

**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. 4**

***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

---

December 4, 2022

## **I. BACKGROUND**

1. In accordance with paragraph 24.1 of Procedural Order No. 1 and the procedural schedule for this case, on October 28, 2022, the United States filed a written submission as a non-disputing Party under NAFTA Article 1128.
2. On November 11, 2022, the Parties filed responses to the United States' written submission.
3. On November 16, 2022, the United States requested access to the Hearing as a non-disputing Party. In accordance with paragraph 25 of the Confidentiality Order dated October 7, 2021 and Articles 1127, 1128 and 1129 of the NAFTA, the Tribunal directed the ICSID Secretariat to make appropriate arrangements for the United States to attend the Hearing. On November 23, 2022, the United States was informed of the Hearing details and received a copy of the Confidentiality Order and Hearing protocol. The Parties confirmed that no additional measures to protect confidential information were necessary.
4. On November 23, 2022, the United States stated that it "may, with the Tribunal's leave, wish to make a short oral submission at the upcoming hearing," pursuant to NAFTA Article 1128 and in light of Claimants' comments of October 28, 2022. The United States proposed that such oral submission be no longer than 15 minutes and could be made at the start of the hearing. It indicated that it had not made a final determination as to whether it would make the oral submission but that it wished to provide notice to facilitate planning for the Hearing. The United States' request was transmitted to the Tribunal and the Parties on the same day.

5. On November 28, 2022, the United States confirmed that it wished to make an oral submission at the Hearing. On the same day, the Tribunal invited the Parties to indicate as soon as possible if they had any objections to a brief oral submission by the United States being scheduled immediately after the Parties' openings and before the rebuttals.
  
6. On November 29, 2022, the Claimants objected to the United States' request to make an oral submission at the Hearing. In their view, the NAFTA does not provide a non-disputing Party with the right to make an oral submission at a NAFTA hearing. According to the Claimants, NAFTA Article 1128 focuses on written submissions, and the Confidentiality Order only foresees that the non-disputing Parties may attend oral hearings. In this case, the United States availed itself of the opportunity to make a written submission, and there is nothing in that submission that requires any oral exposition. The Claimants argue that an oral submission by the United States would put them in an unfair position having to respond to two Respondents, which would prejudice their right to an equal hearing and create time constraints at the Hearing. They also submit that the request is untimely, as the United States did not indicate in its 1128 submission that it wanted to make an oral submission at the Hearing. In these circumstances, the Claimants do not consent to the oral submission, and the Tribunal should therefore deny the United States' request.
  
7. Given the Claimants' objections, on November 30, 2022, the Tribunal requested the United States and the Respondent to file comments by December 1, 2022.
  
8. On December 1, 2022, Canada indicated that it had no objection to a short oral statement by the United States. It stated that oral submissions are permitted by NAFTA Article 1128, which is not limited to "written submissions." The Respondent also stated that there would be no procedural unfairness by such oral submission as any submissions are limited to matters of Treaty interpretation, and the Tribunal previously indicated that the disputing parties would have an opportunity to comment.

9. Also on December 1, 2022, the United States filed its observations, arguing that NAFTA Article 1128 does not contain a limitation with regard to oral submissions. The provision imposes two requirements: (i) a “written notice to the disputing parties;” and (ii) that the submission must address “a question of interpretation of this Agreement.” According to the United States, it has complied with both conditions. The United States also listed three examples of cases in which it requested and received permission to make oral submissions, and argued that such submissions are routine. There would be no prejudice or undue burden on the Claimants as the result of a short, 15-minute oral submission, which would address certain points raised in the Claimants’ response to the United States’ 1128 submission.

## **II. DECISION**

10. Article 1128 of the NAFTA provides:

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

11. The Tribunal notes that the provision does not specify the modality of the submissions, and whether a non-disputing Party may make both written and oral submissions. Article 1128 is not expressly limited to written submissions, nor does it expressly provide a right to make both types of submissions. The Tribunal is of the view that it may therefore determine whether to allow an oral submission taking into account all circumstances, such as the timeliness of the notice to make an oral submission, the utility of such submission, and any undue burden on the parties.

12. The Tribunal notes in this respect that the United States first indicated that it may wish to make an oral submission on November 23, 2022, and that it confirmed such request on November 28, 2022, one week before the Hearing. Given the short notice, the Tribunal is not convinced that the United States should be given the opportunity to make an oral submission, however, it will allow a short submission of no more than 15 minutes before the Parties' openings. The Parties may comment on the oral submission orally during the Hearing or, after consulting with the Tribunal, in writing after the Hearing.

On behalf of the Tribunal

[signed]

---

Mr. Eduardo Zuleta

President of the Tribunal