

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. 3

Members of the Tribunal

Mr. Eduardo Zuleta, President of the Tribunal

Mr. Henri Alvarez KC, Arbitrator

Prof. Andrea K. Bjorklund, Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

Assistant to the President of the Tribunal

Ms. María Marulanda Mürrle

November 19, 2022

INTRODUCTION

On October 17, 2022, the ICSID Secretariat circulated a draft agenda for a pre-hearing organizational meeting to the Parties and invited them to file joint proposals with regard to any agreement they were able to reach on the agenda items, or their respective positions where they were unable to agree, by November 3, 2022.

On November 3, 2022, the Parties submitted their joint proposals on the agenda for the pre-hearing organizational meeting, and separate proposals on items 1.1; 1.2; 1.4; 1.6; 1.7; 2.1; 6.1 and 6.3.

The pre-hearing organizational meeting was held by videoconference on November 10, 2022 from 9:30am to 10:07am (EST). The following persons were present:

Tribunal:

Mr. Eduardo Zuleta	President
Mr. Henri Alvarez KC	Arbitrator
Prof. Andrea K. Bjorklund	Arbitrator

ICSID Secretariat:

Ms. Martina Polasek	Secretary of the Tribunal
Mr. Carlos Molina Esteban	ICSID Legal Analyst

Assistant:

Ms. María Marulanda Mürrle	Assistant to the President of the Tribunal
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For the Claimants:

Mr. Christophe Bondy	Steptoe & Johnson LLP
Ms. Chloe Baldwin	Steptoe & Johnson LLP
Mr. Alexandre Genest	Steptoe & Johnson LLP
Ms. Claire Schachter	Steptoe & Johnson LLP

For the Respondent:

Ms. Alexandra Dosman	Trade Law Bureau, Government of Canada
Mr. Benjamin Tait	Trade Law Bureau, Government of Canada
Ms. Marianna Maza Pinero	Trade Law Bureau, Government of Canada
Mr. Michael Solursh	Ministry of Economic Development, Job Creation and Trade, Government of Ontario
Ms. Rana Arbabian	Ministry of Economic Development, Job Creation and Trade, Government of Ontario
Ms. Laura Nemchin	Ministry of the Environment, Conservation and Parks, Government of Ontario

This Procedural Order contains the Parties' agreements and the Tribunal's decisions on the items set out in the agenda for the pre-hearing organizational meeting.

1. HEARING SCHEDULE AND ALLOCATION OF TIME

1.1 Hearing dates: The Hearing on Jurisdiction and the Merits in this case will take place from December 5 through December 8, 2022. December 9, 2022 is held in reserve.

1.2 Total time reserved for the Hearing (excluding December 9) is 28 hours, with 7 hours of sitting time per day. Each Party may use 13 hours of the total Hearing time, subject to any adjustment if necessary.

1.3 Allocation of time between the Parties: Pursuant to paragraph 20.6 of Procedural Order No. 1, the Hearing time shall be allocated equally between the Parties.

1.3.1 Time used by the Parties in oral argument or in examination of witnesses and experts (including direct examination, cross-examination and re-direct examination) shall be attributable to the Party making such argument or conducting such examination.

1.4 Allocation of time to the Tribunal: A total of 2 hours (30 minutes per day) is reserved for the Tribunal's questions to the witnesses, experts and Counsel. The Tribunal reserves the right to use more time for questions, if necessary.

1.5 Manner of time keeping: The Secretary of the Tribunal shall keep time using the chess-clock method and shall account at the end of each day for the time incurred by the Tribunal and each Party. Interruptions to the Parties' respective presentations or examinations, such as time spent resolving technical difficulties, and questions from the Tribunal and answers to those questions shall not be counted against the Parties' time.

1.6 Sequence of Hearing

1.6.1 Each Party shall be allowed a maximum of 3 hours for its Opening Statement and any rebuttal it may wish to make to the opposing Party's Opening Statement. Rebuttals by both parties, if any, will follow Respondent's Opening Statement, commencing with Claimants' rebuttal followed by Respondent's rebuttal. There shall be only one round of rebuttals, and the Tribunal encourages the Parties to limit the length of such rebuttals. Unused time for Opening Statements will not be added to that Party's time for examination of witnesses and experts.

1.6.2 There shall be no closing statements at the Hearing. At the conclusion of the Hearing, the Tribunal will consult with the Parties regarding the post-Hearing procedure, in particular whether there should be further written briefs or oral submissions by videoconference.

1.6.3 Witnesses of fact shall be heard sequentially (first the Claimants' witnesses, followed by the Respondent's witnesses). Expert evidence shall be presented by subject matter.

1.7 Daily Schedule: The tentative daily schedule of the Hearing is attached to this Order as Annex A. The Hearing will start every day at 9:00am (EST) and is expected to conclude by 5:30 pm (EST). There will be three breaks during each Hearing day, two of fifteen (15) minutes in the morning and afternoon, and a lunch break of sixty (60) minutes.

2. WITNESS AND EXPERT EXAMINATION

2.1 Names of witnesses and experts who will testify at the Hearing:

2.1.1 Witnesses called by the Claimants:

Ms. Nadia Ramlal

Mr. Alexander Wood

2.1.2 Experts called by the Claimants:

Prof. Larissa Katz

Mr. Franz Litz

2.1.3 Witnesses called by the Respondent:

Mr. Graeme Martin¹

Mr. Frank King

2.1.4 Experts called by the Respondent:

Prof. Jeremy de Beer

2.1.5 Experts called by the Tribunal:

Prof. Michael Mehling

Prof. Robert Stavins (at the request of Claimants pursuant to para. 18.4 of PO1)

2.2 Length and format for direct-, cross- and re-direct examination of experts and witnesses

2.2.1 Paragraph 18.6 of Procedural Order No. 1 shall apply to direct-, cross-, and re-direct examination of experts and witnesses.

¹ Mr. Graeme Martin is unable to attend the Hearing in person and will be examined by video-conference.

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- 2.2.1.1. The length of the cross-examination and re-direct examination is a decision taken by each Party at their discretion. Unless otherwise directed by the Tribunal considering the development of the Hearing, the examination of a witness or expert shall be completed on the same hearing day on which it was commenced.
- 2.2.1.2. There shall be no re-cross examination after the re-direct examination.
- 2.2.2 Paragraph 18.7 of Procedural Order No. 1 shall apply to expert and witness sequestration.
- 2.2.3 Paragraph 18.10 of Procedural Order No. 1 shall apply to examination of experts and witnesses by videoconference. The Parties have agreed that Mr. Graeme Martin will testify by videoconference.

2.3 Examination bundles

- 2.3.1 The Party presenting a witness or expert shall ensure that a clean unannotated copy of the witness statement or expert report is available to the witness or expert at the time of the examination. If a witness or expert so requests a hard copy shall be provided, unless the Parties agree that the witness or expert may testify remotely.
- 2.3.2 The cross-examining Party shall provide the fact witnesses and experts with clean unannotated copies of the exhibits to which such witness or expert may be referred during their cross-examination. If a witness or expert so requests, a hard copy shall be provided, unless the Parties agree that the witness or expert may testify remotely. The Parties shall notify one another by November 28, 2022 which of their witnesses (if any) requests a hard copy of such exhibits. The cross-examination bundle may be provided at the time of the cross-examination.
- 2.3.3 Experts shall have access to annotated copies of their demonstrative exhibits under paragraph 3.1 exclusively during their presentations. Witnesses or experts shall not have access during examination to any other documents, notes, information, or materials of any kind.

2.4 In-person participation: The Covid protocol for the Hearing is attached to this Procedural Order as Annex B.

3. HEARING MATERIALS

- 3.1 Demonstrative exhibits: Demonstrative exhibits shall be used in accordance with paragraph 16.8 of Procedural Order No. 1.
- 3.2 Rules on Submission of new evidence/exhibits into the record during the Hearing: Paragraph 16.3 of Procedural Order No. 1 applies to the submission of new documents into the record before the Hearing.

3.3 Hearing bundles:

3.3.1 The Parties shall prepare a joint electronic hyperlinked hearing bundle by November 25, 2022. This electronic hearing bundle shall not contain any document not previously filed, and shall be organized as follows:

01. Pleadings

A. Claimants

B. Respondent

02. Witness Statements

A. Claimants

B. Respondent

03. Expert Reports

A. Claimants

B. Respondent

04. Exhibits

A. Claimants

B. Respondent

05. Legal Authorities

A. Claimants

B. Respondent

06. Expert Exhibits

A. Claimants

B. Respondent

07. Tribunal Rulings

3.3.2 The Electronic Hearing Bundle shall be uploaded by the Parties to a designated sub-folder in the BOX filesharing platform, and placed on a USB and couriered by ICSID to each Member of the Tribunal.

4. PRE- AND POST-HEARING SUBMISSIONS

4.1 Chronology of events, *dramatis personae* and list of substantive issues: The Parties shall endeavor to reach an agreement on and provide to the Tribunal a chronology of events, *dramatis personae* and list of substantive issues required to be determined by the Tribunal by November 30, 2022.

4.2 Post-Hearing submissions: There shall be no closing statements at the Hearing. After consulting with the Parties in accordance with Section 1.6.2 above, the Tribunal will provide directions on post-Hearing written or oral submissions, if any.

5. MAIN LOGISTICS ITEMS

5.1 Venue: Conference Room C1-450 (1st Floor) of the World Bank C Building, located at 1225 Connecticut Avenue, N.W., Washington, D.C. 20036, U.S.A.

5.2 Set up: Access to the hearing and breakout rooms will be possible on Friday, December 2, 2022, starting at 11:00am (EST).

5.3 Transcription: David Kasdan – B&B Reporters.

5.4 Technical requirements for use of visual aids, if any: There will be external monitors available to the Parties, the Tribunal and the witness or expert, and IT help to accommodate other technical needs, e.g. use of PowerPoint.

5.5 Remote participation: The parties shall indicate in their list of participants those participants who wish to attend the Hearing remotely by videoconference. Any disagreement about remote participation shall be decided by the Tribunal. ICSID shall provide the Parties with a secure videoconference link by November 28, 2022.

6. OTHER MATTERS

5.6 Public access to Hearings: In accordance with paragraph 20.7 of Procedural Order No. 1, absent consent of the parties, the Hearing shall be closed to the public.

5.7 List of potentially relevant issues to be addressed during oral submissions: On November 8, 2022, the Tribunal provided the parties with the following list of relevant issues to be addressed at the Hearing:

Without prejudice to any other matters that the Parties consider relevant or other issues that the Tribunal may raise during the hearing, the Tribunal would appreciate hearing from the Parties on (a) the debate on why the emission allowances are or are not property under Canadian law; and (b) the cross-border trade resulting from the linkage and its impact, if any, on the definition of investment under NAFTA.

5.8 Submissions by Non-Disputing NAFTA Parties: On November 16, 2022, the United States requested access to the Hearing. In accordance with paragraph 25 of the Confidentiality Order dated October 5, 2021, the United States may thus attend the Hearing and shall be made aware

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of the Confidentiality Order. The ICSID Secretariat will provide the United States with the logistical details for the Hearing and allow it to attend in person or remotely.

On behalf of the Tribunal

[signed]

Mr. Eduardo Zuleta
President of the Tribunal

ANNEX A

ORDER OF PROCEEDINGS AND SCHEDULE

The following schedule may be adjusted by the Tribunal to complete the agenda and to accommodate any logistical disruptions. While Tribunal questions have been included at the end of each day, the Tribunal may ask questions at any time.

Day 1: December 5, 2022²		
<i>Hour</i>	<i>Duration</i>	PROCEDURAL STEP
00:00 AM/PM	(# hours/min.)	
09:00 am	15 mins	Housekeeping
09:15 am	1 hour 30 min	Claimants' Opening Statement
10:45 am	15 min	Break
11:00 am	1 hour 30 min	Claimants' Opening Statement (continued)
12:30 pm	1 hour	Lunch break
01:30 pm	1 hour 30 min	Respondent's Opening Statement
03:00 pm	15 min	Break
03:15 pm	1 hour 30 min	Respondent's Opening Statement (continued)
	30 min	Questions from the Tribunal
05:30		End

Day 2: December 6, 2022		
<i>Hour</i>	<i>Duration</i>	PROCEDURAL STEP
00:00 AM/PM	(# hours/min.)	
09:00 am		Examination of Mr. Graeme Martin
10:45 am	15 min	Break
11:00 am		Examination of Mr. Graeme Martin (continued)
		Examination of Mr. Frank King
12.30 pm	1 hour	Lunch
01:30 pm		Examination of Mr. Frank King (continued)
03:00 pm	15 min	Break
03:15 pm		Examination of Mr. Alexander Wood
		Questions from the Tribunal
05:30		End

² If there are rebuttals as per section 1.6.1, the Tribunal will adjust the schedule for Day 1 accordingly.

Day 3: December 7, 2022		
<i>Hour</i>	<i>Duration</i>	PROCEDURAL STEP
00:00 AM/PM	(# hours/min.)	
09:00 am		Examination of Ms. Nadia Ramlal
10:45 am	15 min	Break
11:00 am		Examination of Ms. Nadia Ramlal
		Examination of Prof. Jeremy de Beer
12.30 pm	1 hour	Lunch
01:30 pm		Examination of Prof. Jeremy de Beer (continued)
03:00 pm	15 min	Break
03:15 pm		Examination of Prof. Michael Mehling
		Questions from the Tribunal
05:30		End

Day 4: December 8, 2022		
<i>Hour</i>	<i>Duration</i>	PROCEDURAL STEP
00:00 AM/PM	(# hours/min.)	
09:00 am		Examination of Prof. Larissa Katz
10:45 am	15 min	Break
11:00 am		Examination of Prof. Larissa Katz (continued)
		Examination of Prof. Robert Stavins
12.30 pm	1 hour	Lunch
01:30 pm		Examination of Prof. Robert Stavins (continued)
03:00 pm	15 min	Break
03:15 pm		Examination of Mr. Franz Litz
		Questions from the Tribunal
05:30		End

ANNEX B

COVID PROTOCOL

1. The ICSID Secretariat will communicate any COVID-19 related restrictions regarding in-person attendance at the Hearing to the Parties and Tribunal; all in-person Hearing Participants are expected to abide by any applicable rules in this regard. All individuals who will be attending the Hearing must be fully vaccinated against COVID-19, in accordance with the prevailing guidelines by the American Centers for Disease Control and Prevention. Counsel for each Party should confirm by **November 21, 2022**, whether all intended in-person participants are in compliance with this requirement.
2. Unless otherwise determined by the Tribunal after consultation with the Parties, all Hearing participants must wear surgical masks or N95/KN95/KF94 style masks, fully covering their nose and mouth, while in attendance in person in the hearing room. Only the person who is addressing the Tribunal or a witness or expert, as well as the witness or expert who is being questioned, may remove their mask during their examination. Participants may remove their masks temporarily to drink.
3. A Hearing participant who experiences fever or chills, cough, shortness of breath, sore throat, or any other COVID-19 symptoms shall immediately inform the Tribunal and the ICSID Secretariat and shall self-isolate and refrain from coming to the Hearing until he or she has obtained a negative rapid antigen or PCR test. Any other participant who was in close contact with the symptomatic Hearing participant shall also self-isolate and arrange for COVID-19 testing and refrain from coming to the Hearing until he or she has obtained a negative rapid antigen or PCR test. Where more than one Hearing participant from one side has been captured by this rule, and after hearing from the Parties, the Tribunal may consider alternate arrangements for the mode of Hearing participation.
4. If a Hearing participant with a speaking role in the Hearing tests positive for COVID-19 or is self-isolating, he/she will connect to the Hearing Platform from his/her place of self-isolation.
5. If within 10 days after the Hearing has ended, any of the Hearing participants present symptoms or test positive with COVID-19, they must immediately inform the other Party and the Tribunal.