

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

MOTION FOR PRODUCTION OF DOCUMENTS

1. On May 3, 2001, the Tribunal rendered Procedural Order No.1 concerning the schedule of submission of pleadings and the production of documents. The order incorporated the parties' agreement with respect to requests for production of documents evidenced in a letter submitted to the Tribunal on April 4, 2001;

ADF Group Inc.'s informal request for production of documents:

2. On May 14, 2001, pursuant to the Tribunal's Procedural Order no. 1, ADF Group Inc. (hereinafter referred to as the "Investor") informally requested the Government of the United States of America (the "Party") to produce and communicate the following documents (the "Requested Documents"), the whole as more fully appears from a copy of the said letter attached hereto as Exhibit R-1:

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

The Party’s informal response:

3. On June 20, 2001, the Party provided an informal response to the Investor’s informal request for the production of documents and refused to produce or communicate the vast majority of the Requested Documents, the whole as more fully appears from a copy of the said letter attached hereto as Exhibit R-2;
4. The Party alleges that all of the Requested Documents are protected from disclosure by the “litigation or arbitration privilege” as well as the “attorney-client and government deliberative and pre-decisional privileges”;
5. These claims for privilege are improperly raised and cannot provide a “blanket immunity” from disclosure. The claims for privilege need to be raised on a “document-by-document” basis and sufficient particulars must be provided to allow the Investor to decide whether to accept or challenge the claim for privilege;

6. In addition to the above-mentioned privileges, the Party bases its refusal to produce and communicate the vast majority of the Requested Documents on the following grounds:

6.1. With respect to the documents requested in paragraph A of the Investor's informal request, the Party states:

“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.”

The Investor takes note of the Party's offer to make available the requested administrative files to the extent that ADF Group Inc. or ADF International Inc. did not originate documents contained in those files. The Investor strongly takes issue with the Party's refusal to disclose documents “to the extent that . . . such documents are not already in the possession of ADF Group Inc. or ADF International Inc.” and requests an order of the Tribunal ordering the Party to comply with the Investor's informal request. The Investor is entitled to verify both the accuracy and the completeness of its own files and those of the Party. Access to the entire administrative file, rather than selected portions thereof, is the only way to do this. Moreover, the Party's objection entails speculation on its part as to the content of the Investor's files. Such speculation and guesswork is contrary to the principle of full and complete disclosure of relevant material to the arbitration. The Requested Documents are relevant and in the care and control of the Party;

The Investor requests an order of the Tribunal ordering the Party to produce and communicate the Requested Documents.

6.2. With respect to the documents requested in paragraph B of the Investor's informal request, the Party states:

“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 40692-12. 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>.”

The Investor takes issue with the Party's objection to the production of the Requested Documents. The documents are relevant to the subject matter of the arbitration and, by the Party's own admission, are within its possession, power or control. The documents should therefore be disclosed and the fact that they are said to be “publicly available” is irrelevant and not a proper reason for non-disclosure. In arguing that the Party is not obliged to deliver documents that are “publicly available”, the Party is admitting that it can have no objections to the release of those documents but simply does not want to be bothered with the task of delivering them. The Investor reminds the Tribunal that the National Archives from which the Requested Documents are “publicly available” is but an agency of the Party. The Investor should not be required to stand in line at the door of every government agency to inquire about the existence and availability of relevant documents.

The Investor requests an order of the Tribunal ordering the Party to produce the Requested Documents;

- 6.3. With respect to the documents requested in paragraph C of the Investor's informal request, the Party states:

“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.”

The Investor takes issue with the Party's objection to the production of the Requested Documents and notes that its request is not overly broad but is limited to relevant documents produced by relevant agencies. It is limited to the documents held by the Office of the United States Trade Representative, the Department of State or the Department of Transport, or any agencies thereof in respect of a narrow area of policy. The Investor also notes that the last sentence of the Party's answer implies that the Party will sort and examine the Requested Documents to produce only those upon which it intends to rely on in its defence. The Investor's request cannot therefore be considered unduly burdensome as the Party will necessarily already have conducted a search for the Requested Documents.

The Investor requests an order of the Tribunal ordering the Party to produce and communicate the Requested Documents.

- 6.4. With respect to the documents requested in paragraph D of the Investor's informal request, the Party states:

“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 predates 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.”

The Investor takes issue with the Party’s objection to the production of the Requested Documents. The requested administrative files are relevant to the dispute 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 beams. In particular, all three cases examined the question of whether beams produced in one country and fabricated in another are produced or manufactured in the first or second country, an issue that is of major importance in the present arbitration. As for the Party’s allegation that “many of the documents” are publicly available, the Investor reiterates that the Party’s answer is not a proper ground for non-disclosure. The Investor requests an order of the Tribunal ordering the Party to produce the Requested Documents;

- 6.5. With respect to the documents requested in paragraph E of the Investor’s informal request, the Party states:

“To the best of the undersigned’s knowledge, information and belief after due inquiry, there are no documents responsive to this request.”

The Investor takes note of the Party’s response;

- 6.6. With respect to the documents requested in paragraph F of the Investor’s informal request, the Party states:

“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.”

The Investor takes issue with the Party’s objection to the production of the Requested Documents. However, the Investor is willing to limit the scope of its request to the documents used to report to or inform members of Congress and the President of the United States. These documents are relevant to the arbitration as they contain the official position of the Party concerning the disputed Buy America provisions.

The Investor requests an order of the Tribunal ordering the Party to produce and communicate 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.

- 6.7. With respect to the documents requested in paragraph G of Investor's informal request, the Party states:

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

The Investor takes issue with the Party's objection to the production of the Requested Documents. The documents are relevant because they provide a measure of the market opportunities denied to the Investor as a result of the disputed Buy America measures adopted by the Party.

The Investor requests an order of the Tribunal ordering the Party to produce and communicate the Requested Documents;

- 6.8. With respect to the documents requested in paragraph H of Investor's informal request, the Party states:

"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."

The Investor takes note of the Party's offer to make available 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 and maintains its request with respect to waivers granted prior to 1996. The Investor further notes that pursuant to section 165(e) of the *Surface Transportation Assistance Act* of 1982, the Department of Transport is required to report to Congress about its activities in the area of waivers and requests that the Party produce those reports. The Investor also objects to the suggestion that the Requested Documents be made available "at the Federal Highway Administration's offices". If documents are to be disclosed, they ought to be disclosed. If necessary, counsel may be required to sign a protective order.

The Investor notes also that he did not request "the administrative record" of waivers granted but rather "the record which contained the administrative rationale for granting such a waiver." That would be a memorandum, decision letter or other document setting out why a particular waiver was granted and the statutory authority supporting the waiver;

The Investor requests an order of the Tribunal ordering the Party to produce the Requested Documents including all reports to Congress made during the last ten years in compliance with Section 165(e) of the *Surface Transportation Assistance Act* of 1982;

- 6.9. With respect to the documents requested in paragraph J of Investor's informal request, the Party states:

"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."

The Investor notes that the Requested Documents are relevant in that they contain previously stated positions of the Party on questions in issue in the present case.

The Party's objection to the production of the Requested Documents is all the more ill founded in light of the *Notes of Interpretation of Certain Chapter 11 Provisions* (the "Notes of Interpretation") recently adopted by the NAFTA Free Trade Commission on July 31, 2001. Part A of the Notes of Interpretation relates to access to documents and provides in part that "*nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven Tribunal*" [emphasis added]. The Party therefore has a duty to disclose the Requested Documents, whether it considers them relevant or not for the purposes of the arbitration.

The Investor also notes that representatives of the Party has been publicly stating that the Requested Documents will be posted on the web site of the Department of State "in the near future" for a number of months. The Investor should not be obliged to wait for disclosure of relevant documents until the Party decides to act.

The Investor requests an order of the Tribunal ordering the Party to produce and communicate the Requested Documents;

7. In light of the Party's largely negative response, the Investor hereby requests the Tribunal to order, pursuant to the Tribunal's Procedural Order No. 1 and Article 41 of the ICSID Additional Facility Rules, the Party to produce and communicate the Requested Documents;
8. The Requested Documents are relevant and material to the outcome of the case because they bear directly on the situation of the Investor and ADF International Inc. (the "Investment") with respect to Buy America requirements that are the subject matter of the dispute;
9. The Requested Documents are not in the possession, custody or control of the Investor or the Investment and the Investor and the Investment assume that they are in the possession

of the United States of America, including all branches and agencies thereof (“United States”) or the State of Virginia, including all branches and agencies thereof (“Virginia”);

WHEREFORE MAY IT PLEASE THE TRIBUNAL:

ORDER the Party 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. (“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 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 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.

ORDER that for each document withheld under a claim of privilege, the Party shall state:

- a) the name and title of the author(s);
- b) the name and title of the person(s) to whom a copy of the document was addressed;

- c) its date;
- d) the name and title of the person(s) to whom the documents was addressed;
- e) the number of pages;
- f) a brief description of the subject matter;
- g) the nature of the privilege claimed;
- h) the facts which support such a claim of privilege; and
- i) the request(s) to which the document is otherwise responsive.

Signed at Montreal, this 3rd day of August, 2001

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