming electronic files and for the accompanying Consolidated Hyperlinked Index. The examples provided (in *italics*) are for demonstration purposes only and should be adapted to the relevant phase of the case.

All pleadings and accompanying documentation shall indicate the LANGUAGE in which they are submitted (e.g. SPA=Spanish; FR=French; ENG= English). Such indication should be reflected both i) in the name used to identify each individual electronic file and ii) in the Consolidated Hyperlinked Index (which shall be attached to each submission).

For cases with a single procedural language, the “LANGUAGE” designation may be omitted, except for documents in a language other than the procedural language and the corresponding translations.

SUBMISSION TYPE	ELECTRONIC FILE NAMING GUIDELINES
MAIN PLEADINGS	Title of Pleading–LANGUAGE
	<i>Memorial on Jurisdiction-FR</i>
	<i>Counter-Memorial on the Merits and Memorial on Jurisdiction-SPA</i>
	<i>Reply on Annulment-FR</i>
	<i>Rejoinder on Quantum-ENG</i>
SUPPORTING DOCUMENTATION Exhibits	C-####–LANGUAGE
	R-####–LANGUAGE
	To be produced sequentially throughout the case.
	CLAIMANT’S FACTUAL EXHIBITS
	<i>C-0001-ENG</i>
	<i>C-0002-SPA</i>
	RESPONDENT’S FACTUAL EXHIBITS
	<i>R-0001-FR</i>
<i>R-0002-SPA</i>	
Legal Authorities	CL-####–LANGUAGE
	RL-####–LANGUAGE
	To be produced sequentially throughout the case.
	CLAIMANT’S LEGAL AUTHORITIES
	<i>CL-0001-ENG</i>
	<i>CL-0002-FR</i>
	RESPONDENT’S LEGAL AUTHORITIES
	<i>RL-0001-SPA</i>
<i>RL-0002-ENG</i>	
Witness Statements	Witness Statement-Name of Witness-Name of Submission-LANGUAGE
	<i>Witness Statement-Maria Jones-Memorial on Jurisdiction-SPA</i>
	<i>Witness Statement-Maria Jones-Reply on Jurisdiction-[Second Statement]-ENG</i>
Expert Reports	Expert Report-Name of Expert-Type-Name of Submission-LANGUAGE
	<i>Expert Report-Lucia Smith-Valuation-Memorial on Quantum-ENG</i>
	<i>Expert Report-Lucia Smith-Valuation-Reply on Quantum-[Second Report]-ENG</i>

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Legal Opinions	Legal Opinion-Name of Expert-Name of Submission-LANGUAGE
	<i>Legal Opinion-Tom Kaine-Counter-Memorial on the Merits-FR</i>
	<i>Legal Opinion-Tom Kaine-Rejoinder on the Merits-[Second Opinion]-FR</i>
Exhibits to Witness Statements, Expert Reports, Legal Opinions	WITNESS/EXPERT INITIALS-###
	<i>For exhibits filed with the Witness Statement of [Maria Jones]</i>
	<i>MJ-0001</i>
	<i>MJ-0002</i>
	<i>For exhibits filed with the Legal Opinion of [Tom Kaine]</i>
	<i>TK-0001</i>
	<i>TK-0002</i>
	<i>For exhibits filed with the Expert Report of [Lucia Smith]</i>
	<i>LS-0001</i>
	<i>LS-0002</i>
INDICES	Consolidated Hyperlinked Index
	Index of Exhibits-C-#### to C-####
	<i>Index of Exhibits-C-0001 to C-0023</i>
	Index of Legal Authorities-RLA-### to RLA-###
	<i>Index of Legal Authorities-RLA-0001 to RLA-0023</i>
OTHER APPLICATIONS	Name of Application-[Party]-LANGUAGE
	<i>Preliminary Objections under Rule 41(5)-SPA</i>
	<i>Request for Bifurcation-ENG</i>
	<i>Request for Provisional Measures-[Respondent]-SPA</i>
	<i>Request for Production of Documents-[Claimant]-SPA</i>
	<i>Request for Stay of Enforcement-FR</i>
	<i>Request for Discontinuance-[Claimant]-ENG</i>
	<i>Post-Hearing Brief-[Claimant]-SPA</i>
	<i>Costs Submissions-[Respondent]-ENG</i>
<i>Observations to Request for [XX]-[Claimant]-SPA</i>	

ANNEX B

PROCEDURAL CALENDAR

Step	Days	Date
<i>The following proposed time frames assume Procedural Order No. 1 will be completed and issued at the latest two weeks after the first meeting (scheduled for June 24, 2021). The following dates therefore use a base date of July 8, 2021 as the starting point for the procedural calendar.</i>		
Memorial	90 days	6 October 2021
Counter-Memorial	120 days	3 February 2022
Parties' respective Requests to Produce Documents	21 days	24 February 2022
Objections to Requests	14 days	10 March 2022
Replies to objections	7 days	17 March 2022
Deadline for applications for leave to submit non-disputing party <i>amicus curiae</i> submissions, if any, attaching the proposed submission ²	n/a	17 March 2022
Target Date for Rulings by the Tribunal on Objections to Document Requests	14 days	31 March 2022
Production of Document (both non-contested and as ordered by the Tribunal)	28 days	28 April 2022
Reply	60 days (144 days from receipt of Counter-Memorial)	27 June 2022
Rejoinder	88 days	23 September 2022
NAFTA Article 1128 Submissions by non-disputing NAFTA Parties, if any	28 days	21 October 2022

² The Tribunal shall request confirmation from the disputing parties on whether they have comments on or objections to the applications for leave to file a non-disputing party submissions and, if so, set an appropriate period for written submissions thereon.

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Step	Days	Date
Disputing Parties' Submissions, if any, on NAFTA Article 1128 Submissions	14 days	4 November 2022
List of witnesses and experts to be cross-examined during the hearing	At least four weeks before the dates for Hearing	
Pre-hearing organizational teleconference	At least four weeks before the dates for Hearing	
Hearing	5 days	Week of 5 December 2022
Post-Hearing Briefs	TBD	
Cost submissions	TBD	

ANNEX C

STERN SCHEDULE

Document Request Number	
Documents or Category of Documents Requested	
Relevance and Materiality according to the Requesting Party	
Objections to Document Request	
Reply to Objections to Document Request	
Decision of the Tribunal	