

ADF Group Inc.
v.
United States of America
(ICSID Case No. ARB(AF)/00/1)

Procedural Order No. 3
Concerning the Production of Documents

October 4, 2001

1. We have before us the following submissions:
 - (a) Claimant's Motion for Production of Documents, dated 3 August 2001 (the "Motion");
 - (b) Respondent's Objections to Claimant's Request for Documents of Respondent United States of America, dated 17 August 2001 (the "Objections");
 - (c) Claimant's Response to Objections Raised by the Respondent United States of America to Production of Documents, dated 24 August 2001 (the "Response"); and
 - (d) Respondent's Final Observations on Claimant's Request for Production of Documents, dated 4 September 2001 (the "Final Observations").

2. In its Motion, ADF Group Inc. ("ADF"/"Investor"/"Claimant") asks us to require the United States of America ("Party"/"Respondent") to produce and communicate certain documents grouped under the following nine categories:
 - (A) The administrative file held by the United States and those held by Virginia relating to the supply of steel to the Springfield Interchange Project by ADF Group Inc. and ADF International Inc. ('Investment'), including, but without limiting the generality of the foregoing:
 - 1) All records relating to the 'Main Contract', and the 'Shirley/ADF Sub-Contract,' as those terms are defined in the Notice of Arbitration filed by the Investor ('Notice');
 - 2) All records prepared by or on behalf of the United States or by or on behalf of Virginia relating to the scope and meaning of the Buy America provisions found at Section 165 of the STAA (1982), Pub. L. 97-424, 23 CFR 635.410 and to the scope and meaning of Special Provision 102.5 of the Main Contract;
 - 3) All records (including correspondence between the United States and the State of Virginia) relating in whole or in part to the supply of steel to the Springfield Interchange Project;
 - 4) All correspondence between the United States and Virginia relating in whole or in part to the Special Provision 102.5 of the Main Contract.

 - (B) The administrative files held by the U.S. Department of Transport[ation] or the Federal Highway Administration relating to the consideration,

development, drafting, approval and adoption of the Final Rule of the Federal Highway Administration concerning Buy America Requirements (23 CFR Part 635) which was published in Volume 48, No. 228 of the Federal Register dated November 25, 1983.

- (C) All records prepared by or on behalf of the Office of the United States Trade Representative, the Department of State or the Department of Transport[ation], or any agencies thereof relating in whole or in part to the impact of the North American Free Trade Agreement ('NAFTA') on buy national requirements such as Buy America and Buy American requirements, including, but without limiting the generality of the foregoing:
- 1) All records relating to the Buy America and Buy American requirements, policies and laws, as those requirements and policies and laws relate to or are affected by NAFTA;
 - 3) [sic] All records relating to the impact of the implementation of NAFTA on Tea-21, Pub. L. 105-178, Section 165 of the STAA(1982), Pub. L. 97-424 and 23 CFR 635.410.
- (D) The administrative file in the following cases, including all the administration records in all appeals taken from these cases and all pleadings submitted by the parties:
- 1) S. J. Amoroso Construction Co., Inc. v. The United States, 26 Cl. Ct. 759 (1992), aff. 12 F. 3d 1072 (United States Court of Appeals);
 - 2) Wright Contracting, Inc., ASBCA Nos. 39120, 39121, 91-1 B.C.A. P23, 649 (1990); and
 - 3) Decision of the Comptroller General, B-167635 (1969) U.S. Comp. Gen., Lexis 2267.
- (E) All records relating to every instance within the last ten years wherein federal funding for a highway project (including bridges and tunnels) has been withheld from or denied to a Department of Transport of any State of the United States ('State') or any agency thereof as a result of the application of any Buy America provisions.
- (F) All documents used to report to or inform members of Congress, 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.
- (G) A complete list of highway contracts and/or highway projects, listed by State, which have been approved for funding under Tea- 21, Pub. L. 105-178 or which are currently under consideration to receive funding under Tea-21, Pub. L. 105-178, along with a list of the amount of funding for each such contract or project.
- (H) A list of 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), along with the record which provides the administrative rationale for granting such a waiver and the reports to

Congress made during the last ten years in compliance with Section 165(e) of the *Surface Transportation Assistance Act* of 1982.

- (I) All pleadings filed by the United States in NAFTA Chapter 11 proceedings to date.” (Motion, pp.9-10).

We set out some general considerations we think important concerning document production, before examining below each of the categories of documents requested.

General Considerations

3. Article 41(2) of the ICSID Arbitration (Additional Facility) Rules (" ICSID Rules") state that "[t]he Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts."(emphasis added) There are at least two main aspects of necessity when considered in the context of a request for document production. The first aspect relates to a substantive inquiry into whether the documents requested are relevant to, and in that sense necessary for, the purposes of the proceedings where the documents are expected to be used. Inquiry into the relevancy of the documents requested needs to be done on a category by category basis.
4. The second aspect concerns a procedural inquiry into the effective and equal availability of the documents requested to both the requesting party and the party requested. Where only one party has access to requested documents relevant to the proceeding at hand, we consider that the party with access should be required to make the documents available to the other party. Where, however, the documents requested are in the public domain and equally and effectively available to both parties, we believe that there would be no necessity for requiring the other party physically to produce and deliver the documents to the former for inspection and copying. Where, however, the requesting party shows it would sustain undue burden or expense in accessing the publicly available material, the other party should be required to produce the documents for inspection. In the present case, where the Respondent identifies the particular government office at which the documents are in fact available to the Claimant or its representatives, as members of the general public, the Respondent will, in principle, have produced the documents requested within the meaning of Article 41(2) of the ICSID Rules. The Respondent should also provide the document reference numbers, and any other data, necessary to enable the official custodians of the documents to identify and locate them physically or in electronic data bases, with reasonable dispatch. There may be other administrative details that may

need to be attended to by the Respondent (e.g., phone calls to the document custodians) to ensure the Claimant's effective and prompt access to the documents. The Respondent would be reasonably expected to provide such necessary and appropriate assistance, without having to deliver the documents physically to the Claimant. The appropriate assumption in every case is that, both parties having proceeded to international arbitration in good faith, neither would withhold documents for its own benefit and that good faith will render any practical problems of document production susceptible of prompt resolution without undue hardship or expense on either party.

5. The Claimant cites a paragraph from Procedural Order No.8 in Pope and Talbot v. Government of Canada, also a NAFTA Chapter Eleven case, where the Tribunal said:

"Documents which the Claimant has refused to produce on the grounds that they are publicly available and readily accessible to Canada. In the Tribunal's view, the fact those documents are available to Canada from other sources, assuming that to be correct, is not an adequate basis for refusal to produce to Canada those in the possession of the Claimant. Accordingly, the Claimant is required to produce documents under the heads listed in this paragraph." (Response, para. 42)

The Pope and Talbot Procedural Order does not provide enough detail to be helpful in the present case and may well have been the result of the specific circumstances of that case. On the other hand, the view we have adopted above is in line with the procedure and practice in the District of Columbia, as well as with the case law under the United States Federal Rules of Civil Procedure ("FRCP"), both of which form part of the lex arbitri in the present case. Under Rule 34(b) of the FRCP, the requirement to produce a document is a requirement to make the requested document available for inspection and copying at a reasonable time and place. Federal courts in the United States have held that a court may refuse to order production of documents of public record that are equally accessible to all parties (See 7 Moore's Federal Practice (Third Edition) at 34-46; and e.g., Dushkin Publishing Group, Inc. v. Kinko's Service Corporation, 134 FRD 334, 335 (DDC); SEC v. Samuel H. Sloan & Co., 369 Fed. Supp. 994, 995-6 (SDNY 1973); Hoffman v. Charnita, 17 Federal Rules Service 2D 1215, 1217 (W.D. Penn. 1973). It has also been held that production from the adverse party may be ordered if the requesting party could demonstrate that it would be "excessively burdensome for financial and other reasons" for the requesting party to obtain documents from a public source rather than from the opposing party who has them in their files (e.g., Snowden v. Connaught Laboratory, Inc., 137 FRD 325, 333 (D. Kan. , 1991).

6. The Respondent brings to our attention the timing of the Motion, which was filed on 3 August 2001, one day after the Claimant submitted its Memorial on 2 August 2001. The Respondent states that ADF's Memorial "did not purport to rely on any of the documentation that is the subject of [the] Motion and [that the documentation was not] necessary to the proof of its case."(Objections, pp.2-3) While the Motion could have been filed earlier, it appears to us that the documents sought could still be used in preparing a Reply. If the Respondent has been substantially inconvenienced by the timing of the Motion, a request for additional time to prepare its Counter-Memorial may be submitted for the consideration of the Tribunal. We do not believe in this instance that the timing of the Motion affords adequate basis for dismissing the Motion.

Category A documents

7. In its Objections, the Respondent states that, subject to its objection that the request for Category A documents is too broadly drawn and to the Respondent's general claim of privileges,

"the United States is willing to make available to ADF the administrative files held by the United States Federal Highway Administration and the Department of Transportation of the Commonwealth of Virginia relating to the supply of steel to the Springfield Interchange Project by ADF Group and ADF International Inc. to the extent that ADF Group Inc. or ADF International Inc. did not originate documents contained in those files and such documents are not already in the possession of ADF Group Inc. or ADF International Inc." (Objections, p.8)

We believe that while the request could perhaps have been more tightly drawn, it does refer with sufficient specificity to the subject of the desired files: "relating to the supply of steel to the Springfield Interchange Project by the ADF Group, Inc. and ADF International Inc." The four sub-categories under Category A add further clarity by specifying records relating to the "Main Contract" and the "Shirley /ADF Sub-Contract" and to "Special Provision 102.5 of the Main Contract." The relevance of these documents to the subject-matter of the present case is, in effect, conceded by the Respondent. Accordingly, we believe that the Claimant should accept the offer of the Respondent which we read as embracing all Category A documents and the Respondent should produce those documents by making them available in the manner indicated above under "General Considerations."

8. We note that the Respondent qualifies its willingness to make Category “A” documents accessible by excluding documents originated by, and therefore presumably already in the possession of, ADF Group Inc. or ADF International Inc. This exclusion is reasonable enough in principle, but it should not apply to documents which, though originated by the Claimant, have upon them information or notations placed there by staff of the governmental agencies through whose desks the documents passed. At the same time, we agree with the Claimant that the Respondent need not make available documents which appear under the ADF letterhead and are signed by a responsible official of ADF(Response, para. 31). For this purpose, a person purporting to sign as an officer or staff of ADF shall be presumed to be a responsible officer or staff of ADF.

Category B documents

9. Category B documents might possibly provide some background information on the "Final Rule" (23 CFR part 635). But they have not been shown by the Claimant to bear upon the subject-matter of, that is, the issues raised or likely to be raised in, the present case. We note, however, that the Respondent has stated that these documents "are publicly available and that the United States is willing to make such documents available to ADF under the same conditions as they are available to the general public."(Objections,p.10) Accordingly, the Claimant should accept the offer of the Respondent and the Respondent should make the Category B documents available to the Claimant in the manner indicated above under "General Considerations."

Category C documents

10. We consider that Category C documents are described in overly broad terms which makes identification of the requested documents very problematical. In addition, the Claimant has not shown how those documents relate to the issues raised, or expected to be raised, in the present case. There appear to be differing "buy national requirements" in different statutes or regulations pertaining to various sectors of business activity, each of which might have been affected in some measure by the provisions of NAFTA invoked by the Claimant. At the same time , we do not necessarily agree with the Respondent that the only relevant documents are those on which the United States intends to rely in preparing its Counter-Memorial. The request for Category C documents simply lacks the necessary particularity and indication of potential relevancy to the present case for us to determine it is sufficiently “necessary” to order production.

Category D documents

11. The Respondent objects to the request for Category D documents upon the ground, *inter alia*, that they do not relate to "the Buy America provisions found in Section 165 of the STAA and concern conduct that pre-dates the entry into force the NAFTA" (Objections, pp.13-14). The Claimant believes the documents are relevant "since they relate to the manner in which U.S. courts and administrative agencies have addressed 'buy national' policies in the context of the fabrication of steel."(Motion, p.6) It is unclear to us what the "administrative file" and "administration records" of judicial cases and appeals and administrative adjudications would consist of. The Claimant has not shown how such administrative files and records and pleadings would shed light on the manner in which U.S. courts and administrative agencies have addressed "buy national" policies. We refer here to light not already captured in and discernible from the published decisions themselves rendered by the courts and agencies involved. Since, however, according to the Respondent, "many of the requested documents are publicly available"(Objections, p. 14), we believe that Claimant should consult with the Respondent to determine which of those documents (other than the published decisions) are available to the general public and proceed in the manner indicated above under "General Considerations"

Category E documents

12. In the Respondent's informal response dated 20 June 2001 (Exhibit R-2, Motion) to the Claimant's informal request for production of documents of 14 May 2001 (Exhibit R-1, Motion), the Respondent stated that in respect of Category E, "[t]o the best of the[Respondent's counsel's] knowledge, information and belief after due inquiry, there are no documents responsive to the request." In its Motion,(p. 6) the Claimant "noted" this response but nevertheless included Category E documents in its prayer for relief. In their subsequent submissions, neither Claimant nor Respondent addressed the request for Category E documents. Accordingly, we consider that Claimant has dropped its request for these documents, having in effect accepted Respondent's statement that there are no such documents.

Category F documents

13. In its Response (para. 58), the Claimant clarified its request for Category F documents as referring to "documents used to report to or inform members of Congress acting as a body,

whether it be acting as the full Congress or as a Congressional Committee and the President of the United States." This request is still cast in overly broad terms, since it is not limited in respect of, e.g., the government agencies whose reports are sought and the years during which such reports were rendered. The Claimant has also not indicated how such reports would bear upon the issues raised or expected to be raised in this case. In principle, the request for this Category of documents should be denied.

14. Nevertheless, it appears to us that there may be reports from agencies required by statutes embodying Buy America requirements to be made to the U.S. Congress or to the U.S. President and that such statutorily mandated reports would probably be publicly available in the United States. The Claimant should consult with the Respondent to determine what reports are required by which Buy America statute to be made to the U.S. Congress or the President, possibly falling within Category F, are publicly available and to request the information and assistance necessary for accessing such reports promptly on the ground or in electronic databases.

Category G documents

15. In its Response (para. 62), the Claimant has expressed its willingness to postpone its request for Category G documents, which relate to the issue of damages, until a subsequent phase of the present proceedings. Accordingly, we regard this particular request as withdrawn, without prejudice to the Claimant re-submitting it, or a similar request, should it so wish, at some later stage of these arbitration proceedings.

Category H documents

16. Claimant and Respondent have effectively reached agreement as to the Category H documents that the Respondent will produce and make available to the Claimant (Final Observations, pp.12-13).

Category I documents

17. The Claimant invokes paragraph 2(b) of the Interpretative Note on Certain Chapter Eleven Provisions issued by the NAFTA Free Trade Commission, dated 31 July 2001, which reads, in pertinent part:

"Each Party agrees to make available to the public, in a timely manner, all documents submitted to, or issued by, a Chapter Eleven Tribunal, subject to the redaction of: x x x x "

It is not clear to us , and neither party to this case has made any submission on, whether paragraph 2(b) above is intended to refer to all documents submitted to all Chapter Eleven Tribunals past , present and future. By its terms, the Interpretative Note may be read as designed to have prospective rather than retroactive operation. It is also unclear to us , and no pertinent submission has been made on this point too, whether paragraph 2(b) establishes a duty that is enforceable by a Chapter Eleven Tribunal. Pleadings and evidence may as a technical matter be distinguishable from each other. However, a written submission may have evidentiary value where the issue is, e.g., what position was taken in the past on a particular question by the party making the submission. But Claimant has not shown what pleadings filed by the United States in which Chapter Eleven proceedings, set out matters relevant to the issues raised or expected to be raised in the present case. On the other hand, it is our impression that some Category "I" documents are publicly available in the United States. Accordingly, we believe that the Claimant should consult with the Respondent to determine what Category "I" documents are available to the general public and how these might be effectively accessed.

Privileged documents

18. The Respondent entered a general objection to the Motion to the extent that the documents requested are "protected from disclosure by applicable law, including without limitation, documents protected by the attorney-client and government deliberative and pre-decisional privileges." (Objections, p. 18) For the Tribunal to be able to determine the applicability of the privileges so adverted to, the Respondent will have to specify the particular documents in respect of which one or more privilege is claimed and the nature or scope of the specific privilege claimed, and show the applicability of the latter to the former. This is a matter for future determination, should the Respondent decide in fact to withhold, under claim of privilege, particular documents it should otherwise make available to the Claimant .
19. Wherefore, the Tribunal disposes of the requests for production of the following categories of documents in the following manner:

- (a) Category A documents shall be made available by the Respondent to the Claimant in the manner and subject to the terms indicated above;
- (b) Category B documents need not be made available by the Respondent to the Claimant, save to the extent that such documents are publicly available in the United States, in which case Claimant and Respondent shall proceed in the manner indicated above;
- (c) The request for Category C documents is denied for lack of the necessary specificity and indication of potential relevance to the present case;
- (d) Category D documents need not be made available by the Respondent to the Claimant, save to the extent that such documents are publicly available in the United States in which case Claimant and Respondent shall proceed in the manner indicated above;
- (e) The request for Category E documents has been rendered moot, having in effect been dropped by the Claimant;
- (f) Category F documents need not be made available by the Respondent to the Claimant, save to the extent such documents consist of publicly available statutorily mandated agency reports to the U.S. Congress or the U.S. President, in which case Claimant and Respondent shall proceed in the manner indicated above;
- (g) The request for Category G documents is deemed withdrawn without prejudice to re-submission thereof by the Claimant at some later stage of the present proceedings;
- (h) Category H documents shall be made available by the Respondent to the Claimant in accordance with the understanding reached by the parties and in the manner indicated above;
- (i) Category I documents need not be made available by the Respondent to the Claimant, save to the extent that such documents are publicly available in the United States in which case Claimant and Respondent shall proceed in the manner indicated above.

[Signed]

Florentino P. Feliciano
President of the Tribunal

[Signed]

Carolyn B. Lamm
Member

[Signed]

Armand de Mestral
Member