

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

**OBJECTIONS TO CLAIMANT'S  
REQUEST FOR DOCUMENTS OF  
RESPONDENT UNITED STATES OF AMERICA**

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UNITED STATES DEPARTMENT OF STATE

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As contemplated by paragraph III(3) of Attachment 1 to Procedural Order No. 1, respondent United States of America respectfully submits these objections to claimant ADF Group Inc.'s Motion for Production of Documents, dated August 3, 2001 (the "Motion").

**PROCEDURAL HISTORY**

On May 14, 2001 – some ten months after its notice of arbitration was submitted and six weeks after the time for submission of its Memorial began to run – ADF Group Inc. ("ADF") transmitted to the United States an informal request for production of documents, as contemplated by paragraph III(1) of Attachment 1 to Procedural Order No. 1. As envisaged by that paragraph, the United States informally responded to ADF's request on June 20, 2001.

In its response, the United States offered to make available to ADF a substantial number of documents, to the extent that those documents were not protected from disclosure under applicable law. For example, the United States offered to make available:

- the administrative files relating to the supply of steel by ADF to the Springfield Interchange to the extent ADF did not originate those documents; and
- computer listings of all national and regional waivers of the Buy America provisions of 23 C.F.R. § 635.410(c) since June 1996, as well as the administrative record accompanying the requests for such waivers.

The United States also provided specific direction as to how ADF could obtain many of the additional documents it requested. Finally, the United States objected to production of other documents on grounds discussed in more detail below.

At the time of the United States' informal response, over six weeks remained before the date for submission of ADF's Memorial and any and all evidence in support thereof. *See* Procedural Order No. 1, Attachment 1, ¶ V ("Parties shall include in or with their written submissions (i.e., memorials, counter-memorials, reply memorials and rejoinder memorials) not only their legal arguments, but also the evidence on which they intend to rely"). ADF, however, never contacted the United States to arrange for a time to view those documents the United States offered to produce. Nor did it make any effort to access those documents that were available to the public.

ADF submitted its Memorial on August 2, 2001. ADF's Memorial did not purport to rely on any of the documentation that is the subject of its Motion. Not until the United States' time to prepare its Counter-Memorial began to run did ADF seek action by the Tribunal on its request.

### ARGUMENT

It is apparent from the timing and scope of this Motion that ADF interposed it not because any of the voluminous documents sought are necessary to the proof of its case, but rather as a device calculated to harass and distract the United States from the preparation of its Counter-Memorial. If ADF had really needed the documents in question, it would have accepted the United States' offer to provide the bulk of the documents requested and then, so as to be in a position to rely upon them in its Memorial, pursued its request for the remaining documents. It did not. Instead, ADF waited to interpose its request until the United States' time for preparing its principal pleading began to run. The requested documents plainly are not necessary to ADF's case. For example, ADF asks this Tribunal to order the United States to produce:

- documents that ADF authored or originated, not because ADF requires these documents but so that ADF may “verify both the accuracy and completeness of its own files and those of the [United States],” Motion at 4;
- documents maintained by the National Archives and available to all members of the public including ADF, not because these documents are less accessible to counsel for ADF than to counsel for the United States, but because ADF seeks to avoid “stand[ing] in line at the door of [a] government agency,” and therefore impose the burden of collecting these documents on counsel for the United States, Motion at 5; and
- all documents used to report to or inform any of the 535 members of Congress or the President of the United States on the application of the Buy America provisions to federally-funded highway contracts and the impact of NAFTA on those provisions, without limitation as to the nature of the document, the identity of the sender, or the time of creation. Motion at 6.

A request of this breadth, and for these purposes, can only be termed abusive. As demonstrated below, neither the ICSID Arbitration (Additional Facility) Rules nor principles generally applied in international arbitrations support ADF's Motion. The United States' objections to ADF's requests should be sustained.

**I. ARTICLE 41 CONTEMPLATES PRODUCTION ONLY OF “NECESSARY” DOCUMENTS**

Article 41(2) of the ICSID Arbitration (Additional Facility) Rules, entitled “*Evidence: General Principles*,” provides as follows: “The Tribunal may, if *it* deems it *necessary* at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts.” (Emphasis supplied). Thus, Article 41(2) empowers the Tribunal, *not the parties*, to determine what evidence is necessary. Indeed, under Article 41(2), it is presumed that the Tribunal will decide what evidence is necessary and issue an order accordingly.<sup>1</sup> Vague general requests, or “fishing expeditions,” for documents that a *disputing party* suspects might be helpful cannot justify a document production order. Rather, the standard under which this Tribunal should consider ADF’s Motion is whether, in the Tribunal’s view, ordering the production of documents is necessary.

Both the International Bar Association (“IBA”) and the Iran-US Claims Tribunal have provided substantial guidance regarding requests for production of documents in international arbitration. The IBA Rules, often cited as reflecting a consensus view on the scope of evidence-taking in international commercial arbitration, adhere to the “only-if-necessary” approach embodied in Article 41(2), requiring that a Party’s request for documents contain:

(a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of *a narrow and specific requested category of documents* that are reasonably believed to exist;

(b) a description of how the documents requested are *relevant and material* to the outcome of the case; and

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<sup>1</sup> *See also* Explanatory Notes to Article 33 of the ICSID Rules of Procedure for Arbitration Proceedings, dated January 1, 1968 (discussing presumption, in Rule on which Article 41(2) is based, that the Tribunal will determine what evidence is necessary).

(c) a statement that the documents requested are *not in the 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.

IBA Rules on the Taking of Evidence in International Commercial Arbitration, dated June 1, 1999 (“IBA Rules”) (emphasis added). Under the IBA Rules, expansive requests for documents and requests unaccompanied by an explanation of how the documents requested are relevant and material are unacceptable and grounds for the tribunal to deny a motion for production of documents. *Id.* art. 3.6. The IBA Rules thus intended to allow for a carefully circumscribed right for documentary production without permitting “fishing expeditions.” See Thomas H. Webster, *Obtaining Documents from Adverse Parties in International Arbitration*, 17 *ARB. INT’L* 1, 44 (2001).

A requesting party’s failure to state in its request that the documents sought are not in its possession, custody or control is also unacceptable. *Id.* arts. 3(3)(c), 3(6) and 9(2); see also IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, *BUS. L. INT’L*, January 2000, at 14, 20-21 (requirement “that the documents sought are not in [the requesting party’s] possession . . . prevent[s] unnecessary hassling of the opposing party by the requesting party”); Thomas H. Webster, *Obtaining Documents from Adverse Parties in International Arbitration*, 17 *ARB. INT’L* 1, 44 (2001).

Like the ICSID and IBA Rules, decisions by the Iran-US Claims Tribunal reflect a carefully circumscribed approach to document production requests. The Iran-US Claims Tribunal has established explicit requirements for requests for production:

that request should include, *inter alia*, specific identification of documents and their location; an explanation as to why those documents are necessary for the case; why the requesting Party has not had access to

them and what specific efforts, if any, the requesting Party has made in order to obtain these documents through other sources.

*Malekzadeh v. Iran*, Case No. 356, Order of August 12, 1993 (Doc. No. 103) (applying provision of Article 24(3) of the UNCITRAL Arbitration Rules that “[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents . . . .”).

The Iran-US Claims Tribunal thus requires a requesting party adequately to explain why its case cannot be proven without the documents requested. In the view of that Tribunal, parties that have not explored the primary methods of proving its case cannot, merely for reasons of convenience, request the production of documents. *See, e.g., id.*, at 1 (denying Iran’s document production request as “inadmissible” because Iran did not “demonstrate what specific efforts, if any, [it] has made to obtain the documents through other sources . . . .”). Allowing such a request would undermine the purpose of the necessity element.

The United States’ position is not that there is no place for the exchange of evidence in international arbitration. Indeed, the United States’ offer to open its files to ADF in response to certain of its requests confirms the United States’ view that there is indeed a significant role for the exchange of evidence in appropriate circumstances. But ADF’s requests go well beyond what is reasonable and necessary in this arbitration.

**II. ADF HAS FAILED TO SHOW THAT THE DOCUMENTS THAT ARE THE SUBJECT OF ITS MOTION ARE “NECESSARY”**

ADF’s request for an order of production must be rejected because it has failed to satisfy the necessity requirement set forth in Article 41(2) of the ICSID Arbitration (Additional Facility) Rules. In bringing its Motion, ADF seeks authority from the Tribunal to undertake an impermissible “fishing expedition” for countless, voluminous

documents. Yet, taking each of ADF's requests that are the subject of its Motion in turn, ADF has failed to show that an order for production is necessary.

As demonstrated below, in no instance has ADF presented a request for a narrow and specific category of documents or the basis for a reasonable belief that those documents exist. Nor has ADF satisfied its burden of establishing that any of the documents sought are material to its claim. ADF makes only cursory allegations of the relevance of the documents requested. For example, ADF's statement of the relevancy of the documents requested in paragraph B consists of the following: "[t]he documents are relevant to the subject matter of the arbitration . . . ." Motion at 5. In paragraph C of its request, ADF merely states that "the request is limited to relevant documents produced by relevant agencies." *Id.* Moreover, with respect to four of the eight requests at issue in ADF's Motion (those set forth in paragraphs A, B, D and J), ADF has failed to show that many of the documents requested are not already available to it. Thus, as set forth in greater detail below, ADF has failed to show that the documents requested are necessary. The Tribunal, therefore, should reject ADF's Motion in its entirety.

**A. ADF-Originated Documents In The Springfield Interchange File**

**1. The Informal Request And Response**

ADF requested:

A) *The administrative file held by the United States of America, including all branches and agencies thereof (“United States”) and those held by the State of Virginia, including all branches and agencies thereof (“Virginia”) relating to the supply of steel to the Springfield Interchange Project by ADF Group Inc. (“Investor”) 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.*

The United States informally responded to this request as follows:

The United States objects to this request on the basis that it is overly broad. Subject to that specific objection and the general objections noted above, 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 Inc. 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. Counsel for the United States is unaware of administrative files held by any other agency that relate to this subject.<sup>2</sup> ADF’s Motion And The United States’ Objections

ADF's Motion acknowledges the United States' offer to provide documents in the administrative files not already available to ADF. Notwithstanding that acknowledgement, ADF incorrectly asserts that the United States' obligation goes further. In particular, ADF seeks an order from this Tribunal directing the United States to produce all documents in the aforementioned files including those that ADF originated and are, presumably, in its possession.

ADF has made no effort to show that these documents are necessary. Rather, in its Motion, ADF simply asserts that it is "entitled to verify both the accuracy and the completeness of its own files and those of the Party." Motion at 4.

ADF's suspicion that its files or those of the United States may be inaccurate or incomplete hardly establishes the materiality or relevancy of the documents requested. Nor does that suspicion justify the United States' undertaking the burdensome task of gathering and providing "access to the entire administrative file." Motion at 4. Again, ADF has ignored the standards applicable to its request. ADF's statement that it desires to "verify both the accuracy and completeness of its own files" demonstrates that, in fact, ADF has many or all of the requested documents in its possession, custody or control. To show that an order of production is necessary, a requesting party must provide a statement that the documents requested are *not* in its possession, custody or control. *Cf.*, *e.g.*, IBA Rules, art. 3(3)(c). Because ADF maintains many or all of the documents sought in its own files, ADF cannot demonstrate that a production order is necessary. Therefore, the Tribunal should deny ADF's request.

**B. Documents Available To Members Of The Public From The National Archives**

**1. The Informal Request And Response**

ADF requested:

B) *The administrative files held by the U.S. Department of Transport 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.*

The United States informally responded to this request as follows:

The documents called for by this request are publicly available and the United States is willing to make such documents available to ADF under the same conditions as they are available to the general public. To the best of the undersigned's knowledge, information and belief after due inquiry, the Federal Highway Administration's administrative file relating to 23 CFR 635 was retired and sent to the National Archives, located in College Park, Maryland in February 1992. The accession number for the administrative file is 406-92-12. The National Archives will retain the file for twenty years. Members of the public have the same access to records kept at the National Archives as do United States Government officers. On the National Archives website, there is information on researching records that are stored there. The website's address is <http://www.nara.gov/research/all/all.html>.

**2. ADF's Motion And The United States' Objections**

ADF complains in its Motion that it should not have to "stand in line at the door of every government agency to inquire about the existence and availability of relevant documents." Motion at 5 (emphasis added). As an initial matter, the United States objects to ADF's mischaracterization. The United States has not suggested that ADF visit every government agency to satisfy its interest in the requested documents. Rather, the United States has directed ADF to the one government agency that maintains the records in question – the National Archives. Indeed, the United States identified for ADF the specific accession number for the administrative file in which the National Archives maintains the requested documents. If the documents requested truly were necessary to prove ADF's

claim, ADF would be willing to “stand in line” to obtain those documents, as any member of the public as well as any U.S. Government officer would be required to do.<sup>2</sup> ADF’s unwillingness to use the information provided to retrieve the documents from the National Archives provides no basis for an order for production shifting ADF’s burden to the United States. Moreover, because the documents are publicly available, there is no need for the Tribunal to issue an order directing the United States to produce them.<sup>3</sup>

**C. All Records From Long-Inactive Files Relating To The Impact Of The NAFTA On Buy National Requirements**

**1. The Informal Request And Response**

ADF requested:

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, 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:*

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<sup>2</sup> In fact, according to Clarence Lyons, Civil Reference Section Chief, the National Archives, there is no line at the National Archives. Rather, following a brief consultation, an archivist provides the requesting party the records within a few hours of its request for review and copying in the National Archives research room. Mr. Lyons recommends that researchers call in advance of visiting the National Archives (301.713-6800).

<sup>3</sup> The Iran-US Claims Tribunal has rejected document production requests because the party had not sought the evidence requested on its own. *See Aryeh v. Iran*, Award 581-842/843/844-1, 22 May 1997, Doc. 204, at ¶ 9 (denying a document production request as “inadmissible, since the record failed to disclose what efforts the Claimants had made to secure the requested documents.”); *Malekzadeh v. Iran*, Case No. 356, Order of August 12, 1993 (Doc. No. 103), at 1 (denying Iran’s document production request as “inadmissible” because Iran did not “demonstrate what specific efforts, if any, [it] has made to obtain the documents through other sources . . . .”); *Fluor Corp. v. Iran*, Order of 13 Nov. 1987, Case No. 333, Chamber 1, Doc. 212, at 1 (“Considering that the Respondent bears the burden of proving the facts it relies upon in support of its defence, the Tribunal concludes that before such a discovery request can be considered, the Respondent must show that it has taken all reasonable steps to procure these documents itself.”); *Aeronutronic Overseas Services, Inc. v. Telecommunications Co. of Iran*, Order of 20 Mar. 1986, Case No. 410, Chamber 3, Doc. 107 (denying a document production request in order to enforce the party’s “burden of proving the facts relied on to support its claim or defence . . .”).

- 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) *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.*

The United States informally responded to this request as follows:

The United States objects to this request on the grounds that it is overly broad and would be unduly burdensome to comply with. A search for “all records” on the subjects identified would require examination of an indeterminate number of long inactive files that would be difficult to identify, locate and examine due to the number of years that have elapsed and the significant changes in government personnel since 1992. The United States will make available to ADF with its counter-memorial any documents relating to such subjects that it intends to rely on in its defense of the claim.

## **2. ADF’s Motion And The United States’ Objections**

The United States maintains its objection to ADF’s request for “all records” prepared by three distinct federal government agencies and any of their sub-agencies since 1992. The request is overly broad and unduly burdensome to comply with. ADF incorrectly argues in its Motion that the United States already will be required to “sort and examine the Requested Documents to produce only those upon which it intends to rely on in its defence,” and therefore cannot complain of the burdensome nature of the request. Motion at 5. Apparently, ADF has misconstrued the last sentence of the United States’ informal response to this request. The United States does not intend to “sort and examine the Requested Documents” to prepare its defense of the claim. The United States is aware at this time of a limited amount of evidence falling within this category. It may or may not rely on that evidence. In accordance with Paragraph V of Attachment 1 to Procedural Order No. 1, the United States will make available with its Counter-Memorial any such evidence on which it intends to rely in defense of the claim.

In addition to the unduly burdensome nature of the request, ADF makes no attempt in its Motion to describe how the documents sought are either relevant or material to its claim, nor does ADF identify any specific documents that the United States should be required to produce because ADF cannot prove its claim without them. Instead, ADF seeks this Tribunal's authority to undertake an impermissible "fishing expedition." The Tribunal should deny the request.

**D. The Administrative File In Three Cases That Pre-date The NAFTA And Do Not Concern The Buy America Program At Issue In ADF's Claim**

**1. The Informal Request And Response**

ADF requested:

*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:*

- i) 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);*
- ii) Wright Contracting, Inc., ASBCA Nos. 39120, 39121, 91-1 B.C.A. P23, 649 (1990); and*
- iii) Decision of the Comptroller General, B-167635 (1969) U.S. Comp. Gen. Lexis 2267;*

The United States informally responded to this request as follows:

The United States objects to this request on the grounds that the documents requested are not relevant to the dispute. Documents relating to these cases do not concern the Buy America provisions found in Section 165 of the STAA and they concern conduct that pre-dates the entry into force of the NAFTA; many of the requested documents are publicly available; and it would be unduly burdensome for the United States to produce these documents.

**2. ADF's Motion And The United States' Objections**

ADF asserts in its Motion that the requested administrative files for the three cases listed above are relevant to its claim “since they relate to the manner in which U.S. courts and administrative agencies have addressed ‘buy national’ policies . . . .” Motion at 6.

ADF’s cursory statement of relevancy ignores several critical facts regarding each of the three cases. First, none of the three cases concerns the provisions of the Buy America program at issue in ADF’s claim before this Tribunal; rather, an entirely different statutory scheme, the Buy American Program, is at issue in each of the cases. Second, the three cases were decided in 1969, 1990 and 1992, respectively. Therefore, information contained in the documents related to those cases is stale, and particularly so in light of the fact that each of the three pre-dates the NAFTA’s entry into force in 1994. Third, ADF has failed to make any showing as to how any documents requested from the court files, other than the decisions which ADF already has in its possession, will show how U.S. courts or administrative agencies have addressed the statute at issue. Finally, ADF does not dispute that many, if not all, of the documents requested are publicly available. ADF has not satisfied its burden to show that an order of production is necessary. Therefore, the Tribunal should not issue the production order requested by ADF.

**E. All Documents Sent To Members of Congress And The President Relating To The Buy America Program**

**1. The Informal Request And Response**

ADF requested:

*F) All records used to brief members of the legislative or executive branches of the United States government on the application of Buy America provisions to federally funded highway contracts and the impact of NAFTA on those provisions.*

The United States informally responded to this request as follows:

In addition to the general objections noted above, the United States objects to producing documents responsive to this request on the grounds that the request is overly broad and it would be unduly burdensome for the United States to identify, locate and produce documents responsive to this request.

## **2. ADF's Motion And The United States' Objections**

In its Motion, ADF conceded that its informal request was overly broad in scope and agreed “to limit the scope of its request to the documents used to report to or inform members of Congress and the President . . . .”

However, this proposed limitation will not do. ADF's request remains overly broad and unduly burdensome to comply with. There are currently 535 members of Congress. Since 1982, there have been several Congressional elections. Therefore, there may be as many as 1,000 past or present members of Congress – perhaps more – whose records the United States would be required to review to satisfy ADF's request. Moreover, ADF has failed to specify how any document requested is necessary to its claim. Its request is an impermissible “fishing expedition.” The Tribunal should deny ADF's request.

## **F. Information Regarding Any Contracts Or Projects Funded Or To Be Funded Pursuant To The Transportation Equity Act That Is Relevant, If At All, Only To Damages Issues**

### **1. The Informal Request And Response**

ADF requested:

- 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.*

The United States informally responded to this request as follows:

The United States objects to producing documents that are responsive to this request on the grounds that such documents are not relevant.

## **2. ADF's Motion And The United States' Objections**

ADF seeks documents to measure market opportunities missed purportedly as a result of the Buy America provisions. Upon agreement of the parties, however, this Tribunal bifurcated the jurisdictional and merits phase of this case from any damages phase. *See* Minutes of First Session of the Tribunal held on Feb. 3, 2001, ¶ 13. The documents requested are relevant, if at all, only to the damages phase of these proceedings – a phase that, the United States submits, never will be necessary for this Tribunal to reach. Consequently, ADF has not shown any need for an order for production of the requested documents at this time, and the Tribunal should deny its request.

### **G. A List Of All Waivers Of Buy America Requirements Granted Within The Last Ten Years, And The Records Containing The Rationale For Such Waivers**

#### **1. The Informal Request And Response**

ADF requested:

*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.*

The United States informally responded to this request as follows:

In addition to the general objections noted above, the United States objects to producing documents that are responsive to this request on the ground that the request is overly broad and would be unduly burdensome to comply with. Subject to these objections, the United States is willing to make available to ADF a computer-generated list of all national and regional waivers of the provisions of the Buy America requirements that have been granted within the last five years (*i.e.*, since June 1996) under 23 CFR 635.410(c). To the best of the undersigned's knowledge, information and belief after due inquiry, before June 1996, the Federal Highway Administration did not maintain computerized records of all national and regional waivers of the provisions of the Buy America requirements. The United States is

willing to make available to ADF, at the Federal Highway Administration's offices, the administrative record accompanying any request.

## **2. ADF's Motion And The United States' Objections**

ADF complains that the United States should do more than make available, at the offices of the Federal Highway Administration, the "administrative record" accompanying any requests for waivers of the provisions of the Buy America requirements, and requests the production of documents that may contain the rationale for granting such waivers. As stated in its informal response, the United States is prepared to make available for ADF's review the complete contents of the administrative record. ADF may arrange for copies of any portion of the record it deems relevant. To the best of the United States' knowledge, if "a memorandum, decision letter or other document" containing the rationale for granting waivers exists, such a document would be contained within the administrative record. In addition, the United States is willing to provide ADF the reports submitted to Congress for the years between 1982 and 1996, as requested by ADF in its Motion. *See* Motion at 7. Given the unduly burdensome nature of copying the administrative file for each waiver request, and the United States' offer to provide ADF with access to the administrative record for its review, no order of production is necessary.

## **H. Publicly Available Pleadings In NAFTA Chapter Eleven Proceedings**

### **1. The Informal Request And Response**

ADF requested:

*J) All pleadings filed by the United States in NAFTA Chapter 11 proceedings to date.*

The United States informally responded to this request as follows:

The United States objects to producing documents responsive to this request on the grounds that such documents are not relevant. The United States notes, however,

that the Department of State is in the process of posting on its website a selection of publicly available documents that have been filed in all NAFTA Chapter Eleven cases. We anticipate that this website will be functional in the near future.

## **2. ADF's Motion And The United States' Objections**

The United States objects to ADF's request for all pleadings filed by the United States in NAFTA Chapter Eleven cases because the documents requested are not evidence and not relevant. *See* ICSID Arbitration (Additional Facility) Rules, Art. 41. Notwithstanding that objection, the United States, in its informal response, noted that it was in the process of posting on the Department of State's website a selection of publicly available documents that had been filed in NAFTA Chapter Eleven cases. The United States regrets that this website is not yet operational, but expects that the website will be operational well before the due date for the submission of the United States' Counter-Memorial. ADF's request for an order of production should be denied.

## **III. DOCUMENTS WITHHELD AS PROTECTED BY PRIVILEGE**

The United States reiterates its general objection to ADF's requests to the extent they call for disclosure of documents protected from disclosure by applicable law, including, without limitation, documents prepared in anticipation of litigation or arbitration, and documents protected by the attorney-client and government deliberative and pre-decisional privileges. Contrary to ADF's suggestion, however, this objection does not represent a refusal to produce any and all documents sought. Rather, once the universe of documents in question has been defined, counsel for the United States will review those documents, remove any protected documents from the set made available to ADF and provide a listing of any documents withheld pursuant to this general objection.

**CONCLUSION**

For the foregoing reasons, the United States respectfully requests that the Tribunal deny ADF's Motion in its entirety.

*Respectfully submitted,*

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