

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

Introductory Note

The Award reproduced below with the permission of both parties to the case was rendered on January 9, 2003, by the Tribunal composed of Professor Armand deMestral, Ms. Carolyn B. Lamm, and Judge Florentino P. Feliciano, who was the presiding arbitrator.

The dispute was brought to ICSID in July 2000 by ADF Group Inc., a Canadian company, as Claimant, against the Government of the United States of America, as Respondent, under provisions of the Investment Chapter of the NAFTA. The case, which was conducted under the ICSID Additional Facility Arbitration Rules, concerned a dispute arising from the Springfield Interchange Highway construction project in Virginia. ADF was a subcontractor to a U.S. company which had entered into a contract with the Department of Transportation of Virginia for that project.

In general, ADF's case was that the so-called "Buy America requirements," imposed by the United States Government as a condition for its funding of projects like the Springfield Interchange Project, breached certain obligations of the Government under the Investment Chapter of the NAFTA. These are the provisions guaranteeing National Treatment (Article 1102); Minimum Standard of Treatment (Article 1105); and absence of Performance Requirements (Article 1106). Also, ADF sought, by virtue of Article 1103 (Most Favored Nation Treatment), to invoke provisions in two bilateral investment treaties, entered into by the United States Government with Albania and Estonia, respectively, which ADF considered more favorable than the treatment open to it under Article 1105 of the NAFTA.

In the course of the proceeding, the Tribunal considered two main procedural issues on which it received written submissions from the parties. First was the question of the place of arbitration, which the Tribunal decided in favor of the Respondent. The Tribunal designated Washington, D.C., as the

place of arbitration, as opposed to Montreal, Canada, which was favored by ADF. The second was a request by ADF for the production of certain documents. The Tribunal granted the request on the basis that those documents were deemed pertinent to the case and that the request for their production was clear and specific.

On the merits, the Tribunal, in agreement with the Respondent, concluded that the regulations on “Buy America requirements” were: (i) not inconsistent with the Government’s national treatment obligation under NAFTA Article 1102; and (ii) not inconsistent with the Government’s minimum standard of treatment obligation under NAFTA Article 1105(1) as construed in the Free Trade Commission Interpretation of July 31, 2000. That interpretation, the first by the Commission, was issued during the course of the proceeding in this case, and the parties had an opportunity to comment on it, particularly, in their post-hearing briefs. The parties, in those submissions, also addressed the Award on the merits of the Arbitral Tribunal in the NAFTA Investment Chapter case of *Pope and Talbot v. The Government of Canada*, which was also rendered while this case was pending.

Having determined that the Springfield Interchange Project constituted or involved “procurement by a Party,” the Tribunal further concluded that the Most Favored Nation treatment guarantee under NAFTA Article 1103 is inapplicable in this case by virtue of Article 1108, which excludes that treatment from situations involving “procurement by a Party.” With regard to Article 1106 which guarantees against the imposition or enforcement of performance requirements, the Tribunal concluded that the regulations on “Buy America requirements” are inconsistent with that Article. The Tribunal, however, determined that the Government is exempted in this case by the provisions of NAFTA Article 1108, which also excludes the application of Article 1106 to “procurement by a Party.”

On costs of the arbitration, the Tribunal decided that it should be shared equally and that each party should bear its own expenses.

The Governments of Canada and Mexico participated in the proceedings by filing submissions, pursuant to NAFTA Article 1128.

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