

TO: International Centre for Settlement of Investment Disputes (ICSID)
1818 H Street, N.W.
Washington, DC
U.S.A. 20422

BETWEEN:

ADF GROUP INC.

INVESTOR

AND:

**THE GOVERNMENT OF THE UNITED STATES
OF AMERICA**

PARTY

**INVESTOR'S RESPONSE TO OBJECTIONS RAISED BY THE RESPONDENT
UNITED STATES OF AMERICA TO PRODUCTION OF DOCUMENTS**

1. As contemplated by paragraph III(3) of Attachment 1 to Procedural Order No. 1, the Investor ADF Group Inc. ("ADF") respectfully submits this response to the objections raised by the Respondent United States of America (the "Objections") to ADF's Motion for Production of Documents dated August 3, 2001 (the "Motion");

The United States Submissions on the Procedural History

2. On May 14, 2001, the Investor, ADF, transmitted to the United States an informal request for the production of documents, as contemplated by paragraph III(1) of Attachment 1 to Procedural Order No. 1. The United States notes that ADF's informal request was filed "some ten months after the ADF Notice of Arbitration was submitted and six weeks after the time for submission of ADF's Memorial had begun to run";
3. The Tribunal should be aware that the joint submission of the Parties, which was adopted by the Tribunal and incorporated as Attachment 1 to Procedural Order No. 1, was the result of long discussions between the Parties on the rules governing requests for disclosure of documents. Throughout those discussions, counsel for ADF had exercised great efforts to accommodate the demands of the United States in adopting procedures that would not greatly inconvenience the United States. Those discussions took place on an accelerated basis following the Tribunal's first session on February 3, 2001, and they resulted in the Parties' agreement on a mechanism for disclosure requests;
4. Instead of burdening the Tribunal with a request for production of documents, ADF sought agreement with the United States on appropriate procedures to follow;
5. The procedures that were agreed to are set out in Section III of Attachment 1 to Procedural Order No. 1. That section was carefully drafted by the Parties, and does not provide for the release by the United States of any documents without a specific Order of the Tribunal that includes documents which the United States had agreed to disclose;
6. Throughout the negotiations between the Parties, the ADF was led to believe that the United States would require an Order before producing any documents, even those to which it had no objection to production. Perhaps the United States did not wish to create any precedent that might be construed as an obligation to disclose documents without a Tribunal Order;
7. It is quite true that the ADF's Motion was filed on August 3, 2001, one day after its Memorial was submitted. That was simply due to the difficulty of producing both the Memorial and the Motion at the same time;
8. The United States in its joint submission to the Tribunal, which resulted in the Tribunal's Procedural Order No. 1, specifically agreed to the procedures to be followed and the time frames within which documents would be filed. It ill behoves the United States to now claim that ADF's compliance with those time frames is evidence of a nefarious intent;
9. Following the Tribunal's Procedural Order No. 1 on May 3, 2001, received under cover of a letter from ICSID dated May 4, 2001, ADF immediately finalised its informal request for documentation, taking care to ensure that such request was limited, concise and reasonable before filing it with the United States on May 14, 2001;
10. The submission of the informal request six weeks after the time for submission of ADF's Memorial had begun to run was the inevitable result of the fact that the Parties had also

agreed in a joint document that was adopted as Attachment 1 to Procedural Order No. 1 that the time for filing of the Memorial would run from April 4, 2001;

11. In addition, ADF's informal request was filed only ten days after the receipt of Tribunal's Procedural Order No. 1 setting out the procedures for requests for disclosure;
12. In sum, rather than burden the Tribunal with a request for production of documents without consulting the United States, ADF chose to find common ground with the United States on the mechanism for production of documents and, having found that common ground, acted accordingly;
13. ADF is disappointed that the United States is now seeking to mis-characterise the result of the Investor's attempts to conduct this litigation in good faith and, to the extent possible, to meet the concerns of the United States, as "a device calculated to harass and distract the United States from the preparation of its Counter-Memorial";
14. Finally, ADF notes that there ought to be no linkage between the procedures relating to the production of documents and the filing of ADF's Memorial or the Counter Memorial of the United States.
15. As Thomas H. Webster states in "Obtaining Documents from Adverse Parties in International Arbitration", (2001) 17 ARB. Intl. 1, at page 44 (Tab 8 in the United States Appendix to the Objection):

"Unlike U.S. litigation practice, where discovery precedes written submissions, in accordance with current practice, one would expect the requests for documents to be made after initial filings and perhaps in several stages, with requests for documents after exchange of the written submissions."

The United States Claim that Necessity is the Test for an Order for Production of Documents.

16. The United States claims that "Article 41 [of the ICSID Arbitration (Additional Facility) Rules] contemplates production only of necessary" documents. At several places throughout its Objections, it claims that ADF's requests for production of documents should be rejected for failure to "satisfy the necessity requirement";
17. In a section of the U.S. Objections which demonstrates more clearly than anything that necessity cannot be a test for documentary production, the United States says that ADF's request should be rejected because ADF failed to identify "any specific documents that the United States should be required to produce because ADF cannot prove its claim without them".¹ That is simply another way of stating the necessity test;

¹ The United States Objections, Section C, at page 13.

18. If the Tribunal can order the production of documents only when they are necessary in order for a claimant to prove its case, then orders for production could only issue where a claimant has filed a claim that he cannot prove on the basis of its own evidence. If the claimant can prove his claim with documents in its possession, then there is no other class of documents necessary to prove the claim;
19. That is precisely how the United States has formulated the test it claims is applicable when it states that ADF's request should be rejected because ADF has failed to identify "any specific documents that the United States should be required to produce because ADF cannot prove its claim without them." Such a test is wholly inappropriate for numerous reasons, including that it would require the Tribunal to enter into an assessment of the evidence and merits of the claim prematurely, and because it favours claimants with no evidence to support their claim over claimants with a substantial body of supportive evidence;
20. To determine whether documents are necessary to the claimant's case, the Tribunal would need to examine what evidence the claimant possessed. The better the claimant's existing evidence, the less likely it is that any additional document would be necessary;²
21. To conduct that exercise, the Tribunal would have to weigh the claimant's evidence and determine whether it was sufficient to prove its case. If it were sufficient, no other evidence would be necessary and no order for production would issue. Such an exercise is wholly inappropriate at this early stage of the proceedings;
22. A necessity test also favours the litigant with the least evidence. For a claimant with no evidence to support its case, the burden of proving necessity is light. For a well-prepared litigant with an already established body of probative evidence, demonstrating the necessity of additional documents will be virtually impossible;
23. The United States bases its argument that necessity is the appropriate test on the text of Article 41(2) of the ICSID Arbitration (Additional Facility) Rules which reads 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."
24. What that rule says is that if the Tribunal deems it necessary, it may order production of documents, and not that the Tribunal may only order production of necessary documents. The Tribunal may find it necessary to order the production of documents where, as in the present case, a Party resists disclosure;
25. The *International Bar Association Rules for the Taking of Evidence in International Commercial Arbitration* (the "IBA Evidence Rules"), which the United States relies upon

² Of course additional evidence might be relevant, material, informative, useful or even decisive but, according to the United States, if it is not necessary, then no order to produce should issue.

heavily for other purposes,³ confirms that necessity is not the test for an order for production of documents but that relevance and materiality are the key factors;

26. Clearly, the documents requested by ADF, as will be further discussed later, are relevant and material to the outcome of this case;
27. We note also that Article 3(4) of the IBA Evidence Rules states that the Party to whom a request to produce is addressed “shall produce to the Arbitral Tribunal and to the other parties, all the documents requested in its possession, custody or control as to which no objection is made”. Where an objection is made, Article 3(6) states that production should be ordered when the tribunal “determines that i) the issues that the requesting Party wishes to prove are relevant and material to the outcome of the case; and ii) none of the reasons for objection set forth in Article 9.2 apply”.
28. Article 9.2 of the IBA Evidence Rules provides, in turn, seven grounds from exclusion from production as follows:
 - a) lack of sufficient relevance or materiality;
 - 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;
 - d) loss or destruction of the document that has been reasonably shown 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 fairness or equality of the Parties that the arbitral Tribunal determines to be compelling;
29. As the Investor will show below, all of the requested documentation is both relevant and material and no part of the request imposes an unreasonable burden on the United States;

³ The United States notes that the IBA Evidence Rules are “often cited as reflecting a consensus view on the scope of evidence-taking in international commercial arbitration” and offer “substantial guidance regarding requests for production of documents in international arbitration”.

A. ADF's Request for Production of the Administrative Files Relating to the Supply of Steel to the Springfield Interchange Project by ADF Group Inc. and by ADF International Inc.

30. These documents are relevant and material as they relate to the contract that gave rise to the present litigation. They would provide information on the acts of the state agencies involved, and the manner in which decisions affecting ADF were taken;
31. We note that 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.” (United States Objections at page 8);
32. ADF objects to the dual conditions imposed by the United States relating to i) documents that ADF Group Inc. and ADF International Inc. originated; and ii) documents that are already in the possession of ADF Group Inc. or ADF International Inc.;
33. ADF objects to the condition that documents need not be produced if either of the ADF companies originated these documents as it leaves the question of determining which document has been originated by ADF to the discretion of the United States. The Investor is willing to accept, however, 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;
34. ADF also objects to the condition that documents need not be disclosed if they are already in the possession of ADF. While the condition might seem reasonable on its face, in practice it is unworkable. The United States has no way of knowing what documents are “already in the possession of ADF” and, consequently, that condition cannot serve as a guide to what documents are to be produced. As the United States is unaware of which documents are in the possession of ADF, it cannot determine which documents are not already in the possession of ADF;
35. The United States claims that providing “access to the entire administrative file” would be a “burdensome task” and yet its claim appears to be that it is easier to select documents from that file to provide selective disclosure rather than full disclosure. That assertion simply does not stand the test of logic. It would be far less difficult for the United States to provide the entire administrative file rather than selected portions;

B. ADF's Request for Production of the Administrative File Held by the United States Department of Transport or the Federal Highway Administration Relating to the Final Rule of the Federal Highway Administration Concerning Buy America Requirements

36. These documents are relevant and material in that they will demonstrate the administrative history of the manner in which the contested law resulted in the contested regulation, including the submissions that were received from interested parties and the Agency's treatment of those submissions. It ought to be remembered that ADF is claiming that it has been damaged by the application of discriminatory, protectionist laws, regulations and policies. The administrative files relating to those laws, regulations and policies are highly relevant and material;
37. The United States points ADF to where it claims the documents are held and tells ADF to go and collect those documents. The U.S. does not rely on any of the grounds for non-production set out in Article 9(2) of the IBA Evidence Rules, which Rules it concedes reflect "a consensus view on the scope of evidence taking in international commercial arbitration";
38. We note that pursuant to Article 3(4) and Article 3(6) of the IBA Evidence Rules where no objection to production is taken or where none of the reasons for objection set forth in Article 9(2) apply, the Party to whom the request for production is addressed must "produce to the Arbitral Tribunal and to the other Parties, those requested documents". The obligation in the IBA Evidence Rules is to produce the documents, not point to where they might be found;
39. Instead of relying on any of the grounds set out in Article 9(2) of the IBA Evidence Rules, the United States, as a precondition to any order for production, requires that a Party must make efforts to obtain the documents itself. The United States even states that a failure by a Party to demonstrate its own efforts to independently obtain the documents is grounds for the Tribunal's refusal to order production. It cites, in support of that proposition, decisions arising out of the Iran-U.S. Claims Tribunal;
40. If the United States' assertion were to be taken as correct, it would introduce an exhaustion of local remedies requirement in documentary production which would render it virtually impossible to obtain any documentary discovery;
41. Under the Freedom of Information Laws Act ("FOIA") of the United States and similar statutes of various states, with limited exceptions, virtually every governmental document is available. That availability may have to be tested with appellate procedures or several related FOIA requests but, with perseverance, time and a sufficiently robust budget, the vast majority of public documents are available. If the assertion of the United States is correct, it would mean an end to any real document discovery under Chapter Eleven claims or, at the very least, an inordinate delay in proceeding with such claims while efforts to locate documents are undertaken;

42. In fact, a Chapter Eleven Tribunal has already examined this question and has decidedly rejected the position now espoused by the United States. In Pope and Talbot v. Government of Canada (“Pope & Talbot”), the Tribunal stated that the fact that documents might be publicly available is not grounds for refusal to produce those documents. In Procedural Order No. 8, the Pope and Talbot Tribunal stated:

“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 that 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.”

C. ADF’s Request for Production of Records Prepared by the Office of the United States Trade Representative, the Department of State or the Department of Transport Relating to the Impact of NAFTA on Buy National Requirements

43. These documents are relevant and material as they relate to the manner various agencies of the United States with competence in trade agreements, treaty obligations and the application of protectionist Buy National policies have reconciled the apparent conflict between NAFTA obligations and the Buy America provisions at issue in this case;
44. The United States objects to this request on the grounds i) it is overly broad and unduly burdensome; and ii) that ADF has not adequately demonstrated the relevance or materiality of the documents requested;
45. The request is not unduly broad and/or burdensome as it relates to documents produced by only three agencies of the U.S. government in relation to the interaction of NAFTA and a very specific policy of the U.S. government.
46. The relevance and materiality of the requested documents are clear in 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;

D. ADF’s Request for Production of the Administrative Files in Three U.S. Cases Involving Buy National Policies and Structural Steel Beams

47. The U.S. has objected to production of the administrative file in respect of the three cases on several grounds.
48. First, the United States claims that “none of the three cases concern the provisions of the Buy America program at issue in ADF’s claim”. Second, it states that the three cases were decided in 1969, 1990 and 1992 respectively and are now “stale”. Third, the United

States claims that ADF has failed to make “any showing as to how any documents requested from the court file ... will show how U.S. courts or administrative agencies have addressed the statute at issue”. Finally, the U.S. states that the documents are publicly available and therefore an order of production should not issue;

49. While it is clear that the three cases concerned statutes other than the particular Buy America provision at issue in the present case, all three cases involved the application of Buy National policies to the fabrication of steel beams. That is precisely the factual scenario at issue in the present case;
50. The suggestion by the United States that the cases are stale is more than a little surprising. Judicial decisions in common law jurisdictions such as the United States do not become stale. They may be overruled, or simply not followed, and will die while another judicial current takes their place. Or, they maintain their strength and vigour over the years, improving and gaining strength with age;
51. In the present case, there is no competing line of jurisprudence suggesting that any of the three cases have been overruled or that they do not reflect the last judicial word on the interpretation of Buy National policies involving fabricated structural steel beams;
52. That would suggest that the age of the cases enhances their value rather than the opposite, as suggested by the United States;
53. While the cases themselves are clearly relevant and material, access to the administrative records themselves will assist in filling gaps that may appear in the decisions. Such access will provide for a much clearer understanding of all of the issues that were facing the administrative agencies and the court in reaching decisions in respect of the Buy National policies at issue in all three cases;
54. Finally, the United States resists disclosure on the ground that the documents may be publicly available. As stated above, and as confirmed by the Chapter Eleven Tribunal in Pope and Talbot, Procedural Order No. 8: “ ... the fact that ... documents are available from ... other sources ... is not an adequate basis for refusal to produce ... those documents in possession of the claimant”;

E. ADF’s Request for Production of Records Used to Brief Members of Congress and the President

55. The United States states that “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.”;
56. That is not true. ADF made no such concession. Rather, in a good faith effort to accommodate the United States, ADF narrowed its request even further;
57. This is but another example of the tendency of the United States to turn the well-intentioned efforts of ADF to be accommodating on their head and to cast negative

aspersions on ADF as a result. Such an approach is hardly calculated to encourage cooperation, civility and accommodation between the Parties. ADF expresses its disappointment at this approach and encourages the United States to abandon it;

58. ADF is not seeking access to documents that may have been sent to individual members of Congress. It is seeking access 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;
59. The request is not overly broad. Such documents are routinely registered through the Congressional Record, and all documents sent to the President by any of the agencies are also recorded;
60. The requested documents are relevant and material because they demonstrate the official U.S. government position taken by the relevant agencies on the issues before this Tribunal;
61. In addition, the requested documents will demonstrate how members of the legislative and executive branches have been apprised of the relationship between NAFTA and the Buy America provisions in issue in the present case by the relevant agencies. The requested documents will put the Tribunal in the position to see what the lawmakers saw themselves;

F. Information Respecting Contract or Projects Funded or to be Funded Under the *Transportation Equity Act*

62. The United States rightly points out that this request for production is related to the issue of damages, and ADF is willing to postpone its request in respect of those documents until the second phase of the Tribunal's procedure;

G. A List of all Waivers of Buy America Requirements Granted Within the Last Ten Years and the Record which Provides the Administrative Rational for Granting Such a Waiver

63. The United States has agreed to make available to ADF the administrative record relating to all waivers granted, and ADF accepts that request and will contact the United States directly to make the physical arrangements for viewing of the documents. ADF has amended the Draft Order at the end of these submissions to reflect that;
64. The United States has also indicated that it is "willing to provide the records submitted to Congress for the years between 1982 and 1996 as requested by ADF in its Motion";
65. ADF questions why the reports to Congress will not be provided with respect to the years in 1997 to 2001 and seeks an Order from the Tribunal ordering production of those documents;

66. The documents are relevant and material because they will shed light on the past practice of the relevant U. S. agencies in granting waivers to the Buy America provisions at issue in the present case;

67. The Tribunal will recall that a waiver was requested and refused in the present case;

H. All Pleadings Filed by the United States in NAFTA Chapter Eleven Proceedings to Date

68. The United States objects to production of the records because they “are not evidence and not relevant”;

69. The United States adds that it “was in the process of posting on the Department of State’s web site, a selection of publicly available documents that have been filed in previous arbitrations”;

70. The “secrecy” of NAFTA Chapter Eleven Tribunal proceedings has been subject to much debate and criticism in the United States and in Canada. That criticism prompted a desire for greater transparency and lead the NAFTA Free Trade Commission to issue an Interpretative Note on certain Chapter Eleven provisions on July 31, 2001;

71. In respect of access to documents, the Commission stated at paragraph 2(b):

“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:

i) confidential business information;

ii) information which is privileged or otherwise protected from disclosure under the Parties domestic law; and

iii) information which the party must withhold pursuant to the relevant Arbitral rules as applied”;

72. In accordance with that Interpretative Note, the Tribunal should order the immediate disclosure by the United States of the requested documents subject to the three exceptions set out above, the requested documents being evidence of the emerging *droit coutumier* of Chapter Eleven arbitrations, being relevant to the instant proceedings and reflective of the positions already taken by the United States;

Conclusion

73. In light of all of the foregoing, ADF requests an order in the following terms from the Tribunal:

WHEREFORE MAY IT PLEASE THE TRIBUNAL:

ORDER the United States:

I. To produce and communicate the following documents:

- 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., 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 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, 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) 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:
- 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;
- E) All documents filed with or presented to Congress or any Congressional body 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.
- F) A list of all the reports to Congress made during the last ten years in compliance with Section 165(e) of the *Surface Transportation Assistance Act* of 1982.
- G) All pleadings filed by the United States in NAFTA Chapter 11 proceedings to date.
- II. To Provide the Representatives of ADF with Access to:
- A) 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).

The whole of which is respectfully submitted.

Signed at Montreal, this 24th day of August, 2001

Peter E. Kirby
FASKEN MARTINEAU DuMOULIN LLP
Stock Exchange Tower
800 Place-Victoria, Suite 3400
Montreal, Quebec
Canada
H4Z 1E9