

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. 2

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

12 April 2022

Background

1. On 29 June 2021, the Tribunal issued Procedural Order No. 1 (“**PO1**”) and its Annex B, containing the procedural calendar. The procedural calendar was subsequently amended on 21 January 2022.
2. In accordance with item 15 of PO1 and the revised procedural calendar, the Parties engaged in the document request phase of the proceeding. The Parties were to record their requests, responses or objections in a schedule attached as Annex C to PO1, and this process was to be completed by 24 March 2022. The target date for rulings by the Tribunal on any objections to document requests was 7 April 2022.
3. On March 28, 2022, the Parties informed the Tribunal that they were still conferring regarding document production and jointly requested a three-day extension to submit their consolidated schedule with contested documents. On 31 March 2022, the Parties jointly requested an additional extension until 1 April 2022.
4. The Parties submitted their respective Requests to Produce Documents on 1 April 2022 in two separate schedules. The Claimants made 12 requests, two of which (Request No. 10 and 12) were contested. The Respondent made 52 requests, eight of which (Request No. 3, 4, 6, 25, 32, 33, 36 and 51) were contested. Only a limited number of document requests were thus referred for the Tribunal’s consideration, although the Parties’ schedules contained all requests.

The Applicable Standards

5. The Tribunal recalls that this arbitration is governed by (i) the ICSID Convention, (ii) the 2006 ICSID Arbitration Rules (hereinafter the “Arbitration Rules”), and (iii) the Procedural Rules as set out in PO1. Moreover, paragraph 15.6 of PO1 states that: “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.”
6. Since the Parties have clearly agreed to be guided by Article 3 and 9 of the IBA Rules with regard to the production of documents, the Tribunal shall give due consideration to these standards.
7. In accordance with Section 15.3 of PO1,

“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

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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.”

8. In addition, Article 3.3(c) of the IBA Rules provides that the request to produce must contain

“(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.”

9. Furthermore, Article 3.7 of the IBA Rules provides that:

“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 Article 9.2 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.”

10. In accordance with Section 15.7 of PO 1:

“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 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.”

11. The relevant parts of Article 9 of the IBA Rules (Article 9.2) provide that:

“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 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;
- (c) unreasonable burden to produce the requested evidence;

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- (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.”

12. Finally, Section 15.10 of PO 1 states that, “[s]hould 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.”
13. The Tribunal notes that the Parties have not contested most of the requests for production and is grateful for the Parties’ efforts to seek agreement on these matters. It has carefully considered the 10 requests that were contested, as well as the objections, replies and responses. Based on its conclusions, the Tribunal issues the following order.

Order

14. For the reasons set forth in the Stern Schedules attached as Annex A (Claimants’ Request to Produce) and Annex B (Respondent’s Request to Produce) to this Order, the Tribunal:
 - (a) Denies Claimants’ Request to Produce No. 10 and grants Claimants’ Request to Produce No. 12, as narrowed by Respondent.
 - (b) Denies Respondent’s Requests to Produce Nos. 3, 4, 6, 25, 32, 33 and 51, and grants Respondent’s Request to Produce No. 36, the latter as narrowed by Respondent.

[signed]

Eduardo Zuleta
President of the Tribunal
Date: 12 April 2022