

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ICSID CASE No. ARB(AF)/00/1**

BETWEEN:

**ADF GROUP INC.**

INVESTOR

AND

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

PARTY

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**INVESTOR'S REPLY TO  
THE COUNTER-MEMORIAL OF  
THE UNITED STATES OF AMERICA  
ON COMPETENCE AND LIABILITY**

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## 1. INTRODUCTION

1. In accordance with Article 38(1)(c) of the ICSID Arbitration (Additional Facility) Rules and paragraph I(4) of Attachment 1 to Procedural Order No. 1 of the Tribunal dated May 3<sup>rd</sup>, 2001, the Investor respectfully submits this Reply Memorial to the United States of America's Counter-Memorial on Competence and Liability with respect to the Investor's claim under Chapter Eleven of the *North American Free Trade Agreement* ("NAFTA")<sup>1</sup>.

## 2. STATEMENT OF FACTS

2. While we agree with the U.S. that a consensus may ultimately emerge as to most facts at issue in this arbitration, the Investor stands by the statement of facts as set out in its own Memorial

3. With respect to issue raised by the U.S. as to ADF's purchase of U.S. steel, and the status of the steel as on investment, ADF will provide full information through witness testimony and documentation establishing all facts relating to its purchases of such steel.

4. With respect to the lifting capacity of 20t indicated on ADF's web-site and ADF's statement to the effect that ADF International's lifting capacity at the Coral Springs plant was limited to 5t, the Investor indicates that the reference on the web-site is a mistake (which has been corrected) and that the lifting capacity at Coral Springs is three (3) cranes with 5t capacity each. The Investor makes the Coral Springs plant available for inspection to the Tribunal if it so wishes.

5. Finally, the Investor notes that the "understanding" of Mr. Claude Napier, provided in his Statement at Tab 2 (p. 8, paragraph 28) of the *Appendix of Evidentiary Materials* and submitted with the United States Counter-Memorial to the effect that Canam Steel is a "subsidiary of ADF Group, Inc.", is incorrect, though ADF did sub-contract some fabrication work to this undertaking in order to perform the Shirley/ADF Sub-Contract.

6. At p. 18 of its Counter-Memorial, the United States indicates that the witness statements submitted by the Investor in its own Memorial are irregular on their face: "Neither statement is sworn or even signed by the witness. Indeed the record casts doubt on whether the witnesses even saw their supposed statements before they were submitted to the tribunal".

7. The Investor would like to point out that what is submitted to the Tribunal is exactly what is purported to be submitted, being witness statements and no more: the statements are what the Tribunal (and the United States) can expect the witnesses will say during the hearing. They were compiled from extensive materials supplied by the client and interviews with their various representatives. They were never meant to be affidavits, nor did one want to induce the Tribunal

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<sup>1</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States of America*, December 17, 1992, Can.T.S., 1994, No. 2 (entered into force January 1, 1994) (Vol. IIA.1; Tab A-1).

into error by making it be understood that they were to be treated as affidavits by supplying signed statements.

8. A brief review of the United States' own evidence contained in its own Appendix of Evidentiary Materials submitted with its Counter-Memorial confirms that the U.S. evidentiary material is not free of its own irregularities.

9. In Tabs 1 through 4, the United States submit two witness Statements and two Expert Reports. Only one of the statements is sworn (that of C. Frank Gee at Tab 1). The Statement of Claude Napier (at Tab 2) is notsworn, even though it is made on a statement of affirmation under penalty of perjury. As for the Reports, both of them are not sworn, though the one of Gerald H. Stobo (at Tab 3) is purportedly affirmed under penalty of perjury, and the one of Claus von Wobeser (Tab 4) is also purportedly made under declaration that his statement is true.

10. All of the last pages of the Statements and Reports where one finds the signature of the respective authors are faxed and appended to a distinct document (the previous pages to the final signature faxed page are not themselves faxed pages, as evidenced by the difference in the quality of print), which naturally leaves one to believe that the signature faxed pages were distinctly inserted and not signed contemporaneously with the rest of the documents submitted.

11. Further, in both Expert Reports, there is considerable empty space contained at the end of the page preceding the last signature faxed page, which demonstrate that the two last pages of each Report do not flow through continuously. As this implies that the last signed faxed page and the previous pages were not made contemporaneously, one would naturally be interested to see the drafts of each of the previous pages of the Reports that were not made at the same time the last faxed pages were signed.

12. No doubt that the United States will assert in all these respects that it was and is acting in good faith, as the Investor now asserts with respect to the witness statements submitted with its own Memorial.

13. As for the Paschini Letter dated July 15<sup>th</sup>, 1999 (the "Paschini Letter"), the United States considers that by this letter, the Investor is making one set of representations to Virginia and another set of representations to this Tribunal. Citing the authority of Bin Cheng, at p. 41, note 95 and the SS "*Lisman*" case cited therein, the United States submits that "International law, however, does not countenance such a behaviour".

14. The Paschini Letter must be understood within the context in which it was written. Mr. Paschini was facing difficult time constraints and knew that all major steel fabrications were at or near full capacity. While he was eventually proved wrong, and the work was performed elsewhere, it was only due to the superhuman efforts of ADF's staff. No one fabricator could perform the work and it was therefore parcelled out to several fabricators scattered throughout the United States.

15. The additional costs associated with such efforts were enormous, but ADF was able to do what Mr. Paschini had earlier predicted was impossible.

16. Mr. Paschini should be commended for directing those efforts at ADF. The Tribunal will learn that the statement referred to by the U.S. was an accurate reflection of what any reasonable businessman would have believed at the time it was made.

17. Under such circumstances, the Investor can only cite the United States' own authority, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*:<sup>2</sup>

Finally, it should be added that declarations, admissions, proposals made in the course of negotiations which have not led to an agreement do not constitute admissions which could eventually prejudice the rights of the Party making them. (at p. 149, emphasis is ours).

18. In contrast with the above, the United States' own conduct again bears examination.

19. In the letter dated March 17<sup>th</sup>, 1994, submitted by the United States into evidence at Tab 9 of its *Appendix of Evidentiary Materials*, Mr. Rodney E. Slater of the FHWA explains to the President and Chief Executive Officer of the American Road and Transportation Builders Association (of the United States) that:

Article 1001 of the NAFTA, however, expressly exempts grants, loans, cooperative agreements, and other forms of federal financial assistance from its coverage. Thus unless future negotiations among the three nations create additional requirements, the NAFTA does not affect the Buy America requirements for federal-aid highway construction projects.

20. Before this Panel, the United States now argues that the measure found in S.165(a) of the 1982 Act is a "measure *relating* to procurement", and is "*clearly* not a grant".<sup>3</sup>

21. The United States may find it convenient to make one set of representations to the domestic fabricators of the United States and another set of representations to this Tribunal with respect to a Canadian fabricator.

### **3. THE SCOPE OF THE EXEMPTIONS FOR "PROCUREMENT BY A PARTY"**

22. The United States begins its defence in law by stating that the Investor's claims based on Articles 1102 (national treatment) and 1106 (performance requirements) are foreclosed by the exceptions contained in Article 1108(7)(a) and 1108(8)(b), because what is involved in the instant case is "procurement by a Party"<sup>4</sup>

23. That assertion constitutes its entire defence to the alleged violation of Article 1106, and constitutes its main defence to the alleged violation of Article 1102.

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<sup>2</sup> Cambridge: Grotius Publications Ltd., 1987, pp. 141-149, located in the United States Counter-Memorial Appendix Volume II, *Legal Authorities, International Agreements & Related Materials, Periodicals and Treaties*, at Tab 36.

<sup>3</sup> U.S. Counter-Memorial at p. 33, emphasis is ours.

<sup>4</sup> United States' Counter-Memorial, at page 2.

24. Article 1108(7)(a) and Article 1108(7)(b) provide in part that:

Articles 1102, 1103 and 1107 do not apply to:

- (a) procurement by a Party or a state enterprise; or
- (b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance. (...).

25. Article 1108(8)(a), (b) and (c) provide in turn that:

The provisions of:

- (a) ...
- (b) Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply to procurement by a Party or a state enterprise; and (...).

26. The United States asserts that the purchase of steel by Virginia is “plainly procurement by a Party” and that the context of the exception requires the rejection of ADF’s claims for violation of Articles 1102 and 1106. We will deal with each argument in turn.

#### **ADF’s CLAIMS ARE NOT BASED ON VIRGINIA’S PROCUREMENT**

27. As noted in its Memorial, ADF’s claims are not based on Virginia’s procurement. They are based on measures of the Federal government contained in a grant program which condition Federal financial assistance on the grant recipient agreeing to discriminate in favour of U.S. enterprises and U.S. steel.

28. ADF’s complaint has never been with Virginia’s procurement; its complaint is focused on the U.S. measure that forces Virginia to discriminate as a condition to receiving funds.

29. Without the Buy America provisions, ADF would have been able to supply steel to Virginia, which did not have any buy national requirements of its own. It is only because of the condition imposed within the Federal grant of funds that ADF was excluded from the market. The U.S. cannot hide behind Virginia’s procurement to give legitimacy to its own violations of Articles 1102 and 1106.

30. Had it not been for the federal measure, ADF would have been able to complete the work planned and could have fully participated in Virginia’s procurement.

31. In its own Counter-Memorial, the U.S. recognizes that that the federal-aid highway program is not procurement, stating that “ADF is quite correct that the federal-aid highway program provides for funding and other assistance that cannot be considered procurement under

Article 1001(5)(a)”<sup>5</sup>. How then does the U.S. reconcile that admission with the claim that the Buy America conditions contained in that program is “procurement of a Party”? It seeks to do so by stating that, while the assistance is not procurement, the requirement conditioning that assistance on the imposition of domestic preferences is a “measure relating to procurement” and therefore “procurement by a Party”.

## **THE “PLAIN TERMS” OF ARTICLE 1108: PRELIMINARY CONSIDERATIONS**

32. In support of its assertion that the “plain terms” of Article 1108 require dismissal of ADF’s claims under Articles 1102 and 1106, the United States raises three related arguments. It claims that dismissal of ADF’s claims is supported by (i) the ordinary meaning of “procurement by a Party”; (ii) a contextual interpretation of “procurement by a Party”; and (iii) the subsequent conduct of the NAFTA Parties and rules of international law.

## **INTERPRETATION OF NAFTA**

33. ADF agrees with the U.S. “that Article 31(1) of the *Vienna Convention* sets forth the cardinal rule in construing international agreements such as the NAFTA”.<sup>6</sup> Article 31 of the *Vienna Convention* reads as follows:

### **Article 31 – General Rule of Interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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<sup>5</sup> United States’ Counter-Memorial, at page 32.

<sup>6</sup> United States’ Counter-Memorial, at page 22.

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

34. That Article does not require a sequential step-by-step approach to interpretation. Rather, it requires a simultaneous and good faith consideration of all of the elements of ordinary meaning of the treaty terms, in their context and in light of its object and purpose in order to determine the true intentions of the Parties when the treaty was signed.

35. The interpretation of the term “procurement by a Party” offered by the United States runs contrary to its ordinary meaning. In the context in which it is used, it cannot bear the meaning proposed by the U.S. In addition, the U.S. interpretation is directly opposed to the object and purpose of NAFTA.

### **GOOD FAITH IN INTERPRETATION**

36. The U.S. Counter-Memorial omits all reference to the first requirement of Article 31, to interpret treaties in good faith. That good faith approach reflects the *pacta sunt servanda* rule contained in Article 26 of the Convention stating simply that every treaty in force is binding upon the parties and must be performed by them in good faith.

37. Clearly implicit in the *pacta sunt servanda* rule is a requirement to abstain from acts calculated to frustrate the object and purpose of the treaty. As a rule of interpretation, it requires an interpretation which is not at variance with a treaty’s object and purpose.

38. The interpretation offered by the United States falls short of a good faith interpretation of the meaning of “procurement by a Party”. That interpretation is driven by a desire on the part of the federal government of the U.S. to maintain its ability to enforce a coercive measure requiring a state government that might not otherwise choose to discriminate, to discriminate in favour of U.S. suppliers and goods at the expense of Canadian and Mexican suppliers and goods. Rather than permitting the state governments to make their own policy decisions respecting what is appropriate in their trading relations, the federal government seeks to impose a choice for them and a choice that runs directly contrary to the stated object and purpose of NAFTA.

### **THE ORDINARY MEANING OF PROCUREMENT**

39. As a preliminary observation, we note that in the section of its Counter-Memorial devoted to the “ordinary meaning of procurement”, the U.S. makes no attempt to provide any “ordinary meaning” of either the noun “procurement” or the expression “procurement by a Party”.

40. Rather, the U.S. states that the term “procurement” is not defined in the NAFTA and then makes the bald and unsupported assertion that the ordinary meaning of the term “on its face” encompasses any and all forms of procurement by a NAFTA Party”.<sup>7</sup>

41. Such a bald assertion brings the U.S. no closer to establishing that the measure complained of is “procurement of a Party”.

42. If the U.S. is saying that procurement encompasses any and all forms of procurement, it is probably correct. However, that is not the issue in the present case.

43. In the instant case, the federal government, the author and enforcer of the disputed measure, procured nothing. It merely provided funding to the State of Virginia but conditioned that funding on a requirement that Virginia impose domestic content and performance requirements. There was no procurement or procurement contract between the U.S. and any supplier of goods and services.

44. While procurement is not defined in the NAFTA, several provisions of the NAFTA do cast light on its ordinary meaning.

45. The NAFTA does state with admirable clarity what is included in procurement and what is excluded from procurement.

46. NAFTA Article 1001(5) provides that:

Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include:

(a) non-contractual agreements or any form of government assistance, including co-operative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments; (...).

47. Thus, “procurement includes procurement by such methods as purchase, lease or rental” but does not include “*any* form of government assistance”. (our emphasis)

48. The federal-aid highway program is a form of government assistance and is thereby expressly excluded from the NAFTA definition of procurement under Article 1101(5).

49. The materials filed by the U.S. government in support of its Counter-Memorial are replete with confirmations that the federal-aid highway program is not procurement. For example:

ADF is quite correct that the federal-aid highway program provides for funding and other assistance that cannot be considered procurement under Article 1001(5)(a).<sup>8</sup>

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United States’ Counter-Memorial, at page 23.

50. Thus, according to the U.S., funding under the federal-aid highway program “cannot be considered procurement”, but restrictions and conditions attached to that funding are procurement.

51. There is no ordinary meaning of the word procurement that would support such a tortuous interpretation.

52. The ordinary meaning of a word is found in dictionaries. “Procurement” is defined in the Oxford English Dictionary as: “[t]he action or process of obtaining by care or effort; acquisition, attainment, getting, gaining”<sup>9</sup>. In Webster’s Ninth New Collegiate Dictionary, the verb “procure” is defined as: “To get possession of: obtain by particular care and effort”<sup>10</sup>.

53. Thus, the ordinary meaning of procurement means to obtain possession of something by the exercise of particular care.

54. Central to the concept of procurement is the award of a contract whereby a purchaser chooses a supplier to provide goods or services to the purchaser. The federal-aid highway program does none of those things; it merely puts money in the purse of a state to permit it to engage in procurement and is not, as the U.S. admits, procurement.

55. While the U.S. admits that its grant of funds to Virginia “cannot be considered procurement”, it claims that conditions attached to such grants can, in accordance with what constitutes the ordinary meaning of procurement. It supports that curious proposition with nothing more than the assertion that because Virginia was procuring, then the conditions attached to the grant of funds to finance that procurement must be procurement, even though the grant itself is not.

56. That view of the ordinary meaning of “procurement by a Party” is without support and runs contrary to all dictionary definitions of the word.

57. There is, quite simply, no ordinary meaning of the expression “procurement by a Party” which supports the U.S. interpretation. If there is any support for the interpretation of procurement favoured by the U.S., and the investor strongly suggests there is none, it cannot be found in any ordinary meaning, and must be found elsewhere.

## **PROCUREMENT BY A PARTY IN CONTEXT**

58. The U.S. claims that consideration of the term “procurement by a Party” in context supports dismissal of ADF’s claims under Articles 1102 and 1106. It supports its contextual argument by stating first that Chapter Ten of NAFTA sets forth the NAFTA’s principle rules with respect to such procurement rules, providing for national treatment and the prohibition of performance requirements. The U.S. then notes that the scope of Chapter Ten obligations is

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<sup>8</sup> United States’ Counter-Memorial, at page 32.

<sup>9</sup> The Oxford English Dictionary, 2d Ed. Clarendon Press, Oxford 1989.

<sup>10</sup> Webster’s Ninth New Collegiate Dictionary, Merriam-Webster, Springfield 1983.

limited to specified government entities and claims that the NAFTA Parties intended to subject only certain categories of government procurement measures to these various obligations. The NAFTA Parties did not intend to subject state and provincial governments to any national treatment or performance requirement obligations. Consequently, according to the U.S. argument, Article 1108 ensures that such state and provincial procurements are not subject to Chapter Eleven obligations. Finally, the U.S. argues that because the Springfield Interchange constituted a state procurement, it must be exempt from Chapter Eleven.

59. The fundamental flaw with this contextual argument is that it necessarily relies on the assumption, false in the instant case, that the federal measure at issue falls within the scope of “procurement by a Party”. It simply states what the Parties all acknowledge, that state procurement is not subject to Chapter Ten rules. How this statement can lead to a conclusion that a federal measure contained in federal-aid highway projects escapes all NAFTA obligations is not stated.

60. State and provincial procurement is not subject to Chapter Ten because the states and the provinces declined to voluntarily subject their procurement to NAFTA and the federal governments declined to subject such procurement to NAFTA rules without the consent of the states and provinces.

61. The phenomenon, albeit in the context of U.S. negotiations of the Uruguay Round, is described in James D. Southwick’s article, “Binding the States: A Survey of State Law Conformance with the Standard of the GATT Procurement Code is as follows:

As a matter of constitutional law, the United States could bind the states without this consent. However, because of the politics of federalism, the United States refuses to force the states to conform to the Code without their consent. Instead, the United States has offered to seek, and, in fact, has begun seeking, voluntary commitment from the states to bind their procurement practices under the Code.<sup>11</sup>

62. Canada’s Statement of Implementation<sup>12</sup> of NAFTA reflects this refusal to bind sub-national governments without their consent and Canada’s desire to have its provinces voluntarily commit to accept Chapter Ten obligations:

The procurement chapter applies only to covered federal entities and enterprises... However, Article 1024(3) provides that the Parties will consult with their provincial and state governments with a view to obtaining commitments, on a voluntary and reciprocal basis, to include procurement by provincial and state agencies within the scope of this chapter.

63. Thus, from a contextual perspective, the Parties did not want to bind state or provincial governments to procurement practices without their consent. In that context, there is no

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<sup>11</sup> James D. Southwick, *Binding the States: A Survey of State Law Conformance with the Standard of the GATT Procurement Code*, 13 U. Pa. J. Int’l Bus. L. 57 (1992) at p. 57, reproduced in the United States Counter Memorial Appendix Volume II, at Tab [ ].

<sup>12</sup> Canadian Statement of Implementation, *Canada Gazette*, Part I, 01/01/1994, p. 68 at p. 142.

compelling reason to enlarge the definition of “procurement by a Party” to cover federal measures designed to coerce the state recipients of federal aid.

64. There are no state procurement obligations because the Parties did not want to bind states or provinces against their will. The measure at issue is not a state measure but a federal measure, designed to force states to do what they might not otherwise do. In fact, in the instant case, Virginia did not have its own buy national requirements that would have applied to the contract.<sup>13</sup>

65. The U.S. argument in this respect is nothing more than an attempt to bootstrap the discriminatory federal measure into the field of non-obligations occupied by states and provinces, by claiming that, because states are unconstrained by any obligations, federal governments can order the states or provinces to violate obligations that the federal governments have committed to respect.

66. There is nothing in the context of NAFTA and, in particular, of Chapter Ten, that lends support to such an approach.

67. Rather than support the U.S. approach, the context of the exception for “procurement by a Party” clearly supports ADF’s position that restrictions and conditions applied in the federal-aid highway program are not protected by that exception.

68. Context here means Chapters Ten and Eleven of NAFTA and any other relevant provisions of NAFTA.

69. Chapter Ten specifically excludes from the meaning of procurement “any form of assistance” and the federal-aid highway program is admittedly not procurement. The context of Chapter Ten would require that one interprets “procurement by a Party” in light of the coverage of the Chapter Ten that is devoted to procurement. That coverage specifically excludes the very program at issue here.

70. From another contextual perspective, none of the obligations found in Chapter Ten will ever reach the federal-aid highway program in question. That is so because such assistance programs are specifically excluded from Chapter Ten. Yet, the U.S. asserts that notwithstanding the fact that Chapter Ten excludes such programs from procurement, the context of that Chapter requires that conditions attached to such programs should be included in the meaning of procurement.

71. In addition, the broader context of NAFTA does not countenance the interpretation offered by the U.S.

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<sup>13</sup> That Virginia has no buy national measure applicable here is stated in a memorandum dated July 6th, 1999 of C.F. Gee of the Commonwealth of Virginia and produced as item 00034 of the United States’ Production of Documents: “Virginia does not have a “Buy America” provision under our statutes. Therefore, this is a federal provision in our contracts upon which we have to rely solely on FHWA’s determination and interpretation.”.

72. A proper contextual approach to the interpretation of “procurement of a Party” must begin with Article 102(2), which provides as follows:

The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

73. The relevant objectives set out in Article 102(1) are the following:

- (a) [to] eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- (b) [to] promote conditions of fair competition in the free trade area;
- (c) [to] increase substantially investment opportunities in the territories of the Parties.

74. Clearly, the interpretation offered by the United States of “procurement by a Party” fails to even approach these objectives. Rather, that interpretation works to frustrate these objectives in every case.

75. The interpretation offered by the United States cannot be said to be a reasonable interpretation of the phrase “procurement by a Party” in context. The measure in question is, and is admitted to be so, a financial assistance program, specifically excluded from the definition of procurement.

76. In prescribing a Party’s various obligations with respect to laws, regulations or practices concerning procurement, the Parties have used different terms, namely:

“Measures ... relating to procurement” - Article 1001(1)

“Any procurement contract” - Article 1001(4)

“Procurement includes procurement by such measures as purchase, lease or rental, with or without an option to buy” - Article 1001(5)

“Procurement does not include ... any form of government assistance” - Article 1005(2)

“Measures covered by this Chapter [Ten]” - Article 1003

“Procurement covered by this Chapter” - Article 1017

“The procurement process ... begins after an entity has decided on its procurement requirement and continues through the contract award” - Article 1017(a)

“Any law, regulation, precedential judicial decision, administrative ruling of general application and any procedure, including standard contract clauses, regarding government procurement covered by this Chapter” - Article 1019

“This Chapter does not apply to the procurement of transportation services that form a part of, or are incidental to, a procurement contract” - Annex 1001.2b, General Notes, Schedule of United States, Article 2

“Procurements made: ... (b) pursuant to loans from regional or multilateral financial institutions to the extent that different procedures are imposed by such institutes (except for national content requirements)” - Annex 1001.2b, General Notes, Schedule of Mexico, Article 1(b)

“Procurement by a Party” - Articles 1108(7)(a) and 1108(8)(b)

77. It is apparent from the foregoing that the Parties have carefully drafted precise language with a view to aiding the interpretation of Chapter Ten. At one end of the spectrum, one finds limitative, clear language to describe the control element of payment: “the procurement contract”. In other situations, one sees more expansive language such as “measures... relating to procurement”.

78. The Parties have also carefully circumscribed procurement, saying what it includes and clearly stating that it does not include any form of government assistance. When the Parties have wanted to give a broad scope to a category, they have not hesitated in doing so: “any law, regulation precedential judicial decision, administrative rulings of general application (...)”.

79. While the U.S. never states directly what interpretation it gives to the term “procurement by a Party” so as to ensure that it includes conditions imposed on government assistance, it obviously must be an extremely broad meaning. However, given the obvious care taken by the Parties in drafting references to procurement, had the Parties meant “procurement by a Party” to have so expansive a meaning, they would certainly have used different language.

80. Finally, we note that Mexico recognizes that restrictive conditions imposed in connection with the funding of covered procurements could leave it in the position of accepting the funding, but being obliged to violate its Chapter Ten obligations.

81. Mexico carefully drafted an exception to address that issue:

Article 1001.2b, General Notes, Schedule of Mexico

1. This chapter does not apply to procurements made:

(a) ...

(b) pursuant to loans from regional or multilateral financial institutions to the extent that different procedures are imposed by such institutions (except for national content requirements)

82. The Mexican negotiators clearly recognized that loans and procurement are different and that Chapter Ten did not apply to loans (“procurements made... pursuant to loans”). They also realized that those loans could be conditional and that those conditions were tied to the loans, not the procurement. They sought and obtained a partial exemption for those types of procurement.

83. The other NAFTA Parties ensured that, whatever conditions were imposed, national content requirements would not be applied in the procurement.

84. The U.S. claims that NAFTA's silence of the issue of its own imposition of conditions in financial assistance programs is because such conditions are in themselves procurement. Is it reasonable to suppose that the U.S. negotiations would be content to remain silent on such an important issue when the Mexican negotiators had clearly thought about it and acted upon it? Simply put, there is nothing in the context of NAFTA that can be construed to be supportive in any way of the interpretation put forward by the U.S.

## **OBJECT AND PURPOSE**

85. It is telling that while the U.S. lauds Article 31(1) of the *Vienna Convention* as setting forth "the cardinal rule in construing international agreements such as the NAFTA", its Counter-Memorial is all but silent on its direction to interpret a treaty "in light of its object and purpose".

86. That silence is likely explained by the fact that the interpretation of "procurement by a Party" offered by the United States, and the conduct it seeks to protect, is directly contrary to the object and purpose of the NAFTA.

87. That object and purpose of NAFTA is given in clear language in both the Preamble and Article 102. Those provisions read in relevant part:

### **Preamble**

The Government of the United States of America, the Government of Canada and the Government of the United Mexican States, resolved to:

CREATE an expanded and secure market for the goods and services produced in their territories;

REDUCE distortions in trade;

ESTABLISH clear and mutually advantageous rules governing their trade;

ENSURE a predictable commercial framework for business planing and investment;

(...)

HAVE AGREED as follows:

(...)

ARTICLE 102: Objectives

The objectives of this Agreement, as established more specifically through its principles and rules, including national treatment, most-favoured nation treatment and transparency, are to:

- (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between its territories of the Parties;
- (b) promote conditions of fair competition in the free trade area;
- (c) increase substantially investment opportunities in the territories of the Parties.

88. It is impossible to conclude that the U.S. interpretation of “procurement by a Party” is in accordance with the object and purpose of NAFTA. It is an expansive interpretation of a term of the Treaty, the sole aim of which is to permit a federal measure to enforce discriminatory practices and performance requirements. Given the object and purpose of NAFTA, the clearest, most unambiguous language would be required to countenance such an interpretation. There is no such language.

89. In addition, Article 31(4) of the *Vienna Convention* states that a special meaning is to be given to the term if it is established that the Parties so intended. The Parties to NAFTA have intended to provide a meaning for procurement and have done so in Article 1001(5) specifically excluding from the scope of procurement “any form of government financial assistance” including grants and loans. Giving effect to the Parties’ intention requires that “procurement by a Party” be interpreted to exclude the financial-aid highway program, an admitted financial assistance program.

90. One cannot subscribe to the interpretation put forward by the U.S. that “procurement by a Party” reaches measures that are clearly not procurement without doing violence to the ordinary meaning of “procurement by a Party”, its context and the object and purpose of NAFTA.

91. The phrase “procurement by a Party” must not be read so large as to permit a Party to subvert the objects and purposes of the treaty: to eliminate barriers to trade in and facilitate the cross-border movement of goods and services, to promote conditions of fair competition, and to increase substantially investment opportunities.

92. To allow the U.S. interpretation of “procurement by a Party” to prevail would be to permit any Party to significantly reduce its NAFTA obligations by conditioning all of its financial assistance to sub-national entities on the imposition of protectionist, discriminatory measures by those entities.

93. That runs directly contrary to the object and purpose of NAFTA but also to the express obligation that the Parties have undertaken to “commence negotiations ... with a view to the further liberalization of their respective government procurement markets”<sup>14</sup> and to seek “to expand the coverage” of Chapter Ten.<sup>15</sup>

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<sup>14</sup> Article 1024.

<sup>15</sup> Article 1024.

#### 4. SUBSEQUENT CONDUCT OF THE PARTIES AND RULES OF INTERNATIONAL LAW

94. Article 31(3) of the *Vienna Convention* states that, in interpreting a treaty, one shall take into account, along with the context: (i) subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions; (ii) subsequent practice in the application of a treaty “which establishes the agreement of the parties regarding its interpretation”; and (iii) any relevant rules of international law applicable in the relationship between the parties.

95. In the section of the Counter-Memorial dealing with the subsequent conduct of the NAFTA Parties and rules of international law, the U.S. appears to be striving to address the requirements of Article 31(3).

96. That attempt fails, however, as there are no such agreements, subsequent practices or relevant rules of international law that support the U.S. position.

97. In the absence of any agreements or subsequent practices, the U.S. seeks to rely on contemporaneous statements of the Parties which, it claims support its position.

98. The U.S. claims that such “contemporaneous statements made by the NAFTA Parties in implementing the NAFTA make clear the Parties’ understanding that the NAFTA does not subject domestic-content restrictions on state procurements to national treatment or performance requirement obligations”.<sup>16</sup>

99. In this respect the United States refers to Canada’s Statement of Implementation of the North American Free Trade Agreement<sup>17</sup> and the U.S. Statement of Administrative Action.<sup>18</sup>

100. There is nothing in either the Canadian or the U.S. statements that supports the contention that the NAFTA Parties intended the Buy America measures contained in federal-aid highway program to be excluded from NAFTA discipline.

101. The U.S. also seeks to demonstrate a subsequent practice in the application of NAFTA which establishes the agreement of the Parties regarding its interpretation through the Expert Reports of Messrs. Stobo and van Wobeser. Those reports show that the two other NAFTA Parties have not adopted practices similar to be the U.S. measure at issue.

102. The U.S. also makes reference to what it considers to “relevant rules of international law” in support of its position. However, rather than cite any relevant rule of law, the U.S. merely refers to domestic practices in several countries.

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<sup>16</sup> United States’ Counter-Memorial, at page 27.

<sup>17</sup> Canada’s Statement of Implementation, *Canada Gazette*, Part 1, January 1, 1994, p. 68, at pp. 146-147.

<sup>18</sup> *North American Free Trade Agreement, Implementation Act*, Statement of Administrative Action, HR DOC No. 103-159, Vol. 1 (1993), at pp. 135-136.

## **CANADA'S STATEMENT OF IMPLEMENTATION**

103. As set out in the U.S. Counter-Memorial, Canada's Statement of Implementation states, in part:

While Chapter Ten represents a significant expansion of opportunities for Canadian suppliers of goods and services, it falls short of the comprehensive agreement sought by Canada. The government will, therefore, continue to press its NAFTA partners to liberalize their restrictive government procurement laws and practices. In particular, the government will use further negotiations called for in the agreement to negotiate Canadian access to small business set-aside programs and transportation procurements currently restricted under Buy America programs. Canada considers this to be part of the unfinished agenda in the procurement negotiations and will pursue these concerns at every opportunity.<sup>19</sup>

104. The reference to "small business set-aside programs" and "transportation procurements" in the Statement of Implementation is a reference to two General Notes to the Schedule of the United States in Annex 1001.2(b). Those General Notes read as follows:

### **Schedule of the United States**

1. This Chapter does not apply to set-asides on behalf of small and minority businesses.
2. This Chapter does not apply to the procurement of transportation services that form a part of, or are incidental to, a procurement contract.

105. Thus, the reference in the Canadian Statement of Implementation to small business set-asides and to transportation procurements is not, in any sense, a recognition that the Buy America conditions in the federal-aid highway program were somehow exempt from the discipline of NAFTA but a mere recognition of two specific exemptions taken by the U.S. Instead of supporting the U.S. position, Canada's Statement does the opposite. Canada's recognition of two specific exemptions taken by the United States, and its expression of regret that those exceptions were taken, points to a conclusion that Canada considered that other Buy America restrictions were subject to NAFTA discipline. By no means can the Canadian Statement be read as a recognition that anything other than the specific exemptions would not be subject to NAFTA discipline.

## **THE U.S. STATEMENT OF ADMINISTRATIVE ACTION**

106. The U.S. Counter-Memorial refers to the United States' Statement of Administrative Action as supporting the view that the United States considered that all Buy America restrictions

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<sup>19</sup> *North American Free Trade Agreement: Canada's Statement on Implementation, Canada Gazette, Part I, at p. 68, at pp. 146-47 (January 1, 1994).*

were excluded from the application of Chapter Ten of NAFTA. In this respect, the U.S. cites the following extract from its Statement of Administrative Action:

The rules of Chapter Ten do not apply to certain types of purchases by the U.S. government, among them:

(...)

procurements by state and local governments, including procurements funded by federal grants, such as those made pursuant to

(...)

the *Federal-Aid Highway Act* (23 U.S.C. 101 et seq.).<sup>20</sup>

107. The foregoing simply states the obvious, namely that state and local government procurements are not subject to Chapter Ten. ADF is not claiming that Virginia's procurement is subject to Chapter Ten. It claims that the imposition of Buy America conditions in the federal-aid highway program is prohibited. The Statement of Administrative Action does not support the view that coercive action undertaken by the federal government to force state governments to discriminate and impose performance requirements is exempt from all NAFTA discipline. It states merely that state procurements are not subject to Chapter Ten.

## THE EXPERT REPORTS

108. The United States relies on the Expert Reports of Gerald R. Stobo and Claus von Wobeser to support its argument that the NAFTA Parties' subsequent conduct supports the interpretation favoured by the United States. Neither of the Expert Reports support that view.

109. Mr. Stobo was not even asked to render an opinion on whether, in funding sub-central procurements, the Canadian federal government imposes buy national requirements on those sub-central entities. Rather, he was asked "[w]hether there are any federally funded sub-central government procurement programs in Canada which imposed buy national requirements".

110. Once again, the issue before this Tribunal is not whether a sub-central government may, of its own volition, impose buy national requirements. The issue is whether the federal government, in funding state projects, can condition that funding on a requirement that the State impose discriminatory provisions and performance requirements. The action that is being tested in this arbitration is not the action of the state government but the action of the federal government.

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<sup>20</sup> *North American Free Trade Agreement, Implementation Act*, Statement of Administrative Action, HR DOC No. 103-159, Vol. 1 (1993), at pp. 135-136.

111. Mr. Stobo's opinion does not state that the federal government of Canada requires or has ever required its sub-central governments to discriminate as a condition of receiving federal funds. Mr. Stobo's opinion is therefore of no relevance to the issue before this Tribunal.

112. Mr. von Wobeser states that the *Ley de obras públicas y servicios relacionados con las mismas* (the "Public Works Act"), and the *Ley de adquisiciones, arrendamientos y servicios del sector público* (the "Acquisitions Act") are applicable to acquisitions made by the states and the Federal District using partial or total federal funds, except those funds set forth in Chapter V of the *Ley de coordinación fiscal* (the "Tax Coordination Act"). According to Mr. von Wobeser, these laws support the proposition that in contracting procedures for the acquisition of movable goods, the goods offered must be produced in Mexico and have at least fifty percent national content.

113. While it is true that section 14 of the Acquisitions Act and section 29 of the Public Works Act state that agencies and entities must grant preference to the use of human resources and goods produced in Mexico that have a national content of at least 50 percent, it is important to note that section 4 of the Acquisitions Act expressly states that the provisions of the Acquisition Act are applicable without prejudice to the provisions of Treaties. The Public Works Act contains an identical provision at section 4 and section 29 *in fine*. It is thus clear that the discrimination requirements of the Public Works Act and the Acquisition Act are not applicable to the extent that they run counter to Mexico's obligations under the NAFTA.

114. With respect to the Tax Coordination Act, Mr. von Wobeser does not state that the Act mandates states or municipalities to discriminate on the basis of national content. Mr. von Wobeser simply remarks that the Tax Coordination Act provides a framework within which "the federated entities, including the municipalities, *could* impose national product requirements on acquisitions" [emphasis added]. The decision to grant preferential treatment to national products is thus taken freely by the federated entities and is not mandated by the Tax Coordination Act.

115. Finally, Mr. von Wobeser states, after referring to the Acquisitions Act and Public Works Act, that the two laws were promulgated on January 4, 2000 and were drafted "[w]ith the clear intention of adjusting the internal Mexican legal regime to the commitments made under NAFTA".

116. One may be forgiven for asking how, after a delay of six years from the entry into force of NAFTA, it remains "clear" that the intention was to adjust the internal Mexican legal regime to the commitments made under NAFTA.

## **RELEVANT RULES OF INTERNATIONAL LAW**

117. Article 31(3)(b) of the *Vienna Convention* requires that in interpreting treaty provisions, there shall be taken into account "any relevant rules of international law applicable to the relations between the Parties".

118. The United States closes this section of its Counter-Memorial argument by what it claims to be a reference to relevant rules of international law which it claims support the conclusion that conditions imposed in federal funding projects are not subject to NAFTA discipline.

119. However, instead of referring the Tribunal to any relevant rules of international law, the U.S. refers to a collection of domestic content requirements adopted “in most, if not all, countries”<sup>21</sup>.

120. The U.S. argument would appear to be that because most countries have, at one time or another, adopted discriminatory practices which violate national treatment obligations, those national practices should be elevated to rules of international law.

121. Of course, those national practices are not rules of international law, but are instead domestic practices by various countries.

122. However, the practical difficulty implied by the U.S. argument in this respect is striking. The U.S. appears to be arguing that a treaty designed to eliminate barriers to trade and promote conditions of fair competition, should be interpreted in light of the plethora of discriminatory national measures that the treaty was designed to eliminate. The fact that the treaty is specifically designed to reduce or eliminate these national trade barriers seems to be no obstacle to the U.S. argument.

123. The Tribunal should obviously reject this argument.

## 5. MANIFESTLY UNREASONABLE RESULTS

124. The United States argues that ADF’s proposed interpretation of the Article 1108 government procurement exceptions would lead to “manifestly absurd or unreasonable results”. It supports that claim with three arguments: (i) that ADF’s argument “lacks substance”; (ii) that the Buy America provision complained of is not a grant or assistance but a measure “relating to procurement”; and (iii) that its exemption for the Buy America provisions of the *Clean Water Act* do not support the conclusion put forward by ADF.

## THE SUBSTANCE OF ADF’S ARGUMENT

125. In this section, the U.S. takes issue, once again, with ADF’s statement that it is not challenging Virginia’s procurement but the measure enacted by the United States forcing the

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<sup>21</sup> In this respect, the United States cites, *inter alia*, in support Paul Carrier, *Domestic Price Preference in Public Purchasing: An Overview and Proposal of the Amendment to the Agreement on Government Procurement*, 10 N.Y. Int’l L. Rev. 59 (1997):

“The public procurement systems of virtually every country protect domestic suppliers and contractors of goods, services and constructions services from external competition.”  
(at p. 67)

The citation is interesting, if only and more particularly in light of the following sentence which was not quoted by the United States:

“In other cases, such as that to of the United States, federal procurement system, barriers to foreign bids on public purchases have been used to open up the procurement system of other nations via reciprocity.” [Emphasis added]

state of Virginia to impose domestic content and performance requirements. The U.S. states that in the absence of procurement, the 1982 Act Buy America program would have no effect on ADF.

126. The mere fact that the impact of the federal measure was delivered indirectly, does not absolve the federal government from responsibility and the federal government cannot hide behind state acts which it brought about.

127. In the absence of the Buy America provisions at issue here, ADF would have obtained the contract in the Virginia procurement. The State of Virginia has no buy national or performance requirements of its own which would have hindered ADF's full participation in the contract.

128. The substance of the U.S. defence in this matter relates to its expansive interpretation of the expression "procurement by a Party" which would seem to be that the expression can be extended to mean any and all measures which can be linked to procurement, including all measures relating to the financing of that procurement. Such is clearly not the case.

#### **MEASURE "RELATING TO PROCUREMENT"**

129. Given that the U.S. does not claim, nor could it, that the Buy America provision is procurement, the position of the United States to the effect that measure in question is "procurement by a Party" under Article 1108 is textually inconsistent. The U.S. argument effectively amends the text of the Treaty by adding to the text the concept of "relating to" at Article 1108(7)(a) and to Article 1108(8)(b) where none is found [but where it is found in contradistinction in Article 1108(9)(c)].

130. On its face, the Article 1108 defence of the United States simply cannot stand.

131. Before this Tribunal, the United States submits that while "the federal-aid program provides for funding and other assistance that cannot be considered procurement"<sup>22</sup>, the "preference for domestically produced goods" which are imposed "as a condition to the assistance provided"<sup>23</sup>, is "*clearly* not a grant", but a measure "*relating* to procurement".<sup>24</sup> The first part of that sentence is diametrically opposed to the position taken by the U.S. government to date, that the program is a grant. The second part simply restates the newest U.S. argument that "procurement by a Party" must be read up to include all measures affecting a procurement.

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<sup>22</sup> U.S. Counter-Memorial, at 32.

<sup>23</sup> U.S. Counter-Memorial, at p 14.

<sup>24</sup> Counter-Memorial, at p. 33, emphasis is ours.

132. The Agency that administers the program at issue, the FHWA, has consistently claimed that the Buy America measure found in s. 165 of the STAA of 1982 is a grant exempted under Article 1001(5)(a) and thus not covered by Chapter 10.<sup>25</sup>

133. The U.S. does not explain how the grant program is clearly not procurement but conditions found within the grant program are procurement. The argument is without merit and compels rejection by the Tribunal.

## THE WTO EXCEPTION

134. The U.S. states that its claim that the Buy America requirement is “a measure relating to procurement (although not, as described above, a measure relating to procurement by a covered entity)”, is confirmed by the exception negotiated in the *WTO Agreement on Government Procurement* (the “GPA”)<sup>26</sup>.

135. Under that GPA, which entered into force between Canada and the United States in 1996, two years after NAFTA, the United States negotiated an exemption for the 1982 Act’s Buy America requirements in the following form:

The Agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects.

136. The U.S. states that: “If restrictions attached to federally-funded state procurement were not considered to be “procurement”, there would have been no need for the United States to negotiate an exemption to that agreement governing government procurement.”<sup>27</sup>

137. A number of observations are in order. As the U.S. notes, under the GPA, some states voluntarily offered to subject some of their own procurement to WTO discipline. Consequently, the impact of the Buy America restrictions in the funding program would have been seen in procurements which were themselves subject to discipline. In order for the U.S. to protect its ability to ensure that the measures in question would have their desired impact and not be frustrated by a state’s inability to comply with federal coercion, the state’s ability to apply those conditions in its own procurement had to be protected. That exception does not make the Federal restrictions procurement. It merely ensures that they will be effective.

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<sup>25</sup> Letter dated March 17<sup>th</sup>, 1994, submitted by the United States into evidence at Tab 9 of its Appendix of Evidentiary Materials, Mr. Rodney E. Slater of the FHWA explains to the President and Chief Executive Officer of the American Road and Transportation Builders Association (of the United States) that:

“Article 1001 of the NAFTA, however, expressly exempts grants, loans, cooperative agreements, and other forms of federal financial assistance from its coverage. Thus unless future negotiations among the three nations create additional requirements, the NAFTA does not affect the Buy America requirements for federal-aid highway construction projects.”

<sup>26</sup> United States’ Counter Memorial, at page 33.

<sup>27</sup> *Id.*

138. The exception is focussed on funding, not on procurement. The federal restrictions have their impact on several levels: at the time of the original grant, during the state procurement and in all downstream private procurements. The exception seeks merely to ensure that, when the impact of the measures is felt in covered procurements, the GPA will not be applicable. That is a far cry from demonstrating that the measure is otherwise a procurement.

139. The U.S. states that: “(i)t was not necessary to include such a provision in Chapter Ten of the NAFTA, because those state government entities are not included in the coverage of that Chapter.” That, however, does not answer the question of how a restrictive condition which is not procurement can, itself, be saved by the absence of any obligations on the procuring authority.

### ***CLEAN WATER ACT***

140. The *Clean Water Act*, 33 U.S.C. § 1295 reservation made under the authority of Article 1108(1)(a) with respect to Article 1108(8)(b), is claimed to be aimed at ensuring that performance requirements are protected in procurement by private enterprises. That explanation is not accurate.

141. In fact, the statement in the reservation that “[g]rant recipients may be privately owned enterprises” is factually incorrect. Privately owned enterprises will eventually receive some of the federal grant money, but they are never the grant recipients with respect to the construction of water treatment works, as will be explained below.

142. To the extent that the United State argues that private parties under the *Clean Water Act* will be the direct grant recipients that will then be in turn engaged in private procurement because of the “private” nature of the grant in the first place (thereby otherwise requiring a reservation under Article 1108(1)(a)), this also is inaccurate.

143. Under 33 U.S.C. §1295 [the *Clean Water Act* “Buy America” provision], it is provided as follows:

Notwithstanding any other provision of law, no grant for which application is made after February 1, 1978, shall be made under this subchapter [being Subchapter II of Chapter 26 of Title 33] for any treatment works unless only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States, substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States will be used in such treatment works. This section shall not apply in any case where the Administrator determines, based upon those factors the Administrator deems relevant, including the available resources of the agency, it to be inconsistent with the public interest (including multilateral government procurement agreements) or the cost to be unreasonable, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality .

144. Under this provision, no “grant” “application” may be made for any “treatment works” unless the Buy America requirement is otherwise met. That measure is directed to the grant applicant under 33 U.S.C. § 1281(h)(1)(2) & (3) (“Grants to Construct Privately Owned Treatment Works”) of the *Clean Water Act*. Under these provisions, it is provided that grant applications to construct priority owed treatment works can only be made through public bodies. That provision reads as follows:

(h) A grant may be made under this section to construct a privately owned treatment works serving one or more principal residences or small commercial establishments constructed prior to, and inhabited in, December 27, 1977, where the Administrator finds that –

- (1) a public body otherwise eligible for a grant under subsection (g)<sup>28</sup> of this section has applied on behalf of a number of such units and certified that public ownership of such works is not feasible;
- (2) such public body has entered into an agreement with the Administrator which guarantees that such treatment works will be properly operated and maintained and will comply with all other requirements of section 1284 of this title and includes a system of charges to assure that each recipient of waste treatment services under such a grant will pay its proportionate share of the cost of operation and maintenance (including replacement); and
- (3) the total cost and environmental impact of providing waste treatment services to such residences or commercial establishments will be less than the cost of providing a system of collection and central treatment of such wastes. [Emphasis added]

145. Under this provision dealing with the constitution of privately owned “treatment works”, the grant applicant is not a private party, but a “public body”. Further, there is to be an agreement between the “public body” and the “Administrator” (of the Federal Environmental Protection Agency - “EPA”) which guarantees the proper administration and maintenance of the privately-owned treatment work. It is because of this “grant agreement” with a “public body”, other conditions of the agreement being found, *inter alia*, in 33 U.S.C. 1284(d)(1) that bind the “grant applicant”, that the grant recipient is not a private party.

146. Under 33 U.S.C. 1284(d)(1), it is provided more particularly that:

(d) Engineering requirements; certification by owner and operator; contractual assurances, etc.

(1) A grant for the construction of treatment works under this subchapter shall provide that the engineer or engineering firm supervising construction or providing architect engineering services during construction shall continue its relationship to the grant applicant for a period of one year after the completion of construction and initial

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<sup>28</sup> Under 33 U.S.C. §1281(g)(1), grants for “public-owned treatment works” may only be made to State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works.

operation of such treatment works. During such period such engineer or engineering firm shall supervise operation of the treatment works, train operating personnel, and prepare curricula and training material for operating personnel. Costs associated with the implementation of this paragraph shall be eligible for Federal assistance in accordance with this subchapter.

147. Under this provision, the “*relationship*” between the engineer or engineering firm and “grant applicant” (which can only be a “public body” for privately owned treatment works under 33 U.S.C. 1281(h)(1)) “*continues*” for a period of one year after the completion of the construction, thereby implying that the procurement must have been made by the “public body” in the first place.

148. This interpretation is confirmed by EPA practice<sup>29</sup> and the applicable *Federal Regulations*.

149. Under either 40 C.F.R. Part 30 (inapplicable to grants for the construction of treatment works)<sup>30</sup>, 40 C.F.R. 31 (grantees and sub-grantees may only be State, local and Indian Tribal governments), 40 C.F.R. Part 35, §§ 35.001 and ss. (limited applicability), 40 C.F.R. Part 35, Subpart E (application for grants for privately owned treatment works may only be made by a “public body”) and 40 C.F.R. Part 35, Subpart I (subject to 40 C.F.R. 31 under 40 C.F.R. §31.4(a) and §31.4(a)(1) and 40 C.F.R. §31.5), none of the grantees or sub-grantees for the construction of treatment works may be privately owned enterprises. It is only governmental grantees and sub-grantees that may receive federal grants and that will subsequently be engaged in the procurement with private contractors, whether they be for publicly-owned or privately-owned treatment works.

150. Thus, the claim by the U.S. that its reservation under the *Clean Water Act* was driven by the need to preserve its ability to impose performance requirements in private procurement is deeply flawed. The Buy America requirements of the *Clean Water Act* are imposed only in respect of applications for grants under that Act, and only public bodies can apply for such grants.

151. The U.S. chose not to seek a similar exclusion under s. 165 of the STAA of 1982 and consequently that measure is subject to the full discipline of Chapter Eleven and means that it is not covered by the article 1108(8)(b) exception.

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<sup>29</sup> According to the EPA, no grant for the construction of treatment works has ever been given to a “Profit Making Organization or Institution”, a “Other Non-Profit Organization or Institution”, a “Individual”, a “Public College or University”, or to a “Private College or University”. Please see: [http://www.epa.gov/enviro/html/gics/gics\\_query.html](http://www.epa.gov/enviro/html/gics/gics_query.html)

<sup>30</sup> See: <http://aspe.os.dhhs.gov/cfda/p66418.htm#i16> : CATALOG OF FEDERAL DOMESTIC ASSISTANCE 66.418: Construction Grants for Wastewater Treatment Works: “Regulations, Guidelines, and Literature: “Grants for Construction of Treatment Works, Environmental Protection Agency (40 CFR Part 35, Subpart E (and Subpart I, applicable to grants awarded after May 12, 1982); General Grant Regulations and Procedures, EPA (40 CFR Part 31) (...).”

152. The more reasonable explanation is that the U.S. negotiations, recognizing that the Buy America provisions constituted a prohibited performance, and wishing to preserve that particular policy, sought and received an exemption for the measure.

153. The United States also indicates that “[p]rivately-owned enterprises that receive federal funds under the Clean Water Act will not be engaged in government procurement when they purchase goods or services or contract with others to provide those goods or services.” In contrast, argues the United States, “only State governments may receive funds under the 1982 Act’s Buy America requirements”.<sup>31</sup> This is equally inaccurate. Under both sets of provisions, private parties will ultimately receive federal funds and private parties will be engaged in procurement but will do so only under contract from the grant recipient.

154. Under the *Clear Water Act*, public bodies receive federal funds to which buy national conditions are attached. Those funds eventually flow lower to private procurements and the buy national requirements flow with the funds.

155. The same is true in federal-aid highway projects.

156. Shirley, a private enterprise, received funds through Virginia and was obliged to impose Buy America conditions in the Shirley/ADF sub-contract.

157. Clearly Shirley was procuring fabricated steel from ADF and was obliged to impose Buy America conditions in the sub-contract.

158. The U.S. explains its reservation for the *Clear Water Act* in the following terms: “If the *Clear Water Act*’s Buy America provision were not listed in the United States’ Annex as an existing non-conforming measure, the United States could not, consistent with Article 1106, impose domestic content requirements on the privately-owned enterprises receiving those funds.” However, that is precisely what happened in the instant case, as the federal funds flowed down, they carried Buy America restrictions with them, eventually obliging a private party, Shirley, to impose prohibited domestic content requirements.

159. The U.S. admits that a reservation was necessary to accomplish that under the *Clear Water Act*. No reservations were taken in respect of the *STAA Act* of 1982. The measure in that Act is, by the U.S.’s own admission, a prohibited performance requirement for which no reservation was taken.

## **6. THE SUBSIDIARY DEFENCE TO ADF’S ARTICLE 1102 CLAIM**

160. The U.S. claims that even if the Buy America measure were not protected by the procurement exemption, ADF’s claim of violation of national treatment would fail for the following reasons: (i) Chapter Eleven does not reach trade in goods; (ii) neither ADF nor its investments were denied national treatment; and (iii) all claims founded on court decisions

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<sup>31</sup> Counter-Memorial, at p. 34-35.

involving fabricated steel are baseless.

## CHAPTER ELEVEN REACHES TRADE IN GOODS

161. The U.S. Counter-Memorial states that “[t]he central defect in ADF’s Article 1102 claim is that it fails to distinguish between *trade* and *investment*,” stating that Article 1102 “does not prescribe national treatment obligations with respect to Canadian or Mexican origin goods or services”.

162. The U.S. offers no support or authority for its assertion that if a NAFTA investment claim involves damage caused to trade in goods or services, that claim must necessarily fail. That proposition is radical and is unsupported by any reading of NAFTA or any relevant jurisprudence.

163. Without any language in the Treaty to support its position, the U.S. claims that the Parties have agreed to carve out of Chapter Eleven all claims which involve trade in goods and services. It is inconceivable to consider that the Parties would have taken such a radical step without clear words to that effect.

164. It is not uncommon to find various business sectors or classes of goods excluded from NAFTA chapters which would otherwise be of general application. However, clear language is consistently used to do so.

165. For example, Article 1101 provides specifically that Chapter Eleven “does not apply to measures adopted or maintained by a Party, to the extent that they are covered by Chapter Fourteen (Financial Services).<sup>32</sup>

166. Similarly, Chapter Twenty-One sets out some of the general exemptions found in NAFTA. Article 2101 provides that GATT Article XX and its Interpretative Notes are to be incorporated and made part of the NAFTA “except for the purposes of Part II (Trade in Goods)” to the extent that a provision of that Part applies to services or investment. Article 2101(2) provides that nothing in Part II (Trade in Goods), to the extent that a provision of that Part applies to services, “shall be construed to prevent the adoption or enforcement by any party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement”

167. Any reading of NAFTA will confirm that where the parties have intended to isolate the obligations contained in any particular Chapter or Part from the application of obligations contained in other Chapters or Parts, they have done so with clear, explicit language.

168. The bald suggestion of the U.S., that the Tribunal should approach the interpretation of NAFTA on the basis that Chapter Eleven does not include issues that might be characterised as “trade in goods”, is without any foundation in the text of the NAFTA.

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<sup>32</sup> Article 1101(2)

169. In addition, Chapter Eleven itself is replete with references that confirm that the Chapter does indeed cover trade in both goods and services: Article 1101(4) states that:

Nothing in this chapter should be construed to prevent a party from providing a service ... in a manner that is not inconsistent with this chapter.

170. The definition of “investment” found in Article 1139, specifically includes: “real estate or other property, tangible or intangible, acquired in the expectation or used for a purpose of economic benefit or other business purposes”. Thus, moveable and immovable property are investments subject to Chapter Eleven.

171. Investment is also said to exclude: “commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party”. Clearly, if Chapter Eleven did not apply to trade in goods, there would be no requirement for that provision.

172. Article 1102 dictates national treatment:

With respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

173. Article 1106 speaks to performance requirements and refers in numerous instances to performance requirements in respect of trade in goods and services.

174. Quite simply, there is no reading of Chapter Eleven or any other provision of NAFTA which offers any support to the U.S. assertion that Chapter Eleven protection does not extend to issues which impact trade in goods or services owned or offered for sale by investors.

175. Finally, in *SD Myers*, the panel considered the same argument and soundly rejected it in the following terms:

The chapters of the NAFTA are part of a “single undertaking”. There appears to be no reason in principal for not following the same preference as in the WTO System for viewing different provisions as “cumulative and complimentary.

(...)

The view that different chapters of the NAFTA can overlap and that the rights it provides can be cumulative except in cases of conflict, was accepted by the decision of the Arbitral Tribunal in *Pope and Talbot*. The reasoning in the case is sound and compelling. There is no reason why a measure, which concerns goods (Chapter 3) cannot be a measure, relating to an investor or an investment (Chapter Eleven).

Chapter 3 deals with items of trade – namely, “goods”. A measure that relates to goods can relate to those who are involved in the trade of those goods and who have made investments concerning them. The thrust of a dispute under Chapter 11 is that the impugned measure relates to an investor or an investment. If it were to do so, it would be covered by Chapter 11 unless excluded. If it were not to do so, it would not be covered (at pp. 77-73; §§ 292 and §§ 294-295).

## **ADF AND NATIONAL TREATMENT**

176. The U.S. asserts that there was no violation of national treatment because “the measures at issue here on their face apply to all investors and investments regardless of nationality”.<sup>33</sup> The crux of the U.S. argument is that, because all investments faced the same constraints, ADF’s investments (that is ADF International and the steel owned by ADF in the United States) were not subject to less favourable treatment than that accorded to investments of U.S. investors.

177. A measure will violate Article 1102 if (i) non-national investors or their investments are in “like circumstances” with U.S. investors or their investments, and (ii) the measure discriminates against non-national or their investments on its face, or the practical effect of the measure is to treat non-nationals, or their investments, less favourably than nationals.

## **ADF IN “LIKE CIRCUMSTANCES” WITH THE U.S. STEEL FABRICATORS**

178. The U.S. concedes that ADF Group, ADF International and the U.S. steel purchased by the Investor are in “like circumstances” with the U.S. steel fabricators and with the steel owned by those U.S. fabricators.

179. ADF will not therefore pursue this issue. ADF and its investments are in “like circumstances” to U.S. steel producers and the steel owned by those producers.

## **ADF WAS DENIED NATIONAL TREATMENT**

180. The U.S. claims that ADF and its investments received exactly the same treatment as that afforded to every steel fabricator in the United States. That, however, ignores the fact that the measure in question is specifically crafted in order to benefit U.S. nationals at the expenses of non-nationals. It is a classic piece of protectionist legislation designed to favour national enterprises over non-national enterprises. The measure in question effectively imposes an obligation on ADF International to either increase its productive capacity in the U.S. or refrain from participating in a particular market sector. As such, it is clearly a measure that impacts the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of ADF’s investments. The measure obliges ADF to either expand its operations in the U.S., sub-contract steel fabrication work to U.S. steel fabricators or desist from participating in a particular market segment.

181. The fact that the measure purports to treat all steel fabricators in the same way is not relevant if its intent and effect is to favour nationals over non-nationals. That principle finds expression in GATS Article XVII(3) as follows:

Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service

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<sup>33</sup> U.S. Counter-Memorial, p. 39.

suppliers of the member compared to like services or service suppliers of any other member.

182. Thus, the GATS national treatment obligation specifically provides for situations where formally identical treatment can be considered non-violative of the national treatment obligation any where the formally identical treatment does not modify the conditions of competition in favour of national services or service suppliers.

183. In the instant case, the supposed identical treatment has robbed the Investor of its ability to fully participate in the market, clearly modifying the conditions of competition in favour of national steel fabricators.

184. Clearly any treatment, whether it be formally identical or formally different, that modifies the condition of competition in favour of domestic suppliers compared to non-national suppliers, is a violation of the national treatment standard. In the instant case, the claim by the United States that it offers formally identical treatment to all U.S. steel fabricators simply ignores the reality that the intent and impact of the measure is to ensure that non-national investors who wish to participate in the market are obliged to locate all of the required production capacity in the United States. It cannot therefore take advantage of its full corporate structure and capacity.

185. In its Counter-Memorial in the *Loewen* case, the U.S. provided a clear statement of the requirements of Article 1102 stating:

(...) Claimants decline even to discuss the most fundamental requirements of Article 1102: namely, that either claimants or their investments received treatment “less favourable” than any treatment accorded U.S. investors and investments “in like circumstances.” See NAFTA Article 1102

Article 1102(1) and (2) require each NAFTA Party to accord to investors of another Party (and their investments) treatment no less favourable than the treatment accorded in like circumstance to its own investors (and their investments) with respect to investments. This is a relative standard because the treatment a Party affords its own nationals provides the sole basis of comparison for the treatment it owes to investors of another Party (and to investments). (...).

Thus, to establish a violation of Article 1102, more is required than merely showing that Claimants received treatment that they contend is adverse. Rather, Claimants must show that they and/or their investments, when compared to U.S. investors or investments *in like circumstances*, received treatment that was *less favourable*.<sup>34</sup>

186. Formally identical treatment is no defence to a violation of national treatment when the measure in question is described to protect domestic investors and their investments and to shut non-national suppliers out of the market.

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<sup>34</sup> U.S. Counter-Memorial in *Loewen* case, March 30, 2001, at pp. 118-120.

## CASE LAW CITED BY ADF

187. The U.S. states that ADF's argument that it was denied national treatment by the failure of the United States to follow constant case law is "groundless".<sup>35</sup> The United States claims that the cases cited by ADF "all concern the interpretation of the 1933 *Buy America Act*", which is not at issue in the present case.

188. The Investor has clearly stated in its Memorial that the cases cited were decided under a different Buy America provision. However, the reasoning behind those decisions is identical in all cases. Under the measure in issue in the instant case "steel, iron and manufactured products", must be "produced in the United States". Under the FHWA Regulations issued in order to implement that requirement, "manufactured products" were ignored and only "steel" and "iron" were addressed. If steel or iron materials are to be used, all manufacturing processes, including the application for coating, for these materials must occur in the United States.<sup>36</sup>

189. In the *Antenna Towers* case, the Comptroller General was asked to provide an opinion "as to whether the use of structural steel in antenna towers to be constructed in Greece as proposed by Page Communication Engineers, Inc. ["Page"], (...), would be consistent with the balance of payment provision of the contract". That contract provision read in part as follows:

Pursuant to agency balance of payments policy, the contractor agreed that only United States domestic construction material (as that term is defined in 41 CFR 1-6.201) shall be used in the performance of this contract....

190. The case goes on to state that "the above-mentioned Section 1-6.201, title 41, of the *Code of Federal Regulations*, concerns the *Buy-American Act* and refers to 41 CFR 1-18.6, wherein the following pertinent definitions are set out with respect to construction contracts (1-18.601):

"Construction Material" means any article, material, or supply brought to the construction site for incorporation in the building or work.

"Component" means any article, material, or supply directly incorporated in construction material.

"Domestic Construction Material" means an unmanufactured construction material which has been mined or produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced or manufactured in the United States exceed 50% of the cost of the cost of all its components.

191. The contractor Page had placed an order with a U.S. steel mill for the manufacture of the structural steel members of the antenna towers. However, it was going to be necessary to trim the ends of various structural members to ensure the exact specification measurements required

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<sup>35</sup> United States' Counter-Memorial, at p. 44

<sup>36</sup> 23 CFR 635.410(b)(1)(ii)

for the towers. Page proposed to have the steel members delivered to a sub-contractor in the United Kingdom who would trim the ends of the steel members where necessary, to the precise measurements set forth in the shop drawing. The work to be done by the sub-contractor was described as “punch bolting holes in designated members; attach (by welding) bolting plates, gussets, caps, etc.; and galvanized to prevent rust”. The structural members would then be delivered to the construction site for incorporation in the towers. The Comptroller General stated that:

The question presented (...) is whether the various structural members produced by United States Steel and eventually delivered to the construction site, may be considered as having been “manufactured” in the United States under the above definition of “Domestic Construction Material” in view of the operations performed on those members in the United States.

192. The Comptroller General held:

Accordingly, it is our opinion that the intermediate hole punching, bolting plate attachments, and other operations performed on the structural members of the towers in the United Kingdom would not sufficiently alter those members as to change the United States as the place of their manufacture.

193. It is significant that in his decision, the Comptroller General did not examine the cost or value of the work performed to determine whether the cost of U.S. components exceed 50% of the cost of all its components. Rather, he concluded that the type of work involved in fabricating steel for inclusion in a structure did not constitute manufacture of a produce so as to change the place or origin of that structural steel member.

194. The *Wright Contracting* case involved the fabrication of structural steel from foreign plate and beams. The Buy American provisions that were at issue were similar to those in the *Antenna Towers* case. The Buy American clause in issue required Wright to use only “domestic construction materials” in the work. “Construction Materials” were defined as “articles, materials and supplies brought to the constructions site for incorporation into the work”. A “manufactured domestic construction material” was defined as: “a construction material manufactured in the United States, if the cost of its components mined, produced or manufactured in the United States exceeds 50% of the cost of all its components”. “Components” were defined as “articles, materials, and supplies incorporated directly into construction materials”.

195. In *Wright Contracting*, the Administrative Judge did not calculate domestic content requirements in order to determine if the steel qualified as manufactured in the United States. Rather, he concluded that shop fabrication was not a “component” of the end products that could be used in any such calculation. Consequently, no amount of fabrication in the United States could change the country of origin of the foreign plate and beams. The Administrative Judge held that the origin of the foreign beams would not change as a result of any fabrication that might be conducted in the United States.

196. The *SJ Amoroso* case is to the same effect, that is that no amount of fabrication of foreign steel will qualify that steel as U.S. origin.

197. The Investor has cited these cases to demonstrate the consistent practice by U.S. tribunals of finding, that the fabrication of steel does not change its origin. More specifically, that U.S. steel that is fabricated in the U.S. qualifies as steel manufactured in the U.S. and foreign steel fabricated in the U.S. is not produced in the U.S. The fact that the statutes at issue contained domestic content requirements permitting an amount of foreign source material is irrelevant because in each case no reference to any calculations of domestic content was made.

198. In referring to the different statutory schemes, the U.S. states that:

By its use of the word “product” and its failure to suggest that a substantial percentage of production in the United States could suffice, the *1982 Act* places emphasis on production of the *finished product* in the United States.<sup>37</sup>

199. That, however, is precisely what the three cases stand for, that the fabrication of steel does not change its country of production or, for that matter, its country of manufacture. None of the three cases applied a percentage domestic content requirement and each stands for the simple proposition that fabrication does not change to country of production of structural steel.

200. The fact that the FHWA has “consistently interpreted the standard in the *1982 Act* to require all manufacturing activities, including “rolling, extending, machinery, bending, grounding, drilling and coating” must take place in the United States<sup>38</sup> is no defence to ADF’s claim that U.S. regulatory authority has failed to follow constant case law. That FHWA is consistent in its refusal to follow constant case law does nothing to save its policy. If a violation of Article 1102 has occurred, it matters little if the Agency’s violations have occurred consistently or occasionally.

201. Finally, in this Section, the U.S. argues that ADF’s reliance on the decision in *SD Myers* is misplaced “as the reasoning of the tribunal was flawed in certain respects essential to ADF’s argument here”.<sup>39</sup>

202. Interestingly, in a footnote, the U.S. declines to express an opinion as to whether an Article 1102 violation could nevertheless have been found on a proper analysis of the case.<sup>40</sup>

203. The U.S. complaint is that the tribunal in *SD Myers* found that SD Myers and Myers Canada were in like circumstances with Canadian companies engaged in the business of providing PCB waste remediation services. The U.S. claims that Myers Canada was not in the business but rather the “business of marketing such services”.

204. To draw this artificial distinction between the services provided by the investor, which are, necessarily, outside of the territory in which the investment is located, and those provided by

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<sup>37</sup> U.S. Counter-Memorial at p. 45.

<sup>38</sup> U.S. Counter-Memorial at p. 46.

<sup>39</sup> U.S. Counter-Memorial at p. 47.

<sup>40</sup> U.S. Counter-Memorial, footnote 106, at p. 47.

its investments ignores the requirement contained in Article 1102 that national treatment be accorded to both “investors” and their “investments” with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

205. The obligations contained in Article 1102 reach across borders to require that a Party treat investors of another Party at least as favourably as it treats its own investors.

206. To require that, as a condition of participating in a particular national market, an investor expand its U.S. production facilities to equal those of an U.S. investor is necessarily to treat Canadian investors less favourably than U.S. investors.

207. NAFTA places traditional investor protection measures squarely within a regional free trade agreement and that fact must inform any interpretation of Chapter Eleven. To rely on borders as a rationalisation for maintaining effectively different, and less equal treatment, for Canadian investors runs contrary to its clear intent of Article 1102, Chapter Eleven and NAFTA as a whole.

208. As the U.S. admits, ADF is in like circumstances with “those investors and investments supplying steel to federally funded state projects governed by the same statutory and regulatory regime”.<sup>41</sup> The investor is seeking to participate in that market through its investments, ADF International, which sells fabricated steel, and the U.S. steel that ADF acquired for the purpose of the Springfield Interchange and other contracts.

209. The measure in question forces ADF to make choices which U.S. investors and investments do not have to make. Those choices are to participate in the market by increasing all investments in the U.S. or by sub-contracting the work it acquires to U.S. investments or to abandon the market to U.S. investors and their investments.

210. That is, quite simply, treatment, less favourable than that offered to U.S. investors and their investments.

211. The Buy America provision in question is effectively a bar to the importation of fabricated steel for certain markets. To pretend that all steel fabricators in the U.S. face the same ban is to ignore the reality that its measure is designed to promote the interests of national fabricators at the expense of non-national investors.

## **7. THE ABSENCE OF ANY SUBSIDIARY DEFENCE TO ADF’S ARTICLE 1106 CLAIM**

212. The Investor notes that the U.S. does not raise any additional defences to the violation of Article 1106. Thus, unless the Tribunal finds that the exception for “procurement by a Party” covers the restrictive conditions applied to Federal funding, the Investor will succeed on its claim

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<sup>41</sup> U.S. Counter-Memorial, at p. 47.

that Article 1106 constitutes a prohibited performance requirement imposed upon the Investor and on its investments.

## **8. ARTICLE 1105: THE MINIMUM STANDARD OF TREATMENT OBLIGATION**

### **THE FREE TRADE COMMISSION INTERPRETATION**

213. The Investor is compelled to notice the arrival of the “Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31<sup>st</sup>, 2001) (the “FTC Notes”), issued “out of the blue”, without any prior public consultation, even less any warning to investors party to ongoing Chapter Eleven arbitrations and, more particularly with respect to the Investor in the instant case, on the eve of the submission of its Memorial on August 1<sup>st</sup>, 2001. No doubt eager to share the pleasure of what had been secured, the very same day the FTC Notes were issued, the United States submitted them to the Tribunal and to the Investor.

214. The Investor invites the Tribunal to review the materials available on the United States State Department web-site concerning Chapter Eleven claims against the United States, more particularly the materials filed in the *Methanex* case and the *Loewen Group* case.<sup>42</sup>

215. In these materials, the Tribunal will find an ongoing debate as to the effect of the FTC Notes (notably, whether or not the FTC Notes are a valid retroactive amendment to NAFTA). It is no grand state secret that arguments made under Article 1105 of Chapter Eleven against the NAFTA Parties prompted “officials” to adopt the FTC Notes for the clear purpose of limiting the liability of the Parties to NAFTA at the expense and prejudice of the investors that are the beneficiaries of the Treaty.

216. No doubt that the United States will argue (as it has already done in other proceedings) that investors must have known, in light of Article 1131(2) of NAFTA, that such unilateral “moving of the goal posts” is part of the game, but such conduct has been vigorously protested, more notably by Sir Robert Jennings, Q.C.,<sup>43</sup> where he is on record as stating as follows:

“In the present case [being the *Methanex* proceedings], without even asking for leave, one of the actual Parties to the arbitration has quite evidently organized a *démarche* intended to apply pressure on the tribunal to find in a certain direction

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<sup>42</sup> See generally: <http://www.state.gov/s/l/index.cfm?id=3741> and more particularly 1) <http://www.state.gov/s/l/index.cfm?id=3757> for the case of *Methanex Corp. v. The United States of America* and 2) <http://www.state.gov/s/l/index.cfm?id=3755> for the *Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*.

<sup>43</sup> Opinion of Professor Sir Robert Jennings, Q.C. in the *Methanex* case. Sir Robert, need one remind, is former Judge and President of the International Court of Justice at the Hague and former President of the Institut de Droit International. In 1993, Sir Robert received the Manley Hudson Gold Medal from the American Society of International Law. Sir Robert’s opinion otherwise merits careful attention, as it must, in his analysis of the way the FTC Notes unequivocally operate a Treaty *amendment* as opposed to a mere *interpretation*. The Opinion is available at <http://www.naftaclaims.com/>, under the heading dealing with the FTC Notes.

by amending the treaty to curtail investor protection. This is surely against the most elementary rules of the due process of justice. The phrase due process is itself of United States origin and has become international (see NAFTA Article 1110) because the United States has for so long been regarded as the guardian of due process. It is very sad to see this present betrayal of principles of which the United States has long been the revered author and practitioner.” (at pp. 4-5).

217. Indeed.<sup>44</sup>

218. The decisions in *Methanex* and *Loewen* are pending. To the extent that the decisions in either or both cases reaffirm the strength of Article 1105 as the provision stood unamended prior to the FTC Notes (or even after), the Investor intends to rely on them, and reserves the right to comment them, if and when appropriate. Indeed, in the January 4<sup>th</sup>, 2002 edition of the *Inside U.S. Trade* review (Vol. 20, No.1), it is revealed that Methanex has filed an affidavit (recited in the review) of Guillermo Aguillar Alvarez, former Mexican negotiator to NAFTA, stating that the history of Article 1105 contradicts the FTC Notes in that during negotiating sessions, the concept of “customary international law” had been discussed at length and expressly left out of Article 1105 at Mexico’s insistence [!]. If this allegation is true (and we presume it is in light of its seriousness), one need not speculate too long as to what Sir Robert, or any other well recognised internationalist for that matter, would have to say about that.

219. As a result, the Investor is not abandoning its Article 1105 claim but rather, the Investor now intends to pursue its Article 1103 NAFTA claim already announced in its Memorial in order to seek “most favoured nation treatment”.

220. To the extent that the United States objects to this claim as being outside of Article 48(1) of the ICSID (Arbitration) Additional Facility Rules, the Investor (in anticipation) simply points out that in its Counter-Memorial, the United States did not object (and in fact made no reference) to the complementary argument presented by the Investor in its Memorial based on Article 1103 of NAFTA and arising out of its Article 1105 claim. The United States was thus clearly aware that this argument was within the arbitration landscape in the instant proceedings. In light of the egregious conduct evolving from, and out of, the FTC Notes, which now compels the pursuit of the argument, the United States cannot now claim, having deliberately ignored the argument in its Counter-Memorial (and having thus waived any objection as to its continued presentation), that it is prejudiced or otherwise caught by surprise.<sup>45</sup> In any event, as demonstrated by the case

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<sup>44</sup> We would also add a reference to the “due process” requirement for the arbitral process itself which is explicitly stated in Article 1115.

<sup>45</sup> In any event, the requirement to specify in the notice of arbitration the provisions of NAFTA alleged to have been breached (Article 1119(b)) is not a “Condition Precedent to Submission of a Claim to Arbitration” (compare and see heading of Article 1121). The notice requirement of Article 1119 is precisely what it is: a “notice”. Indeed, it could hardly be said that the failure of a Party to timely fulfill its own notice obligation under Article 1127 would affect the currency of the proceedings. Also, and more to the point in this particular case, in its Notice of Arbitration dated July 19<sup>th</sup>, 2000, the Investor at p. 22, under Heading “H. RELIEF SOUGHT”, item vi), specified that it was reserving its right to request “Such further relief that counsel [for the Investor] may advise and the Arbitral Tribunal may permit”. At no time did the United States object to this request for relief nor formally or informally seek particulars. Such a

of *Maffezini*,<sup>46</sup> explained in more detail below, the same argument submitted under Article 1103 may otherwise also be submitted under the “national treatment” obligations of Article 1102.

## **MOST FAVOURED NATION TREATMENT**

221. As indicated in its Memorial, from a contextual perspective, any attempt to introduce and apply a “customary international law” standard in Article 1105 would be ineffective. NAFTA Article 1103 imposes a “most favoured nation” (“MFN”) standard on a Party’s treatment of investors. Thus, NAFTA investors benefit from the better of the treatment afforded to (i) NAFTA investors under Article 1105 *or* (ii) the treatment afforded to any non-Party investor.<sup>47</sup> Thus, given the MFN requirement in Article 1103, if any U.S. BIT offered a treatment better than “customary international law”,<sup>48</sup> any inclusion of “customary international law” in Article 1105 would be ineffective. The NAFTA investor would benefit from the better treatment set out in the other U.S. BIT. Since the FTC Notes purportedly limit Article 1105 protection to customary international law minimum standard of treatment of *aliens* (as opposed to investments), one is now allowed to seek better treatment under any subsequent U.S. BIT.

222. In its Memorial, the Investor identified in this respect the BIT between the Government of the United States and that of the Government of the Republic of Albania, where the comparable investor protection provision reads as follows:

### **Article II**

(...)

3. (a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law.<sup>49</sup>

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“basket clause” is precisely designed to cover changes in situation such as the one encountered here, to the extent that it is indeed encountered. See by analogy: *Native Women’s Association of Canada v. Canada*, [1994] 3 S.C.R. 627, citing: *Loudon v. Ryder (No. 2)*, [1953] Ch. 423, . *R. v. Bales, Ex parte Meaford General Hospital*, [1971] 2 O.R. 305 (H.C.), *Meisner v. Mason*, [1931] 2 D.L.R. 156 (N.S.C.A.), and *Harrison-Broadley v. Smith*, [1964] 1 All E.R. 867 (C.A.). As a result, the Article 1103 claim is properly before this Tribunal, the Investor having already reserved the Tribunal’s jurisdiction in this respect and the United States submitting no objection at any time to keep open the Tribunal’s competence in this manner.

<sup>46</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction, January 25<sup>th</sup>, 2000 (“*Maffezini*”). The Investor will rely on the English version of the Spanish original, both versions being accessible at: <http://www.worldbank.org/icsid/cases/awards.htm>.

<sup>47</sup> Article 1103 of NAFTA extends the MFN treatment to investors of another Party than it accords to investors of “any other Party *or* of a non-Party”.

<sup>48</sup> That is, after the coming into force of NAFTA. See the United States’ Annex IV to NAFTA (**Vol. IIA.1; Tab A-1**).

<sup>49</sup> THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF ALBANIA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, WITH ANNEX AND PROTOCOL, SIGNED AT WASHINGTON ON JANUARY 11, 1995, in force January 4, 1998 (**Vol. IIA.2; Tab A-17**).

223. Again, the Investor points out that the language in the *U.S.-Albania BIT* clearly contemplates separate obligations of “fair and equitable treatment” and “full protection and security” (they are explicitly cited) and establishes a floor, treatment “required by international law”, below which the first two elements cannot fall.

224. In “The Bilateral Investment Treaty Program of the United States”,<sup>50</sup> Kenneth J. Vandavelde who, from 1982 to 1988, was a member of the Office of the Legal Adviser of the Department of State and served as counsel to the United States Bilateral Investment Treaty negotiating teams, gives a comprehensive view of the origin of this provision.

225. Originating in the 1984 Draft US BIT, the provision rationalised, *inter alia*, the prior 1983 Draft. The goal of the 1984 clause was to render the obligations of the BIT - being the separate obligations of “fair and equitable treatment” and “full protection and security” on the one hand - and international law on the other - “mutually reinforcing” (at pp. 221-222). Much like the role of a MFN clause, the purpose was obviously to ratchet-up protection of investors as treaty law evolved. And indeed, the stated objective was to protect US Investors and, consequently, “strengthen the United States position on international law, especially through the rendering of arbitral decisions under these dispute provisions.” (at p. 222).

226. The initial fundamental stated objective was, by way of BITs, to *inter alia* override the Calvo doctrine prevailing in capital importing countries and thus to promote the interests of U.S. investors abroad: “The BITs had three purposes: (1) to provide greater protection for United States investment in those countries with which the United States negotiated BITs,<sup>51</sup> (2) to reaffirm that the protection of United States foreign investment remained an important element of United States foreign policy, and (3) to establish a body of practice<sup>52</sup> to support the United States view<sup>53</sup> of international law governing the protection of foreign investment.” (at pp. 209-

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<sup>50</sup> [1998] 21 *Cornell International Law Journal* 201 (“Vandavelde’s *Cornell Law Journal* article”).

<sup>51</sup> Obviously, if customary international law already provided adequate protection, one would not be seeking “greater protection” by way of a BIT, customary international law being otherwise binding in the absence of any Treaty.

<sup>52</sup> The Investor notes that the United States has already admitted during the *Methanex* proceedings that “the international minimum standard is not a standard frozen in the 1920s. It is an evolving standard. It is one that, like other rules of international law, evolves through state practice.” (Tr. at 514: 12-15: available at: <http://www.state.gov/s/l/index.cfm?id=3757>).

<sup>53</sup> In this respect, the letter of transmittal of The White House to the Senate of the United States (**IIA.2; Tab A-17**) with respect to the *U.S.-Albania BIT* indicates what is the United States view of international law: “Paragraph 3 sets out a minimum standard of treatment *based* on standards found in customary international law. The *obligations* to accord “fair and equitable treatment” and “full protection and security” are *explicitly* cited, as is the Parties’ obligation not to impair, through unreasonable and discriminatory means, the management, conduct and sale or other disposition of covered investments” (at p. 6, emphasis is ours). The letter of transmittal does not say that the obligations to accord “fair and equitable treatment” and “full protection and security” are *based* on standards found in customary international law. Now either the “fair and equitable treatment” and “full protection and security” standards are already part of customary international law in relation to BITs (which is the ultimate foreign policy objective of the United States), or they are *explicit* (distinct) Treaty obligations (until that objective is actually reached under customary international law). Either way, the protection of the Investor (over and above that of Article 1105 under the MFN of Article 1103) is assured: if “fair and equitable treatment” and “full

210, emphasis is ours).<sup>54</sup> And indeed, “one of the most important purposes (...) was to counter the claim made during the 1970s by many developing countries that customary international law no longer required that expropriation be accompanied by prompt, adequate, and effective compensation, if indeed it ever had. (...). The United States hoped to create a network of bilateral investment treaties embracing the prompt, adequate and effective standard that would counter assertions that State practice no longer supported that standard”.<sup>55</sup> These objectives are clearly found in the standards adopted by the *U.S.-Albania BIT* and serve to inform them.

227. Vandevelde expresses the view that not only do such provisions in question allow investors to invoke customary international law in an investor-State arbitration,<sup>56</sup> but also that, where the BIT requires treatment exceeding that required by international law [as is obviously the case in the one contained in the *U.S.-Albania BIT*], “host states must abide by the higher BIT standard.”<sup>57</sup>

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protection and security” are already part of customary international law, then customary international law does not admit to treatment that is either unfair or inequitable, or that does not provide for full protection and security. On the other hand, if the “fair and equitable” and “full protection and security” standards are *based* on customary international law principles, they can consequently only be viewed as rising *above* them, taking their place as *explicit* and distinct *obligations*, as they do, in a Treaty, the higher international law norm. This is why the letter of transmittal refers to the “fair and equitable” and “full protection and security” *obligations* as being *explicitly* stated: the explicit obligations apply until customary international law rises up to meet and merge into them. The treatment under the *U.S.-Albania BIT* is thus clearly better than the one afforded under Article 1105, as amended by the FTC Notes, since the FTC Notes limit the protection to “*customary*” international law of “*aliens*” (terms nowhere used in NAFTA), whereas the *U.S.-Albania BIT* deals with the broader protection of investments.

<sup>54</sup> See also the U.S. Bilateral Investment Treaty Program, Fact Sheet, Released by the Office of Investment Affairs (found at: <http://www.state.gov/www/issues/economic/7treaty.html>, visited on January 7<sup>th</sup>, 2001, that sets out the objectives by which the BIT standards must be interpreted:

“The BIT program's basic aims are to:

- **Protect** U.S. investment abroad in those countries where U.S. investors' rights are not protected through existing agreements such as our treaties of Friendship, Commerce and Navigation;
- **Encourage** adoption in foreign countries of market-oriented domestic policies that treat private investment fairly; and
- **Support** the development of international law standards consistent with these objectives.” (underline is ours)

<sup>55</sup> Kenneth J. Vandevelde, “U.S. Bilateral Investment Treaties: The Second Wave”, [1993] 14 *Michigan Journal of International Law* 621, at p. 625, footnotes omitted (“Vandevelde’s *Michigan Law Journal* article”), referring here to the standard of compensation with respect to expropriation, but the original policy dealing with expropriation expanded as it sought to extend more comprehensive and “mutually reinforcing” protection in the US Draft BITs as they evolved.

<sup>56</sup> Kenneth J. Vandevelde, *United States Investment Treaties – Policy and Practice*, Boston: Kluwer, 1992, at pp. 77-78.

<sup>57</sup> Vandevelde’s *Cornell Law Journal* article, at p. 221, note 137, and previous note, at p. 77.

228. Since the standards contained in the BIT are designed to be “mutually reinforcing”, clearly the “fair and equitable” and “full protection and security” standards found in the *U.S.-Albania BIT* must also be viewed as “self contained” from that of customary international law,<sup>58</sup> for how else could the principles mutually “reinforce” each other.

229. In the *Methanex* case, the United States,<sup>59</sup> Canada,<sup>60</sup> and Mexico,<sup>61</sup> cite Rudolf Dolzer, and Margrete Stevens, *Bilateral Investment Treaties*,<sup>62</sup> to the effect that the “fair and equitable standard [in NAFTA Article 1105] is explicitly subsumed under the minimum standard of customary international law”. The same authors, however, quote no less than F.A. Mann to the effect that the terms “fair and equitable treatment” envisage “conduct far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form a words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously”.<sup>63</sup>

230. Accordingly, the authors submit that the “fact that parties to BITs have considered it necessary to stipulate this [“fair and equitable treatment”] standard as an express obligation rather than relied on a reference to international law and thereby invoked a relatively vague concept such as minimum standard is probably evidence of a self contained standard.”<sup>64</sup>

231. In light of the stated “mutually reinforcing” policy objective of the US BITs, it is not probable, but certain that the intent is to have the “fair and equitable” and “full protection and security” standards “self contained” within Article II(3)(a).

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<sup>58</sup> This assumes that customary international law does not by itself already contain the standards of “fair and equitable treatment” and “full protection and security”. In light of the BITs that already contain such a standard, one may reasonably submit that this is already the case.

<sup>59</sup> See *response of the Respondent United States of America to Methanex’s Submission Concerning the NAFTA Free Trade Commission’s July 31<sup>st</sup>, 2001 Interpretation*, at pp.4-5, available at (<http://www.state.gov/s/l/index.cfm?id=3757>).

<sup>60</sup> Second Submission of Canada Pursuant to Article 1128, April 30<sup>th</sup>, 2001, at p. 7, note 29; located at : <http://www.state.gov/s/l/index.cfm?id=3757>.

<sup>61</sup> Second submission of Mexico Pursuant to Article 1128, p. 4, note 12; located at : <http://www.state.gov/s/l/index.cfm?id=3757>.

<sup>62</sup> Boston: Martinus Nijhoff Publishers, 1995.

<sup>63</sup> At p. 59, quoting F.A. Mann, “British Treaties for the Promotion and Protection of Investments” in *Further Studies in International Law* (1990), at p. 238.

<sup>64</sup> At p. 60.

232. In accord, Professor Stephen Vasciannie,<sup>65</sup> after providing a most detailed and comprehensive analysis on the origins and the rise of BITs on the world scene, concludes with respect to the use of the “fair and equitable” standard in BITs in general:

(...) [G]iven the substantial volume of State practice incorporating the fair and equitable standard, it is noteworthy that the instances in which States have indicated or implied an equivalence between this standard and the international minimum standard are relatively sparse. Moreover, bearing in mind that the international minimum standard has itself been an issue of controversy between developed and developing States for a considerable period, it is unlikely that a majority of States would have accepted the idea that this standard is fully reflected in the fair and equitable standard without clear discussion. These considerations point ultimately to the conclusion that the two standards in question are not identical: both standards may overlap significantly with respect to the issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors. Following Mann, where the fair and equitable standard is invoked, the central issue remains whether the actions in question are in all circumstances fair and equitable or unfair and inequitable (at p. 144, footnotes omitted, emphasis is ours).

233. That the “fair and equitable” and “full protection and security” standards are distinct from the floor standard of customary international law is also confirmed, *a contrario*, by the decision of Justice Tysoe in *Metalclad*<sup>66</sup> where his Lordship noted that the “additive” wording found in the 1987 Model Bilateral Investment Treaty was different from the wording found in NAFTA Article 1105, thereby justifying a different interpretation for that provision: “The NAFTA Parties chose to use a different language in Article 1105 and the natural inference is that the NAFTA Parties did not want Article 1105 to be given the same interpretation as the wording of the provision in the Model Bilateral Investment Treaty of 1987” (at p. 24, § 65 *in fine*). The entire justification to read Article 1105 in such a fashion rests on the difference (“additive” character vs. “includes”), according to his Lordship, in the structure of the comparable texts. All three NAFTA Parties, including of course the United States, have been quick to submit Tysoe J’s decision to NAFTA Tribunals. The United States should therefore have no difficulty accepting the converse reasoning that flows from the decision: since the *U.S.-Albania BIT* is clearly framed as having an “additive” structure, the “natural inference” is that Article II(3)(a) should be applied as having an “additive” (dare we say “mutually reinforcing”) character.<sup>67</sup> Though it will undoubtedly strain to do so, the United States cannot have it both ways.

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<sup>65</sup> “The Fair and Equitable Treatment Standard in International Investment Law and Practice”, [1999] *British Yearbook of International Law* 99.

<sup>66</sup> *United Mexican States v. Metalclad Corporation*, [2001] BCSC 664 (**Vol. IIB.1; Tab B-7**).

<sup>67</sup> See also: Heribert Golson, “France-Union of Soviet Socialist Republics: Agreement for the Promotion and Reciprocal Protection of Investments”, [1990] 29 *I.L.M.* 317: “The United States has in most cases, e.g. *Bangladesh-U.S. BIT*, Article II(3) followed in part traditional FCN language by stipulating that the standard of fair and equitable treatment “shall in no case be less than that required by international law”. This latter formula, of course, does not enshrine a restrictive interpretation” (at p. 317, emphasis is ours).

234. Finally, based on Article 31(1) of the *Vienna Convention on the Law of Treaties*,<sup>68</sup> the provision “shall be interpreted in good faith in accordance with the ordinary meaning to be given to [its] terms” in “the context and in light of its object and purpose”. The “ordinary meaning” of Article II(3)(a) sustains its additive character.

235. In light of the United States’ stated policy objectives, the way those objectives are contained in the adopted standards of Article II(3)(a) of the *U.S.-Albania BIT*, the adoption of the standard by scholars cited by the United States before NAFTA Tribunals and the fact that the difference in the wording of the standard in Article 1105 justifies its “self contained” application in the instant case, as approved *a contrario* by a decision of a national court of one of the NAFTA Parties and cited by the United States before NAFTA Tribunals, this Tribunal is in the best of company by implementing the United States’ stated policy as regards the application in this case of Article II(3)(a) the *U.S.-Albania BIT*.

236. The Investor invokes, therefore, the MFN provision of Article 1103 of NAFTA and the “self contained” “mutually reinforcing” standard of Article II(3)(a) the *U.S.-Albania BIT* for the purposes of this case.

237. But there is more.

238. The Investor also invokes Article II(3)(b) of the *U.S.-Estonia BIT*.<sup>69</sup> Article II(3)(a) of the *U.S.-Estonia BIT* is equivalent to the provision found in the *U.S.-Albania BIT* mentioned above. Article II(3)(b) of the *U.S.-Estonia BIT*, also found in Article II(3)(b) of the *U.S.-Albania BIT*, is however, wider and provides in turn as follows:

## II

(...)

3(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purpose of dispute resolution under Articles VI and VII [the arbitration provisions], a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

239. Under this provision, the Investor is assured two (2) *additional* forms of protection:

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<sup>68</sup> Done at Vienna, May 23, 1969, entered into force, January 27, 1980, 1155 U.N.T.S. 331 (*Vienna Convention*) (Vol. IIA.2; Tab A-16).

<sup>69</sup> TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF ESTONIA FOR THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS, signed April 19<sup>th</sup>, 1994, in force February 16<sup>th</sup>, 1997. Located at : [http://www.state.gov/www/issues/economic/bit\\_treaty.html](http://www.state.gov/www/issues/economic/bit_treaty.html).

- The United States shall not in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the Investor's investments. The treatment need not be arbitrary *and* discriminatory.
- So as not to introduce by the back door the application of a variant of the local remedies rule, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a party.

240. The first form of additional protection widens the protections accorded under the "self contained" standards mentioned above in Article II(3)(a).

241. The second form of additional protection is designed to defeat any argument that the existence of local remedies is indicative that the host state has not acted arbitrarily or in a discriminatory manner. This provision was inserted by the United States in its draft BITs following the *ELSI* case<sup>70</sup> and obviously negates also any defence that the presence of a regulatory apparatus (such as the FHWA), adopting a rule according to a structured process and subject to (limited) judicial review (by the United States' own contention) is evidence that the Investor has not been treated arbitrarily or in a discriminatory fashion. By the back door, the United States is attempting to introduce this defence by waxing the FHWA regulatory apparatus.

## NATIONAL TREATMENT

242. Finally, the Investor equally invokes both the *U.S.-Albania BIT* and the *U.S. Estonia BIT* under the National Treatment provision of NAFTA Article 1102.

243. In *Maffezini*, the ICSID Tribunal had to determine whether an Argentine investor could invoke a better arbitration procedure found in the *Chile-Spain BIT* (which did not require exhaustion of local remedies) than the one contained in the *Argentine-Spain BIT* (which did require a limited form of exhaustion of local remedies for a period of 18 months). Notwithstanding the application of the MFN clause to give the Argentine investor the better treatment, the Tribunal also noted the important function of the National Treatment Clause. It stated in this respect that:

While this [National Treatment Clause] applies to national treatment of foreign investors, it may also be understood to embrace the treatment required by a Government for its investors abroad, as evidenced by the treaties made to ensure their protection. Hence, if a Government seeks to obtain a dispute settlement method [in that case] for its investors abroad, which is more favorable than that granted under the basic treaty to foreign investors in its territory, the clause may

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Vandeveldel's *Michigan Law Journal* article, at p. 651, commenting on the aftermath of the *Case Concerning Elettronica Sicula S.p.A.* (U.S. v. Italy), 1989, I.C.J. 15 (July 20): "(...) the new language was inserted into the 1991 [Draft US BIT] to preclude a tribunal from deciding that a host State act subject to appeal *ipso facto* could not be an arbitrary and discriminatory act within the meaning of the BIT".

be construed so as to require a similar treatment of the latter. (at p. 23; §61; emphasis is ours).

244. What is true (in that case) with respect to an arbitration mechanism must also hold true as regards investor protection (or treatment) that is afforded over and above that which is granted by Article 1105.

245. Of interest, the Tribunal in that case did not require that the Argentine investor show (or even allege) that *any* investor of either Spain or Chile (or both) under the *Chile-Spain BIT* had in fact invoked the *Chile-Spain BIT* at all. As a result, all Canadian investors seeking to make investments in the United States are entitled to the same treatment given to all United States investors seeking to make investments in Albania and Estonia with respect to the protection of their investments.

246. The Investor also invokes, therefore, under Article 1102, the treatment accorded to US investors under the provisions of the BITS referred to above.

247. Under either provision, the Investor is entitled now to the legitimate expectation that the provisions create. The provisions are designed to promote conditions of fair competition for foreign investors in relation to domestic investors.<sup>71</sup> Both Articles not only protect current trade but also create predictability<sup>72</sup> needed to plan future trade.<sup>73</sup> That objective could not be attained if investors could not challenge existing measures until they had actually been otherwise applied in relation to the treatment or conduct of other investors over which and whom the Investor has no control.

#### **APPLICATION OF THE “FAIR AND EQUITABLE”, “FULL PROTECTION AND SECURITY” AND “NON-ARBITRARY OR DISCRIMINATORY” CONDUCT TO THE INSTANT PROCEEDINGS**

Arbitrary Application of Section 165 of the STAA of 1982 by the FHWA

248. As stated in its Memorial, notwithstanding that the Buy America provision of section 165 of the STAA is *per se* unfair, inequitable, arbitrary and discriminatory within the context of NAFTA and its national treatment and MFN components, under the present circumstances, section 165 of the STAA of 1982 also does not give to the FHWA a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements.

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<sup>71</sup> Article 102(1)(b) of NAFTA: “promote conditions of fair competition in the free trade area”. (Article 31 of the *Vienna Convention* and reference to “contextual interpretation”).

<sup>72</sup> The Preamble to NAFTA indicates in this respect that it is designed to “ENSURE a *predictable* commercial framework for business planning and Investment.” (Article 31 of the *Vienna Convention* and reference to “contextual interpretation”).

<sup>73</sup> In any event, we note that both the *U.S.-Albania BIT* and the *U.S.-Estonia BIT* were in force prior to the actions of the Investor in relation to its investments in the United States and the treatment it received by the United States and that, accordingly, the rights to United States’ investors had already been granted.

249. The provision fails to give direction as to how to exercise this discretion, so that this exercise may be controlled (if at all, according to the deferential case law submitted by the United States). The provision does not accord *full* protection and security because it delivers investors into the hands of the FHWA which applies the law as it sees fit, irrespective of the text of section 165.

250. This is precisely what happened here.

251. As indicated in its Memorial, the Investor restates that the FHWA considers itself entirely free in this respect to ignore past administrative and judicial pronouncements in order to stretch section 165 of the STAA of 1982 to cover post-production fabrication of “steel” -- beyond the text of section 165 -- and to exempt all “manufactured products”. The FHWA thereby selectively ignores that the coverage of “manufactured products” was expressly maintained under section 165 of the STAA of 1982 in order to justify its position that one must accordingly, after statutory pruning, focus coverage on “iron” and “steel”. Consequently, the FHWA can thus artificially extend the coverage of Buy America on “steel” to post-production fabrication all the while completely ignoring the free trade context that nullifies the policy considerations for enacting “buy national” policies in the first place.

252. Further in this respect, a time-honoured canon of statutory construction provides that, absent express language to the contrary, a statute should not be interpreted to conflict with the international obligations of the United States.<sup>74</sup> The two-step *Chevron* test must be applied in concert with the *Charming Betsy* doctrine when the latter is implicated.<sup>75</sup>

253. Section 165 of the STAA of 1982 must be read in light of NAFTA and the obligation of Article 31(1) of the *Vienna Convention* that the Treaty shall be interpreted in “good faith”. In this respect the position of the United States in this case is contradictory with that of the FHWA in relation to U.S. domestic steel fabricators. In its Counter-Memorial, at p. 33, the United States indicates that the measure in question found in s. 165(a) of the 1982 Act is “*clearly* not a grant or assistance”. Yet in the letter dated March 17<sup>th</sup>, 1994, submitted by the United States into evidence at Tab 9 of its Appendix of Evidentiary Materials, Mr. Rodney E. Slater of the FHWA explains to the President and Chief Executive Officer of the American Road and Transportation Builders Association (of the United States) that:

Article 1001 of the NAFTA, however, expressly exempts grants, loans, cooperative agreements, and other forms of federal financial assistance from its coverage. Thus unless future negotiations among the three nations create additional requirements, the NAFTA does not affect the Buy America requirements for federal-aid highway construction projects.

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<sup>74</sup> See: *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 2 L. Ed. 208 (1804).

<sup>75</sup> See *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (setting forth a two-part test for determining whether a court should defer to an agency’s interpretation of a statute); and *DeBatolo Corp. v. Florida Gulf Coast Bldg. And Constr. Trades Council*, 485 U.S. 568, 574-575, 99 L. Ed. 645, 108 S. Ct. 1392 (1988) (discussing application of *Chevron* test in concert with the *Charming Betsy* doctrine)

254. Before this Panel, however, caught by its own inconsistency in relation to its application of Articles 1108(7) and 1108(8), the United States now argues that the measure is a “measure relating to procurement”, which is “clearly not a grant”.<sup>76</sup> There is an obvious conflict between the measure and the obligations set out in Articles 1102 and 1106. The treatment afforded to the Investor in relation to the application of such provisions (in context with Chapter Ten and Article 1108) shows a lack of consistency in the United States’ position, which in turn demonstrates that the conduct of the United States is unfair, inequitable, and arbitrary. The United States is not interpreting the Treaty in “good faith”. How can the measure be labeled a “grant” by the FHWA for the purposes of Chapter Ten of NAFTA with respect to U.S. steel fabricators, but “clearly” not a “grant” by the United States before this Tribunal under Article 1108(8), which does not exempt “grants” with respect to performance requirements under Article 1106?

255. To distinguish (and disregard) the administrative and judicial precedents submitted by the Investor in its Memorial (at pp. 30-34), the United States also indicates that the statutory schemes under the 1933 and 1982 Act differ (which therefore presumably justifies the FHWA actions). The United States points out in this respect, and we quote: “The 1933 Act allows some foreign content by requiring that “substantially all” of the components incorporated into a manufactured construction material must be mined or produced in the United States. By contrast, the 1982 Act at issue here requires that all production of steel materials take place in the United States”.<sup>77</sup>

256. Section 165 of the STAA of 1982 says **nothing** of the sort. It says that “**steel, iron, and manufactured products used in such project are [to be] produced in the United States**” without using the term “all” and without specifying at all where does the production process begins or ends, even less whether or not it involves post-production fabrication. The fact that the United States was compelled to use [add] the term “all” in its Counter-Memorial to extend the reach of the 1982 Act, when the 1982 Act does not use that term,<sup>78</sup> is quite telling.

257. The United States argues that the use of the word “product” (in the 1982 measure) and its failure to suggest that a substantial percentage of production in the United States could suffice, the 1982 Act “places emphasis on the production of the *finished product* of the United States” (U.S. Memorial, at p. 45). But again, s. 165(a) of the STAA of 1982 does not telling use the term “*finished*” product and, in any event, that is not the test hitherto applied with respect to post-production fabrication involved in the manufacturing process.

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<sup>76</sup> U.S. Counter-Memorial at p. 33, emphasis is ours.

<sup>77</sup> U.S. Counter-Memorial, at p. 53, emphasis is ours.

<sup>78</sup> Further, section 165 of the STAA of 1982 no longer uses a percentage-based domestic content requirement as s. 165(b)(3) was repealed by Pub. L. 103 103-272, Sec. 4(r)(2), July 5, 1994, 108 Stat. 1371 so that, in light of the United States new obligations under NAFTA, the statute must *now* be read in conformity with such obligations, original Congressional intent notwithstanding (U.S. Counter-Memorial, p 17, note 51). The absence of a percentage bases requirement under s. 165(a) at issue here must therefore not be read *now* as meaning that post-production fabrication is included in the measure, as this would extend the reach of the statute so as to run against the obligations contained in NAFTA. By so doing, the FHWA is unfairly extending the reach of the provision.

258. In *Amoroso*,<sup>79</sup> the Court was of the view, based on *Wright*,<sup>80</sup> that a contractor “who cut, drilled, shaped and welded structural pieces from plates and beams had not manufactured the structural pieces because the fabrication process did not substantially change the metallurgical properties” (at p. 772, emphasis is ours). The rule is based on a change of “metallurgical properties”. The 1982 Act does not in any way change this rule hitherto applied. In the instant case, cutting, drilling, shaping and welding structural pieces from plates (in our case to take on the form “I” beams) does not change the metallurgical properties of the steel already produced in the form of plates (as recognised in *Amoroso*), may they have been “substantially” produced or even “all” produced in the United States [notwithstanding that the 1982 Act does not use the term “all”].

259. Also, fabrication cannot be considered a “component” for the purposes of domestic content calculation under the direct federal procurement statute, so that the United States cannot claim that even if similar treatment had been given under the 1933 Act, the Investor would not have benefited from it in any event as the cost of post production fabrication to make the “I” beams would have exceed the cost of the U.S. steel.<sup>81</sup>

260. The United States is thus now applying a new rule [being the one now imposed on ADF that is unsupported by the statute and the consequent *ultra vires* regulations made thereunder], a new standard, a double standard. The fact that the FHWA has “consistently applied its [new] regulations to require that all *manufacturing* [as opposed to “production” as specified in the statute] processes, including fabrication, take place in the United States”<sup>82</sup> only means that it has been consistently unfair, inequitable, arbitrary and has applied the provision in a discriminatory fashion. Further, the internal consistency of conduct of the FHWA cannot be used to defeat an arbitrary *or* discriminatory claim under the *U.S.-Estonia BIT*.

261. Within the context of a “free trade” agreement, the FHWA conduct is arbitrary and (or at least) discriminatory and is neither fair nor equitable nor, in the manner in which the measures are applied, does this afford full protection and security.<sup>83</sup>

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<sup>79</sup> See paragraphs 105 to 111 of the Investor’s Memorial.

<sup>80</sup> See paragraphs 102 to 104 of the Investor’s Memorial.

<sup>81</sup> Investor Memorial, p. 31, at paragraph 104.

<sup>82</sup> U.S. Counter-Memorial, at pp. 53-54, emphasis is ours.

<sup>83</sup> With respect to the issue of the amendment respecting coating, the Investor notes the following congressional intent (Appendix Volume I, *Legal Authorities, Cases, U.S. Legislation & Related Materials*, Tab. 14 – Congressional Record):

“Mr. Symms. Mr. President, I compliment the Senator from Oregon for bringing up this amendment. I think it is important that if our trading agreements with our best trading partners, like Canada, in this instance, are going to work and have lasting impact and we will really want to ultimately realize the kind of North American trade zone we would all like to have, we must do things like the Packwood amendment outlines so we can keep the playing field level.” (at p. 14809, second column).

262. By imposing new rules on to others that which the United States hitherto applied to itself, there entails a radical and arbitrary shift in the law that defeats its reasonable stability and predictability and the reasonable attempts to comply with it, which, in turn, defeats the reasons for there being “law” in the first place.

263. In short, the relevant statutory and regulatory provisions and administrative decisions and conduct that have been applied to the Investment in this case have become a means to deny it “fair” and “equitable” treatment with “full protection” and “security” in a manner that is arbitrary or at least discriminatory.

264. Finally, and again, from a structural viewpoint, after agreeing to exclude Buy America from federal procurement under Chapter 10 of NAFTA, the United States should not, indirectly, force states to apply those provisions. There is a difference between allowing states to pursue such policies on the one hand, and actively forcing them to do so on the other. That is particularly true when the project is federally funded and the federal government dictates the content of requirements. As a result, the United States is simply not fulfilling its NAFTA obligations in “good faith”.

## **9. CLAIMS RELATING TO CONTRACTS OTHER THAN SPRINGFIELD**

265. In the final section of its Counter Memorial, the United States claims that the Tribunal lacks jurisdiction over claims, other than those concerning the Springfield Interchange, alleging that c claims involving other projects under Buy America were "advanced for the first time in the Memorial””.

266. That is, quite simply, not the case. The Investor gave notice to the United States in its Notice of Arbitration of its intention to arbitrate in respect of additional breaches as they occurred. It stated that:

Continued application of the law, regulations and administrative policies and practices referred to herein will cause additional damage to ADF International, limiting its ability to fully participate in al future Federal-aid highway construction projects<sup>84</sup>.

267. Its Notice of Arbitration fully complies with all relevant provisions of the NAFTA and the Additional Facility Rules and the U.S. was given specific notice of ADF’s intention to claim damages in respect of all future contracts wherein the measures in question were applied, caused damage to ADF.

268. This Tribunal has jurisdiction has jurisdiction to hear those claims and assess damages in respect thereto.

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That such a beautiful plea for “free trade” and keeping the “playing field level” be used as justification for adopting a measure that clearly runs contrary to the first and squarely tilts the other in favor of the United States is a glaring example of the unfairness and arbitrariness of the measure.

<sup>84</sup> Investor’s Notice of Arbitration, at paragraph 76.

## **10. RESPONSE TO MEXICO'S ARTICLE 1128**

269. On January 18, 2002, pursuant to Article 1128 of the NAFTA, the government of Mexico filed submissions in the case. We would like to take the present opportunity to respond to those submissions.

### **GOVERNING LAW**

270. Mexico takes issue with the Investor's statements respecting the manner in which NAFTA is to be interpreted, specifically the Investor's suggestion that NAFTA "be read purposefully and in a large and liberal manner" and " 'read up' to the task of obtaining its stated objectives".

271. The Investor was doing no more than referring to Article 101(2) of NAFTA which obliges ("shall") the NAFTA parties to interpret and apply the provisions of the Treaty "in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law".

272. Article 31 of the Vienna Convention requires treaties to be interpreted *inter alia* "in accordance with the ordinary meaning of the terms of the Treaty in their context. The ordinary meaning of the terms of Article 102(2) is that any interpretation of NAFTA must be informed by the objectives that the Treaty seeks to attain. Those objectives include the elimination of barriers to trade in and the facilitation of the cross-border movement of goods and services between the territories of the Parties. The objectives also include the promotion of conditions of fair competition in the free trade area. To seek to interpret NAFTA without being enforced by and seeking to attain those laudable objectives would be to ignore the terms of the Treaty, in their context and the cardinal rule of treaty interpretation set out in Article 31 of the Vienna Convention.

### **GOVERNMENT PROCUREMENT MEASURES**

273. Mexico makes several comments in respect of the Investor's argument relating to government procurement which deserve comment. First, Mexico disagrees with the Investor "that the U.S. national law forbidding states from purchasing foreign-processed steel in certain circumstances, and the interpretation of that law by the U.S. national government, can somehow be characterised as unrelated to government procurement".

274. The issue cannot be stated so simply. On one level, the question is whether the exempting provision found in the exempting provision "procurement by a Party" can be interpreted expansively to cover "any and all measures relating to procurement" as claimed by the U.S. If the answer to that question is yes, whether the measures in question are "measures relating to procurement" within the meaning of that expression. The scope of the exemption is not expansive and specifically excludes the Buy America measure in question.

275. Mexico's statement that the United States' measures complained of by the claimant relates to the treatment of goods in a government procurement context, not investment, and is not, therefore within the scope of Chapter Eleven, falls far short of any reasoned debate on the issues and should be given little, if any, weight. Mexico's observations fail to address with any clarity the issue of the scope of the "procurement by a Party" exemption. They also fail in their entirety to address the issue of how a measure contained in a financial assistance program, which is "clearly not procurement" could, in itself, be procurement.

276. The Investor's complaint is not, as Mexico claims, "in reality a complaint about U.S. government procurement practices", it is, in reality, a complaint about U.S. protectionist measures contained in funding programs which are "clearly not procurement".

277. Finally, Mexico claims that "even if Chapter Eleven could be construed to prohibit measures that are authorized by other Chapters, there would be a resulting inconsistency that must be resolved in favour of the other Chapters". Mexico does not state how Chapter Ten can be considered to authorize the measure in question, particularly when Chapter Ten specifically states that such measures are outside of the purview of Chapter Ten.

278. There is nothing in Chapter Ten which authorizes the federal government to attach conditions to their funding programs that require grant recipients to discriminate as a condition of receiving government assistance. Thus, there is no inconsistency between the investor's claim under Chapter Eleven and any other provision of NAFTA.

## **INTERPRETATION OF ARTICLE 1105**

279. The Investor first notes that it has responded to the implication of the FTC Interpretative Note in an earlier section of this Response and directs the attention of the Tribunal to that discussion. There are, however, a few points worth reviewing.

280. Mexico states:

There clearly is not an established state practice of according national treatment to foreign products in government procurements; to the contrary, only a minority of the world's nations have ever entered into treaties imposing such national treatment obligations, and those nations have not agreed to accord national treatment unconditionally. Further, there is no customary international law on a rule of origin that must be applied in determining whether products are of foreign origin. Mexico also agrees with the United States that there is no rule of customary international law mandating the procedures by which regulations are adopted.

281. Mexico's first observation seems focussed on an assumption that the Investor is complaining about government procurement practices. The Investor is not complaining of the practices of the State of Virginia, its complaint lies with the conditions imposed by the Federal government on the receipt of financial assistance by sub-national entities. Without those conditions, the State of Virginia would not have applied the Buy America provisions and the investor would have been able to complete the contract as planned.

282. Second, the Investor is not relying on customary international law to develop rules of origins for products that must be applied in determining whether products are of foreign origin. Rather, the Investor points to the refusal of the relevant agencies in the United States to follow constant U.S. case law in this respect.

283. Finally, the Investor is not arguing that there is a customary international law mandating the procedures by which regulations are adopted. Rather the Investor is complaining that the procedures used by the United States to adopt the regulations in question violated the obligation contained in Article 1105 and the Albanian and Estonian BITs to provide the Investor with fair and equitable treatment, full protection and security and non-arbitrary and non-discriminatory rulemaking.

284. Finally, Mexico indicates that the Investor may be “inappropriately seeking that the Tribunal apply U.S. domestic law as a court of appeal”.

285. The Investor is not asking this Tribunal to sit in appeal of the application of U.S. domestic law. Rather, it is asking this Tribunal to determine whether in the application of domestic law the U.S. has violated its obligations under the Treaty.

## 10. CONCLUSION

286. On the basis of all of the foregoing, the Investor respectfully asks that this Tribunal :

- a) Find that in applying and enforcing the Buy America measures in question, the Party failed to accord to ADF Group treatment no less favourable than it accorded in like circumstance to its own investors with respect to the management, conduct and operation of its investments in violation of Article 1102(1);
- b) Find that in applying and enforcing the Buy America measures in question, the Party failed to accord to ADF International treatment no less favourable than it accorded in like circumstance to investments of its own investors with respect to the management, conduct operation and sale of its investments in violation of Article 1102(2);
- c) Find that in applying and enforcing the Buy America measures in question, the Party failed to accord to ADF International, treatment in accordance with international law, including fair and equitable treatment and full protection and security in violation of Article 1105(1);
- d) Find that in applying and enforcing the Buy America measures in question, the Party imposed performance requirements in connection with the expansion, management, conduct and operation of ADF International in violation of Article 1106(1)(b) and Article 1106(1)(c); and
- e) Find that in applying and enforcing the Buy America measures in question, the Party failed to provide:

- i. ADF International and the steel owned by ADF Group, treatment in accordance with international law, including fair and equitable treatment and full protection and security as required by Article 1105;
  - ii. ADF International and the steel owned by ADF Group, the treatment required by Article II(3) of the Bilateral Investment Treaty between the governments of the United States and Albania, in violation of Article 1103; and
  - iii. ADF International and the steel owned by ADF Group, the treatment required by Article II(3)(b) of the Bilateral Investment Treaty between the governments of the United States and Estonia in violation of Article 1103.
- f) Order that the parties now proceed to the second stage of the arbitration, being an assessment of damages, as per Item 13 of the Minutes of the First Session of the Tribunal held on February 3, 2001.

287. The whole with costs.

**Signed at Montreal, this 28<sup>th</sup> day of January, 2002.**

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