

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

(the “Claimants”)

v.

Canada

(the “Respondent”)

(ICSID Case No. ARB/20/52)

CONFIDENTIALITY ORDER

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

Ms. Martina Polasek

5 October 2021

Confidentiality Order

DEFINITIONS

1. For the purposes of this Confidentiality Order:
 - a. “disputing party” means either Koch Industries, Inc., Koch Supply & Trading, LP, or the Government of Canada;
 - b. “Confidential Information” means information that is not publicly available and is designated by a disputing party as confidential on the grounds that it is:
 - i. Business Confidential Information of a disputing party or of a provincial, territorial or municipal government;
 - ii. Business Confidential Information relating to a third party;
 - iii. information otherwise protected from disclosure under the applicable domestic law of the disputing State party including, but not limited to, and as amended, Canada’s *Access to Information Act*, the *Canada Evidence Act*, Canada’s *Privacy Act*, and Ontario’s *Freedom of Information and Protection of Privacy Act*; or
 - iv. information that is deemed to be financial, commercial, scientific or technical information supplied by third parties that has been treated in a confidential manner by those third parties;
 - c. “Business Confidential Information” includes:
 - i. trade secrets;
 - ii. financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the disputing party, provincial, territorial or municipal government or third party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;
 - iii. information the disclosure of which could result in material financial loss or gain to the disputing party, provincial, territorial or municipal government or third party to which it relates;
 - iv. information the disclosure of which could interfere with contractual or other negotiations of the disputing party, provincial, territorial or municipal government or third party to which it relates; or
 - v. other communications treated as confidential in furtherance of settlement between the disputing parties.
 - d. “Written Submission” includes all substantive written submissions made by either disputing party, all Memorials (Memorial, Counter-Memorial, Reply Memorial and Rejoinder Memorial), and accompanying documents filed with the Memorial, including but not limited to witness statements, exhibits, and expert reports.

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- e. “Public Document” means a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, order, or award that contains no Confidential Information and no redactions of such information.
- f. “Public Version” means the version of a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, order, or award that has been redacted to remove all Confidential Information.
- g. “Confidential Version” means the version of a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, order or award that contains Confidential Information that has not been redacted.

GUIDING PRINCIPLES, OBJECTIVE AND PURPOSE

- 2. The Tribunal (and their assistants, if any), the disputing parties and the International Centre for Settlement of Investments Disputes (the “Administering Authority”) agree to respect and maintain the confidentiality of information exchanged in this arbitration in accordance with the terms of this Confidentiality Order and, for this purpose, to adopt and maintain appropriate communications modalities and secure data storage systems.
- 3. A disputing party may designate Confidential Information contained in any Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, order or award, and in any other document produced by a disputing party to the other disputing party. These designations shall be made in accordance with the procedures set out in this Confidentiality Order.
- 4. The Tribunal may, either *proprio motu* or on application of a disputing party, after affording the disputing parties an opportunity to be heard, designate Confidential Information contained in any document produced to or generated by it. Such designations shall be made in accordance with the procedures set out in this Confidentiality Order.

WRITTEN SUBMISSIONS AND PROCEDURAL OR ADMINISTRATIVE CORRESPONDENCE

- 5. This section encompasses Confidential Information filings for all Written Submissions and procedural or administrative correspondence sent to and received from the Tribunal.
- 6. Information that Canada has designated as Confidential Information shall be surrounded by double brackets highlighted in yellow: **[[...]]**. Information that the Claimants have designated as Confidential Information shall be surrounded by double brackets highlighted in blue: **[[...]]**.
- 7. A filing disputing party has 21 calendar days from the date of the filing of a Written Submission to designate Confidential Information.
- 8. The disputing parties shall use the attached Disputed Designations Schedule (Appendix A) to file any objections and responses to any objections.

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9. Designations of Confidential Information, objections, and responses to objections shall be made on the following timetable:

Filing Date	Filing Party	Non-Filing Party
+21 calendar days	Proposes designations (or confirms that it has no designations)	
+21 calendar days		Objects to filing party's proposed designations Proposes any additional designations (or confirms that it has no designations)
+14 calendar days	Responds to non-filing party's proposed objections Objects to non-filing party's additional designations	
+14 calendar days		Responds to filing party's objections
+14 calendar days	Attempt to agree on final designations	
+7 calendar days	Submission of the Disputed Designations Schedule (Appendix A) to the Tribunal	

10. If a disputing party does not object to the designation of Confidential Information pursuant to the timetable in paragraph 9, the disputing party is deemed to have accepted the designation.
11. Within twenty-one (21) calendar days from the date on which the final designations of Confidential Information have been confirmed by agreement of the disputing parties, by the failure of a disputing party to make or object to any designation, or by order of the Tribunal, the disputing party that originally filed the Written Submission or procedural or administrative correspondence sent to and received from the Tribunal shall file:
- a. a final Confidential Version of the Written Submission or procedural or administrative correspondence sent to and received from the Tribunal, reflecting the final designations of Confidential Information; and
 - b. a final Public Version of the Written Submission or procedural or administrative correspondence sent to and received from the Tribunal, with all Confidential Information redacted.
12. Each page of a Confidential Version must be labeled, "Confidential Information, Unauthorized Disclosure Prohibited." Each page of a Public Version must be labeled "Public Version." Public Documents shall be labeled "Public Document" on the first page of the document.

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13. Where whole documents or multiple pages of Confidential Versions have been redacted entirely, such pages need not be reproduced in redacted form in the Public Version. Instead, a summary page stating the number of pages that have been redacted in their entirety will suffice.

DOCUMENTS EXCHANGED IN DOCUMENT PRODUCTION

14. Any document produced by a disputing party to the other disputing party shall be protected from disclosure as though it contained Confidential Information in its entirety, except that (a) should the document be filed by one of the disputing parties as part of a Written Submission, the disputing parties must follow the process for designating Confidential Information as set out in this Confidentiality Order; and (b) any produced documents that are already publicly available need not be treated as Confidential Information protected from disclosure.

ORDERS AND AWARDS

15. The disputing parties shall have twenty-one (21) calendar days from the receipt of an order or award from the Tribunal to designate information as Confidential Information in the order or award and to exchange such designations. The disputing parties shall have an additional twenty-one (21) calendar days from the receipt of such designations to raise any objections to the other disputing party's designations. At the conclusion of that period, if the disputing parties are unable within fourteen (14) calendar days to agree on any designations of Confidential Information, a disputing party may submit the issues to the Tribunal for resolution. The disputing parties shall use the attached Disputed Designations Schedule (Appendix A) for filing these objections.
16. Within fourteen (14) calendar days after any objections to proposed designations of Confidential Information have been resolved by agreement of the disputing parties or by order of the Tribunal, the disputing parties shall consolidate their final designations and submit, as appropriate, a final Confidential Version and Public Version of the order or award.

TREATMENT OF CONFIDENTIAL INFORMATION

17. Until the elapse of any period for a disputing party to provide the other disputing party with its proposed designations of Confidential Information, or such earlier time should the disputing parties communicate in writing that they have no proposed designations, a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, order, or award shall be deemed to be entirely designated as Confidential Information. Thereafter, until the final designations of Confidential Information have been agreed by the disputing parties, or determined by the Tribunal, each disputing party's proposed designations of Confidential Information shall be presumed valid.
18. Except with the prior written consent of the disputing party that claimed confidentiality with respect to the information, and, in the case of materials from provincial, territorial or municipal governments or third parties, the owner of such Confidential Information, Confidential Information may be used only in these proceedings and may be disclosed only for such purposes to and among:

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- a. Members of the Tribunal (and their assistants, if any) and officials of the Administering Authority to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary;
 - b. counsel to a disputing party (and their support staff) and counsel to provincial, territorial or municipal governments whose involvement in the preparation or conduct of these proceedings is reasonably considered by a disputing party to be necessary in connection with preparation of the disputing party's case;
 - c. officials or employees of a disputing party and of provincial, territorial, or municipal governments to whom disclosure is reasonably considered by the disputing party to be necessary in connection with preparation of the disputing party's case;
 - d. independent experts or consultants retained or consulted by a disputing party or by provincial, territorial, or municipal governments in connection with these proceedings;
 - e. witnesses, who in good faith are reasonably expected by a disputing party to offer evidence in these proceedings but only to the extent that the information is material to their expected testimony; or
 - f. court reporters and other hearing support staff.
19. No disputing party shall file any confidential material covered by the terms of this Confidentiality Order in any Court unless required to do so by the Court. In such case, the disputing party shall bring this Confidentiality Order to the attention of the Court and seek directions concerning the filing of such material in a manner that protects its confidentiality. A disputing party shall notify the other disputing party and any affected parties prior to requesting such direction from the Court.
20. Inadvertent or improper disclosure of Confidential Information, as set forth in the present Confidentiality Order, does not constitute a waiver of the designation of the information as confidential.
21. All persons receiving Confidential Information shall be bound by this Confidentiality Order. Each disputing party shall have the obligation of notifying all persons receiving Confidential Information of the obligations under this Confidentiality Order and to ensure that persons receiving Confidential Information pursuant to paragraphs 18(d), or (e) execute a Confidentiality Undertaking in the form attached as Appendix B before gaining access to any such information. Each disputing party shall maintain copies of Confidentiality Undertakings under Appendix B and shall make such copies available to the other disputing party upon order of the Tribunal or upon the termination of this arbitration.
22. Notwithstanding any other provision in this Confidentiality Order, any request for documents (other than those made in this arbitration), or for the production of documents under the applicable domestic law of the disputing State party, including documents produced to Canada in these proceedings, shall be wholly governed by the relevant federal or provincial legislation.

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23. In light of the Note of Interpretation of the NAFTA Free Trade Commission issued July 31, 2001, a disputing party shall be free to disclose the Public Version of a Written Submission, procedural or administrative correspondence sent to and received from the Tribunal, order, and award.
24. Notwithstanding any other provision in this Confidentiality Order, the disputing parties may make such disclosure of documents or information as is required by law.
25. In accordance with Articles 1127, 1128 and 1129 of the NAFTA, non-disputing NAFTA Parties may attend the oral hearings, and may have access to orders, awards and Written Submissions, including those designated as Confidential Information under this Confidentiality Order. Non-disputing NAFTA Parties shall be made aware of this Confidentiality Order and pursuant to Article 1129 of the NAFTA, shall treat all information received from the Respondent as if they were a disputing party, notably in respect of protection of Confidential Information.
26. Nothing in this Confidentiality Order shall be construed to abrogate or support a claim or entitlement with respect to a refusal to disclose any information under or on the basis of: (a) federal or provincial law; (b) a privilege; or (c) other grounds for exemption or non-disclosure.
27. The obligations created by this Confidentiality Order shall survive the termination of these proceedings.
28. In the event that a disputing party considers that certain information requires an additional level of confidentiality on the grounds that: (i) its disclosure to the other disputing party could result in a serious material gain or loss which could potentially prejudice the competitive position of the disputing party, provincial, territorial or municipal government or third party to whom that information relates; or (ii) the information is highly sensitive Business Confidential Information that belongs or relates to a disputing party, provincial, territorial or municipal government or third party, the disputing party may request that the Tribunal limit disclosure of such information to the persons identified in paragraphs 18(a), (b), (d), and (f).
29. The time periods set out in this Confidentiality Order may be amended by agreement of the disputing parties, or by order of the Tribunal after hearing the disputing parties and taking into account all relevant circumstances.
30. A disputing party may apply for an amendment to, or a derogation from, this order if compelling circumstances so require.
31. This Confidentiality Order shall be effective and binding upon a disputing party, the Tribunal (and their assistants, if any) and the Administering Authority upon the signature of the Confidentiality Order by the Tribunal.

[signed]

Eduardo Zuleta
President of the Tribunal

October 7, 2021

Date

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Signed by both disputing parties in acknowledgement of the obligation to abide by this Confidentiality Order:

[signed]

—

On behalf of Koch Industries Inc. and Koch Supply
& Trading, LP

Mr Christophe Bondy
Steptoe & Johnson UK LLP
5 Aldermanbury Square
London, EC2V 7HR

October 5, 2021

Date

[signed]

—

On behalf of Canada

Ms. E. Alexandra Dosman, Counsel
Mr. Mark Luz, Counsel
Ms. Michelle Hoffmann, Counsel
Mr. Stefan Kuuskne, Counsel
Mr. Dmytro Galagan, Counsel
Ms. Shawna Lesaux, Paralegal
Ms. Krystal Girvan, Paralegal
Trade Law Bureau (JLTB)
Global Affairs Canada
125 Sussex Drive
Ottawa, Ontario KIA OG2
Canada

October 5, 2021

Date

APPENDIX A

DISPUTED DESIGNATIONS OF CONFIDENTIAL INFORMATION

No.	Ref. to Designation	Objection to Designation	Response to Objection	Tribunal's Decision
CHALLENGES TO [CLAIMANTS'/RESPONDENT'S] CONFIDENTIALITY DESIGNATIONS IN [MEMORIAL XX]				
1.				

APPENDIX B

CONFIDENTIALITY UNDERTAKING

TO: Canada (and its legal counsel) and Koch Industries Inc. and Koch Supply & Trading, LP (and its legal counsel).

FROM: _____

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Koch Industries Inc. and Koch Supply & Trading, LP and Canada, over which claims for confidentiality have been advanced (“Confidential Information”), I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person who has not signed a Confidentiality Undertaking nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of the Confidentiality Order that has been agreed to by the disputing parties, a copy of which is attached to this Undertaking, and agree to be bound by it.
3. I will promptly return or otherwise destroy any Confidential Information received by me to the disputing party that provided me with such materials or the information recorded in those materials, at the conclusion of my involvement in these proceedings.
4. I acknowledge and agree that either of the disputing parties to this arbitration is entitled to relief to restrain breaches of this Confidentiality Order, to enforce the terms and provisions hereof in addition to any other remedy to which any disputing party to this arbitration may be entitled at law or in equity.
5. I agree to submit to the jurisdiction of the courts:
 - a. For residents of Canada in the Province of Ontario; or
 - b. For residents of the United States of America in the District of Columbia; or
 - c. For residents of another jurisdiction, at their choice [check one box]:
 - In the Province of Ontario
 - In the District of Columbia

SIGNED, SEALED AND DELIVERED before a witness this __ day of _____, 20__.

(Print Name)

(Print Witness Name)

(Signature)

(Witness Signature)