

GRAND RIVER ENTERPRISES *ET AL*

v.

UNITED STATES OF AMERICA

(NAFTA / UNCITRAL Arbitration)

PROCEDURAL ORDER

(May 14, 2007)

The Tribunal has given careful consideration to the Parties' written submissions relating to the exchange of documents, and has taken into account the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration ("the IBA Rules"), which the Parties have agreed apply for this purpose. In this regard, the Tribunal has considered the "Claimant's First Request for Production of Documents" and "Respondent's Request for Production of Documents" (both dated January 22, 2007); the Parties' initial responses to those requests (both dated February 6, 2007); as well as each Party's Further Submissions (as requested by the Parties and authorized by the Tribunal's Order of February 21, 2007).

The Tribunal has made the following determination, which is hereby communicated to Parties as follows:

PART I - CLAIMANTS' REQUESTS FOR DOCUMENTS, DEPOSITIONS AND INTERROGATORIES

- (1) With regard to the Claimants' Request for Production of Documents, it is ordered that the Respondent do produce to the Arbitral Tribunal and to Claimants, in accordance with Part III below all documents that are in its possession, custody or control (including public documents or documents in the public domain), which it (the Respondent) considers "relevant and material to the outcome of the case," and which it (the Respondent) considers should not be excluded from production for any of the reasons specified in Article 9.2 of the IBA Rules. The Respondent shall produce these documents within thirty days, in the manner specified by Part III of this Procedural Order.
 - (2) The Respondent is further directed to produce to the Claimants all documents on which the Respondent intends to rely to support its case-in-chief at the merits-hearing of this Arbitration no later than the date to be set by the Tribunal for the filing of the Respondent's Pre-Hearing Memorial, in the manner specified in Part III of this Procedural Order.
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- (3) Regarding the Claimants' "Document Request" contained in items 1 to 22 of "Claimant's First Request for Production of Documents", the Tribunal rules that the Request to Produce as formulated in each such item (seeking "all documents concerning" 22 separate subject matters) is not in conformity with Article 3 of the IBA Rules, and the Request to Produce is declined. However, the Respondent is directed to disclose such documents as are mentioned generally in items 1 to 22 of the Claimants' Request to Produce, which the Respondent considers to be included within the scope of paragraph (1) of this Procedural Order.
 - (4) As regards item No. 23 of the Claimants Request for Production of Documents (seeking "the original of each exhibit or Document referred to by Respondent ... and any exhibit upon which Respondent intends to rely"), the Tribunal takes note of Claimants' clarification of that request in their Second Submission on The Production of Evidence (dated February 28, 2007, at page 14). Pursuant to item No. 23 as so clarified, the Respondent is directed to produce to the Claimants the original (or a true copy) of each exhibit or Document referred to by the Respondent in its pleadings and/or at the hearings or proceedings in this Arbitration to date; such exhibit/document will be specifically identified and requested by the Claimant to the Respondent following the communication of this Procedural Order; such identification and request should be made within seven days following communication of this Order. Respondent shall then produce the specific documents so identified and requested, within 30 days of the Claimants' request.
 - (5) Regarding item 24 of the Claimants' Request for Production of Documents (seeking "the original or a true copy of each exhibit or document drafted or authored by Respondent and referred to by Claimants") – the same is declined, as it is not in accordance with Article 3 of the IBA Rules.
 - (6) With regard to items 25, 26 and 27 of the Claimants' Request for Production of Documents, the same is declined. However, the Respondent may produce such documents in its possession, custody or control as it considers to be relevant and
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material to the outcome of the case relating to the matters generally mentioned in items 25, 26 and 27 and that are otherwise considered to be included within the scope of paragraph 1 of this Procedural Order.

- (7) Regarding the Claimants' Request for Depositions – items 28, 29, 30 and 31 in the "Claimants' Request for Production of Documents" – the same is not foreshadowed in the IBA Rules and is declined: but it is ordered that each Party shall identify the names and particulars of the witnesses it proposes to call, prior to the hearing as provided in Part III below.
- (8) The Claimants' Submission of Interrogatory–Questions is also not foreshadowed in the IBA Rules, and is declined.

PART II - RESPONDENT'S REQUESTS FOR DOCUMENTS

- (9) With regard to items 1 to 12 in the Respondent's (United States of America's) Request for Production of Documents, it is ordered that the Claimants do deliver to the Arbitral Tribunal and to the Respondent, within thirty days, in the manner specified in Part III of this Procedural Order, the documents that Claimants undertook to produce in their Response to Respondent's Request For Production of Documents, dated February 6, 2007, or have otherwise agreed to produce. Claimants shall also deliver to the Respondent whatever additional documents that are in their possession, custody or control, (including public documents or documents in the public domain), and which they (the Claimants) consider "relevant and material to the outcome of the case", and which they (the Claimants) consider should not be excluded from production for any of the reasons specified in Article 9.2 of the IBA Rules.
 - (10) The Claimants are further directed to produce to the Respondent all documents on which the Claimants intend to rely to support their case-in-chief at the merits-hearing of this Arbitration no later than the date (to be set) by the Tribunal for the filing of the Claimants' Pre-Hearing Memorial – in the manner specified in Part III
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of this Procedural Order.

PART III. PROVISIONS APPLICABLE TO BOTH PARTIES

- (11) All documents to be produced pursuant to this Procedural Order are to be produced in paper form, and in such other form as may be agreed to by the Parties. The documents shall be produced on or before the dates specified in this Order, to the Tribunal and, as to the Parties, at locations and in a manner to be agreed by the Parties. The Parties should promptly inform the Tribunal and seek its directions in respect of difficulties (if any) encountered with regard to implementation of this paragraph of the Procedural Order.

 - (12) The Parties should continue to confer and communicate with each other with a view to agreeing upon any measures required to protect proprietary or confidential business information, or other similar types of sensitive information in any documents to be disclosed, as for instance indicated in Mr. Luddy's letter to the Tribunal of March 29, 2007. In this regard, the Tribunal draws attention of the parties to paragraph 10 of the Minutes of the First Session of the Tribunal (dated March 31, 2005). The Parties should promptly inform the Tribunal and seek its directions in respect of difficulties (if any) encountered with regard to implementation of this paragraph of the Procedural Order.

 - (13) In accordance with Article 25 of the UNCITRAL Arbitration Rules (which applies in this Arbitration), it is ordered that each Party shall identify and set out in a written communication the names and particulars of all its witnesses together, with the subject matter of their testimony, no less than fifteen days prior to the date (to be set) by the Tribunal for the hearing.

 - (14) All the above directions will be subject of course to the provisions of Article 3.9 and Article 3.10 of the IBA Rules.
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- (15) In complying with directions in this Procedural Order, the Parties are to keep in mind (at all times) the provisions of Articles 9.4 and 9.5 of the IBA Rules.
- (16) The Tribunal may give further directions regarding discovery inspection exchange of documents (when necessary) in any subsequent Procedural Order.

Fali S. Nariman

Mr. Fali Nariman
President of the Tribunal