

IN THE MATTER OF:

**ADF GROUP INC.**

Claimants/Investors,

v.

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

Respondent/Party.

ICSID Case No. ARB(AF)/00/1

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**SUBMISSION OF THE  
GOVERNMENT OF CANADA  
PURSUANT TO NAFTA  
ARTICLE 1128**

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## **INTRODUCTION**

1. Canada makes this submission pursuant to NAFTA Article 1128. On January 3, 2002, Canada notified the Tribunal and the disputing parties that it intended to make submissions to the Tribunal on certain issues raised by the disputing parties in this arbitration.
2. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that it does not address certain issues, Canada's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.
3. Canada takes no position on any particular issues of fact or on how the interpretations it submits below apply to the facts of this case.

## **ARTICLE 1105 (NOTES OF INTERPRETATION)**

4. On July 31, 2001, the Free Trade Commission established under NAFTA Article 2001, issued a binding interpretation of NAFTA Article 1105(1). The Commission confirmed that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party". *FTC interpretation July 31, 2001*. It also noted that "the concepts of "fair and equitable treatment" and full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens". In addition the interpretation made clear that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1). This note of interpretation clarifies the standard to be applied by Chapter 11 tribunals in examining Article 1105 violations.
5. The Commission, which is established under NAFTA Article 2001, comprises cabinet-level representatives of each Party, specifically, the Ministers of the three Parties

responsible for international trade, including investment issues arising under Chapter Eleven. The Commission is the Parties to the NAFTA acting collectively under that treaty. It is the highest level policy-making organ and administrator for the Treaty as a whole. In acting through the Commission, the Parties act through a single body vested with decision-making power under the NAFTA.

6. The Commission is vested with the prime and final authority as the interpreter of the NAFTA. Article 1131(2) makes that clear: “[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section [i.e., Section B of Chapter Eleven].” Article 1131(2) forms part of the governing law that a tribunal established under Section B of Chapter Eleven, such as this one, is required to apply.
7. The Commission’s authority as the prime and final interpreter of the NAFTA reflects the NAFTA Parties’ long-term institutional interest in the proper functioning of the Treaty. An interpretation by the Commission is the full expression of what the NAFTA Parties intended, and its effect is clear: it is binding.
8. The role of the NAFTA Parties as disputing parties, capital exporters, recipients of investments of other Parties and as sovereign states with a clear interest in the proper operation of the NAFTA transcends the merits of specific cases. In acting in their plenary capacity as the Commission, the Parties act as the guardians of the Treaty. They have the legal right to clarify the meaning of the obligations that they agreed to undertake and have specified in the NAFTA a mechanism for doing so. This right was not only negotiated in the NAFTA; it was also approved by the legislatures of each Party when the NAFTA was ratified and implemented.
9. The appropriate legal standard under Article 1105 is that set out in the Commission’s Interpretation. In particular, the latter provides that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or

beyond that which is required by the customary international law minimum standard of treatment of aliens.” This is the standard that must be applied.

10. Any attempt to apply a different legal standard under Article 1105 must fail, as it would be contrary to the governing law of this proceeding as set out in Article 1131. The task of the Tribunal is to apply Article 1105 in accordance with the Commission’s Interpretation.
11. By its own terms, the Commission’s Interpretation consists of “interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions.” It states not what the provisions of the NAFTA are to mean in the future, but what they always have meant. It identifies the legal standard that the NAFTA Parties intended to apply when agreeing to certain provisions of the NAFTA. It is the legal standard that has been applicable under Article 1105 since the NAFTA entered into force on January 1, 1994.
12. As a treaty, the NAFTA is the creature of the States that are party to it. The Parties have assumed obligations vis-à-vis one another that protect investors and investments and have established the process that applies to this proceeding. In this instance, the Parties, acting as the Commission, have simply carried out a function that they expressly reserved for their Ministers acting collectively: to ensure the correct understanding of the governing law through issuance of authoritative interpretations.

All of which is respectfully submitted,



Sylvie Tabet  
Of Counsel for the Government of Canada  
January 18, 2002