

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

ADF GROUP INC.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/00/1

**FINAL OBSERVATIONS OF
RESPONDENT UNITED STATES OF AMERICA
ON CLAIMANT’S REQUEST FOR PRODUCTION OF DOCUMENTS**

As contemplated by paragraph III(5) of Attachment 1 to Procedural Order No. 1, respondent United States of America respectfully submits these final observations on claimant ADF Group Inc.’s (“ADF”) Response to Objections Raised by the United States to ADF’s Request for an Order for Production of Documents, dated August 24, 2001 (the “Response”).

I. GENERAL OBSERVATIONS

The timing and scope of ADF’s document request demonstrates that it is not “necessary” for this Tribunal to issue an order of production. ADF’s convoluted explanation for having waited until after submission of its Memorial to submit its Motion for Production of Documents (“Motion”) does not prove the contrary. Therefore, pursuant to the ICSID Arbitration (Additional Facility) Rules Article 41, ADF’s request must be denied.

First, in light of the Tribunal's twice-expressed wish "to deal with requests for the production of documents concurrently with the filing of the parties' written pleadings,"¹ ADF's stated belief that it need not work on its request concurrently with the preparation of its principal written pleading is difficult to understand. In any event, ADF's tactic of filing its Motion one day after its Memorial was submitted, ostensibly so as not to interfere with its preparation of its Memorial, now places the United States in the position of having to respond to ADF's motion while *it* prepares its Counter-Memorial.

Second, ADF's contention that parties to certain international arbitrations exchange documents after the submission of written pleadings (*see* Response at 3 ¶¶ 14-15) is beside the point. The parties here agreed that all evidence relied upon by either party would be submitted by that party with its written submissions. Procedural Order No. 1, Attachment 1, ¶ V. Thus, to the extent that ADF sought to rely on any documents it was requesting, it should have sought an order from the Tribunal for those documents before filing its Memorial. The fact that it did not demonstrates that the documents ADF now requests are not material to its case and it therefore cannot be necessary for this Tribunal to issue an order for their production.

Third, ADF's attempt to import wholesale the standards of the IBA Rules is similarly without merit. Response at 3-5 ¶¶ 16-29. The parties here have agreed to arbitration under the Arbitration (Additional Facility) Rules, Article 41 of which requires the Tribunal to make a finding that it "deems it necessary" to order the requested production of documents. While the criteria suggested in the IBA Rules may provide

¹ Procedural Order No. 1, ¶ 5 (May 3, 2001); *see also* Letter, dated March 7, 2001, from Secretary of Tribunal to Counsel at 1-2 (Tribunal invites parties "to seek agreement on a schedule on the basis that production of documents by the parties would proceed concurrently with the time periods for the filing of the parties' written pleadings").

useful guidance in some circumstances, the standard that governs the Tribunal's decision on this request is that of necessity spelled out in Article 41. That Article requires the Tribunal to find that *it* deems the production of evidence in question necessary. Contrary to ADF's suggestion (Response at 4 ¶ 24), the mere fact that one party objects to the other party's expansive and burdensome request for immaterial documents does not support a finding of necessity.²

In any event, there is no merit to ADF's demand that the United States produce all documents requested to which the United States has made no objection on one of the grounds listed in Article 9(2) of the IBA Rules. Response at 5 ¶¶ 27-28. As an initial matter, the United States *has objected* based on "considerations of fairness [and] equality" contained in Article 9(2)(g) of the IBA Rules to producing publicly-available documents and documents to which ADF already has access. *See* Objections to Claimant's Request for documents of Respondent United States of America, dated August 17, 2001 ("Objections") at 11; *see also infra* at 5, 6-7, 9, 11.

Regardless, ADF's selective reliance on the IBA Rules is wholly unavailing. Under Article 3(3)(c) of the IBA Rules, several of ADF's requests are deficient on their face, and therefore must be rejected:

A Request to Produce *shall* contain: . . . (c) a statement that the documents requested are not in its possession, custody or control of the requesting party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

² ADF mischaracterizes the United States' position as suggesting that Article 41 can be satisfied only upon a finding that the requesting party could not prove its case without such documents. Response at 3-4 ¶¶ 17-22. While such a showing would in most circumstances satisfy the necessity test, a tribunal could find it necessary to order the production of evidence in other circumstances as well. The question presented is whether the *Tribunal* finds it necessary to *its* task to order production of the evidence.

IBA Rules, art. 3(3)(c) (emphasis added). ADF has conveniently chosen to ignore this IBA Rule, because, as set forth below in sections A, B, D and E of the United States' responses to ADF's individual requests, any such statement by ADF would lay bare the fundamental unfairness of ADF's attempt to shift the burden of document retrieval to the United States for categories of documents that either are in ADF's possession, or to which the United States has no greater access than ADF.

Finally, ADF's impression that the United States would provide access to documents only upon issuance of a Tribunal order was neither shared by the United States nor reflected in the procedural order. The United States stood ready to provide access to those documents as it agreed if and when asked to by the claimant. Notwithstanding this offer, ADF never communicated its desire to receive the documents or gain access to those documents the United States offered to make available to it. Instead, it waited six weeks and then filed its Motion.

Notwithstanding the fundamental disagreements noted above, the United States notes that there remain few issues in dispute between the parties. The United States responds below to each of ADF's responses to its objections in turn.

II. THE UNITED STATES' RESPONSES TO ADF'S REQUESTS

A. The Administrative File Relating To The Supply Of Steel By ADF To The Springfield Interchange Project

In its informal response, the United States agreed to produce documents responsive to this request to the extent that as those documents did not originate with ADF and were not in ADF's possession. Objections at 8-9. ADF has now agreed that "the United States is not obliged to produce documents which are on ADF letterhead and have been signed by a responsible official of ADF." Response at 6 ¶ 33.

The United States reiterates its previous offer to make available documents responsive to this request that ADF did not originate. *See* Objections at 8-9. Documents originated by ADF should be presumed to be in ADF's possession. To the extent that documents are in ADF's possession, it is not necessary for this Tribunal to order the United States to produce those documents. The United States should not be called upon to make a determination as to whether individuals signing documents on behalf of ADF are "responsible officials" before it concludes that such documents are indeed in ADF's possession.

The United States also wishes to clarify a misunderstanding by ADF. ADF states that it would be easier for the United States to simply produce the entire "administrative file," including those documents that originated with ADF. The Virginia Department of Transportation, however, maintains its "administrative file" pertaining to the Springfield Interchange Project in the form of a computerized document management system into which correspondence relating to the Project is scanned. To respond to ADF's request, the United States will need to run several computer searches through that document management system. Because of their size and pictorial nature, engineering drawings

and plans are not scanned into the document management system. Not only would it be unduly burdensome for the United States to search for and copy engineering plans, because those plans originated with ADF, they are undoubtedly in its possession. Therefore, an order for their production cannot be necessary. In addition, such plans are neither relevant nor material to the issues before this Tribunal. The United States therefore objects to ADF's request for an order requiring it to produce documents that originated with ADF or are in its possession and submits that excepting from its request all such documents will facilitate compliance with ADF's request.

B. Documents Available At The National Archives

Despite having been given the exact location of the documents it seeks, the file number for those documents and the telephone number of an individual to call to arrange for viewing the requested documents, ADF persists in seeking an order from this Tribunal compelling the United States to do ADF's work for it. It cannot be "necessary" for the Tribunal to issue an order for the production of these documents when they are available to ADF and ADF has made no effort to obtain them. Article 41 may not properly be construed to require one disputing party to compensate for the other's reluctance to search out and offer up evidence to support its claim. If the documents were truly relevant and material, ADF would have taken advantage of the information provided by the United States and retrieved the documents by now.

In addition, ADF's reliance on a cryptic order in the *Pope & Talbot* Chapter Eleven arbitration is misplaced. No context is provided for that tribunal's statement that the claimant in that case could not avoid production of certain documents because the documents are publicly available. Nor does the order give any indication of what

category of documents the tribunal ordered produced or why they were sought. The *Pope & Talbot* order provides little guidance here.³

Moreover, the documents ordered produced in *Pope & Talbot* were, in fact, in the claimant's possession. See Order at 1 ¶ (a) (“[no] adequate basis for refusal to produce to Canada [those] documents in the possession of the Claimant [that are publicly available]”). Here, by contrast, it is undisputed that counsel for the United States has no greater access to the documents than ADF does: to retrieve the documents, someone will need to go to the National Archives. That burden should not be shifted to the United States.

Finally, the United States' assertion that ADF should itself seek out the information it contends to be necessary does not remotely resemble “exhaustion of local remedies requirement.” Indeed, the United States has agreed to provide other documents to ADF and has not proposed that ADF be required to file a request under the Freedom of Information Act before it produces those documents. ADF's complaint is without foundation.

C. Documents Prepared By The Office Of The United States Trade Representative, The Department Of State And The Department Of Transportation Relating To The Impact Of NAFTA On Buy National Requirements

The United States objected to producing documents responsive to this request on the grounds that ADF has not demonstrated that these documents are material or relevant

³ Because awards by Chapter Eleven tribunals are not binding on other Chapter Eleven tribunals, see NAFTA art. 1136(1), there can be no question that orders by tribunals similarly do not bind other tribunals. While orders in other arbitrations can sometimes provide useful guidance because of the persuasiveness of their reasoning, the *Pope & Talbot* order here does not offer enough reasoning to provide any guidance.

to its case or that it is necessary for the Tribunal to issue an order of production for these documents. In its Response, ADF merely asserts that the “documents will provide information on the rationale for the continued maintenance by the United States of a protectionist, discriminatory policy under a trade agreement which would appear to expressly prohibit such policies except where specific exemptions and/or exclusions have been taken or made.” Response at 8 ¶ 46.

ADF’s response – its mischaracterization of U.S. policy notwithstanding – confirms that this request is an impermissible “fishing expedition.” The United States’ “rationale” for maintaining Buy National policies is not material to the only issue before this Tribunal: whether the particular Buy National regime for federally funded state highway procurement at issue here violates Chapter Eleven of the NAFTA or whether, in fact, the NAFTA contains “specific exemptions and/or exclusions” for that regime. The issue here is one of law, not one of policy. Because ADF has failed to provide a basis on which the Tribunal can conclude that the requested documents are necessary, its request for an order of production should be denied.

The United States also reaffirms its objection to ADF’s request on the grounds that it is overly broad and that complying with the request would be unduly burdensome. In response, ADF states that the request is not overly broad because it applies to only three agencies of the United States Government. Those three agencies, however, employ and have employed thousands of individuals since the NAFTA was negotiated. To comply with such a request would require extraordinary effort and would be unduly burdensome.

D. The Administrative File In Three Buy National Cases

The United States previously objected to production of the requested documents on the grounds that ADF had not demonstrated their relevance. Objections at 13-14. ADF has still failed to make that showing. ADF has offered no explanation of how anything other than the decisions themselves – which it has – could possibly be relevant. The fact that counsel believes that having the full record before it might “assist [it] in filling gaps that may appear in the decisions,” Response at 9 ¶ 53, does not make it necessary for this Tribunal to issue an order compelling production of those documents. Counsel has identified no “gaps” in the decisions that it hopes to fill with information provided in the administrative file. Nor has ADF demonstrated how filling such “gaps” is material to its case. Quite simply, ADF seeks this Tribunal’s authority to conduct an impermissible fishing expedition.

Moreover, ADF does not dispute that most, if not all, of the requested documents are publicly available and that it has made no effort to retrieve those documents. Nor does ADF contend that counsel for the United States has the ability to obtain these documents in any manner not available to it. Again, the burden of retrieving these documents should not be shifted to the United States.

E. All Documents Used To Brief Members Of Congress And The President Relating To The Buy America Program

The United States objected to ADF’s request for all documents used to brief “members of Congress, [and] the President of the United States on the application of Buy America provisions to federally funded highway contracts and the impact of NAFTA on those provisions” on the grounds that the request was overly broad and ADF had failed to

demonstrate the relevance of such documents. Motion at 10; *see* Objections at 15. In its Response, ADF claims that the United States' assertion that ADF requested documents used to brief "members of Congress" was "not true" and was intended "to cast negative aspersions on ADF," and that ADF had, in fact "narrowed its request even further [and] is not seeking access to documents that may have been sent to individual members of Congress . . . [but] is seeking access to documents used to report to or inform members of Congress as a body, whether it be acting as the full Congress or as a Congressional Committee and the President of the United States." Response at 9-10 ¶¶ 56-58.

As a preliminary matter, the United States can hardly be faulted for interpreting ADF's request for "documents used to report to or inform *members of Congress* and the President of the United States," Motion at 6, 10 (emphasis supplied), to mean that ADF was, in fact, requesting documents used to report to or inform members of Congress.

In any event, ADF's newly revised request is still overly broad and would be unduly burdensome to comply with. It would require an enormous effort to locate and produce all records prepared by any official at any government agency over a period of at least twenty years that were used to report to or inform Congress or the President of the United States on the application of Buy America provisions to federally-funded highway contracts and the impact of NAFTA on those provisions.

In addition, ADF has not demonstrated that the documents it seeks are relevant to its case. ADF merely asserts that the documents are relevant "because they demonstrate the official U.S. government position taken by the relevant agencies on the issues before this Tribunal; . . . [and] will demonstrate how members of the legislative and executive branches have been apprised of the relationship between NAFTA and the Buy America

provisions” Response at 10 ¶¶ 60-61. How U.S. government officials have been apprised of the relationship between the NAFTA and Buy America provisions and positions taken by those officials is not material to the issue of whether the Buy America provisions violate certain provisions of Chapter Eleven of the NAFTA. Again, ADF’s request amounts to nothing more than an impermissible fishing expedition.

Finally, ADF has not denied that it has access to some, if not all, of the documents for which it seeks an order of production. In fact, ADF contends that its request is not burdensome because the records used to report to or inform Congress “are routinely registered through the Congressional Record.” Response at 10. The Congressional Record is available to the public and may be searched through any number of on-line research databases.⁴ The United States should not be ordered to do ADF’s legal research for it. It is not necessary for this Tribunal to order the United States to produce documents to which ADF already has access.

F. Reports To Congress And Access To The Administrative Record Of Waivers Of The Buy America Requirements

The Tribunal will recall that ADF initially requested a list of all waivers of the Buy America requirements granted in the last ten years and the administrative record accompanying such requests. Motion at 3. In its informal response, the United States agreed to make available a list of waivers granted during the past five years and explained to ADF that, prior to 1996, the Department of Transportation did not keep a

⁴ For example, the Congressional Record for the years 1995-2001 is available and may be searched on-line by accessing <http://www.access.gpo.gov/su_docs/aces/aces150.html>. The Congressional Record is also available through on-line legal research databases. *See, e.g.*, <<http://www.lexis.com>> (available from 1985 through the present); <<http://www.web2.westlaw.com>> (available from 1994 through the present).

computerized list of waivers. *Id.* at 7. The United States also agreed to make available, at the Federal Highway Administration’s offices, the administrative record accompanying any waiver. *Id.*

In response, ADF requested that the United States provide it with the record submitted to Congress regarding waiver requests for the years preceding 1996 for which the FHWA did not have computerized records. *Id.* The United States agreed to do this. Objections at 17. ADF now questions why the United States has not offered to make available to it the Congressional reports filed for the years 1997-2001. Response at 10 ¶ 65. The simple answer is that ADF had not previously requested these reports.

ADF now requests “[a] list of all reports to Congress made during the last ten years in compliance with Section 165(e) of the *Surface Transportation Assistance Act* of 1982” and access to the “administrative records relating to all national and regional waivers of the provisions of Buy America requirements which have been granted within the last ten years under 23 CFR 635.410(c).” Response at 13 ¶¶ I(F), II(A). The United States has no objection to producing the requested documents and providing the requested access.

G. NAFTA Chapter Eleven Pleadings

The United States reaffirms its objection to ADF’s request for an order requiring production of all pleadings filed by the United States in Chapter Eleven cases on the grounds that such documents are not evidence and are not properly the subject of an order for production. Because these documents are not evidence, it cannot be necessary for the Tribunal to order production of them. The Free Trade Commission interpretation relied upon by ADF does nothing to change the nature of the pleadings filed by the United

States in other Chapter Eleven cases: those pleadings are not evidence in this case.

Although the United States contends that these documents are not properly a subject of an order for production, it wishes to acknowledge that it supports transparency in Chapter Eleven arbitration and it is for this reason that the United States is posting a selection of documents filed in these arbitrations on its website. The fact that the United States is posting a selection of publicly-available documents, rather than every publicly-available document, merely reflects the United States' determination that the public will not be interested in viewing every letter written to every tribunal and every piece of evidence or authority submitted. Rather, the United States intends to post publicly-available documents that contain legal argument and will be of general interest.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Tribunal deny ADF's request for an order for production of documents to the extent objected to by the United States.

Respectfully submitted,

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