IN THE ARBITRATION UNDER CHAPTER ELEVEN

OF THE NORTH AMERICAN FREE TRADE AGREEMENT

AND THE ICSID ARBITRATION

(ADDITIONAL FACILITY) RULES

BETWEEN

ADF GROUP INC.	:	
Claimant/Investor,	:	
v.	:	Case No. ARB(AF)/00/1
UNITED STATES OF AMERICA,	:	
Respondent/Party.	:	

Volume I

Monday, April 15, 2002

Conference Room MC13-121
The World Bank
1818 H Street, N.W.
Washington, D.C.

The hearing in the above-entitled matter was convened at 9:34 a.m. before:

JUDGE FLORENTINO P. FELICIANO, President

PROFESSOR ARMAND DE MESTRAL

MS. CAROLYN B. LAMM

UCHEORA ONWUAMAEGBU, Secretary of the Tribunal

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT FELICIANO: Good morning, ladies and gentlemen. On behalf of my colleagues and myself, I would like to welcome you to this oral hearing, and by you, I mean the disputing parties, and as well the representatives of the State parties to NAFTA who are not disputing parties, to this oral hearing.

Let me say that if either of the State parties to NAFTA not a party to the dispute wish to make an oral submission during this hearing, it would be welcome to do so. We understand that at present there is no intent or desire to do so. I only bring up this point to assure you that, should you decide otherwise, the Tribunal will provide an opportunity for that submission.

Should you decide to take advantage of this opportunity, that opportunity will be provided after the presentations in chief of the respective parties to the dispute so that both parties would be able to take into account any submissions that

the State parties might wish to make.

I should also add I believe you have been furnished by our very efficient Secretary a copy of the schedule that he has put together. Happily, he consulted with the members of the Tribunal in putting this together. I wanted to say that the Tribunal at this time does not really know how much time it would take for the raising of questions by the Tribunal to the parties to the dispute. Quite possibly a lot would depend upon the respective presentations of the parties to the dispute.

We are aware that both parties to the dispute are desirous of completing the oral hearing as soon as is reasonably practicable. For our part, I should like to assure you that our principal purpose is simply to make certain that we fully understand your respective positions and the bases of those positions.

In respect of the questioning that the Tribunal might undertake towards the end or after the formal presentations, including the rebuttal

presentations of the parties, please do not imply anything from either the questions or the tenor of the questions or the timing of the questions or the lack of questions from the Tribunal. No inference as to anything ought to be drawn from those considerations. None of us has made up our mind in respect of any of the issues presented by the respective parties to the dispute.

I should now suggest that the parties to the dispute introduce the various members of their respective delegations. Also at this time let me ask you whether there are any matters or questions that either or both of the parties to the dispute may wish to raise at this time.

If there are none, if there are no such matters or comments, I would invite the Claimant to make its presentation, requesting the Claimant to introduce the members of his delegation.

MR. KIRBY: Thank you, Mr. Chairman. Perhaps first before I even get started with my presentation, I'll introduce the members of our

group, and then if the U.S. wants to do the same, and then I will start with the presentation, or rather than skip the U.S. introduction, I think the U.S. should be given a chance to introduce themselves.

My name is Peter Kirby. I'm assisted this morning on my left by Mr. Rene Cadieux and on his left by Jean-Francois Herbert, all of the firm Fasken Martineau. We represent the investor in this case, ADF Group Inc., and its investments, including ADF International.

With us this morning and sitting behind me is Mr. Pierre Paschini, who is the President and Chief Operating Officer of ADF Group, and to his left, Mtre Caroline Vendette, who is general counsel for ADF Group.

Thank you, Mr. Chairman.

MR. CLODFELTER: Thank you, Mr. Chairman. My name is Mark Clodfelter, and I am assistant legal adviser in the Office of International Claims and Investment Disputes at the Office of the Legal

Adviser for the United States Department of State. It's a pleasure and an honor to appear before you again. I'd like to introduce the members of our team.

To my right is the chief of the NAFTA Arbitration Division of our office, Bart Legum. To his right are three attorneys from that office: Ms. Andrea Menaker, immediately to his right; Mr. David Pawlak, to Ms. Menaker's right; to Mr. Pawlak's right is Ms Jennifer Toole. We will also be assisted by Eva Dantzler and Erica Bomsey in our presentation, and during the course of the hearing, various other members of the Office of the Legal Adviser will attend to observe.

In addition, representatives from various U.S. Government agencies will also be present during parts or all of the hearing, and if you will, as they appear, we could have them introduced at that time.

Thank you, Mr. Chairman.

PRESIDENT FELICIANO: Thank you. We note

that representatives of Canada and of Mexico are present in the room. May I invite the chief representative of these State parties to NAFTA to introduce themselves and their colleagues in their respective delegations.

MR. ROMERO: Good morning. My name is Maximo Romero, counsel in the Office of the Legal Adviser for International Trade Negotiation and Investment Disputes from Mexico, and today with me are Mr. Salvador Behar from Mexico Embassy and Mr. Sanjay Mullick from Shaw Pittman, who is counsel for Mexico.

Thank you.

PRESIDENT FELICIANO: Canada?

MR. KIRBY: Mr. Chairman, if I might just note that the representative of--there is no representative for Canada here this morning. I understood there was going to be one, but I don't see that person in the room.

PRESIDENT FELICIANO: Fine. Well, should they show up later, I guess they will make

themselves known to the rest of us.

So, Mr. Kirby, may I invite you to commence your presentation?

MR. KIRBY: Thank you, Mr. Chairman. Good morning, members of the Tribunal.

Firstly, before I get started with the formal presentation, I would like to thank the members of the Tribunal, the staff at ICSID, for having assisted in conducting what really has been a fairly efficient process from start to finish. And in that also, I don't think I would be remiss in thanking the United States for their cooperation in making this process fairly efficient and getting us to this point with the least amount of disruption.

Today, in terms of our presentation, where we intend to go is that I will give a very brief introduction to the facts and the applicable law. I will begin my sort of substantive presentation by looking at Article 1108, which is a fairly central issue in this particular case. I will then review

Article 1106 and 1102. My friend, Rene Cadieux, will take us there Article 1105 and will also take us through the claim made by the United States that ADF is--that this Tribunal cannot look at any claims made by ADF other than the claim in respect of the Springfield Interchange Project. After Mr. Rene Cadieux's presentation, I will then summarize and conclude.

Before, again, starting the formal submissions, I would also just like to put on the record a comment in respect of the oral arguments. I see these oral arguments as an opportunity for us to make a final presentation in respect of our case to the members of the Tribunal. But that's based on the written pleadings. If we fail to address a particular issue in the written pleadings or ignore it at all, don't touch on it, that's not to be seen as an admission; that's not to be seen as a withdrawal of the complaint or an abandonment of the complaint. Our claim is in the written materials supported by this oral argument. We're

not abandoning any particular claim.

If I might say a few words about the investor in this particular case, ADF Group Inc. ADF's origins go back to 1956 when an Italian immigrant to Canada, Jean Paschini, opened a blacksmith shop, and sometimes from very small beginnings, great things happen. Over the years, sons and a daughter of Mr. Paschini came into the business, and the business grew from a small blacksmith shop to one of North America's leading fabricators of steel structures. ADF builds bridges, stadiums, buildings, skyscrapers.

Interestingly, in Washington, they've recently completed a building at the Smithsonian Institution and are currently working on the National Air and Space Museum. I believe that they also were involved with the Natural History Museum here in Washington.

ADF Group is known as an industry leader in North America, one of the top steel fabricators in the area. It has a subsidiary in Coral Gables,

Florida, called ADF International, a wholly owned subsidiary, which also does steel fabrication work but is somewhat smaller than ADF Group in Canada in terms of capacity and ability to perform certain kinds of work.

The genesis of this particular litigation goes back to the spring of 1999 when ADF International, the subsidiary, the investment in this particular case, ADF International signed a subcontract agreement with a general contractor called Shirley, who had in turn contracted with Virginia, the State of Virginia, to do a major piece of construction known as the Springfield Interchange. ADF International's contract was to build the structural steel part of the Springfield Interchange.

Soon after the contract was signed, the provisions that are being challenged in this arbitration, the Buy America provisions, came to the fore, and ADF International was told effectively that they could not use U.S.-origin

steel in the project if they brought that steel to Canada, fabricated it in Canada, and brought it back into the United States; that if any work was done on the steel outside of Canada, the steel would not qualify for the contract requirements that were under Buy America, that is that everything used in the contract, all steel had to be 100 percent U.S. origin.

Several meetings with officials of the Virginia Department of Transport and the U.S. Department of Transport, Federal Highway Division, occurred. They were unrelenting. The Buy America provisions were applied to exclude the possibility of fabricating any of the steel in Canada. Eventually, to complete the contract, what was done was all of the fabrication work--not all. Virtually all of the fabrication work was subcontracted to ADF's competitors in the United States, and it was performed by those competitors under somewhat trying conditions.

As you might imagine, when you have to--when your

competitors know that you are stuck to complete a contract, your bargaining position is not particularly great.

The measure in question is the Buy America provisions, which we have detailed in our Memorial. If you could turn to the investor's Memorial, members, at page 13, and subsequent. Section 165 of the Surface Transportation Administration Act of 1982, which reproduced at page 15--I'm sorry. I said page 13. I meant the section starts at 14, and then on page 15 we're reproduced the provision in question, and I will read just a short extract from that:

"Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated by this Act..." and then if you drop down, "...unless steel, iron, and manufactured products used in such projects are produced in the United States."

That provision found its way into a regulation, which is reproduced on page 18, and the

regulation 635.410, Buy America requirements, and paragraph (b) states that "No Federal-aid highway construction project is to be authorized for advertisement or otherwise authorized to proceed unless at least one of the following requirements is met," and then over the page, the project either doesn't include steel, or, and I quote, "if steel or iron materials are to be used, all manufacturing processes, including application of a coating, for these materials must occur in the United States."

It should be noted--and we will deal with this in a little more detail in terms of the background to this legislation when we deal with Article 1102. it should be noted that this particular provision is a significant tightening up--this legislation was made more restrictive in 1982 than it had been previously. I think it's no surprise, back in the 1980s North America was in recessionary times, and these kinds of protective measures come to the fore. Our complaint is that this measure put in place in 1982, still existing

in the year 2002, that's the measure that we're challenging in this particular litigation. And if there's one message that I need to get to the Tribunal, it's the difference between that measure and procurement by the state that's crucial in this litigation.

The measure in question does not--is not procurement. We'll get to the details of that argument, but I need to make certain that the Tribunal understands where we're going on this. Two things happen.

Under the Buy America provision, under the parent legislation, what happens is appropriation of funds. Funds are sent to state governments for the state governments to go off and procure highway construction. That's what happened in this particular case.

The Federal Highway basically appropriates money, gives it to the state for their highway construction projects. When they do that, they say to the state, and they said to Virginia in this

particular case: When you spend that money, discriminate; do not spend that money on anything other than U.S. products.

Virginia went out and spent the money and built the highway with it and did as it was told. Virginia discriminated. Virginia told ADF that it could not bring its steel to Canada and fabricate that steel.

We're not complaining about what Virginia did. We are complaining about the main actor behind Virginia's action. We are complaining about what the Federal Government did. There's a distinction. As my friends will tell you, procurement is not covered by Chapter 11. Our complaint is not with Virginia's procurement. Our complaint is with the reason why Virginia discriminated, and the reason why Virginia discriminated is because the Federal legislation told Virginia, If you do not discriminate, you will not receive the funds.

Our view of this--

PRESIDENT FELICIANO: Mr. Kirby, forgive me for interrupting, but--

MR. KIRBY: Absolutely.

PRESIDENT FELICIANO: --some question has popped in my mind. What was the total project cost of the Springfield Interchange Project? And what was the total amount of U.S. Federal funds that was supplied to the Virginia Department of Transportation for use in respect of that project?

MR. KIRBY: I'm not going to answer that off the top of my head. That's a factual question. Let me get back to you with the numbers.

There are numbers out there. I'm not certain if I'll be able to answer the state portion versus the Federal portion, but I could certainly answer the question of how much Federal money went to the state. My friends, I'm certain, will be able to answer the second question. I don't want to throw numbers around. We'll get back to you with that answer. But you raise an interesting point, Mr. Chairman. You spent some time

discussing questions this morning. We're going to be here for most of the day, and sometimes questions are absolutely essential to keep us all alert and, you know, on point. So, by all means, if something comes to mind, rather than hold it off until some later time, fire the question. I would enjoy having questions from the panel.

Our view of Buy America, the Buy America provision that we're challenging, is that it is by design, by architecture, by its intent, by its purpose, discriminatory. It is there to favor U.S. suppliers and U.S. supplies over non-U.S. suppliers and non-U.S. supplies. I don't think anybody will tell you any different. That is what the measure is intended to do, and that's exactly what it does.

We'll look at in a little more detail congressional intent. Congressional intent demonstrates that this is pure protectionism at its rawest form. it's not finessed. This is there to protect U.S. goods, U.S. suppliers, versus foreign goods and foreign suppliers. And, bottom line, in

its application it's a Federal measure.

Another interesting point, Mr. Chairman, is that Virginia, the State of Virginia, doesn't have its own Buy America provisions. In fact, Mr. Gee--and excuse me if I'm pronouncing his name incorrectly; I think it's Mr. Frank Gee, the engineer that was in charge of the project, in one of the letters he sent to Federal Highway asking for Federal Highway's input, he notes the fact that Virginia doesn't have its own Buy Virginia or Buy U.S. provisions.

The consequence of that is, without the Federal measure, there would have been no discrimination. Had Virginia been free to do whatever it wanted with the funds, to spend the funds in the most efficient way it thought it could do so, it would not have discriminated against ADF. It would have simply bought the product from the best supplier at the best price. Because of the Federal measure, it didn't do that. It said we don't--basically we cannot take into account how

you might want to supply us the goods. We need to have these goods fabricated in the United States.

So there is a very distinct difference between what the Federal Government is doing and what the state government is doing.

In fact, also I could refer you to the affidavit of Pierre Labelle which has been filed. During a meeting with VDOT--and VDOT, I'll slip into the shorthand. VDOT is the Virginia Department of Transport. Sometimes people refer to USDOT as the U.D. Department of Transport. But there was a meeting between the Federal Highway officials and VDOT officials and representatives of ADF. And during those meetings, it was made abundantly clear--and Mr. Labelle's affidavit points this out. It was made abundantly clear that the driving force behind the discriminatory provisions in the contract was the Federal Highway Administration. They decided how the contract clause would read. They approved it. And if they did not approve the contract clause, no money would

be released.

In essence, the funding was conditional. It was conditional upon a obligation to discriminate. If you did not discriminate, you would not get the funding.

And my friends throughout the pleading, their pleadings, my friends from the United States, their approach to this is to try to blur the line between what the Federal Government was doing and what the state government was doing. Why? Because it's much easier than to find some excuse for finding that the Federal action was really a procurement. And if it was a procurement, it's not covered by Chapter Eleven. I'll have more to say about how effectively they have managed to merge the two. I would say not very effectively at all, and I'd say that the two remain clearly distinct actions. We have the Federal action at one end, the state action at another. One might want to think of it as the actor, the Federal Government, creating a result through a third party, the state

government.

Who's responsible? Especially when the state government will not discriminate on its own, it doesn't have its own Buy America provisions. Who is responsible in that circumstances? The Federal Government because it's the Federal Government that's ordering the intermediary if you are--if Virginia is going to receive Federal funds, they must do certain things. That's the action that we're complaining about, not the fact that Virginia did, in fact, comply with those conditions.

And I think, before we get into looking at Article 1108, we'd like to just talk briefly about NAFTA, and I realize that members of the panel probably know more about NAFTA than I do. I will throw it out, in any event, and give my view of what NAFTA is all about.

Firstly, it's a comprehensive agreement on trade, and goods, and services, and investment. Traditionally, we've seen investment protection

measures in separate stand-alone statutes, as bilateral investment treaties, Treaties of Friendship and Investment I think they're called. NAFTA takes investment protection and plugs it into the middle of what looks like a traditional Free Trade Agreement, not without reason, because it's simply a recognition of the sort of multi-faceted nature of international trade these days.

One can't compartmentalize trade and say that if you are looking for a trade agreement that is going to take you significantly further into the future, in terms of liberalizing the conditions of trade in the area, you can't simply deal with trade in goods any more. Trade in goods, we've already made such significant advances that the incremental advances are perhaps less.

We can lower tariffs, we can talk about certifying origin, et cetera, but that's not what the NAFTA negotiators wanted to do. They wanted something more. They wanted to create the environment which would build the North American

economy through all of the factors that will influence greater trade--thus, the investment protection provisions.

NAFTA contains provisions on intellectual property. Why? Because intellectual property acts by states will affect trade flows. So you'll want to have discipline on that because that has an impact on your goal, what you're trying to achieve.

Let me just read to the Tribunal, in terms of what were the parties trying to achieve in NAFTA, and the panel doesn't need to refer to the section itself. It'll be just a short--the objectives of NAFTA are set out in Article 102. "Eliminate barriers to trading and facilitate the cross-border movement of goods and services between the territories, promote conditions of fair competition in the free trade area. Increase substantially investment opportunities in the territories of the parties."

In the preamble to NAFTA, "Create an expanded and secure market for the goods and

services produced in the territories. Reduce distortions to trade," and so on.

It's a very ambitious agreement, and this panel will be called upon to give effect, if I may say so, give effect to that ambition. The U.S. position would have precisely the opposite effect, wouldn't give effect to the ambitions of the drafter of NAFTA, it would give effect to I was going to say the political ambitions of Congressmen that sought a quick fix for unemployment in the steel industry, and we can see how effective that was because the U.S. has now had to resort to safeguard measures. That's the kind of measure that we're talking about. It would give effect to protectionism at its most blatant.

We believe that the federal measure violate Article 1102, National Treatment; Article 1106, which prohibits the imposition or the enforcement of listed performance requirements; and Article 1105, which sets a standard for treatment of investors, and we believe that as a result of

those violations that ADF group is entitled to claim damages for the losses that it suffered.

I'll now turn to Article 1108 because it's such a critical article for this particular arbitration, and I have prepared an extract so that we don't need to jump around from page-to-page in the NAFTA because, at times, it resembles a spider's web. If you've spent as much time as I have reading these provisions, they begin to become crystal clear, but as I tried to explain them, I realized that, wait a second, not everybody has spent weeks reading these things, so I will try and make it as painless as possible. But once again, if there is anything that is not clear, please ask.

Before we even get into them, let me just give conceptually what we're doing. I said before we're talking about two different things in this litigation. The U.S. is talking procurement, and we're talking government assistance. We're talking financial assistance. Why have we reached those positions? Because within the procurement

agreement, there is an exception, and we will get to it. There is an exception for, rather, within Chapter Eleven, many provisions of Chapter Eleven do not apply to procurement by a party.

In Chapter Ten, which covers procurement, there is an exception governing any form of government assistance, including grants. The question then is, well, this federal measure is it any form of government assistance or is it procurement?

I should also say, Mr. Chairman and members of the Tribunal, that while we're starting off with this particular provision, it's an exception. This is the provision that the U.S. needs to demonstrate clearly applies to the situation. If the U.S. fails that burden, if the U.S. cannot demonstrate that its actions under this Buy America provision are saved by the exceptions, the U.S. must lose. Why do I say that? I say that because, in respect of Article 1106, at least, the U.S. has admitted that Buy America measures are

nonconforming measures. That is not to say that if the U.S. demonstrates that the exception applies, that they win; if they fail to demonstrate it, they lose; if they do demonstrate it, they continue arguing.

They don't win because there are other provisions which are not protected by the exception, which we have invoked, but you can obviously see the importance of this measure, this provision. So let's look at them.

The first page is an extract from Chapter Ten of NAFTA. Chapter Ten of NAFTA governs government procurement. That provision, Article 1101, deals with the scope and coverage of Chapter Ten. It says, clearly, "The chapter applies to measures adopted or maintained by a party relating to procurement."

1001(5), however, states, "Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include any form of government

assistance, including grants, loans, fiscal incentives, government provision of goods and services to persons or state governments."

"Procurement does not include any form of government assistance to state governments."

Now my friends would take you to Article 1108, which is the page marked 4. Article 1108 states that certain articles, including the article that covers the national treatment obligation, Article 1108(a) says, "Article 1102," which is national treatment, "does not apply to any existing nonconforming measure that is maintained by a party at the federal level, as set out in its schedule to Annex I."

What has the U.S. place in its schedule to Annex I? It's reproduced down below. Annex I, and this is an admittedly nonconforming measure. In Annex I, they place a piece of legislation called the Clean Water Act, which is a very similar provision to the provision under question. It is federal funding project, which provides funds for

water works, municipal sewage works and water treatment centers.

The exemption reads, "The Clean Water Act authorizes grants for the construction of treatment plants for municipal sewage or industrial waste." It says, "Grant recipients may be privately owned." And then here is the Buy America provision. "The act provides that grants shall be made for treatment works only if such articles, materials, and supplies have been manufactured, mined or produced in the United States will be used in the treatment works." That is a summary of the Buy America provision.

And the U.S., in its Annex I, admits that this is a nonconforming measure that requires exemption, and why is it nonconforming? It's nonconforming because it's a performance requirement under Article 1106. That's what the provision states.

Now the exceptions that the U.S. argues saves the entire provision are set out on the next

page. This is, again, Article 1108. Article 1108(7) states that Article 1102, the national treatment provision, does not apply to procurement by a party. It also says that Article 1102 doesn't apply to subsidies or grants provided by a party. And my reading of the U.S. arguments, and they will, I'm certain, correct me if I'm wrong, the U.S. is not claiming this exemption in respect of the alleged violation of 1102. The exemption that the U.S. is claiming is based on procurement by a party.

Article 1108(8) exempts certain performance requirements found in 1106. It says that they do not apply to procurement by a party. That is why I said, members, that crucial to this case is the meaning of procurement by a party.

The U.S. claims that the measure is saved by that provision. We claim that the federal measures in question are not procurement by definition and it cannot be saved by the procurement exemption. Why not? We now take a

look at the meaning of procurement by a party.

Vienna Convention on the Law of Treaties tells us how we can set about interpreting a treaty and its terms. If the members would like to turn to, this is found, the Memorial of the Investor, I'm sorry, the materials filed in respect of the Memorial, materials and cases, Volume II-A.2. Materials and Cases, Volume II-A.2, relating to the Memorial of the Investor. In that package of documents, it's found at Tab 16.

And in Tab 16, if we could turn to Article 31, Article 31 is the provision accepted by the United States as an authoritative statement as to how one sets about interpreting a treaty. Treaties should be interpreted in good faith, in accordance with the ordinary meaning to be given to the term of the treaty in their context and in light of its object and purpose.

The next two articles add to context; what kinds of things can be and should be included in a contextual analysis, and then the final argument

states that a special meaning shall be given to a term if it's established that the parties so intended.

Then Article 32 talks about supplementary means of interpretation, which can be used when an interpretation under 31 leaves the meaning ambiguous or obscure or interpretation of 31 leads to a conclusion, a result that is manifestly absurd or unreasonable.

I intend to, in my analysis of procurements of a party, follow those provisions, and then relate how the U.S. deals with those issues and how we deal with those issues. There are five elements: good faith, ordinary meaning of the terms, ordinary meaning of the terms in context, in light of the objects on purpose of the treaty, special meaning of the parties. Plus, we are also told, in Article 102(2) of the NAFTA, how to interpret NAFTA. 102(2) says, "Clearly and unambiguously, the parties shall interpret and apply the provisions of this agreement, NAFTA, in

the light of its objectives set out in paragraph 1 and in accordance with the applicable rules of international law."

The parties wanted to be certain that we get a purposeful analysis of NAFTA, one that will move the parties towards achieving what NAFTA intended to achieve, rather than one that puts barriers in front of the North American Trade Area that was sought to be achieved.

First element, good faith. Article 26 of the Vienna Convention on Treaties states that "every treaty enforces binding upon the parties to it and must be performed by them in good faith." So not only must the treaty, according to Article 31, be interpreted in good faith, it must be performed in good faith.

The U.S. has said nothing in terms of either issue, in terms of good faith interpretation. However, I would submit that the positions put forward by the United States raise some issues that need addressing.

Firstly, the argument of the United States amounts to the following: A Federal measure imposing on a state an obligation to discriminate is permissible in a Free Trade Agreement, even if the Federal Government has agreed not to do so itself.

Under Chapter Ten, and my friends will agree with me, at the Federal level, the Federal Government cannot or agreed not to impose Buy America restrictions on Federal procurement. If the Federal Government were to procure, Buy America would not be applicable.

The state government does not have its own discrimination provisions. So the state is now saying, yes, we have agreed at a Federal level we will not do this. We will not discriminate in respect of our Mexican and Canadian trading partners. However, when we use our not insignificant financial clout to fund subnational governments, we think we have the right to tell those subnational governments to discriminate,

otherwise they will not get the funding--one issue.

Second, the United States is seeking to protect in a clearly protectionist provision by relying on an exemption that refers to procurement. What is perfectly clear, I would suggest, is that that measure is not subject to Chapter Ten, and therefore will never be subject to the disciplines of Chapter Ten, including within Chapter Ten there is an obligation for covered entities, and not all entities are covered, but for covered entities not to discriminate.

So why is it not covered by Chapter Ten? It's not covered by Chapter Ten because Chapter Ten procurement doesn't cover any form of financial assistance. So now it takes a while for the thing to sink in, but it would appear that we're saying we should get the advantage of the exclusion, even though we've agreed not to do this in our own procurements, and there is an exclusion there, even though Chapter Ten will never reach the measure in question, therefore it's not subject to Chapter Ten

discipline either, even though the apparently only entities that could use the exclusion, which are state governments, are not subject to any obligations whatsoever under the treaty.

The final issue in this area relates to the fact that the U.S. is now claiming that this measure, that the measure that we're challenging is not a grant, but rather is procurement, and yet they have consistently referred to it as a grant.

If I could just bring the same binder that contained the Vienna Convention, Tab 20 of that binder, which is "Materials and Cases of the Investor," Volume II-A.2 at Tab 20. This is a document called "Quick Facts About Buy America Requirements for Federal Aid Highway Construction," and it's published by the U.S. Department of Transport Federal Highway Administration.

This is what the Federal Highway Administration, the people that give out the money and the people that impose the obligation on Virginia, this is what they think about their

measure. Paragraph 8 states, "NAFTA does not apply." We disagree, but why do they think it doesn't apply? There is a specific exemption within NAFTA, Article 1001, for grant programs, such as the Federal Aid Highway Program.

So Federal Highway didn't think it's procurement, they think it's a grant, and a grant program.

In a document filed by the U.S. entitled, "The Appendix of Evidentiary Materials," there is a letter at Tab 9, once again, U.S. Department of Transport, Federal Highway, shortly after NAFTA comes into force, there's a letter from Rodney Slater, an administrator of the Federal Highway. The last paragraph of that letter, and I will read it, and he's talking about precisely the program that is at issue in this case. He states, and I quote, "As stated in the section above, Article 1001 of the NAFTA, is the treaty provision that mandates that the Federal Government acquire certain goods and services without regard to the

Buy America Act." What he is referring there to is the scope of the procurement obligations.

"Article 1001 of the NAFTA, however, expressly exempts grants, loans, cooperative agreements and other forms of Federal financial assistance from its coverage." Then he says, "Therefore, NAFTA doesn't apply."

He's talking about if we spend the money in a procurement, we are obliged, that's what he says, we're obliged to apply NAFTA, but we're not spending money in a procurement here. This is a grant program. It is not covered by Chapter Ten.

Despite the fact that agencies have consistently conducted themselves on the basis that this program is not a procurement program, it is a grant program, despite that fact, the U.S. is now arguing it's procurement, not a grant.

MS. LAMM: May I ask a question?

MR. KIRBY: Surely.

MS. LAMM: Why is it that a grant can't be a procurement?

MR. KIRBY: We'll get there any number of ways.

MS. LAMM: Okay.

MR. KIRBY: Let's think of the ordinary meaning of the word "procurement." "Procurement" means to purchase. A grant means to give. With a procurement you've got a contract to buy and to sell, you've got the acquisition of ownership. Remember the definition, procurement means procurement by any means including options to buy, purchases, et cetera, et cetera. A grant is not procurement.

Good example. My daughter, I'm proud to announce, recently won a book scholarship. She gets funds to go and buy books from the university. The university isn't buying books. The university is granting funds. Now, it's attaching conditions, but the university isn't engaged in procurement. My daughter, when she buys the books, will be purchasing books. She is engaged in procurement. I think that the notion--and I talked earlier about

this--the notion of trying to merge the two ignores the reality, especially in a federal system, of multi levels of government acting sometimes to achieve one particular end, but that doesn't mean that you characterize the state action that in turn has to characterize the national government action. They can be completely different. And the NAFTA is telling us that they're completely different because they've already pulled out of the grant program--of procurement. They said procurement isn't grants. Just in case somebody might argue that the grant program is procurement, they've said no it's not. We're going to make a distinction between any form of financial assistance and procurement. So why can't a grant program be procurement?

Chapter Ten tells us specifically procurement does not include any form of financial assistance. So you'd need to ignore that. The ordinary meaning of procurement tells us procurement is the purchasing of something, the

acquisition of something. And I recall there was the Sonar Mapping case. That was one of the issues, who is actually procuring here? I might go out and say to an agent, "Go out and buy me XYZ." And that's my agent working. If that was what the federal government were doing, we would be able to get the discipline of Chapter Ten applied to the federal government's act because the federal government can't avoid its obligations by simply sifting it through an agent. If the federal government has procurement obligations, we can reach those even if it uses an agent. It's not using an agent here. Virginia is not acting as the federal government's agent. Virginia is procuring. The federal government is funding.

MS. LAMM: But isn't it that grants are just a different means of financing a procurement of an entity? The same kinds of procurement regulations would apply with respect to those acquisitions, et cetera. It's just not a direct appropriation. It's more indirect.

MR. KIRBY: One of the things that one has to look at in a procurement is what is the situation at the end of the transaction? Who owns it? Is there a change in ownership? If there isn't, there isn't procurement. Has the federal government leased something? Has it acquired something? The federal government doesn't acquire anything. The state government does. Now, is it close to procurement? As soon as you start getting into that realm of saying, well, let's finesse the notion of procurement till somehow we can expand that notion to capture the federal act. If you do that, you run smack into the definition of procurement which says it doesn't cover any form of government. It's just you have to give some meaning to that.

So the similarities, I would say that that's the nature of the beast, because the book scholarship--my daughter is given money in the book scholarship and told to buy books. Now, she can't buy records. She might want to, but she can't buy

records, and she does go out and buy books. There's a matching. There's a--what you have bought is what you were told to buy. The actor is not buying. The intermediary is buying, but the actor wants to know that books are bought as the federal government wants to know that U.S. goods are purchased, but it's not the actor that's actually purchasing, but that would explain why you've got these very clear sort of similarities between both ends. It's only those similarities are there, not because it's procurement, but because the federal government wants to impose the conditions, so the federal government imposes the conditions in this transaction, and lo and behold, those conditions materialize in the procurement. It's not the procurement that drives the materialization, drives the fact that those specifications arrive in the procurement contract. The procurement contract isn't the driving force. What drives it is the conditions set by the U.S. Government.

I want to build a road. Clearly, it's something that has to be specified, and there's a book. I'm sure some of these gentlemen have it, specs from Virginia on how to build a road. I was amazed at how big the specs are and how detailed they are, those clearly procurement specs. Does it have anything to do with road building, that you have to do it, you have to buy U.S. steel? Not really. I mean you want to buy good quality steel. You might want to buy reliable steel, but the fact that you want to buy U.S. Steel, yes, it's a specification now in the procurement. The reason is there though, has all to do with the Federal Government action, not the state action. The state in fact doesn't discriminate of its own. If the state had enough money to do this itself, it wouldn't have discriminated.

So that's the debate. Can we somehow expand the definition of procurement back into the problem with the exclusion for any kind of financial assistance, somehow deal with that issue,

and what the U.S. has been trying to do is to deal with that issue because it's not easy. You know, how do you reconcile these two provisions? Well, one way is you can expand the definition, try to expand the definition of procurement. The other is you can blur the distinction between the two acts and say that while the act of the Federal Government and the act of the Virginia Government are the same thing, and they're all procurement. There are difficulties, I would suggest, with each and every approach taken by the United States. Why? Because those difficulties require the United States to walk with very heavy boots over a very clear exception. Strip that exception of any meaning only to get the benefit of an exception itself. Why do they need the benefit of the exception? Because they want to do something that they've agreed not to do in their own procurement, I would say.

Mr. Chairman?

PRESIDENT FELICIANO: Yes, yes, Mr. Kirby,

this is a very interesting point, but I would be very grateful if you could clarify a few of the things now buzzing in our respective heads over here.

MR. KIRBY: Surely. I warned you earlier, Mr. Chairman.

PRESIDENT FELICIANO: Yes. If I understand you correctly, the principal distinction relates to who acquires title, you know, in quotes to the project? Is that what you're sending? The procurement agency or the procurer, if there's such a word applied to this particular context, acquires title to the project, because a lot of purchase and sale takes place and title moves from the vendor to the vendee. This is a great big point as far as civil law is concerned, but in this particular case, is it effectively--if--and that was one of the reasons why I asked whether you could inform us about the relative ratio between state versus federal funds involved here. Would it make a difference if the Federal Government supplied, you

know, a little fraction of the total project cost? Or on the other hand, if the Federal Government supplied the great bulk of the funds, and still nevertheless allowed the title to the project remain in the state government that actually carries out the drafting of the detailed engineering specifications and so on and so on. I don't know whether the U.S. Government actually engages in these kind of things, you know, drafting of detailed specifications and owning large infrastructure projects itself as distinguished from state governments. And from where I sit, I'm not sure I know what the difference would be anyway as far as the uses are concerned.

MR. KIRBY: Let me try and--

PRESIDENT FELICIANO: And is there such a thing as joint procurement? If the funds come approximately half and half, and supposing the project couldn't be carried out unless the U.S. Federal Government were to step in and give funds, does that make a difference in this thing?

MR. KIRBY: Let me try and--

PRESIDENT FELICIANO: There are a lot of things going on--

MR. KIRBY: No, no, and this is critical stuff, and some--

PRESIDENT FELICIANO: What was the reason for this express reference to--what is that again? In the 1005(1)(a), could you--

MR. KIRBY: My reference to it?

PRESIDENT FELICIANO: Yes. Could you please explain to us what was the--in terms of the parties--in terms of the parties in saying procurement does not include any form of government assistance, grants, loans and so forth.

MR. KIRBY: Okay. Chapter Ten imposes procurement obligations on covered entities. Generally speaking, most of the Federal Government agencies--

PRESIDENT FELICIANO: Could you say that first sentence again, please?

MR. KIRBY: Surely. Chapter Ten imposes

obligations on the--on covered entities. In other words, the parties have negotiated on an entity-by-entity basis as to the scope of Chapter Ten. And it covers Federal Government agencies and it covers some federal enterprises. For example, I believe that the U.S. Postal Service's is covered. But to determine what's the coverage, you look at the annexes and it talks about what's covered and which entities are covered. The states--sub-national governments are not covered. There are no sub-national governments which have assumed procurement obligations under Chapter Ten.

So the parties sit down and say, "Okay, what are we going to put within Chapter Ten?" They decide, "We're going to put within Chapter Ten procurement by the covered entities." To avoid any discussion, perhaps, of the fact that, well, wait a second, but we, Federal Government, we give money to states, and when they purchase with our money, is that covered? We give grant programs to them. Is that within Chapter Ten? Because the agency

that's going to have the obligations is a non-covered entity. To avoid the debate as to what happens when we give money to a sub-national government, as opposed to buy goods or services. What happens then?

Well, let's write an exemption. Let's say this provision, this procurement, rather, within Chapter Ten, procurement does not apply to any form of government assistance that deals with the problem. All of a sudden the grant programs, as the Federal Highway recognized--and this is the position that they've taken consistently--the grant program is not covered by Chapter Ten because it's not procurement.

Now, some of your earlier questions raised some very, very interesting issues. How do we decide what's--you know, when you have different levels of government involved in what eventually becomes a procurement, and the--I wish I could say it was the seminal case. The problems is we have so few cases on procurement, that it's very hard to

cite the law. Almost any decision that's written today, in terms of the international law of procurement, is going to have an impact on that debate? And I think what we're dealing with here is a very, very important question in that area.

What I recall of the unadopted panel report in Sonar Mapping is that the panel looked at a range of different issues to determine whether--and I don't believe that the decision is before the court, but we could file with the court if the panel wishes. There the issues was the U.S. Government had--and it's a while since I read it, but the U.S. Government had arranged to get a map of the seabed. And in getting that map drawn, had specified what happens to the bolt and the machinery that go along with the mapping. There was a goods requirement that was a component of the entire contract. And I think after the procurement, the goods requirement, the goods, title of the goods went back to the U.S., although I'm not going to swear to that. I believe that

that was the case.

The issue there was whether or not this was a procurement of the U.S. The U.S. said, "Well, it's not a covered procurement, because it's a services contract," and the issue was--the European I believe were complaining, were saying, "Well, no, this goods portion of it is a good contract which is covered." And, you know, the issue of, you know, is it a U.S. procurement covered by the agreement or not? They looked at transfer of title. They looked at specifications for the goods, for example. You know if you--if you say that you want to have a particular good, who has control, who has various different issues?

Some of those issues you could turn to this case and say, "This looks like a federal procurement." The problem is though, if it was a federal procurement, it's covered by Chapter Ten and would have to be conducting in accordance with the rules of Chapter Ten.

If you suggest that somehow,

notwithstanding the exception, what the Federal Government is doing is essentially procurement. Given the fact that the state agencies now have no obligations, you're opening the door to the possibility that all of a sudden that money flows down, everything has to be--you know, you impose this obligation to discriminate, not in a limited way now in Buy America, in the occasional Buy America statute, wholesale, whenever the government spends money. Whenever the government spends money, whenever the government gives financial assistance to anybody, they impose these obligations throughout. Is that what the parties intended? I doubt it. I think what the parties intended is to say, "We are going to erect discipline in respect of these obligations which the parties have agreed to."

Where there is no requirement of discipline, Chapter Ten doesn't apply, and the state governments can do whatever they wish to do in state procurement. However, where there is no

discipline in Chapter Ten, we're going to take out from Chapter Ten financial assistance. We're going to take out government assistance. That's no longer going to be within the realm of Chapter Ten. Does that mean that it's completely free of each and every obligation under NAFTA? No. It just means that it's completely free of obligations under Chapter Ten. It now becomes subject to the general regime of NAFTA. That's what we're saying. We're not saying that somehow the obligations have disappeared. What we're saying is: the parties must have intended to do something by excluding any form of government assistance. And it's always almost a crystal ball activity to really determine what the parties were doing, and I think the proper approach is to say, "We're not certain what the parties thought they were doing. We know what they agree to. We know what the language says, and the language says that any form of financial assistance, any form of government assistance is not procurement." And that then mirrors with the

exceptions which relate to procurement.

I see that--that was a lot of information to absorb. I see that we're reaching 11 o'clock, and we had a note for a break at 11 o'clock. Would this be an appropriate time to take a break, Mr. Chairman?

PRESIDENT FELICIANO: I have no objection to having the coffee break now. I'm sure you can use it, and so can the rest of us.

MR. KIRBY: Absolutely. Thank you very much, Mr. Chairman.

[Recess.]

PRESIDENT FELICIANO: May we resume now?

Before I ask Mr. Kirby to resume, we met the representative of the Government of Canada during the coffee break. May I request the young lady to please identify herself for the record?

MS. TABET: I'm Sylvie Tabet. I'm with the Government of Canada, and I am here alone today, but I will be attending the hearing. Thank you.

PRESIDENT FELICIANO: Thank you very much.
[Inaudible comment off microphone.]
MS. LAMM: I just wanted to follow up to make sure I understood and had down correctly your contention on one point. And my understanding is that under 1001(5), because grants are excluded from Chapter Ten, they are basically included or subject to the disciplines of Chapter Eleven or any other chapter of the NAFTA. And that includes state--grants to states that are explicitly excluded.
MR. KIRBY: Ms. Lamm--
MS. LAMM: I may have it confused. I just want to make sure I've--
MR. KIRBY: And I intended to reach that point again just in terms of a summary, because I think we covered a lot of material in the last 20 minutes. And I just wanted to make sure that the Tribunal had a good understanding of where we were going.
1001(5) excludes not just grants but any

form--very large wording, any form of government assistance, including grants to states.

MS. LAMM: Correct.

MR. KIRBY: Excluded from Chapter Ten. It's gone.

What does that imply? Does that imply that somehow it is not subject to NAFTA discipline? Our position is absolutely not. Grants, as with any other measure by any government, is subject to NAFTA discipline.

Now, one has to, when applying a particular provision, ask: Does this provision apply to this particular measure? Because NAFTA is full of additional exemptions. But certainly it doesn't fall off the map, so to speak. It remains clearly on the map.

Let me give you a very good example of how it remains still on the map, still subject to NAFTA discipline.

If one turns--in fact, over the page at that handout I gave you this morning on the NAFTA

provisions, the last page is the extract from Article 1108(7), and 1108--now, this is a provision found in Chapter Eleven, and the question being, we've excluded grants from Chapter Ten, what happens to those grants when they are released from Chapter Ten obligations? Do they have--are they subject to additional obligations in the rest of NAFTA? And, unequivocally, the answer is yes. Why? Because 1108(7) provides for exemptions from Chapter Eleven and states that, for example, Article 1102 does not apply to procurement by a party, also doesn't apply to subsidies or grants provided by a party.

So that's clear indication in the language of NAFTA that the grants that are excluded by Chapter Ten nevertheless are subject to discipline under Chapter Eleven. Interestingly, the grants are excluded from discipline under national treatment. In other words, what this provision is saying, we've already decided that grants are not in Chapter Ten. They've now moved into Chapter

Eleven. Theoretically--not theoretically. By application of NAFTA, they are automatically subject to any and all obligations of NAFTA.

The parties decided, well, wait a second, when we give away money, we want to discriminate. We might want to give money to only U.S. companies. Or we might--I'm sorry. I thought you had a question, Mr. Chairman.

PRESIDENT FELICIANO: Yes, Mr. Kirby. You'll forgive my interrupting you.

MR. KIRBY: Not at all. Carry on.

PRESIDENT FELICIANO: My mind is very leaky, and I want to ask this point before it eludes me.

MR. KIRBY: I think you are being too humble, Mr. Chairman.

PRESIDENT FELICIANO: You said that grants are subject to Chapter Eleven.

MR. KIRBY: That's correct.

PRESIDENT FELICIANO: I assume you're saying that because 1108, para (7) identifies

particular articles of Chapter Eleven which do not apply to this, you are al contrario concluding that all the other provisions of Chapter Eleven do apply.

MR. KIRBY: That's one way of looking at it. But it's not because--the argument is--a contrario, yes. The argument first, matter of principle, exclude grants from Chapter Ten specifically because they're not procurement. Matter of principle, are they excluded from NAFTA? No, not at all. They're included. Article 1108(7) simply confirms that fact by saying, okay, the parties realize that. The parties, however, had a policy objective that they needed to get an exclusion on national treatment for grants. They knew grants were covered. Therefore, they took the exception.

Simply stated, the argument is if the parties needed an exemption from a provision, it's because the type of measure that was being exempted would otherwise have been subject to the measure.

Otherwise, you don't need an exemption. So this is confirmation of what we're saying. It's confirmation that it's true. The grants that are excluded from Chapter Eleven become subject to the other provisions of NAFTA in general, subject to Chapter Eleven in particular.

An interesting point to note from that is that the parties did take an exemption for Article 1102, but the parties did not take an exemption for grants from 1106, the prohibited performance requirements. 1106 applies--there are exemptions taken only for procurement, but not for grants.

The other clarification, because I didn't respond fully to the Chairman's question, the Chairman's omnibus question on various scenarios, joint procurements, what happens with joint procurements. What happens if the Federal Government gives some of the money but not all of the money for the acquisition by the state? What if it gives the majority of the money? What if it gives only a small portion of the money?

These, I suggest, are precisely the kinds of issues that the parties were grappling with when they negotiated NAFTA, because there's nothing in Chapter Ten that tells you how do you determine whether it's a joint or a non-joint. It simply says if this is a procurement by a covered entity, it's covered. If it's not, it's not.

By excluding grants, government assistance from Chapter Ten, you've now dealt with that issue. So any grant is not procurement; therefore, we don't need to deal with it.

The state governments--if you did have, for example, a joint procurement, a grant from the Federal Government, a procurement by the state government, and the state government isn't a covered entity, Chapter Ten does not apply, clearly. It doesn't apply to the Federal Government because what it's doing is granting government assistance. Chapter Ten doesn't apply to the state government because it has no obligations. What if the state government did have

obligations? No case that I know of has ever addressed that problem. It's hypothetical in the sense that presumably when they negotiate state obligations, they might want to deal with that issue.

And when we get to the GPA, the WTO agreement on government procurement, that same issue arises. How do we deal with grants? And how do we deal with financial assistance? And under the GPA, they've adopted a different way to deal with it. The coverage is different.

So if I might then go back, you'll recall that we were dealing with the elements under the Vienna Convention in terms of interpreting treaties. I dealt with the good-faith issue, and that left ordinary meaning, meaning in context in light of objects and purpose and special meaning given by parties, and I'll run through those fairly quickly just to make sure that we've covered the ground. But I think that the exchanges that we've had to date has fleshed out many of these issues.

It's our position, if we look at ordinary meaning, it's our position that the U.S. has made no serious effort to provide any ordinary meaning of procurement. In its Counter-Memorial, for example, at page 23, it states that the ordinary meaning of the term "procurement" on its face, however, encompasses any and all forms of procurement by a NAFTA party. That's the equivalent of saying that the word "butter" includes any and all forms of butter. It's tautological and brings you no closer to understanding what procurement is.

The U.S. continues, in the same section of their argument, and refers to the French and the Spanish text and says--they refer to purchases, "les achats" in French. Purchases doesn't help the U.S. case. In fact, purchases hinders the U.S. case because procurement requires a purchase and the Federal Government when it is giving money to the state government doesn't purchase anything.

In its Rejoinder, the U.S. tries to

clarify its position on ordinary meaning of procurement, and if I might read a passage from the Rejoinder, which is taken from page 6, setting out where the parties are at idem, and this is in the middle of page 6, states, "The parties concur that the ordinary meaning of the term `procurement,' as used in Article 1108, encompasses all governmental purchases of goods and services. The parties agree that when the Commonwealth of Virginia purchased steel for the project, it was engaged in procurement. The parties also agree that the Federal Government's position of funding to Virginia was not procurement."

That's fairly clear. The parties also agree that the Federal Government's provision of funding to Virginia was not procurement. It's important for the Tribunal to understand that. And it's not a mistake.

The U.S. carries on. Now, they have difficulty with the ordinary meaning, so what do you do? You have to then try and not so much

characterize what procurement is, but try and work on the measure in question to somehow have that measure moved into the definition. Later on, the last project, the United States says, and I quote, "It is, the United States submits, self-evident that the provisions incorporated into ADF's sub-contract specifying what to buy for the project were an integral part of the procurement of the project." And then they proceed in the next sections, Item 1 and 2, to state that what to buy, i.e., the specifications within the program, that is not procurement; the order what to buy was procurement.

In terms of blurring the distinction, there are two approaches that I can see taken by the U.S. One is to say while we admit the funding program is not procurement, the specifications within that program as to what to buy is procurement; and, two, by merging the Federal action into the state action to say that it's all procurement by a party.

Looking first at the issue of the specification as to what to buy, the U.S. states--this is on page 7 of their Rejoinder: "As noted above, it's common ground that the ordinary meaning of `procurement' encompasses purchasing." I would say not encompasses procurement, is purchasing, les achats. Purchasing entails a number of integral activities. Amongst those activities are deciding what to buy, from whom to buy it, what to pay, and how to pay it.

In other words, the order given by the Federal Government to discriminate and only to buy U.S. material, that's a specification within the procurement. And even if it's within a program, a Federal Government program which is not procurement, that order is procurement.

I referred earlier to the effort by the U.S. to strip the exemption of all meaning. What the U.S. is doing here is basically to ignore or empty the exemption. The exemption says procurement does not include any form of government

assistance. The U.S. realizes that it cannot get around that problem. The language is too clear. So they say, well, any form of government assistance, but within that government assistance there is this discriminatory order to purchase goods in that program, that's procurement.

Unfortunately, in our opinion--unfortunately, we--for the Americans, we submit that you cannot simply pull out all of the conditions contained in the funding measure and say that because the funding results in procurement, the conditions in the funding, attached to the funding are themselves procurement.

It ignores the language of the statute. The language of the statute says procurement does not include any financial assistance. And it's doubtful that you could give any ordinary meaning to the expression "any form of financial assistance" if you adopt the U.S. position, because that expression, "any form of financial assistance," would have to exclude conditions

attached to that financial assistance.

In other words, you would have to say that conditions regulating funding are procurement, but the funding is not procurement.

I'm back to the example of the book scholarship. The university gives money to a student under a book scholarship to purchase books and maybe says as, you know, a condition of the receipt of the funds, go out and buy books. There is on reasonable meaning that would support the conclusion that the university, by imposing that condition, is buying books. The university is not engaging in procurement. The university is simply attaching conditions to its financial assistance. If we believe the U.S. argument, however, the university itself is engaging in procurement.

So our position on that approach by the United States is that it simply cannot work. You can't surgically extract from the program the conditions attached to the funding and characterize those conditions as procurement in light of the

clear exemption for any form of financial assistance. What the U.S. would have you believe, that that exemption simply relates to the handing over of the check, nothing more.

The second approach that the U.S. takes is to attempt to shoe-horn the measure into the procurement exemption by claiming that the Federal measures and the state measures are basically merged. If we turn to page 8 to 11 of its Rejoinder, the U.S. Rejoinder--

PRESIDENT FELICIANO: Mr. Kirby?

MR. KIRBY: Yes?

PRESIDENT FELICIANO: For my clarification, please, I just want to be clear again. In your view, the question of who or which entity is engaged in procurement is to be resolved by identifying who or which entity would own the project that is being funded or in respect of which specifications are being established and so on. Am I correct?

MR. KIRBY: I would say that that's one of

the elements that you would look at. Is it the only element? No, because it also says lease purchase, lease, et cetera.

PRESIDENT FELICIANO: Assume that the--

MR. KIRBY: It's one of the elements. The other element is: Who has the contractual link to the vendor? Who's bound by the contract? Who's spending the money for a return, for an acquisition of goods or services? Who signs the contract? Who lets the contract? Recall in Chapter Ten they have--they discuss, you know, various rules about what entities can do when they're procuring. One of them is the public tender. Who set the tender? Who went out into the market to look for the vendors?

No question that Federal Highway, given its responsibilities, had something to say on how the project might be completed. But as the expression goes, the buck stops at Virginia. It's Virginia's procurement. And if it wasn't Virginia's procurement, the United States would be

bound by its own obligations under Chapter Ten to conduct procurements in accordance with Chapter Ten.

So, in other words, if you can blur the waters or muddy the waters sufficiently to say that this might, in fact, be a Federal procurement, if it were a Federal procurement, this measure would have to fall because the U.S. Federal Government has agreed not to apply Buy America provisions in its Federal procurements. So how do we decide whose procurement it is? From this perspective, in this particular case, we look at the contractual arrangements. We look at the fact that Federal Highway said that they're granting funds, and they're not--their whole program is not procurement. The contractual arrangements were signed off by Virginia, which contracted with Shirley, which contracted with ADF. But is there a neat answer to say this is the one item that you look at, this is the crucial item? That's not the approach that was taken in the only case that comes

to mind. The Korean procurement case touches upon those kinds of issues in terms of, you know, who's managing the contract, who's--whether the entity that is nominally procuring is really the entity that is procuring.

But it's largely a fact-based analysis, depending on defining the procurement activity first. Is there something being procured? And then who is engaged in that procurement activity?

I should point out that nowhere in the materials is it suggested that the U.S. is procuring when it grants funds under the Federal Highway project.

I think what may help to focus the Tribunal's thoughts in this area is to recall that there are many, many ways that one can seek to influence decisionmakers. The act itself of influencing the decisionmaker is not the decision. The act of influencing the decisionmaker is a separate act, and the decision taken by that decisionmaker is a separate act. It's two separate

acts. The example: Here we have the decision to grant funding to the Virginia State, and we want to influence that decision. If Virginia wants the money, it needs to do what we tell it in terms of discriminating against non-U.S. sources of steel.

Governments regularly act in that way. Governments can regulate or ban the purchase of goods--guns, cosmetics, drugs. Regulating that activity, even banning that activity is not to engage in the activity itself. It's simply to regulate the activity.

We regulate building construction, the height of floors, types of construction material. In earthquake-prone zones, we'll tell constructors that these are the requirements that, you know, need to be met if you're going to engage in construction.

Nobody would suggest that in doing so the regulators are engaging in construction. They're engaging in regulating construction. They are attempting to influence the decisionmakers.

I would submit that the U.S. totally ignores that distinction. The act of providing funds and the act of purchasing goods and services with those funds are two distinct things. Just in common parlance, the way government operates they're two distinctive things. The way NAFTA tells us to look at the activities, they're two distinctive things. NAFTA tells us that procurement and financial assistance are separate.

We have provided simple dictionary definitions of ordinary meaning in the materials, and certainly there's nothing in the ordinary meaning--I think it's fairly clear at this stage there's nothing in the ordinary meaning that allows one to conclude that these conditions are procurement. Something more is needed.

If one looks at the ordinary meaning in context, if you go back to the Vienna Convention document which we were looking at earlier, I mentioned that Article 31(2) and (3) provides additional information in terms of how does one

approach the ordinary meaning in context. And it says 31(2), "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, agreements relating to the treaty made between all parties"--there's nothing on record that is applicable here--instruments made by one or more parties in connection with the conclusion of the treaty, potentially"--and the U.S. is, I think, claiming that the statements of administrative action, which we'll get to, that these may be instruments made in terms of the conclusion of the treaty. It's not certain from the materials. I would say that they probably don't rise to that level.

And then, together with the context, "There shall be taken into account subsequent agreement between the parties regarding the interpretation of the treaty." There is no subsequent agreement by the parties regarding the interpretation of the treaty on this particular

matter. "Subsequent practice," the U.S. has raised some issues in respect of subsequent practice, and I will deal with that, "relevant rules of international law applicable and the relations between the parties."

So with that guidance, we would be left with context being the text of the agreement itself and how is the agreement structured, its preamble, its annexes and subsequent practice.

In terms of the preamble, I am going to deal with that in terms of the object and purpose of the statute, so we will save a section. So, for the moment, I would like to just say a few words on the text, on the annexes, and on the issues arising out of so-called subsequent practice.

One element of context is that the NAFTA is an omnibus trade agreement--no one chapter, no one provision stands alone unless it is specifically said to stand alone. It is, therefore, no surprise and should not cause consternation to see one element of the agreement

impacting on government, to see NAFTA, as a whole, impacting on government activity at several different levels of that activity; in other words, that the NAFTA would operate at the Federal level on a particular measure and then when that measure becomes a state measure, it may or may not operate on the state measure.

That ought not to be surprising. One does not need to force compartmentalization of particular activities because, as we have seen with 1108(7), the parties, when they pull activities out of one section, realize that those activities are still governed by many other sections and, where necessary, draft exclusions to cover it.

The fact that an activity might be procurement in the hands of one agency of the state and might be a completely different activity, such as government assistance in the hands of another agency of the state, ought not to be surprising. That's how governments work, particularly in a federal system which is the system in place in

three NAFTA parties.

In particular, that context does not imply or require that measures by all levels of government which might have an impact on procurement be somehow defined as procurement themselves. There is nothing in the NAFTA that urges that type of interpretation, and I would suggest that everything about the NAFTA urges an interpretation other than that.

Another element of the text of the agreement which informs the context is the parties' use of language. I know that very often, when reading provisions of NAFTA, one ends up scratching one's head, wondering, "What did they think they were doing?" But I think the proper way to approach the NAFTA is to recognize that this is a very sophisticated agreement, and the parties knew exactly what they were doing. When they have wanted to use expensive language, they have done so, and when they have wanted to use narrow language, they have also done so.

The parties knew the distinction between financial assistance and procurement and clearly had in mind that the two were closely connected, capable of being confused, one with the other, and dealt with that problem by making certain that they would not be confused. Thus, the arguments put forward by my friends which would require a tortuous analysis of the language provisions are not supported by any analysis in context because the context says, if you were engaging in that kind of a tortuous analysis, you are probably wrong. Why? Because the NAFTA parties clearly knew what they were doing, and they used language which got them where they wanted to go.

And we have set out in our I believe it is our Reply, some instances of the wide language and the narrow language used by the NAFTA parties, Page 12 of the Reply to the Counter-Memorial, I will just read off some of them, and this is only in procurement. This is consistent throughout the agreement, however. Various ways they touch on

procurement: "Measures relating to procurement; any procurement contract; procurement includes procurement by such measures as purchase, lease or rental, with or without an option to buy." That's 1001(5). "Procurement does not include any form of government assistance--1005(2)."

Article 1003 talks of, "Measures covered by this chapter."

Article 1017, "Procurement covered by this chapter."

Article 1017(a), "The procurement process," very specific, "begins after an entity has decided on its procurement requirements and continues through the contract award."

Article 1019, now here is an effort at specificity. "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."

The point being that, when the text

contains that kind of carefully drafted language, one has to assume that the parties knew what they were doing when they were drafting, and you give the ordinary meaning to these provisions without tortuous analysis of how can particular provisions be expanded.

The next element of context is found in the annexes, and what can we learn from the annexes? We've already seen in the handout given out this morning that Article, if you will recall, Mr. Chairman, Article Ten--sorry--Article 1108. Now this is Chapter Eleven, not Chapter Ten, but it says to the parties we understand that you have nonconforming measures that are out there and that may otherwise be subject to Chapter Eleven. Here is your chance, if you want to exclude those nonconforming measures, list them in your annex.

The U.S. takes advantage of that, and in its annex of nonconforming measures, refers to the Clean Water Act, which contains a Buy America provision similar to this provision. It states

that we want a reservation from the obligations in respect of performance requirements.

What does that mean? That means the U.S. clearly believed that the Clean Water Act would otherwise have violated performance requirements, the obligation not to enforce performance requirements in Article 1106. You will recall that the U.S. did not need to take a reservation in respect of Article 1102 because 1102 exempts grants, and this is a grant statute, similar to the Federal Highway issue.

They did not take an exemption for the Buy America statute that we're dealing with today. Does that inform the context? I would suggest it does. It suggests that the parties, again, knowing what they were doing, realized that these Buy America provisions are contrary to Chapter Eleven in certain respects, they are clearly performance requirements, and exempted them, but did not exempt the measure in question, the Federal Highway provisions.

We responded--I'm sorry--the U.S. responded to our suggestion that this informs context by pointing to the exclusion. It states, "Grant recipients may be privately owned enterprises." Now what the U.S. stated in its Counter-Memorial--no, I'm sorry, its Reply--is that the reason this exclusion was taken is because grant recipients may be private parties, that--and this may take a few minutes to explain--but grant recipients may be private parties. Private parties, when they receive the money and go out and procure, will not be engaging in Government procurement. Because they won't be engaging in government procurement, they will not be able to take advantage of the procurement by a party exemption. We're clear on that.

So they're saying we took the exemption in order to enable us to continue to order grant recipients to discriminate, without having to worry about the provision that talks about procurement by a party. Even at that level, if that really was

the motivation, and we will show that it wasn't, but if that was the motivation--I lost my train of thought for a second.

That was the U.S. response. We, in our Reply, demonstrated, with an analysis of the statute, that grant recipients could not be private, as stated here, privately owned enterprises. The statute provides for grants only to state enterprises.

If we go to the Investor's Reply at Page 23, paragraph 141, we state, and this is in our Reply, "After hearing what the U.S. had to say about why this exclusion was there, we state, after our analysis of the law, "In fact, the statement in the reservation that grant recipients may be privately owned enterprises is factually incorrect."

And then later we state, at paragraph 150, "Thus, the claim by the United States that its reservation, under the Clean Water Act, was driven by the need to preserve its ability to impose

performance requirements in private procurements 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.

The U.S. got a chance to have the final word on this, and one would have expected them to challenge those two statements, to say that, no, under the statute, privately owned enterprises can be grant recipients.

What was the U.S. response? The U.S. response was to challenge this panel's ability to look at the statute. In other words, and this is found at their rejoinder at Page 22, rather than contradicting our statement that privately owned enterprises cannot benefit under the statute, the U.S. states, at Page 22 of its rejoinder, and I quote, "According to well-established principles of treaty interpretation, however, supplementary means to interpret a treaty may only be resorted to when the treaty terms are ambiguous and obscure." As

the language in the reservation is neither ambiguous nor obscure, there is no justification for this Tribunal to resort to supplementary means such as provisions in domestic legislation to interpret the plain meaning of the reservation.

They didn't deny that we were correct in saying that privately owned enterprises could not benefit. They simply said you, the Tribunal, can't look at the legislation and then their final gasp at this argument states on the same page, Page 22, and I quote, "If ADF is correct and the drafters were mistaken in their beliefs, it simply means that the United States negotiated a reservation where none was needed. Such action in no way implies that the application of the 1982 act does not fall within the exception for `procurement by party.'"

In other words, we point to the exemption. The U.S. responds, and says we have good rationale for that exemption. It's because private enterprises, we needed to protect our ability to

force private enterprises to discriminate. We respond and say that's not true because under the legislation, grant recipients are not private enterprises, they are state entities.

They say, well, first, you can't look at the legislation. Then, if you do look at the legislation, the negotiators were mistaken in their belief.

All right. Well, that's par for the course. Don't forget, however, that it's the U.S. who has the burden to carry the proof that the exemption for procurement by a party covers these kinds of measures, and they have to carry that burden in light of an exemption of a very similar provision, which the U.S. admits is a nonconforming measure. We think the annex reservation stands for itself. It's an admission by the United States that these kinds of measures do not conform to Article 1106. It's an admission that has not been denied, and because they don't conform to 1106, I think that unless the U.S. can demonstrate that it

is saved by procurement by a party, the U.S. has imposed a prohibited performance requirement.

What of the mistaken belief theory. The U.S. seems to be now saying that, in any event, what happened here is probably the negotiator was mistakenly believed that the exemption could have applied to private enterprises.

If that is the case, this mistaken negotiator was sophisticated enough to believe that the same measure in the Buy America provision was at--I'm sorry--to believe that the same measure, a Buy America provision in a single statute was, at the same time, procurement by a party when the money was given to a state government and would not benefit from the exemption when the money was given to a private party. That is a level of sophistication that suggests that it wasn't mistaken, that he knew what he was doing.

That conclusion, if the negotiator was not mistaken, that leads to the conclusion that what the negotiator wanted to do was to exempt this

provision, not unusual. That's what negotiators do all of the time. And that the annex simply does nothing more than show that for the Clean Water Act, at least, the U.S. decided that they wanted to take an exemption, but for the Federal Highway provisions, they chose not to--again, not surprising. Why is it so surprising that the U.S. would fail to take a reservation for the Federal Highway Act when, in fact, in the negotiations, for its own procurements, had done precisely that--agreed, not to apply Buy American provisions in procurements to Canada and the United States, Canada and Mexico. In other words, we were brought into the family with respect to Federal-level procurements.

The NAFTA negotiators agreed not to apply Buy America when they went out and procured. So it is not that unusual to think that, with a few exceptions, we would also be brought into the family under other Buy America statutes, which were not procurement, but which were simply funding

statutes. It is certainly not a radical thought, and this annex simply demonstrates that that is exactly what the U.S. did. They chose what they wanted to exempt, and they exempted it. I would submit that the mistaken belief theory doesn't do credit to the skill of U.S. negotiators and isn't supported by the text.

Another element that comes up from this exemption is that this mistaken negotiator, sophisticated enough to realize that there was a problem between state procurement and private procurement, a level of sophistication I would suggest is pretty high. Why didn't he deal with an exemption for the Federal Highway Act? Because he knew that he didn't need to have an exemption because it was excluded as procurement by a party. Imagine, this is a guy living on the edge making decisions which have pretty large impacts on the basis of this assumption that he's excluded under procurement by a party.

But he refers to the program as a grant

program. The Clean Water Act authorizes grants. If he is so sophisticated as to be able to realize the problem between the private and the state enterprises, why didn't he realize that there might be an issue with respect to grants which are specifically excluded from procurement? Again, that's not my problem, that's the problem of the U.S. trying to demonstrate what this provision stands for. I think it stands for nothing more than, in the grand scheme of things, the U.S. decided to exempt this program and decided not to exempt the Federal Highway Program, and there is nothing in NAFTA that suggests otherwise.

And if the United States had wanted to exempt the Federal Highway Program, what they needed to do was simply write an exemption for it.

Yes, Ms. Lamm?

MS. LAMM: If that is the case, why do you think that this negotiator then wrote, "Grant recipients may be," not always are, but "may be privately owned enterprises"? What was the purpose

of putting that in there?

MR. KIRBY: I wish, you know, we are trying to read negotiators' minds. I agree, there is an issue that arises with respect to this privately--it seems to say that the annexes provide information for whoever. How do you draft the text of it? Who knows. But the bottom line is that where one is U.S. burden, the U.S. is trying to demonstrate that we are covered by procurement by a party. We suggest that this casts light and casts some doubt on that. Their explanation, the negotiator was mistaken.

But that explanation doesn't really fit the reality. Why? Because he's describing it as a grant program. So why does he not deal with the grant? And he didn't exclude, he didn't bifurcate the grant program between grants to states and grants to--he excluded the entire program.

I wish I could explain--I can't explain why he referred to privately owned enterprises, other than to simply say that it's an element of

description of the program. But if he really knew what he was doing, you would have assumed that he would have dealt with that grant program issue because that's not procurement.

I would suggest that one of the exclusions taken by Mexico, once again, shows the level of sophistication of the negotiators in terms of distinguishing between procurement and nonprocurement, and this is found in our NAFTA Annex 1001.2(b), the general notes. This is an annex at the back of Chapter Ten of NAFTA where each party writes its general notes. The schedule of Mexico, first note of Mexico is, and I quote, "This chapter"--Chapter Ten--"does not apply to procurements made"--and in item (b)--"pursuant to loans from regional and multilateral financial institutions to the extent that different procedures are imposed."

Why we are referring to that, because it clear shows the distinction. It's not--it's pursuant--it's procurement pursuant made to the

loans. That's the kind of language that shows the distinction between what's happening at the level of the granting of the funds and what's happening at the level of the spending of the funds that have been granted. And Mexico clearly recognized a distinction between loans and positions--procurements made pursuant to those loans.

The next item I'd like to talk to in terms of interpretation, the subsequent conduct of the parties, and the United States spent some time providing the Tribunal with material that it considers supports its case in that respect.

First, an aside. The Vienna Convention doesn't require, permit a general look at the subsequent conduct of the party. It's put in a somewhat more formal requirement. The parties shall take into account, together with the context, any subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation. Much of the material filed by the United States fails in that

respect and doesn't establish the agreement of the parties in respect of the application. I will, nevertheless, deal with most of the material, and where I have a particular issue, particular problem with material that's been filed, I'll draw the Tribunal's attention to that.

The U.S. may also refer to Article 32, supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, to confirm the meaning of a provision when interpretation under Article 31 leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.

What the U.S. puts before the Tribunal, a number of documents: Canada's Statement of Implementation of the NAFTA, the U.S. Statement of Administrative Action, some expert reports, brief discussion on reservations taken by the U.S. under the Government Procurement Agreement, some academic articles, and, finally, the website of the Canadian

Embassy in Washington.

Canadian Statement of Implementation. This is found in the U.S. appendix to its Counter-Memorial, Tab 24.

The U.S. appendix to its Counter-Memorial, I can simply read it. It's a very, very short provision. Basically, the United States refers to a provision found on page 146 and 147. The Canadian Statement of Implementation document filed basically sets out some of the conclusions that Canada drew after the negotiation of the agreement and what the agreement did.

The U.S. points, at the bottom of the page, to a statement by the Canadian Government expressing disappointment in respect of the results in procurement, and I'll read the quote, the last paragraph. "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 the further negotiations called for in the

agreement to negotiate access to small business set-aside programs and transportation procurements currently restricted under Buy America programs."

The U.S. seems to say that here we have Canada expressing disappointment at the inability to get at the Federal Highway program. That's the reading that the U.S. would like you to have of that provision, saying the reference to transportation procurements is a reference to these Federal Highway programs.

However, we submit that the references by Canada are, in fact, simply references to exemptions clearly taken by the United States. Where are those exemptions found? We looked at the exemptions taken by Mexico in its general notes, which 1001(2)(b). And if one looks at the U.S. general notes, recall Canada was expressing disappointment in respect of small business set-asides and transportation procurements.

Well, the first two notes deal with precisely the issue that Canada appears to be

having with those issues. The first note, the chapter does not apply--this chapter, Chapter Ten, does not apply to set-asides on behalf of small and minority businesses. Second note, this chapter does not apply to the procurement of transportation services that form a part of or are incidental to a procurement contract.

In other words, the Canadian note does nothing but reproduce the references in the annex, the exclusions taken in the notes by Canada.

Recall that what the U.S. is putting forward is that that Canada note is not a reference to the provision in the annex but is, rather, a reference to their disappointment in respect of Federal Highway. They say look at the difference between the Canadian note, which talks about transportation procurement, and the U.S. note, which talks about procurement of transportation services. And they say that that indicates there is something much different going on and that what Canada is doing is admitting that it did not get

the elimination of the Federal Highway program.

I would suggest that the difference between transportation procurements and procurement of transportation services is very difficult to make. It's a distinction without a difference. Would transportation procurement cover procurement of transportation services? In the shorthand used in the Canadian statement, I'd say absolutely, without a question. U.S. admits, in fact, that there are--sorry.

MS. LAMM: I'm sorry. I just have a question. Looking at this page 147, where it says Canada considers this to be part of the unfinished agenda, and by referring to it as part of an unfinished agenda, it seems to encompass more than even the one or two items that are mentioned--

MR. KIRBY: That's correct.

MS. LAMM: --in the area of procurement negotiations. Is there any place that sets forth what this unfinished agenda is?

MR. KIRBY: Article 1024, for example,

talks about an obligation to bring in or to seek to bring in sub-national entities such as states and provinces. That's Article 1024. In fact, I think it had a specific date in which they were supposed to do it, which date has long since passed and nothing has been done.

Article 1024 is further negotiations. Parties shall commence further negotiations not later than December 31, 1998, with a view to further liberalization of their respective government procurement markets. And it continues basically with an exhortation to the parties to continue the work. I'm not certain if my friends from the United States have heard those exhortations, and, in fact, this sort of retrenchment on issues would seem to be a backward step rather than a forward step.

It's interesting, though, that the U.S. is even making this argument in terms of--when we pointed out to the U.S. in our reply that transportation procurement was a reference to the

note that referred to procurement of transportation services, the U.S. response, if I may summarize it--and if I get it wrong, no doubt my friends will correct me. But the U.S. argument is that these are different things. One says transportation procurement, and the other says procurement of transportation services.

How in the same documents can the U.S. put forward the argument that procurement by a party can be extended to reach into government assistance, even though government assistance is specifically excluded, to capture some conditions relating to that, how can they apply that kind of interpretation to one provision and then say, by the way, transportation procurements isn't a reference to procurement of transportation services? There is a wee bit of a disconnect in terms of the internal logic.

I'd also like to draw the Tribunal's attention, in its Rejoinder the U.S. gives a reference to precisely the kind of procurement of

transportation services that are covered by that general note and refer to the Cargo Act. If I might read it, the restrictions referenced in the annex--this is the one we've just read, the restriction respective procurement of transportation services.

MR. LEGUM: Do you have a page number?

MR. KIRBY: I'm sorry. Page 20. The restrictions referenced in the annex include those contained in the Cargo Preference Act, for example, which require that when certain government agencies buy goods, a certain percentage of those goods be carried on a U.S. flag commercial vessel. The Act and similar programs pertaining to procurement of incidental transportation services, however, are not generally referred to as Buy America programs.

We say Canada's reference is clearly a reference to the two notes. The U.S. would seem to read something more into it, but we would submit that it is really stretching to try to say that, one, that statement of interpretation is really

something that we can use to read content into--to understand what the Canadians were thinking back in 1994.

PRESIDENT FELICIANO: For general information, can you tell us what in your understanding has been the U.S. practice in respect of the Buy American provision that is involved in this particular case?

MR. KIRBY: What has been their practice?

PRESIDENT FELICIANO: Yes. Have they consistently applied or not applied this particular Buy America provision? Because I gather from your argument that by failing to include this particular provision, statutory provision in Annex I, just as in the same way that they included the Clean Water Act, that they, in effect, conceded that in their own belief that it was covered by the disciplines and, therefore, prohibited by the disciplines of the applicable NAFTA provisions.

Now, can you tell me whether have they, in fact, been applying consistently?

MR. KIRBY: Let me--three issues, and I hope I can remember all three.

First, have they been consistently applying them? We're on record as admitting that they have been consistently applying the Federal Aid Highway provisions in exactly the same way since NAFTA. We're also of the position that consistently violating an agreement is not a good tool for the interpretation of an agreement. In other words--

PRESIDENT FELICIANO: We can put that aside.

MR. KIRBY: Okay. They've been doing it consistently; however, I think if one--apart from the fact that I think it's bad practice to look at a consistent violation and say that somehow that is going to inform the treaty itself because the parties would have believed it, I think that's bad practice.

Second, though--and this is perhaps more importantly--there may be a rational explanation

for it because they have consistently referred to the program as a grant program and not as procurement. And it is true that grant programs are not subject to the discipline of Chapter Ten. Nobody is arguing that. The United States admits, we have said it all along, grant programs such as the Federal Highway program are not subject to Chapter Ten.

So has that colored the U.S. sort of belief? They may well have believed we have no obligations under Chapter Ten. They have absolutely no reason to believe that they can flout every other obligation of NAFTA because they have been excluded from Chapter Ten. And whether they consistently flout those obligations or intermittently flout those obligations, it comes to the same thing. What's the rationale for their belief that they can flout the regulations? Today it's because it's procurement by a party. Since 1994 until this action was brought, it was because it's a grant.

So the rationale for flouting the obligation has changed. Previously it was we are not subject to Chapter Ten when we grant money to Virginia. Agreed. Not subject to Chapter Ten. The rationale that you're not subject to Chapter Ten because it's a grant program, and they have consistently said that. Consistently. Now, they realize that that's a problem, because if it is a grant program, it's not subject to Chapter Ten. That means it's subject to all these other obligations. We had better start describing it as procurement. That's the rationale, that's the problem. It has never been consistently described as procurement.

In fact, in this respect the U.S. have cited their own Statement of Administrative Action--that's at page 28 of the U.S. Counter-Memorial--where they state in that Statement of Administrative Action, and I quote, "The rules of Chapter Ten
do not apply to certain types of purchases by the U.S. Government, among them"--and we're talking of

Chapter Ten. This is the U.S. Counter-Memorial at page 28. "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."

Quite true. When the state procures pursuant to funding under the Federal Aid Highway Act, Chapter Ten does not apply because the states have no obligations. However, that doesn't mean that other chapters of NAFTA don't apply to the Federal funding.

The next section I can deal with in five minutes, which would take us up to 1 o'clock, which might be a good time to take a break. The U.S. has also filed two expert reports purporting to show the practice of the two NAFTA partners of the U.S.--Mexico and Canada. The report from Canada is from Mr. Stobo, and the report from Mexico, Mr. von Wobeser.

Look at Mr. Stobo's report. What does Mr. Stobo say? Mr. Stobo says that the Federal Government funds provinces. He states that the provinces, some of the provinces discriminate in their procurement. But what he does not say is that in any Canadian funding mechanism, Canada forces the recipient of the funding to discriminate in its own procurements.

In other words, Canada is doing precisely what we say the U.S. ought to be doing. That's the sum and substance of Mr. Stobo's expert testimony.

Mr. von Wobeser, speaking about the Mexican situation, in his original affidavit referred to at least three pieces of legislation--I think it was three pieces of legislation--which he claimed were passed in 2000 to implement Mexican obligations with respect to NAFTA. Leaving aside the question of why you would pass legislation in 2000 to implement obligations you undertook in 1994, I don't know. But what Mr. von Wobeser says is that there are Federal Mexican funding statutes

which permit the requirement of domestic--the imposition of domestic content requirements on the recipients, in a sense, so he is coming closer to the U.S. position seemingly to say that the Federal Government in Mexico has the authority to impose domestic content restrictions.

The problem with the U.S. case in respect of those expert reports is that the Mexican legislation is stated to be subject to the trade agreements. In other words, the Mexican legislation says you can discriminate, you can force a grant recipient to discriminate, providing it's not contrary to any international treaty obligations, which, again, certainly doesn't help the United States' position.

And Mr. von Wobeser does not sort of deal with how to get out of that particular conundrum. In other words, both of the expert witnesses do not support--their testimony does not support the position of the United States that it is clearly within the purview of NAFTA for a funding agency to

order a grant recipient to discriminate. In fact, Canada does not do it. The United States--Mexico has this discretionary ability to do it, but it's subject to international trade agreements, and if the legislation was passed to implement the trade agreements, that may well be in there precisely for that reason, that Mexicans may--the Mexican Government may consider that doing so under a--in a situation governed by a trade agreement would be a violation of NAFTA.

I'm sorry. Ms. Lamm?

MS. LAMM: I was just looking at paragraph 9 of Mr. Stobo's opinion, and there he's saying, in fact, that because sub-central governments in Canada are not bound by procurement disciplines in NAFTA or AGP, they are not required to accord national treatment to suppliers of goods from signatories to those agreements.

MR. KIRBY: Yes.

MS. LAMM: Are you drawing the distinction that he's referring only to procurement and not

grant funds?

MR. KIRBY: No. What I'm trying to get at and what Mr. Stobo--and I have to preface this. I know Jerry Stobo, and I have an enormous amount of respect for him, and I'm not criticizing what he says. I'm simply saying read what he says, and what he says supports us rather than contradicts us. What he says--it was paragraph 9?

MS. LAMM: Paragraph 9, the second sentence.

MR. KIRBY: Some sub-central governments do give preferential treatment--because sub-central governments in Canada are not bound by the procurement disciplines in NAFTA, they are not required to accord national treatment. That's correct. I mean, it's the same situation that the State of Virginia in its procurement is not bound by NAFTA because it has negotiated--there are no obligations on the State of Virginia, as there are no obligations under NAFTA on the Province of Ontario. So the State of Virginia and the Province

of Ontario are free to discriminate should they choose to do so. That's not our problem. Our problem is their liberty to choose to do so or not to do so has been basically taken away by the Federal Government in this particular case saying you do not have a choice, you have to do it if you want to receive the funds.

Mr. Gee's letter to the Federal Highway asking for assistance, asking for interpretation, clearly says Virginia, the state, does not have its own Buy America provisions.

We don't have difficulty with the notion that if a sub-national government wants to discriminate it can do so. That's not our issue. Our issue is: Can the national government force the sub-national government to discriminate as a condition of receiving funds? That's where we say the illegality lies.

PRESIDENT FELICIANO: Mr. Kirby, at the risk of delaying lunch--

MR. KIRBY: This is a big risk.

PRESIDENT FELICIANO: Are you making a big deal out of perhaps something that is very insignificant at the end of the day? Does it make a difference that Virginia didn't have in its statute books a provision like the Buy America provision, but then it accepted the Federal funds which required it to apply that? By the act of--I assume that Virginia went to Washington and asked for these funds. I mean, Washington didn't try to cram those funds down Virginia's throat. And by accepting these funds, wasn't, in effect, Virginia incorporating those provisions into its corpus of law?

MR. KIRBY: Understand there are a number of different ways to--

PRESIDENT FELICIANO: I want to know what is the--is there a fundamental difference at the end of the day between one and the other situation?

MR. KIRBY: There's any number of ways to address the issue. Let me just give you a couple of off-the-top-of-my-head views.

PRESIDENT FELICIANO: You excuse this question because--

MR. KIRBY: No, no. I--

PRESIDENT FELICIANO: --I don't know anything about--

MR. KIRBY: It's a very good question. Does it really make a difference in the end? Does it make a difference?

NAFTA is there to promote--and let's take it for granted that we're all in agreement that promotion of the free trade area of exchange and trade is good, and protectionism is bad. Okay? If it is not a big deal, we're now saying that the Federal Government, the biggest cash supply--I was going to say in the United States. Maybe in the world--is being told that when it gives away money, it can force the recipients of that money to discriminate.

Now what you've done is you've given to the Federal policymakers, politicians, perhaps a temptation that might be difficult to resist when,

in fact, at some point in time they've negotiated an agreement that precisely takes that temptation off the table. You're putting it back on the table. What's the harm that can come from it? The harm is the Federal Highway program is an enormous program. Virginia has chosen for its own good reasons not to have these kinds of domestic preferences. Why? Simple. Because we all know that domestic preferences do nothing but increase costs in the economy. They're bad for the economy. They're bad for business. It's not the way government should conduct themselves.

If we look to the genesis of this particular legislation, 1982, it's still on the books, even--and we have some records--I'll get to them later on this afternoon--from the Congressional Record. There are people that talked against it. There are people that were talking against it, Congressmen, referring to the fact that--they're not new. They weren't new in 1982. They had been on the books forever. But as a

result of these measures, what had happened is you've got a domestic steel industry that's still asking for help in 1982, a domestic steel industry that still needs help in 2002.

So if Virginia for its own good reasons decides that we are not going to accept additional costs in the system associated with protectionism because we think we can give our citizens a better service by allowing open competition, they should be entitled to make that decision.

PRESIDENT FELICIANO: On the other hand, it might be a very convenient excuse that is handed over to Virginia. Otherwise, they would have to explain to their people. Now they can point to Washington, you know, it's Washington fault, they crammed it down our throats.

MR. KIRBY: And when NAFTA was signed--and I referred earlier to the fact that Canada and Mexico were brought into the fold with respect to Federal procurement and protectionist policies, Buy America policies at a Federal level, that's

precisely the argument that was sold to the Congressmen and to the American people. This is part of a good deal for everybody. Okay?

So now, we've got the NAFTA. It's a good deal for everybody. We are not giving up an awful lot. We are bringing our Canadian and Mexican brothers into the fold.

In doing that, that's precisely what they ought to have done in respect of this particular measure, that is, to recognize that Buy America is subject to discipline when it's applied in terms of financial grants. Who decided not to do it or why was it decided not to do? Who knows? But I'd like to go back to the text of the agreement because at some point in time the parties did crystallize an agreement which was not a simple contract. It was an agreement which looked to the future and to the development of a free trade area. And they wrote down what they wanted to do.

Now, in hindsight, we can talk about, you know, the difficulties of putting that into place,

et cetera. But the document is there. This is what the parties intended to do, and I think it's the duty of this Tribunal not to search for excuses to justify measures that are clearly contrary to--

PRESIDENT FELICIANO: Don't misunderstand me. I'm not looking for--

MR. KIRBY: No, no--

PRESIDENT FELICIANO: --an excuse to do anything. I'm merely trying to--

MR. KIRBY: I didn't mean--what I'm saying is that it is the duty of this Tribunal to give effect to that agreement. Article 1002 says purposeful analysis. When you're interpreting this agreement, look at the objectives of it. Why? Because we don't trust ourselves later on. That may well be why.

PROFESSOR DE MESTRAL: Just following on that, and perhaps not asking for an answer at this moment, but you do raise the whole broad question of how the panel should be interpreting, and you suggest we should adopt a purposive approach, and

perhaps at some later point you or your colleague might wish for that, I imagine the other side also. I think that is a central question for us: To what extent is this panel authorized to adopt a purposive and a broad approach?

MR. KIRBY: Okay. My initial--

PROFESSOR DE MESTRAL: Do you now wish to go into that?

MR. KIRBY: My initial answer to that would be that NAFTA instructs you to interpret the agreement in light of its object and purpose. That's not simply reliance on Article 31 of the Vienna Convention that everybody knows is out there. That's something extra. That's within the NAFTA Agreement itself, and it may well be to deal with the fact that we all know that politics, human nature, and a general drive of the daily pressures on decisionmakers are such that if we can point to a statutory obligation to do something, it's often much easier to get it done than if we say we want to do this because we're nice guys. No. That's

why the NAFTA, I think, negotiators said here's our best effort at crafting a document which will get us to where we want to go, that is, establishment of a free trade area free of all but the most clearly exempted non-conforming measures. In other words, if it's not there, if there isn't a clear exemption for a particular measure, I think that's the end of the job. I don't think that this panel has to do much more than say--especially in light of the fact that it's the U.S. bringing forward the exemption to justify a protectionist measure, which is clearly non-conforming, I don't think this panel needs to do much more than say show us the exemption and show us how it's clearly within that exemption. If it's not clearly within it, then the other sort of efforts that one has to make to somehow pull apart other programs and take parts of that program and put it in here, I don't think that's the Tribunal's job. I don't think that that's what the negotiators intended to happen, and I don't think it's what the negotiators intended

this panel to be seeking to do.

We did delay lunch. I'm sorry.

PRESIDENT FELICIANO: Okay.

MR. KIRBY: You had another question? I will come back after lunch.

PRESIDENT FELICIANO: Okay, fine.

MR. KIRBY: Thank you, Mr. Chairman.

PRESIDENT FELICIANO: Thank you, Mr. Kirby.

[Pause.]

PRESIDENT FELICIANO: Our Secretary is asking whether you wanted to come back as per the original schedule, or did you want to take an extra 15 minutes for lunch. That's the gist of his question. We'll be happy to give you additional--

MR. KIRBY: Two thirty is fine by me.

PRESIDENT FELICIANO: Is 2:30 all right with everyone? Fine.

[Whereupon, at 1:10 p.m., a luncheon recess was taken to reconvene at 2:30 p.m.]

AFTERNOON SESSION

[2:36 p.m.]

PRESIDENT FELICIANO: Mr. Kirby, I apologize for being late. You may taken an extra ten minutes.

MR. KIRBY: Actually, at this stage, Mr. Chairman, I'm not sure I'd survive an extra ten minutes.

Where were we? If I recall correctly, I think we had just completed a brief review of the two expert witnesses to demonstrate that, in fact, the practice is not the same as the United States and doesn't support the U.S. argument in that respect.

Now, another line of argument that the U.S. took relates to the Government Procurement Agreement, the without agreement. And the argument, if I understand it correctly, is that under the WTO agreement, the United States took a reservation for precisely these measures. And, in fact, I'll be working from--it might be useful to

have these documents in front of you. I'll be working from two U.S. volumes. One is Appendix Volume IV to the U.S. Rejoinder. And the other is Appendix Volume II to the Counter-Memorial of the United States. These are big packages.

Now, in Appendix Volume II to the Counter-Memorial, it's Tab 27. And in Appendix Volume IV to the Rejoinder, it's Tab 11.

Just to repeat, the United States makes the argument that under the Government Procurement Agreement, the WTO agreement, they took a reservation under that agreement for precisely the measures talked about here. That's found at Tab 27, second page of text; it says page 2 of 14 at the top right-hand side--I'm sorry. That's the wrong page. It's page 11 of 14, where the reservation clearly states, "The agreement"--and this is for the United States only. It's the United States package of reservations. "The agreement shall not apply to restrictions attached to Federal funds for mass transit and highway

projects." And the U.S. then makes the argument that clearly if these provisions, restrictions attached to Federal funds for mass transit and highway projects were not procurement, we would not have had to make a reservation. We would not have had to make a reservation, the implication being that procurement under NAFTA is the same thing.

The difficulty with that analysis is that we're dealing with two very different treaties: the NAFTA and the Government Procurement Agreement, the GPA. The starting point is to look at the definition of procurement in the two agreements, and I think we've looked at the definition of procurement within the NAFTA enough that we can recall it from memory. It says, "Procurement does not include any form of financial assistance."

The same provision in NAFTA--in the GPA--and this is at Tab 11, page 2 of 30--the equivalent provision is found in Article 1. And I hate to jump between the two volumes, but the U.S. exclusions are found in one volume, and the text of

the agreement is found at another volume. But you'll recall that Article 1001, the scope article of Chapter Ten, states that procurement includes procurement by such measures as purchase, lease, or rental, with or without an option to buy; procurement does not include--scope Article 2 of the agreement states, "The agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental, or hire purchase, with or without an option to buy, including any combination of products and services." So right away you have a different definition of the scope of the procurement agreements in question, Chapter Ten and the GPA.

When you look for the provision which says procurement does not include any form of government assistance, you will not find it in the agreement. What does that mean? That means that when the U.S. signed this agreement, they already had in mind a definition of procurement that they had negotiated in NAFTA, which excluded financial assistance.

They looked at the text of this agreement and it's different. What do you do?

The first reaction is, well, we'd better make sure that financial assistance is also excluded from the GPA, which they did, to a certain extent, and that's found in the Tab 27 at page 13 of 14, where the U.S. attempts to duplicate the limiting provision that's in the NAFTA. Item 2 says of the general notes, "Except as specified otherwise in this appendix, procurement in terms of U.S. coverage does not include non-contractual agreements," and here's the similar to NAFTA language, "or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, government provision of goods and services, to persons or governmental authorities." But then, for some reason, we have additional language right at the end, "not specifically covered under U.S. annexes to this agreement."

What does that difference mean? So we

start with the NAFTA which says all financial assistance is outside of the scope of procurement. Procurement does not include any form of government assistance. The GPA doesn't do that, so the U.S. needs to write an exemption to replicate that. The exemption it gets presumably in the back and forth of negotiations is a half measure. We're going to take out of the procurement agreement government assistance, but only that government assistance that goes to entities that are not covered. So within the GPA, we still have, by definition now, government assistance being within the scope of procurement, which is a huge contrast to the NAFTA.

The U.S. still has a problem now because given the definition of procurement under the GPA, financial assistance to a covered entity and state governments--some state governments are covered entities under GPA. Financial assistance to state governments that are covered will now be considered procurement. Why? U.S. has taken a position by definition, we pull procurement out under NAFTA, we

pull government assistance out of the definition of procurement in NAFTA. We've done that by definition. We then negotiate--the United States negotiates another agreement without that clause. Most lawyers would say, well, wait a second, if you had to exclude it under Chapter Ten and you haven't done so here, it must be included, this a contrario type argument.

So now we've got--because of the language of NAFTA compared to the language of GPA, the GPA arguably covers financial assistance or government assistance, so the U.S. needs to take an exclusion. The U.S. takes an exclusion, but it only goes as far as to cover government assistance to other entities that are not covered. The scope of the GPA is such that the Federal Highway provisions may well give government assistance to covered entities. What does that mean? That means--an analysis of the language of the statute means that that financial assistance now virtually by definition is procurement; whereas the financial

assistance under NAFTA by definition is not procurement.

The U.S. reacts, two pages forward, by stating that the agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects. So now they've taken those restrictions out of the definition of procurement. Why did they do that? They did that because the GPA is so different to the NAFTA that the GPA definition of procurement, the scope of the agreement, clearly includes government assistance. In contrast, the NAFTA clearly excludes government assistance. So not only does it not support the U.S. claim that somehow we can compare the scope of procurement under the GPA to the scope of procurement under the NAFTA, we can't compare it because the starting point is completely different. The definition of procurement is different under the GPA, and it's different in precisely the area that we're talking about.

Under NAFTA, financial assistance is taken

out of procurement by definition. Under GPA, that definition is not there. Under GPA, the U.S. has to negotiate to take out financial assistance. So we're saying look at the GPA and look at the NAFTA. It has to lead to the conclusion that under NAFTA financial assistance, including restrictions attached to Federal funds for mass transit, is what they meant when they excluded that from procurement.

It's a tough one, I know. It's tough in the sense it's difficult to understand, but I think once you line the provisions up and you see what happens, there's a certain resonance.

MS. LAMM: No. I understand that argument completely. The thing that I'm trying to discern is: Is it your position that the definition of procurement in Chapter Ten of NAFTA applies in Chapter Eleven? It's not one of the up-front provisions that clearly applies throughout NAFTA. It's in a particular chapter. So does that--do we have to give the same effect to that as we would to

an up-front provision that would clearly apply throughout? Or is it limited to Chapter Ten?

MR. KIRBY: The U.S. has not made the argument, if I might just frame it, that somehow the reference to procurement by a party is different in Chapter Eleven than procurement in Chapter Ten. They haven't made that argument. And I don't think they will make it. If they will make it, I'll respond to it again. I'm going to respond to it now in any event.

What that does is break the symmetry of the agreement. Now you've got a class of procurement within Chapter Ten, and we all know what procurement is because procurement is--we've got government action which is based on that model, the government--the Federal Highway saying, for example, it's excluded because it's a grant.

Now we go into Chapter Eleven, and we expand and we say somehow the definition of procurement in Chapter Eleven is broader and different to the procurement of Chapter Ten.

There is no textual reason to reach that position. What it does is--as I said, it breaks the symmetry of the agreement. We're using the same words to mean different things, when, in fact, we've attached obligations, we've shut off that particular bag of obligations. We now move into another chapter. The rational thing to do would be to say, no, no, what the parties meant to say was we're going to exclude procurement by a party. They didn't say, as they have done in other provisions, all measures affecting procurement, anything affecting procurement, measures relating to procurement. They said procurement by a party. Give meaning to that. We're back at the ordinary meaning. We're back at, you know, the ordinary meaning means to purchase. Then we have the same debate, well, is this what they're doing?

It's hard to conceive that they would--that the negotiators would have used that as a working model without giving something additional to interpreters to be able to comprehend what

exactly are we talking about here. The reason, I would suggest, that the GPA doesn't specifically exclude procurement and that caused the U.S. to have second thoughts and to seek exemptions, why would the U.S. do that? Precisely because of the problem caused by the NAFTA problem, the issue caused by the NAFTA. Not two years previous they have negotiated an agreement respecting procurement, and in that agreement specifically exempted procurement does include government assistance.

So merely by that act, if there was an argument that government assistance was procurement, the U.S. in respect of making the exemption has given force to that argument. I'm not sure that that argument is good in the first place. I'm not sure that if you simply look at procurement and say would procurement normally cover all forms of government assistance, I would say it's a fairly extensive view of what procurement means, and you'd need language to try

and show that. But perhaps it was the overly cautious approach of negotiators. They wanted to simply make sure that they defined what procurement was. That's how they defined it. But in doing so, they now left open the argument that somehow procurement under GPA includes government assistance, and because of the door they left open, then they had to go in and negotiate the agreement.

But to get back to the question of are we dealing with two definitions of procurement, one which is broader than the other, there is no justification in NAFTA, and if my friends can think of an argument to support that position, I'd be glad to respond to it. The argument hasn't been made by the United States, and from a definitional perspective, from every other perspective, it's non-sustainable.

PROFESSOR DE MESTRAL: Do we have any sense of the timing of the negotiation of both--

MR. KIRBY: I think the GPA was 1996. The note--there's a date attached to, I think, the note

on exclusions. The note on exclusions was transmitted January 16, 1996, and that's on page 1 of 14 at Tab 27. So it certainly post-dates NAFTA.

The other argument is, of course, that they took the exclusion, given the two notes, where they've said procurement isn't financial assistance to non-covered entities. The negotiators simply chose to exclude that particular provision under the GPA and have chosen not to do it under the NAFTA.

The U.S. has also submitted two academic articles, one by Kathleen Troy and the other by Hart. Our view on those two articles is that they are non-authoritative. They are geared precisely to procurement. They don't address the issue at hand, and they are of no value to the Tribunal.

The U.S.--if there is, of course, any question arising out of those articles, I'd be more than happy to respond to them. But I don't think t they're particularly forceful or particularly authoritative.

Yes?

PRESIDENT FELICIANO: A small question for clarification. Do you believe that the word "procurement" as used in Article 1001(5)(a)--or, rather, 1001(5) in the opening clause should be given the same meaning as the word "procurement" as used in Article 1108(7)(a)?

MR. KIRBY: Yes.

PRESIDENT FELICIANO: Or are you suggesting that the two might not be the same?

MR. KIRBY: No. I'm suggesting that there is no reasonable argument that would support a different definition in Chapter Eleven to the definition in Chapter Ten.

PRESIDENT FELICIANO: And by saying there is no reasonable argument to support, you are, in effect, relying upon this presumption that the same word used in different parts of the same treaty should, unless shown to otherwise, be given the same meaning--

MR. KIRBY: Exactly.

PRESIDENT FELICIANO: --that you are invoking?

MR. KIRBY: Precisely. And I'm saying that--that's one. Now, you might make an argument that somehow we can try, but I'm saying that if you then dig and try and find an ordinary meaning of "procurement" that would support the--we're back to where we started at the beginning in terms of the word itself is not capable of extending to grants. Am I making myself clear? In other words, I think they're using the same--"procurement" in Chapter Eleven means the same as "procurement" in Chapter Ten. I think that that's the bottom-line assumption.

PRESIDENT FELICIANO: Do you think that "procurement" as used in the GPA has the same meaning or would have the same meaning save for specific clauses stuck in one but not found in the other in these two agreements? Is that what you are saying?

MR. KIRBY: I'm saying that in both

agreements, in the NAFTA and in the GPA, the negotiators have decided upon the scope of the word "procurement," and they've put that scope into their agreement, that they've defined the word "procurement" in a particular way. Now, which implies that they're not using external sources to give meaning to those provisions. They're defining carefully what they're talking about, what they're talking about in each agreement. There's definitions to the extent that it says procurement means procurement by any method, including lease purchase, with an option to buy, et cetera. But the fundamental point is that the two agreements, in order to determine what the word "procurement" means in each agreement, one needs to look at the terms of that agreement.

So in the abstract, if we--your question was in the absence of specific terms changing the meaning of the word in each agreement, would the word mean the same--

PRESIDENT FELICIANO: [Inaudible comment

off microphone.]

MR. KIRBY: I would say that the core meaning is the bottom-line meaning of procurement, which is to acquire or to purchase. We have--I think my friends have cited the Encyclopedia Britannica. I think we have cited the Oxford University--the Oxford Dictionary. I think abstract from the treaty provisions, what does "procurement" means? "Procurement" means to acquire something, purchase something, maybe lease it, but it means to acquire. It means to give money and to get something. Fundamentally different to grant, within that sort of abstracted meaning of procurement, can procurement be extended to mean grant? I'd say outside of the agreements it's even more difficult to make that argument because we do not generally think of giving away money to be procurement, even if we give it away for a specific purpose.

I come back to the university giving the book scholarship. The university is not in any

sense of the word procuring books. The university is giving grants.

[Pause.]

MR. KIRBY: We're almost through the morass, just one quick observation. My friends have cited in their Counter-Memorial and have produced it at Volume I, Tab 16, which is an extract from a Web page of the Canadian Embassy. The value of this to this litigation I'd say is nothing. However, my friends rely on it, and I think it's worthy of some note.

The Canadian Embassy has posted on its Web site certain information respecting Buy America and highway projects. The first thing to note is that the first paragraph, the notes were written for Canadian companies seeking to do business with the Federal Highway Administration in highway contracts. They were written by the Second Secretary Commercial at the Canadian Embassy and there does not constitute legal advice. Indicative of a Canadian Government position on a particular

issue, I'd say, no, it's not.

Federally funded highway contracts, they discuss it at the bottom of the page. And then over the page, page 2 of 3, first full paragraph, it says, "Funds provided by FHWA"--Federal Highway Administration--"have Buy America restrictions attached. Since NAFTA Chapter Ten only applies to Federal direct procurement, Canadian companies cannot rely on NAFTA for a provision of"--"NAFTA provisions for equal treatment in this market."

My friends have cited simply the provision "Canadian companies cannot rely on NAFTA provisions for equal treatment in this market" as evidence that Canada believes that the NAFTA doesn't touch these provisions.

In Item 8 you'll see it says NAFTA does not apply as a specific exemption within NAFTA Article 1001 for grant programs. I have in fact the latest version of the Canadian website page, which apparently has been amended since some inaccuracies have been brought to its attention.

Where the Canadian Government has made some amendments to this provision at the top of the second page, well, actually, at the very bottom of the first page, it states, quote: "Funds provided by FHWA have Buy America restrictions attached. Since NAFTA Chapter Ten only applies to federal direct procurement, Canadian companies cannot rely on NAFTA Chapter Ten provisions for equal treatment in this market." And then Item 8, you'll recall it said "NAFTA does not apply?" Item 8 now says, quote: "There is a specific exemption within NAFTA [Article 1001] for grant programs such as the Federal Aid Highway Program."

Clearly, as drafted the current version of the Canadian Embassy website is supportive of our position that yes, Chapter Ten does not apply to these programs. However, in no sense does it support the position that no other provision of NAFTA supports these programs--applies to these programs.

Just to say a brief word on provisions of

the U.S. argument that related to, again, I think it's within this area of subsequent activities of the parties. There appears to be an argument to the effect that these provisions, that is, domestic content requirements are practiced by these kinds of--these kinds of measures are imposed by just about every government, and I don't know if they're arguing that because everybody does it they have risen to the level of state practice, but clearly that argument holds no water whatsoever. The fact that other governments might do it within the context of agreements in which they have negotiated exemptions has no bearing on the issue before this Tribunal.

The next element of construction of a phrase of a treaty provision is to interpret the treaty in light of its object and purpose, and as we have seen this morning, Article 1012 of NAFTA states that NAFTA must specifically be interpreted in light of the objectives set out in Article 1.

The U.S. has not provided any information

on any object or purpose of NAFTA that will be served by the measure in question, quite understandably, because the measure in question is diametrically opposed to most of the objects and purposes of NAFTA. The interpretation put forward by the United States is designed to permit the Federal Government to continue to use its financial clout to force state governments to discriminate in favor of U.S. produced goods. And in this particular litigation the U.S. is seeking carte blanche to continue a textbook example of this protectionism.

What are the objects and purposes of NAFTA? They're set out in the preamble to NAFTA and they're also set out in Article 102. 102 of NAFTA states that: "The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment," Article 102, "more specifically through its principles and rules including national treatment," a principle, "most favored nation

treatment and transparency, are to:

"(a) eliminate barrier to trade in, and facilitate the cross-border movement of, goods and services between the territories...;

"(b) to promote conditions of fair competition in the free trade area;

"(C) to increase substantially investment opportunities in the territories of the Parties."

If one looks at the preamble to NAFTA, which we're entitled to do under the Vienna Convention: "Create an expanded and secure market for the goods and services produced in their territories; reduce distortions to trade; establish clear and mutually advantageous rules governing their trade; ensure a predictable commercial for business planning and investment."

The measuring question flies in the face of these objectives without doubt. And the interpretation put before this Tribunal by the U.S. is not an interpretation that would seek to foster the objects and purposes of NAFTA, rather to

frustrate those objects and purpose.

Finally, the Vienna Convention talks about a special meaning to be given to a term when the parties have agreed to do so. I would suggest that that's exactly what they have done when they've decided in respect of procurement.

And before leaving Article 1108, two points. Article 1108(7)(b), and we've referred to that earlier on today, exempts from the national treatment obligation subsidies or grants provided by a party or a state enterprise.

As you've heard this morning, we've been arguing that the measure in question is a grant, and the U.S. has consistently said that it's a grant. Ergo, the question, to what extent does this exemption permit the United States to argue that we're covered, we can deny national treatment in respect of this grant. Interestingly, the U.S. has not raise that argument. Our position on that is: were they to raise that argument, the protection afforded by that measure is only good to

one level, it is not good further down the line. You can impose the restriction on national treatment in terms of the recipient of a subsidy or a grant, but when that recipient of a subsidy or a grant has to then spend the money, you can't impose that restriction indefinitely, and that's the scope of that particular exemption. It does not appear to be on the table at the moment.

My friend reminds me that I didn't really respond to the question about the Clean Water Act. Is there a reason why under that Clean Water Act exemption the negotiators would have put in a provision dealing with a private, you know, some grant recipients of private enterprises, and we think that we have one rational reason. These Buy America have flow-down provisions, so that it's not simply the first time, but in our case the provision was in the Buy America funding to Virginia. Virginia was obliged to apply it in its contracts with other parties, who necessarily are not government parties. They are private parties.

So that Shirley imposed the condition on ADF. That was not procurement by a party. That was private procurement between Shirley and between ADF.

Is Shirley a grant recipient? Shirley is not a direct grant recipient. The direct grant recipient is Virginia. It's impossible to argue or to rationalize what was meant by that exception by saying there are different levels of grant recipients. The money that Shirley got came out of the grant. So one way of look at that is, well, what they were trying to do is protect the flow-down, the ability to flow down those Buy America requirements to various grant recipients as the money flowed through the system.

Does that answer it? It's as rationale as the mistaken negotiator theory. Unfortunately, I think what the Tribunal has to do is to finally weigh up the language and say which interpretation does the least damage to the construction of the statute and which interpretation is the most likely to foster the object and purpose of the statute,

and that, I submit, is the interpretation put forward by ourselves.

Unless there are additional questions on the scope of these exclusion provisions, I propose to turn quickly to Article 1106, the performance requirements and deal there with our claim that there's been a violation of Article 1106 and two provisions. I will deal with that fairly quickly. I will then turn the floor over to my friend, Rene, who will talk to Article 1105, and then I'll come back and finish off with Article 1102, of that's acceptable.

PRESIDENT FELICIANO: Mr. Kirby, I may have misunderstood you, and this is why I am concerned that I be able to understand you. I heard you to the effect that Article 1108(7) especially (b), you read this particular provision as in effect saying that Article--that Chapter Eleven, with the exception of 1102, 1103 and 1107 do apply to this situation A and B. And the fact that the exclusion, in respect of 1102, 1103 and

1107 relate to subsidies or grants does not justify the proposition that the subsequent, the downstream flow of the funds that constituted the subsidy or the grant would themselves be free from any disciplines. Is that what you are saying?

MR. KIRBY: This is under 1107? I think that--

PRESIDENT FELICIANO: 1108(7)(a) and (b).

MR. KIRBY: Our position on that is that if--that this is a grant that we're talking about and that 1108(7)(b) excludes from the discipline of national treatment--

PRESIDENT FELICIANO: Subsidies and grants.

MR. KIRBY: Subsidies and grants.

PRESIDENT FELICIANO: What about the expenditure of the funds constituted but--

MR. KIRBY: We are of the opinion, we take the position that that exclusion stops at the first level of the grantee.

PRESIDENT FELICIANO: Why?

MR. KIRBY: Why?

PRESIDENT FELICIANO: What is the basis for that position?

MR. KIRBY: Because even though--and there's a connection here with the Clean Water Act. Even though I don't think that it's appropriate to describe what Shirley and what ADF are, their position is grant recipients. I think that once you've given a subsidy or once you've given a grant, that's it, that's the end of the subsidy and that's the end of the grant. What the grantee does with that subsidy and what the grantee does with that grant is something completely different. It may be procurement. It may be investment. He may build a factory himself. It may be any number of things. The question is: when that third party then spends the money, is he--is the recipient of the money he spends, who is now a--the recipient of the money is a vendor. He's not receiving a subsidy or a grant. He is receiving payment for services or payment for goods.

So the notion that I can attach to a grant conditions that will continue and have an indefinite life throughout the economy by virtue of an exclusion which allows me to deny national treatment on the basis of subsidy and grant, I would say that that's a fairly expansive interpretation of the exclusion, because once the grant is given, that's the end of the grant.

PRESIDENT FELICIANO: But the recipient of the subsidy or the grant doesn't put the money in his pocket; it wasn't given for that purpose. It was given for a particular purpose, and presumably the purpose relates to this identified project.

MR. KIRBY: We can agree that the purpose is to spend the money to do something with it, not simply put it in your pocket or put it in the bank, to do something with it, to spend it.

PRESIDENT FELICIANO: Exactly. So then the question is whether the recipient of the money is subject to some requirements or disciplines in the process of spending that money.

MR. KIRBY: That's correct. Question: the recipient gets the money. Now the question is: what discipline is upon the recipient who receives that fund.

PRESIDENT FELICIANO: Yes.

MR. KIRBY: Private sector? No discipline. The private sector recipient of the funds can do what he wants with the funds, presumably, can discriminate, can decide he only wants to buy from Americans. He can do that. He's free to do that. There's another question though. If a state receives it, as in the present case, the question is, well, now that state is engaging in procurement by a party when he spends the money. Can he discriminate? Well, now we have to turn to Chapter Ten and see what that state can do or what that state can do under, for example, the GPA, but can that state save itself from the national treatment by saying, "Even though I might have obligations under Chapter Ten or under the GPA, I'm safe--even though I have obligations under Chapter

Ten, I'm safe because a grant, the grantor, the donor of the grant doesn't have to respect national treatment obligations and he can pass on that immunity to me, and I don't have to respect national treatment."

But my point is that once the grant is given, that's the end of it. This is, in fact, the mirror image of the problem we spent this morning talking about, where does procurement end and where does financial assistance begin?

PRESIDENT FELICIANO: What I'm driving at, Mr. Kirby, is it doesn't seem to me to mean very much to say that the grantor in the issuance of the subsidy or the grant is subject to certain disciplines, and then to say that once the money reaches the hands of the grantee or the recipient or the subsidy, that money can be spent any old way that the grantee wants.

MR. KIRBY: With respect, I would say that it makes perfectly good sense, and that the negotiators would not have agreed otherwise,

because picture for a moment industry in need of subsidization because it says grants and subsidies. Industry in need of subsidization, we're going to fund government money into General Electric, and we're going to tell General Electric that when it goes out in the market and buys, that General Electric is going to have to only buy in a particular--will have to apply Buy America restrictions when it buys lightbulbs. That's fairly--a fairly wide view of what governments ought to be entitled to do, or what negotiators would have agreed to in a free trade agreement.

If the Canadian Government had said, "We want to give money to Hydro Quebec, $10 million a year, and we don't want to be subject to national treatment, but we also want to tell"--Hydro Quebec's a bad example. Bombardier, private company. We also want to tell Bombardier, "Not only does Bombardier receive funds, but when Bombardier spends its money, it's going to have to apply the same domestic purchasing policies that we

tell it to apply. And then when the recipients of that money receive the money, they also will have to do the same thing. First you have an accounting nightmare. Secondly, once the money flows into these organizations, unless it's directly attributable project financing, you have a nightmare in terms f managing the funds.

The reasonable conclusion is to say governments wanted to know that when they give their largesse to their favorite clients, to companies, to other governments, when they spend money, they can do so targeted; they don't have to spend money on American companies in Canada, and the Federal Government doesn't have to give money by way of grant or by way of subsidy to American companies. Okay? They have that freedom. It's quite another thing to say that that freedom means that not only when we give money to Bombardier, we tell Bombardier when it spends the money, it can only spend it on Canadians.

PRESIDENT FELICIANO: Go ahead.

MR. KIRBY: Fine.

PRESIDENT FELICIANO: Please do not infer anything from what I said.

MR. KIRBY: No, no, not at all. We're almost trying to look into the minds of the negotiators and what exactly did they mean here. They say, when you give grants and subsidies you can avoid your national treatment obligations. I can understand that in terms of if governments are going to give away money, while it won't do too much damage to the economy, it won't do too much damage to the objectives we're trying to achieve, if when the government spends money it can--not spends money--when the government gives away money, it can discriminate. We're not talking about spending money in return for services here, we're talking about give it away, grants and subsidies. So when they give away the people's money, they're entitled to discriminate.

If you say there's not end to that provision, to me it seems inconceivable that the

negotiators would have agreed to such a wide open provision.

PRESIDENT FELICIANO: My point is, is that it's very easy to avoid the thrust of the requirement in respect of the recipient or the subsidy or the grantor if the disciplines stop there, if they do not reach beyond that.

MR. KIRBY: But they're picked up right away.

PRESIDENT FELICIANO: And (7)(b) does not say the recipient of the subsidy or the recipient of the grant. It says "subsidies or grants." They don't refer to persons.

MR. KIRBY: That's right.

PRESIDENT FELICIANO: They refer to what, a sum of money.

MR. KIRBY: Subsidies or grants provided by a party or a state enterprise.

PRESIDENT FELICIANO: Well, but go ahead. I don't wish to push the point at this time.

MR. KIRBY: Okay. What's interesting is

that 1108(8) doesn't give even anything close to the same largesse in respect of subsidies or grants. 1108(8) exempts only procurement by party in terms of performance requirements, which is a requirement to buy domestic goods.

Article 1106 prohibits certain performance requirements, and we're interested in this arbitration in 1106(1) and 1106(3). And I'll just take the members through both provisions so that we have a clear starting point.

1106(1). No party may impose or enforce any of the following requirements or enforce any commitment or undertaking in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a party or of a non-party in its territory.

What kind of requirements cannot be enforced?, Requirements, (b), to achieve a given level of percentage of domestic content; (c) to purchase, use or accord a preference to goods

produced or services provided in its territory, or to produce goods or services from persons in its--to purchase goods and services from persons in its' territory.

Item 3. No party may condition--and I think we're about to answer your question, Mr. Chairman. Sometimes the answer is right there, but 1106(3). No party may condition the receipt of continued receipt of an advantage in connection with an investment in its territory of an investor of a party or of a non-party on compliance with any of the following requirements. To achieve a given level or percentage of domestic content, or (b) to purchase, use or accord a preference to goods produced in its territory or to purchase goods from producers in its territory.

In our opinion both of these provisions are clearly violated by the Buy America measures in question, and they are not saved by the exemption for procurement by a party.

We consider that this Tribunal has before

it an admission that Buy America measures in general, these domestic content requirements, are by definition nonconforming with Article 1106. Where's that admission? That admission is found in the fact that the U.S. claimed an exemption for a non-conforming measure, the Clean Water Act, which is virtually the same as the present measure. It imposes Buy American requirements, but that one is specifically exempted. This one is not. There is nothing in the U.S. argument, nothing in the U.S. arguments to suggest that these measures, the Buy American measures that are at issue here, there's nothing in the U.S. argument to suggest that somehow these measures are not performance requirements.

In the Investor's Reply, at page 34--and I'll read it, it's only a short--page 34 of the Investor's Reply. The Investor noted--and this is at page 34, paragraph 212. "The Investor notes that the U.S. does not raise any additional defenses to the violation of Article 1106." That

is, other than the exemptions. "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 that Article 1106 constitutes a prohibited performance requirement imposed upon the Investor and on its investments."

That clearly put the U.S. on notice that if there were some other defenses out there, that they needed to come and bring those defenses before the Tribunal and the U.S. has not to date brought any defense other than the exemption.

Did the measures impose performance requirements in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment? ADF Group is an--ADF International is an investment of an investor in the territory of the U.S. The steel purchased by ADF Group is an investment, and the contractual interest that ADF International had in the Shirley Sub-Contract is an investment. The Buy America

requirements required ADF International to achieve a given level of domestic content, what was that level? It was 100 percent. It required it to purchase, use or accord a preference to goods produced or services provided in the territory, or to purchase goods or services from persons in the territory. That was a clear requirement of the measures in question.

Article 1106(3) states that no party may conditioned receipt or continued receipt of an advantage in connection with an investment in its territory of an investor of a party or of a non-party on compliance with any of the following:

(a) to achieve a given level or percent of domestic content; and

(b) to purchase, use or accord a preference to goods produced in the territories.

No question that ADF International was required to achieve a given level of domestic content. No question that ADF was required to purchase, use and accord a preference to U.S. steel

and U.S. steel fabricators when they couldn't fabricate the steel itself in Canada. No question that those provisions are met. Did the measure condition the receipt or continued receipt of an advantage in connection with an investment? I would say that the ability to do business with the Virginia Government is an advantage that was conditioned upon these domestic content requirements. If you do not meet the domestic content requirements, don't sell us steel, basically, that's what they say.

Judge Feliciano's discussion earlier on in terms of the flow down of the benefits--and I think that this provision answers in part that problem. If we think, for example, a subsidy or a grant which is excluded from national treatment, the national treatment obligation doesn't appropriately to subsidies or grants. However, when you give that grant or you give that subsidy, and it flows down through the chain, you're not allowed to continue the receipt or continued receipt of an

advantage in connection with the investment in the territory of an investor. So you cannot attach conditions.

So the grant flows down all the way to Springfield and Springfield knows that it needs to attach conditions. Why is it doing that? It's doing that as a result of the actions of the Federal Government.

In terms of Article 1106, it's short, but I think given the fact that U.S. has raised no affirmative defense other than the exemption I don't think we need to go much further. The clear goal of the measure is precisely to enforce domestic content requirements, and it is a prohibited performance requirement. The United States admits as much in the Clean Water Act exemption that it negotiated.

I'm going to turn the floor over to my friend, Mr. Cadieux, who will speak to you on issues arising out of Article 1105 and the claims in respect of contracts other than the Springfield

Interchange Contract. Thank you, Members of the Tribunal.

PRESIDENT FELICIANO: Thank you, Mr. Kirby.

MR. CADIEUX: For purposes of logistics, I will need you to have before you the Investor Reply Volume II as well as Volume IV of the U.S. materials, and we can start the plates inversely because I'll be removing it from the other order.

My presentation on Article 1105 has basically four parts. First I will deal briefly with Article 1105 itself and the arrival of the Free Trade Commission Notes on July 31st, 2001; how in light of these notes we believe that we are now entitled to move forward and make an Article 1102 claim, which will be our second part of the submission; and as well the mirror image of an Article 1102 claim would be an Article 1103 claim, which would be a third part of our submission. This third part of the submission has a preliminary issue as to whether or not we are entitled to make

that claim at all, because the United States objects to it. And finally--and dealing with whether or not we can do the 1103 claim, we will also look at a side issue or a parenthetical issue with respect to future damages because in both instances we are accused of not giving timely notice or proper notice, so I'll deal with these two at the same time. And then finally, the application of the--what we believe to be the better treatment that we are receiving from the Albanian and Estonian bits with respect to fair and equitable treatment, the application of that better treatment to our case.

First let's turn to Article 1105, which says at paragraph 1 that, "Each party shall accord to investments of investors of another party, treatment in accordance with international law," then an important word, "including fair and equitable treatment and full protection of security."

Now, on a first, plain reading, one could

arrive at an easy conclusion that fair and equitable treatment and full protection of security form part of international law since they are included within it. On July 31st of last year, however, the Free Trade Commission adopted an interpretative note which is found in U.S. Volume II at Tab 26. We won't turn to it. Basically the position stated in there is that the treatment accorded by Article 1105 paragraph (1) goes no further than that which is granted under customary international law in relation to aliens.

We submitted in the Investor Reply Volume III at Tab 27 the views of Sir Robert Jennings as to what are the effects of the Free Trade Commission Notes. Basically, Sir Robert views the Free Trade Commission Notes as being an amendment to the treaty because nowhere does Article 1105 mention customary international law or refers to aliens. The fact that notes refers to aliens is anachronistic in light of advances in international human rights law.

Be that as it may, the United States considers that the Free Trade Commission Notes discredits the theory that Article 1105 goes further or gets protection beyond customary international law in relation to aliens. Because of this, we believe that we can move past this and look at better treatment given under Article 1102 and 1103 in relation to subsequent bits entered into between United States and third parties.

The Free Trade Commission Notes were set up as an affirmative defense by the United States. We are entitled to reply to them. If Article 1121 sets a criteria of, quote, unquote, "condition-precedent arbitration," the requirement of a wavier--of a notice, sorry, in Article 1119 requires that notice be given but certainly not in anticipation to all possible U.S. defenses.

In any event, at least the Article 1102 claims has been notified. In the Rejoinder at page 30, the United States indicates that treatment accorded to U.S. investors by Albania or Estonia is

not relevant to an Article 1102 claim, but that's not the 1102 claim we're putting forward. In our Investor Reply at page 43 we cite the ICSID case of Maffezini, which is found in Volume I Tab 5, more particularly at page 23, paragraph 61, for the proposition that if a government like the United States seeks to obtain a treatment for its own investors abroad, which is more favorable than that granted under the basic treaty to foreign investors in its territory, then the national treatment clause is to be construed so as to require similar treatment to the latter. In other words, here ADF is requesting the same type of protection given to U.S. investors that has been secured for their benefit by their government in Albania and Estonia. Such protection, we submit, and we'll get to it, is better than the one found in 1105.

Turning now to the third part of the submission, being the Article 1103 claim, first of all, can we make this claim? Again, we invoke Article 1103 as an affirmative defense to the U.S.

use of the FTC Notes to limit the application of 1105. Since we learned about the FTC Notes on July 31st, 2001, being literally the day before we filed our Memorial, if anybody here was caught by surprise, it was us. The United States was aware in our Memorial that a possible Article 1103 claim was in the arbitration landscape, because we argued that if you tried to reduce the scope of 1105 it would become ineffective because we could then move forward under 1103. The United States should at least have said something about that in its Counter-Memorial, but said absolutely nothing.

The due process clause in Article 1115 allows us to proceed on the Article 1103 claim as the investor got knowledge of the breach only on July 31st, 2001. It would be pointless to serve a new notice at this time.

In our Notice of Arbitration at page 22, we sought a variety of reliefs. We sought first of all, a series of declarations, and at the end such further relief that counsel may advise and that the

Tribunal may permit. We've cited Canadian Case Law to the effect that this allows us to move along if circumstances change. United States has indicated that the Canadian Case Law cited seems to be limited to appellate review, but this is not entirely the case. And we have cases at trial citing the Canadian Supreme Court decision which basically holds for the proposition that you can invoke the basket clause, and I'll get to the principles from the Canadian Case Law because it's reflected in international case law. You can invoke it when the other side has had an opportunity to argue the case on the merits and they were not prejudiced. Here we submit that United States responded fully to the Article 1103 claim and they haven't cried prejudice at all anywhere.

They have cited, however, two cases. One is an ICSID case and the other one is a World Court case, and I will first turn to the ICSID case, the AMCO decision, and I notice that the Chairman of

the Tribunal was involved in that case, and so was Ms. Lamm. So it's a little bit difficult for me to say exactly what you meant in the decision, but I can at least limit myself to a few simple propositions.

That case, the AMCO decision, was not a case involving a situation such as this where we are in reply to an affirmative defense. That case involved an application for annulment which I understand Indonesia merely recited the grounds of annulment contained in the ICSID Convention and then as to the basket clause, saying, "We'll talk about it later." We're a far cry from this situation.

The Tribunal did use a reasonably implicit standard. If you're going to invoke something further down the chain, it must have been reasonably implicit that you would have done it from the start. This is a little bit useful in our case because 1103 is a mirror image of 1102 in terms of what protection are we seeking? For 1102

it's the protection given to U.S. investors. For 1103 it's the protection given under the same treaties to the Albanian and Estonian investors. So one is a corollary or the mirror image of the other, and had we known that the FTC Notes were coming our way, we certainly have covered both.

Of interest, at paragraph 50, the Tribunal felt that there was no licuna on the ICSID rules which would justify the Tribunal to have recourse to the practice before the World Court, but our friends here have cited World Court precedence, so I'll turn to that.

They cite the Nauru Phosphates case. I invite the Tribunal to read the facts of the case because aside from the fact we're not in the same situation, what is more particular in the Nauru case is that what the Court basically said is that you're reaching too far to get extra claims on other matters which are not the same as the one which are before the Tribunal. And in so deciding, the Court formulated a test which states that in

order to advance a new claim it must have been reasonably implicit, and it must arise directly out of the question which is the subject matter of the application.

The Court, at paragraph 68 cites, Societe de Commercial Belge, where the Court states that in order to allow to advance a new claim, it must be done reasonably, one must not transform the dispute into a dispute which is different in character, and it must not be done so as to prejudice the interest of third states. In this case neither Canada or Mexico, and more to the point, nor have the United States asserted any prejudice. United States has argued the case on the merits.

We therefore submit that the Article 1103 claim is reasonably put forward. We have not blind-sided United States. It arises directly, directly out of the question which is the subject matter of the dispute, and it is a logical corollary of the Article 110(?) claim which in any event is properly before you.

This brings me to a parenthetical argument with respect to damages based on other contracts. Here we have three propositions. First, all of the other contracts are directly affected by the exact same measure. The only issue is one of damages that will be addressed at a second part of the hearing. Second, deference to a waiver under Article 1116 and 1117 does not bar claims from ongoing damages. At the time the notice was given, ADF, there had been a breach, and ADF had already suffered damage, and now the question is how much in a situation where damages are ongoing? All of the other contracts affected by the same measure are simply in the wake of the Springfield Interchange Contract.

Finally, it is submitted it's better from the perspective of the administration of justice to have all these damages issues settled in a single arbitration than have a multiplicity of proceedings that serves the interest of no one. We therefore submit that the Article 1103 claim is reasonably

placed before the Tribunal.

So what does Article 1103 give us? It gives ADF the right to claim the benefit given to Albanian and Estonian investors under the Albanian and Estonian bids under all phases of the investment, entry, operation, breakdown. ADF has allowed fair and equitable treatment in terms of the entry of the investment in the U.S. market, and right now the Surface Transportation Assistance Act of 1982 shuts the door equally to all investors. The obligation in 1103, as well as in 1102, is unconditional and immediate. The United States says that 1103 and 1103 claims are barred by 1108, procurement by a party. Matt Kirby has dealt with this issue. I will just simply add that we're seeking better treatment under Article 1105 and 1105 is not covered by 1108.

Now, we get into the nuts and bolts of the better treatment. In its Rejoinder at page 4041, United States asserts that all of these subsequent bids, because we've referred not only--we're

referred only to Albania and Estonia, but the United States has referred to a variety of other BITs, to say that all of them give the exact same treatment as Article 1105.

We believe that this is false for at least three reasons. First the United States has always pushed the idea that fair and equitable treatment and full protection of security, if it's not already part of customary international law, it should be. The idea is developed in the articles of Professor Vandevelde, which we submitted to you. Please read them. I'm told that I misconstrued them. Indeed I assume that Professor Vandevelde wants that to be the case because by way of these arbitration proceedings, you can push the idea that you should have fair and equitable treatment in international law and it's by way of these arbitration mechanisms that you can get to that result.

Second, now that the United States is on the receiving end of such an obligation, here we

have the Free Trade Commission Notes that seeks to limit the rights contained in 1105, but the problem is those notes don't apply to any other bilateral investment treaty.

Third, to the extent that either United States or ourselves are completely wrong and that fair and equitable treatment and full protection and security is not included in customary international law in relation to investments and not aliens, then we simply rely on the explicit treaty obligations contained within the treaty itself, and the treaty norm is higher than the customary international law standard.

In saying that the bilateral investment treaties are equal to Article 1105, the U.S. avoids looking at the actual wording of the bilateral investment treaties, and sends us rather looking at the letters of transmittal to the Senate. We'll look at both. But I would have four prefatory comments before we move to the wording of the letters of transmittal and the wording of the BITs.

First, the wording of the BITs have echoed in the OECD Multilateral Agreement on Investment and this we find in the Investor Reply Memorial, Volume II Tab 12, page 115. This is the article of Professor Vasiani. At the middle of the page, the model BIT clause states that each contracting party shall accord to investments in its territory of investors of another contracting party, fair and equitable treatment and full and constant protection and security. In no case shall a contracting party accord treatment less favorable than that required by international law.

The wording of this model BIT was looked at--and this is our second proposition--by Mr. Justice Tysoe of the British Columbia Supreme Court in the Metalclad Judicial Review, Volume II(b)(1) Tab 7, page 24 at page 64-65. And for Justice Tysoe this was a very easy call. In light of Article 31(1) of the Vienna Convention, Mr. Justice Tysoe bases his decision on the wording of the model BIT in comparison to the wording of Article

1105. In that decision Mr. Justice Tysoe came to the conclusion that the wording was different, that the wording of the model BIT was additive in character, whereas the wording in Article 1105 was subsumed so that 1105 provided a lesser protection.

The best evidence found to determine this was in the wording of the BIT itself. One need go no further. Now, what is true for Article 1105 is true for the model BIT and consequently for the Albanian and Estonian bilateral investment treaties, because we will see that the wording of the model BIT is the same found in those treaties.

Third observation about the BIT language that we will review, none of them, none of them requires that fair and equitable treatment and full protection and security be interpreted, quote, "in accordance with international law or in accordance with customary international law." Rather we use the floor standard of the model BIT, over which piles up the two explicit treaty obligations. And indeed the BIT language alone suggests that those

are explicit obligations, and curiously enough, some of the letters of transmittal to the Senate confirms this position.

Here we will have to do some fingers do the walking because I'd like to go through the letters of transmittal and the wording of the BITs. Volume IV of the U.S. materials, we can start with Tab 15, which is closer to home, Albania.

Each of these tabs is divided into basically two types of documents. One is the letter of transmittal itself, and at the end of the letter of transmittal, there is the actual Bilateral Investment Treaty. The first part is numbered with Roman numerals, the second part with general numerals. And if we can go to page vii in the Roman numbers, and then to page 4--so page vii, and then if you could thumb through all the way to also page 4 later on, which provides for the actual provision itself.

Now, at page 4, we have the provision itself, (3)(a) and (3)(b). Each party shall at all

times accord the covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law." It doesn't say "customary." It doesn't mention "aliens."

Paragraph (b), "Neither party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments."

If we turn at the letter of transmittal, what is this stated to mean at the bottom of the page at page vii? Paragraph (3) sets out a minimum standard of treatment based on standards found in customary international law. That means the entire paragraph, not just (a) but (b) as well.

PRESIDENT FELICIANO: What page is that, please?

MR. CADIEUX: Page vii in numerals.

PRESIDENT FELICIANO: In Roman numerals.

MR. CADIEUX: In Roman numerals, and at

the bottom of the page, it states, last paragraph, paragraph (3)--it starts with paragraph. Am I at the wrong or right tab? Tab 15, Albania--oh, sorry, 8.

MS. LAMM: Good, yes.

MR. CADIEUX: And then at the bottom, paragraph (3). So the entire paragraph, (a) and (b), according to the letter of transmittal, sets out a minimum standard of treatment based on standards found in customary international law, even though the paragraph doesn't use the words "customary international law."

Next sentence, the obligation to accord fair and equitable treatment and full protection and security are explicitly cited--the obligations are explicitly cited, as is the parties' obligation not to impair through unreasonable and discriminatory means the management, conduct, operation, and sale or other disposition of covered investments.

The general reference to international law

also implicitly incorporates other fundamental rules of international law. Albanian BIT.

Next tab. Let's go to Armenia. Roman viii, again, second paragraph, it starts by paragraph (2), further guarantees. Let's go to page 6 now of the treaty itself. Page 6, now we have three paragraphs. Paragraph (1), "Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security, and shall in no case be accorded treatment less than that required by international law." It doesn't use "customary," it doesn't use "aliens." (b), "Neither party shall in any way impair by arbitrary or"--not "and" like in Albania--"or discriminatory measures."

And notice, please, that they use the word "arbitrary," whereas in the Albanian BIT, they use the word "unreasonable."

And then further on, we see something new. "For purposes of dispute resolution under Article 6 and 7, a measure may be arbitrary or discriminatory

notwithstanding the fact that a party had or has exercised the opportunity to review such measure in the courts or administrative tribunals of the party."

In our reply, we indicated that we believe the source of this clause to come out of the ELSI case in which the United States has added this to make sure that use of domestic remedies cannot be a justification for saying that a measure is not arbitrary or discriminatory. So I will call this the ELSI clause.

(c), we have a new paragraph now, something new. "Each party shall observe any obligation entered into with regard to investments." I'll call this the contracts clause. According to the letter of transmittal, this paragraph (a), (b), and (c) with the ELSI clause sets out a minimum standard of treatment based on customary international law. And yet this is quite different than the one in Albania. If this was all customary international law, surely the standard

would be the same. But it isn't. Why? Because it's the treaty language that comes first. And I can go on and on--

PRESIDENT FELICIANO: The what, please?

MR. CADIEUX: Sorry. Because it's the treaty language that comes first.

PRESIDENT FELICIANO: The tree?

MR. CADIEUX: The treaty language.

PRESIDENT FELICIANO: Oh, the treaty.

MR. CADIEUX: Yes. I have just done two. Pressed for time, I won't do them all except go to Ecuador, which is at Tab 17. I will invite you to look at all of the wordings of the letters of transmittal and the letters of the BIT, and I'll come to a general conclusion.

If you go at page 9 for Ecuador, paragraph (3) guarantees that investments shall be granted fair and equitable treatment. It also prohibits parties from impairing through arbitrary or discriminatory means the management, operation, maintenance, use, enjoyment, acquisition, expansion

or disposal of investment. This paragraph also sets out a minimum. It does several things, one of which is to set out a minimum.

What can we conclude from this? First, there is no consistency in the drafting of the letters. Second, there's no consistency in the drafting of the model BITs as well. Sometimes they use "unreasonable." Sometimes they use "arbitrary." Sometimes they use "arbitrary and discriminatory." Sometimes they use "arbitrary or discriminatory." Sometimes the ELSI clause is found. Sometimes the contracts clause is found. Sometimes both are found. Sometimes neither are found.

Surely if the United States is saying that all of these are exactly the same as 1105 and we get nothing more than what we get from the Free Trade Commission Notes, this is somewhat bizarre because the wording of all of this is so different that one cannot make such a general proposition.

If all of this was part of customary

international law with respect to the treatment of aliens, then surely the standard would be the same from BIT to BIT. But it isn't. Obviously, it's the wording of each particular Bilateral Investment Treaty which governs. And we claim the explicit wording found in the Estonian and Albanian BITs.

Application of the principles to the present case. Just a prefatory comment. Professor de Mestral asked a question with respect to purposive interpretation of NAFTA, and he asked the question, well, how far can we go? I also read into that question not only how far can we interpret, but upstream how much authority do we have to do so? Because when faced with these obligations, the first question is, well, what do we give in terms of fair and equitable treatment and full protection and security? Who are we to say so? Who are you to say so is persons appointed under a mechanism given by the United States of America, Canada, and the Mexican state. This is the highest form of sovereignty, the one to be able

to contract it away. And they gave this responsibility to you. You must approach this without any lingering doubts as to your legitimacy.

In domestic law, Canada has gone through the same problem with the advent of its charter, the BC Motor Vehicle Acts reference, what do we judiciary in terms of deference to Parliament, what is our role. Your role is to approach this without any doubts as to your legitimacy. The United States had the same problem in its early days. I believe the case was Marbury v. Madison. And judges came one day to say who's the Constitution. It's the judges. We decide what's the Constitution. You decide what is fair and equitable treatment and full protection and security.

Under Buy American--with an "n"--programs, the U.S. has applied a standard of administrative and judicial decisions to the effect that post-production fabrication is not a manufacturing process. Should we not apply the same standard

here?

The United States sets up a first defense. Well, you're not in like circumstances. The problem with this defense is that the Buy American provision found in direct Federal procurement was also found in the Surface Transportation Assistance Act of 1978. We're now in the same sector.

As the provision was found in the same sector, the question becomes whether changes to the '78 Act by the 1982 Act requires a change in principle. So this is not a question of whether or not the United States can change a rule but, rather, if in the absence of a change of rule the same principles should continue to apply without discrimination.

The United States argues there has been a change of rules. In its Counter-Memorial at page 53, the United States says that it covers all, quote-unquote, steel materials. At page 45 of its Counter-Memorial, the United States says that the provision places emphasis on the production of,

quote-unquote, finished products. In its Rejoinder at page 7, the United States indicates that the provision applies to all steel to be produced and, quote-unquote, fabricated.

The Surface Transportation Assistance Act of 1982 says nothing of the sort, and it is quite curious the United States has to add these words to the provision to stretch it where it does not reach.

Also telling is the admission by the Federal Highway Administration, which we cite at page 24, paragraph 69 of our Memorial: In its final rule of 1983, the Federal Highway Administration took the following view: "With respect to manufactured products, section 165 does not differ in its coverage from section 401 of the [Surface Transportation Assistance Act] of 1978. Since [the Federal Highway Administration] has never covered all manufactured products under its Buy America regulation"--in 1978--"and Congress did not specifically direct change in that policy in

enacting section 165, [the Administration] does not believe that all manufactured products...must be covered."

What is curious is that under the old Act, it was covered and the administration did nothing. Under the new Act, it's still covered. One would have thought that this is a clear indication from Congress to the administration, start covering it. If you had eliminated the coverage in the '82 Act, it would have been a reasonable inference that, A, we don't have the authority to do it and, B, they agreed with us that we shouldn't have done it in the first place. But here it's the other way around.

Here they selectively ignore the fact that all manufactured products are still covered. They ignore that completely. And then they focus squarely and uniquely on steel. I believe this to be arbitrary. I believe this to be discriminatory. And I believe that this creates a serious problem in terms of transparency of the statute.

The Federal Highway Administration has become almost a law unto itself, and it has made the law opaque by the ever so high degree of discretion which it has given to itself. It should not be the discretion which leads. It should be the law. And here we have a serious problem where one can completely ignore a full section of an Act.

Now, the U.S. argues that basically in a regime of delegated legislation the Federal Highway Administration is entitled to discretion, and that when the intent of Congress is silent or unclear, the U.S. Supreme Court will give great deference to that. That may be very well true, but that's no defense in light of Article 27 of the Vienna Convention. You can't use your own domestic system to shield yourself from the higher international law obligations.

By selectively focusing on steel and completely ignoring all other manufactured products, the Federal Highway Administration actions are discriminatory and, it is submitted,

Article 1108, which has to be read restrictively, cannot allow--one cannot allow to read Article 1108 to allow such measures to seep through.

Even if one should give a margin of appreciation to the Federal Highway Administration and they cite in their own domestic law the Chevron doctrine, page 7, note 48, there is no evidence that the Federal Highway Administration sought to ensure its regulations were compliant with NAFTA, and this they had to do under the Charming Betsy doctrine, which we cite in our reply at page 45, note 74 and 75. And where it has looked at NAFTA, it views the measure as a grant.

Now, Mtre Kirby has reviewed the Slater letter. We have nothing, of course, against Mr. Slater. The United States in its Rejoinder indicates that the letter is far too cursory to enable the reader to ascertain on what grounds Mr. Slater believed the 1982 Act is exempt from NAFTA obligations. And yet the letter was issued after some reflection. It took two months before it got

out. And it's also consistent with what is on the Department of Transport Web site. It's also consistent with the U.S. Statement of Implementation Action. They're all saying it's a grant.

That the U.S. has consistently claimed the position that the measure is a grant--and I believe this is no small oversight--and now change position we submit is clearly a radical shift in position. For this we cite no better authority--and I'll conclude on this--than the one cited by the United States against us, U.S. Volume II at Tab 36, page 142, Bin Cheng. And I'll cite: "It is a principle of good faith that a man should not be allowed to blow hot and cold, to affirm at one time and deny at another. Such a principle has its basis in common sense and common justice."

We submit that this radical change in position is surely a breach of fair and equitable treatment, and we would go so far as to say even under the Free Trade Commission Notes of

Interpretation.

That concludes our submission on Article 1105.

PRESIDENT FELICIANO: Thank you, Mr. Cadieux. Could we ask a few clarifying questions at this stage? There are a few. I'm sure we all have a few questions.

Ladies first. Carolyn, please.

MS. LAMM: I understand that you've pointed out the various discrepancies in the standards under the various BITs, and you're telling us that under the MFN principle you have the right to, of course, the best of the standards.

MR. CADIEUX: And national treatment.

MS. LAMM: And national treatment. My question is: What would you have us to rely on, which authority, to describe substantively what is in that provision of international law or customary international law? What case, or Bin Cheng or something that defines the substantive standards that you want us to rely on to decide this?

MR. CADIEUX: In any judicial review decision when you have patently unreasonable as a standard, for example, what do you rely on? You rely on the good sense of the person who's in front of you and who had the job to decide. That's you. You come from different legal backgrounds. You will decide what is fair and equitable, whether you think this is arbitrary, whether you think this is discriminatory.

MS. LAMM: Is there a particular case? I mean, would you have us rely on one of the other NAFTA cases that defined fair and equitable, for instance? Or would you--

MR. CADIEUX: I have found an ICSID case concerning Spain and Argentina and--if I'm allowed two seconds.

[Pause.]

MR. CADIEUX: I wanted to keep this up my sleeve, as it were, for number five, and I guess the cat's out. It's Maffezini on the merits, and the Kingdom of Spain, it's on the ICSID Web site.

And there at paragraph 83, the Tribunal recognized the principle of transparency in the conduct of Spain towards the Argentinean investor.

Now, I wish this could be of more use to you, but--and you'll have to read the facts, because you'll see, you'll appreciate whether or not this was a case to apply the principle. But the court didn't look at customary international law, didn't ask questions of customary international law in relation to aliens and investment. It just basically asked: Is this fair? That's the standard you have to apply.

What makes--what holds down or bridles this from going in unruly directions, to follow a quotation of Lord Dening, is that you're three from different legal backgrounds, you can draw from your own experiences as to what you believe, how these principles which are inherently fact-specific.

PRESIDENT FELICIANO: I'm sorry. Are what?

MR. CADIEUX: Are inherently fact-specific. You

have to look at it according to your good sense as to what you see. Does this bother you? And the whole purpose of these provisions, in fact, was to do precisely what's occurring now. You decide. We states can't. There has to be somebody to decide. There has to be some safety valve. You're it. The United States says that this is an exceptional procedure. No. There are thousands of BITs. This is no longer exceptional.

B, as I indicated--and I forgot to mention the case because it was in light of Mr. de Mestral's question. There's also another ICSID case. It's Antoin Goetz v. Republic of Burundi, also an ICSID case. It's in French so I can't cite you the principle. I'm not sure--I don't think--if I read it in French, it won't pass mark, I don't think. It comes--they cite a principle enunciated by the World Court where, I'll translate loosely, the court refuses to see in the conclusion of a treat, of whatever treaty, by which a state undertakes itself to abandon a part of its

sovereignty--no, sorry. By the conclusion of a treaty, the court does not see this as an abandonment of sovereignty; rather, the ability to contract international undertakings is precisely an attribute of sovereignty.

So this is what they've done. This is an act of sovereignty. They have given you the power. You decide what it means. You may turn to anywhere you wish to give you guidance. The best guidance is your own background. And in a system, at least under the common law, a system of precedent, the House of Lords said at one point, well, there has to be one one day because or else the system won't work. And this is the whole idea.

PRESIDENT FELICIANO: Okay--oh, I'm sorry. Go ahead.

MS. LAMM: I think both the Pope & Talbot case and Metalclad addressed fair and equitable treatment. Were you satisfied with the standards articulated in those cases?

MR. CADIEUX: NAFTA--this is a problem

because each case is its own.

MS. LAMM: Right.

MR. CADIEUX: So my answer would be you take care of your own problem. There's a provision in the agreements which says that, you know, each case is its own case. It's not (?) -ness. I'm not saying don't look at the others. You may seek guidance from the others.

PRESIDENT FELICIANO: Mr. Cadieux, I have only a very few, very simple minor questions. One is in your presentation you seem to be saying that the Federal Highway Administration is completely awry in its interpretation of its own enabling--of its own enabling--

MR. CADIEUX: Yes, I--

PRESIDENT FELICIANO: --statute. In your discussion about the--

MR. CADIEUX: What the Federal Highway Administration has done--

PRESIDENT FELICIANO: The Federal Highway Administration--

MR. CADIEUX: --and gone astray.

PRESIDENT FELICIANO: Yes. You seem to be saying that they're completely out in left field insofar as the interpretation of their own statute.

MR. CADIEUX: I'm not everyone sure they're in the same field because they've eliminated a whole field completely.

PRESIDENT FELICIANO: Okay. There is, I think, a general proposition, a generally accepted proposition in public international law that a state law or a law of a sovereign state is to be taken as a matter of fact. That does not prevent an international tribunal from determining whether a state law is or is not consistent with an international obligation found in a treaty. But what the fact is or the shape and the control of the fact or the meaning of the fact, that is--is that something that we have to accept as a given?

MR. CADIEUX: That they have done this?

PRESIDENT FELICIANO: Do you feel that we are authorized in designing the rulings, the

practice of the Federal Highway Administration and say you're all mistaken, you're mistaken, you're misreading the statute, you're forgetting this and that and the other thing?

MR. CADIEUX: Yes.

PRESIDENT FELICIANO: Do you feel we have the authority to do that?

MR. CADIEUX: Yes.

PRESIDENT FELICIANO: Why, sir?

MR. CADIEUX: Because if they do it in a manner that is discriminatory and arbitrary, the obligations in the Bilateral Investment Treaties kick in.

Now, I think the real issue here is at what level should that rise because obviously any good lawyer will find anything arbitrary, anything discriminatory.

One way in human rights law to control this--and there are a variety of levels of control depending on how dangerous the measure is or how violative the measure is. The basic standard is

that there has to be a rational connection between the measure you're taking and the objective you want to reach.

What is the rational connection here? They've given none. They've said under the prior Act it was there.

PRESIDENT FELICIANO: Yes. Mr. Cadieux, my question is not whether we are authorized to determine the legitimacy or the correctness of a municipal statute or municipal case law with the terms of a treaty obligation. There's no question there. There's on problem there. My inquiry is to whether you feel we are authorized to determine that a ruling or practice issued by the Federal Highway Administration is wrong as a matter of U.S. law.

MR. CADIEUX: No, that you can't do.

PRESIDENT FELICIANO: That we cannot do.

MR. CADIEUX: I don't think so.

PRESIDENT FELICIANO: Thank you very much. That's the question I wanted to--if we cannot do

that, why should we look into these vagaries and strange interpretations or series of interpretations that you are inviting our attention to?

MR. CADIEUX: Because the treaty gives you the authority to autopsy the beast, so to speak. You are allowed to look at how the measure is made, and what the measure is and how it's applied, and you do it--

PRESIDENT FELICIANO: I thought we are required to accept the statement of the Federal Highway Administration, as far as the meaning or the scope or the statute that they are interpreting.

MR. CADIEUX: I take it to understand that you are to judge the matter not according to whether or not the U.S. Federal Highway Administration did it right under U.S. law, but you are allowed to determine whether or not they did it right under the treaty.

PRESIDENT FELICIANO: Yes, our first

requirement is to find out what is it, what is the fact, in determining what do we do. Do we look at the decision or determination or practice of the Federal Highway Administration--

MR. CADIEUX: Am I to understand that as soon as they say, "We did this way, and we think it's compliant with the higher statute, and therefore this is a fact that you have to accept," and you can't inquire into that, even for the purposes of the treaty?

PRESIDENT FELICIANO: That is what I'm asking.

MR. CADIEUX: No, you can't do that because that would be a violation of Article 27 of the Vienna Convention, using your own domestic system to shield review of the international law obligation.

PRESIDENT FELICIANO: No, but you've got it wrong or upside down. First, you have to determine what the municipal law requires, and then you compare the municipal law with the

international obligation.

MR. CADIEUX: The municipal--okay.

PRESIDENT FELICIANO: This is a threshold question I am raising now.

MR. CADIEUX: The municipal law here is Section 165.

PRESIDENT FELICIANO: Municipal law is a question of fact.

MR. CADIEUX: Yes. I don't think it's disputed that the measure here is the Surface Transportation Act of 1982. I don't think it's disputed that in 1983 they adopted a rule, the Federal Highway Administration adopted a rule. I think you can take that for granted. Those are the facts, and you have to take those for granted that those are the facts.

Now the next step, does that law and that rule, the rule which, by its own terms, say that we're completely ignoring all manufactured product, that's what the rule says. We're doing it completely without any justification whatsoever. I

am asking you is that arbitrary and discriminatory under the NAFTA treaty standard by way of 1102 and 1103? That's the precise question I am asking. I still haven't--

PRESIDENT FELICIANO: It sounds to me like a very ingenious way of getting out of the doctrine. In fact, municipal law is a matter of fact to be proven before an international tribunal, but you have just agreed with me that we can't do that.

MR. CADIEUX: You can't judge the municipal law according to its standards. You can't say, well, under U.S.--if I had been the Supreme Court of the United States, I would have broken down this regulation. You can't say that. Am I okay up to now?

However, what I'm asking you to do is when the Federal Highway Administration is saying, I look at the act of Congress, I am going to completely disregard it for no reason whatsoever that has been advanced up to now, and the one they

have advanced has no rational connection with the way the statute is drafted, saying you can go there and compare that with the obligation of the treaty.

PRESIDENT FELICIANO: I better move to something else, to my next question.

Do you believe that the interpretation issued by the, what do you call them?

MR. CADIEUX: Free Trade Commission.

PRESIDENT FELICIANO: The Free Trade Commission, is this binding on this Tribunal?

MR. CADIEUX: I'm getting instructions to say no. The issue I believe is still a live one. And in any event, I conclude in saying that the conduct here is a violation of that anyway because they have changed their position, and under their own authorities--

PRESIDENT FELICIANO: Let's look at that a little later.

MR. CADIEUX: Okay, but such as--

PRESIDENT FELICIANO: Yes.

MR. CADIEUX: No.

PRESIDENT FELICIANO: Your answer is no.

MR. CADIEUX: Because it is a retroactive amendment, pending--

PRESIDENT FELICIANO: Do you believe that this interpretation binds the member governments, the state parties to NAFTA?

MR. CADIEUX: That is being debated as well.

PRESIDENT FELICIANO: Well, what is your answer, yes or no?

MR. CADIEUX: No, we're not conceding anything on the Free Trade Commission notes.

MS. LAMM: How do you reconcile that with 1131(2), that position, which says we're bound by it, I think. I mean, if I'm wrong, please tell me why.

PRESIDENT FELICIANO: Mr. Cadieux--

MR. CADIEUX: Yes?

PRESIDENT FELICIANO: We are not arguing for or against this interpretation.

MR. CADIEUX: I understood that. Yes,

indeed.

I would like to reserve my answer on that, and on reply we'll address that if you don't mind, but the question has been noted.

PRESIDENT FELICIANO: I would like to move to the question of what do you think this interpretation is saying? First of all, I note that the interpretation I am only looking at Section (b). I'm not looking at the other sections, just (b). They have a series of three propositions, two of which really are pertinent here. The last one I don't think is particularly important for our case; am I correct?

MR. CADIEUX: I think the first two are on point as well--are more on point.

PRESIDENT FELICIANO: Yes. There is--

MR. CADIEUX: That's in Volume II?

PRESIDENT FELICIANO: Volume II of the Counter-Memorial of the U.S.

MR. CADIEUX: Well, the United States, nobody has ever told us, and I haven't seen it

really expressed clearly anywhere, what is customer international law minimum standard of treatment of aliens? But, from what I've been reading, the governments take the position that unless you are murdered somewhere in the high desert, and even then this practically gives you nothing.

PRESIDENT FELICIANO: I was going to make a preliminary point. This seems to me a confusion. I note that there is no process of reasoning that is adduced leading up to the conclusion. Is that a fair statement? Is there a memorandum somewhere that explains the basis of these confusions--

MR. CADIEUX: Under Parts--

PRESIDENT FELICIANO: --that you might have submitted to us?

MR. CADIEUX: Under Part (a), there is a provision on access to documents, where it is each party agrees to make available to the public, in a timely manner, all documents submitted to--by Chapter Eleven tribunals.

My application for access to information

before the Government of Canada won't be probably not before another year, if at all. So I haven't been able to get anything, any background on this.

PRESIDENT FELICIANO: I see. Okay.

MR. CADIEUX: I've tried to get access to original drafts of 1105. I probably won't get that for another year. This is, of course, in a timely manner.

I've tried to get information surrounding all of this and nothing. It's not a criticism of Canada. I understand it's a problem with the Access to Information Act inside the Department of Foreign Affairs, where Minister Pettigrew is not responsible for that act. So whatever he signed off on timely manner, well, that wasn't his responsibility under the Canadian legislation. That's why I haven't been able to have access to anything, no memos, nothing, and even then I would doubt that the memos would be accessible.

So, no, I have no process of reasoning, no justification. This came out of the blue, without

a warning, and of course we should have given notice about it.

PRESIDENT FELICIANO: Mr. Cadieux, the phrase "minimum standard of international law" was used in several of these transmittal letters that you have just been--

MR. CADIEUX: Even though the BITs did not use that language. And it's interesting that--

PRESIDENT FELICIANO: Now--

MR. CADIEUX: Sorry.

PRESIDENT FELICIANO: Now that's not accepted, the same language that is used here. I guess what you are really telling us, you are not the person to whom these questions ought to be raised; is that right?

MR. CADIEUX: Yes, I agree.

PRESIDENT FELICIANO: Oh, well.

MR. CADIEUX: And it's interesting that Article 1105 says "Minimum Standard of Treatment" in the heading, but the FTC notes only refers to the minimum standard in relation to 1105(1), when,

in fact, logically it should apply to all three paragraphs, and they don't address that problem.

PRESIDENT FELICIANO: Yes. I note that the subheading says "Minimum Standard of Treatment in Accordance with International Law."

MR. CADIEUX: Yes.

PRESIDENT FELICIANO: Then (b)(1) refers to "Customary International Law Minimum Standard of Treatment of Aliens."

MR. CADIEUX: Yes.

PRESIDENT FELICIANO: Then you have another phrase, "Minimum Standard of Treatment to be Afforded to Investors from Another Country." I was going to ask you what you understand by this.

MR. CADIEUX: I have to turn to Mr. Jennings, who says this is nonsensical. You cannot have a minimum standard of treatment in relation to the aliens within a treaty that looks at investments. It makes no sense. First of all, the word "aliens" is found nowhere in NAFTA at all; second, investments in Chapter Eleven doesn't cover

the human body, it covers property and a variety of things. How can it use a standard in relation to interest arising from the commitment of capital or other resources? How can you use a human rights standard applied to that?

PRESIDENT FELICIANO: It seems to me, Mr. Cadieux, and I apologize to my colleagues here, I've been talking too much, that Judge Jennings appears to be reading this phrase "Customary International Law Minimum Standard of Treatment of Aliens" as referring to a certain body of case law that existed at a certain time in the history of international law.

MR. CADIEUX: Yes.

PRESIDENT FELICIANO: Now do you believe he's correct that that particular body of case law I think much of it came from the Mexican-U.S. claims Tribunals that were set up at a certain period in the second or third decade of the last century.

MR. CADIEUX: Yes.

PRESIDENT FELICIANO: Is that your reference to this or is this something else?

MR. CADIEUX: The United States, to be fair, in Methanex, has said--

PRESIDENT FELICIANO: But do you feel--forgive me--do you feel that the governments were indulging, were acting as historians of international law when they used this phrase or did they have something more practical in their mind?

MR. CADIEUX: The very practical thing they had in their mind was to bar 1105 claims. That was the immediate thing they wanted. They wanted to shut that door and bolt it shut tight. That was their immediate--I may be wrong, but this is clearly what they wanted because they had been burned or they were starting to fear getting burned by this? Why? Because they didn't trust you. They didn't trust these Tribunals.

PRESIDENT FELICIANO: Well, we'll let that pass for the time being, Mr. Cadieux.

MR. CADIEUX: But really, he wanted

certainty.

PRESIDENT FELICIANO: Because I, prima facie, would find it strange that practical men, like the USTR, the Minister of the Economy in Mexico and the Minister of International Trade in Canada, should be acting like historians of public international law, which is the assumption, as far as I read it, behind Judge Jennings' opinion that that was the specific reference that they were making. His whole opinion depends upon your accepting that premise.

MR. CADIEUX: Conversely, if I am wrong and that you should be giving an expansive reading, because the United States has already said in another case that customary international law is not frozen in time.

PRESIDENT FELICIANO: I think everybody would agree with that.

MR. CADIEUX: I think everybody would agree with that one.

So one of two things; either what I've

said already in relation to the BITs, that fair and equitable treatment and full protection and security stand alone and are part of international law. Even interpreted this way, then I don't need to move to 1102 and 1103. What I'm saying is that if the United States is right and it should be read that way, then I'm allowed to move to 1102 and 1103 because those offer the better treatment. So I'm not abandoning the 1105 claim. If you want to decide it that way, I certainly won't stop you. I'm just covering my bases.

PRESIDENT FELICIANO: What you are really saying, as far as I can gather, is that it is not absolutely essential for us to deal with these rather curious formula that we have before us; is that what you are saying?

MR. CADIEUX: You can say, in the alternative, okay, regardless of whether or not 1105, as read by the notes, should be interpreted restrictively or largely. If it is to be interpreted restrictively, then we move to 1102,

1103. If it's not, we get the same result. I have covered all of the territory.

PROFESSOR de MESTRAL: Perhaps you don't want to answer this immediately, but I think we would have to, at some point, look at the question of what is meant by the principle in Article 1104 that said the higher of the two standards under international treatment shall be given, but there is no cross-reference there to 1105. You may want to think about that.

PRESIDENT FELICIANO: Mr. Cadieux, I have just been reminded by our ever-vigilant Secretariat that we are kind of run away with the schedule. I think we have bypassed the coffee break; is that right?

MR. ONWUAMAEGBU: Yes.

MR. CADIEUX: He is a fiduciary of the coffee breaks.

PRESIDENT FELICIANO: We are prepared to stop here for a while if you'd like. I'm sure everybody would benefit from a coffee break.

MR. CADIEUX: A short coffee break maybe.

PRESIDENT FELICIANO: A short coffee break. Fifteen minutes, is that all right? Fine, 15 minutes. So 5:10 we should be back here.

[Recess from 4:54 p.m. to 5:12 p.m.]

PRESIDENT FELICIANO: Mr. Kirby?

MR. KIRBY: Yes, Mr. Chairman?

PRESIDENT FELICIANO: Do you feel that you can complete your presentation for the Claimant this afternoon? I am sorry if we have derailed your original schedule. We have ways of compressing, you know, the inquiries later or deferring them. We want to be sure you are able to finish.

MR. KIRBY: The best-laid plans often go awry. I am happy. I think that we can complete, I think the schedule called for completion by 6:30. Leave me some time for questions. I am now going to address 1102, and then we are going to have a summary conclusion, and I think, on 1102, we can wrap that up fairly quickly.

And my friend, I had just two points that arose out of my friend's presentation that I will give to you, but I think that we are still looking at completing within the scheduled time.

PRESIDENT FELICIANO: Yes. With all due respect, I think Ms. Lamm would like to have one or two more questions for Mr. Cadieux.

MS. LAMM: Yes.

PRESIDENT FELICIANO: Do you want to take those now?

MR. CADIEUX: I would love to take them now.

MS. LAMM: It's just a matter of clarification to make sure that I understood your argument, and it's the predicate for your claim, under 1105 is, as I understood it, was the law itself. Is it also the application of the law and, if so, how? Are you complaining about the waiver request that was denied? Are you complaining about the way it's--

MR. CADIEUX: I focused, during the oral

submission, on the elimination of manufactured products.

MS. LAMM: Yes.

MR. CADIEUX: The rest stays in our Memorial because I couldn't do everything.

MS. LAMM: Okay. So the rest as it's in the Memorial.

MR. CADIEUX: I punched on the two biggest problems.

MS. LAMM: Okay.

MR. CADIEUX: And we will have answers on the FTC notes--

MS. LAMM: Right.

MR. CADIEUX: And 1104.

PRESIDENT FELICIANO: One final remark. I don't want Mr. Cadieux or anyone to feel that I have less than absolute respect, the deepest respect for Judge Jennings. I happen to know him personally, and I know what a great jurist he is. I am just trying to find out what exactly your learned friend is saying.

MR. CADIEUX: And we're trying to answer those.

PRESIDENT FELICIANO: Yes. I was just trying to elicit from you, you know--please go ahead.

MR. KIRBY: Thank you, Mr. Chairman.

I think there are three outstanding issues from that presentation: The 1139 issue; the municipal law/international law issue, which we will respond to; and the question with respect to Article 1104, again, which we'll respond to.

MS. LAMM: It's 1131.

MR. KIRBY: 1131, I'm sorry. That's the provision which talks about an interpretation by the Commission as binding on the full panel.

MS. LAMM: Yes, 1131(2).

MR. KIRBY: I wasn't wearing my glasses.

I said that my presentation on Article 1102 is going to be fairly short, and I think I can hold to that promise.

Article 1102, and I will just read through

it very quickly, "Requires national treatment in respect of investors and/or investments." Article 1102(1) "requires each party to accord to investors of another party treatment no less favorable than it accords in like circumstances to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."

Article 2 "requires each party to accord to investments of investors of another party treatment no less than favorable than it accords in like circumstances to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct operation, sale or other disposition of investments." Very traditional national treatment standard, well known in international law.

The measure in question and one of the reasons why I think that this argument can be dealt with fairly quickly is textbook protectionism in

its raw form. Let me give you a sense of the genesis of this provision. We have included extracts from the congressional record slightly before Christmas, December 1982, at Tab 10 of the Memorial of the Investors' Material and Case, is Volume II-A.1 I will just read some of the statements from the Congressmen when they were discussing the amendment which eventually led to the measure that we're discussing, Section 165.

Mr. Applegate states, "Mr. Chairman, the purpose of my amendment is simple. It is to make sure that all of the revenues generated by the increase in the Federal gasoline tax that this House will pass today will be spent in America on American goods and services. It is a strong Buy America clause, yes, but considering the latest official unemployment figures of 10.8 percent and the fact that the increased imports are the prime cause of these high unemployment rates, I believe it is imperative that strong action be taken to correct what has been a blatant inequity of trade

law."

One more from the same debate. Mr. Williams of Ohio, a heavy steel area, "Mr. Chairman, I, too, want to compliment the gentleman on his amendment and maybe share with the members of this committee the fact that I believe the real enemy of American industry and of the American industrial community is the foreign import. No longer should we fight each other--labor, management and government--we must attack the enemy and the culprit that has put our people out of work, and that is the foreign import."

Strong language which resulted in strong, very strong legislation, which has remained on the books for now almost 20 years. Is it a violation of national treatment? My friends would have you believe that, no, it's not. We treat all investors and their investments alike. On its face, it doesn't discriminate.

The reality is that this measure is designed to discriminate in favor of U.S. goods,

U.S. good providers, to the detriment of any non-U.S. goods and any non-U.S. good providers.

The technical requirements to come within Article 1102, there must be an investor, ADF Group and investor. There must be investments. I have already listed the investments--ADF International, the steel purchased in the contract, which remained in the United States within the definition of investment set out in Chapter Eleven, and the contractual agreement, the interest in the contract is also an investment within the meaning of the definition of investment.

You need to look at the question of in like circumstances. Who are the people in like circumstances against which we must check whether this is, in fact, a violation of national treatment and then this question of, well, is this measure, with respect to the establishment acquisition, operation, et cetera, of the investment?

We have filed jurisprudence and argument on the question of the investor, the question of

who is in like circumstances to the investor and to the investments in respect of which we are claiming a violation. We consider that the people that are in like circumstances are all U.S. steel fabricators. Why? Because that's the market that we operate in. That's the market that ADF operates in. It competes with steel fabricators.

Now, in the OECD's Declaration on International Investment and Multinational Enterprises, this is cited at Page 38 of the Investor's Memorial, the OECDs say that the "adhering governments should accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government treatment consistent with international law and no less favorable than that accorded in like situations to domestic enterprises."

And then they said, "What does that in like situation mean?"

And they said, "As regards the expression

`in like situations,' the comparison between foreign-controlled enterprises is only valid if it is made between firms operating in the same sector."

A good example of how the reality of that like circumstances played out in the marketplace. After ADF could not fabricate the steel as planned, and it was U.S. steel that we were talking about fabricating, it wasn't foreign steel, we were simply talking about taking U.S. steel and bringing it to Canada to fabricate, when we couldn't do it in Canada, we had to subcontract it to a number of other facilities U.S. steel contractors, U.S. steel fabricators in the U.S.

That I think is telling evidence of who were in like circumstances to us. When we didn't get the work, the work went to U.S. companies operating steel facilities in the U.S.

The issue of that long list that's found in Article 1102 with respect to the establishment, acquisition, expansion, management, conduct,

operation, and sale or other disposition, I think what the NAFTA drafters are saying is basically if you impact the daily day-to-day business of an investment, of an investor, that's a measure with respect to any of these activities. It's not specific. It's broadly drawn to try to capture all of the business activities of the investment.

Did it capture the business activities of the investment? Most certainly it did.

Yes?

PRESIDENT FELICIANO: Is it your argument that although Section 165 as it now stands does not on its face discriminate between American--between United States and non-United States investors or enterprises; nevertheless, the effective implementation or effective application consists of actual discrimination? Is that your--

MR. KIRBY: The measure on itself, this notion that facially it applies to everybody in the United States and everybody's in the same boat and suffers from the same disability, that notion, I

think, has been soundly rejected time and time again. What you need to look at is what's the impact of the measure. And if the impact of the measure is borne by foreigners more than nationals, then you've got a violation of national treatment. It doesn't matter that on its face you can make the argument everybody suffers from the same disability, so we're treating everybody alike. The reality is we're not treating anybody alike. We never intended to treat anybody like. We intended to benefit U.S. nationals.

PRESIDENT FELICIANO: We're saying, I think, the same thing. In Geneva we distinguish between de jure discrimination, where the discrimination is apparent on the face of a measure, and de facto discrimination, where you look to the actual, practical, in-the-real-world effects.

MR. KIRBY: Okay. I am not saying this measure is not de jure discriminatory because the measure on its face calls for the use of U.S.

products. That is de jure discrimination.

PRESIDENT FELICIANO: Well, but according to the United States, that requirement applies in respect of all who would tender bids, who would wish to participate in this project.

MR. KIRBY: That is correct. It's correct. However, in its application to, for example, ADF, what it meant was ADF, yes, was on--in like circumstances with the neighboring steel fabricator; however, was also faced with this obligation to provide U.S. steel, meaning its investments, the investment that it could make, for example, its ability to fabricate U.S. steel and send it to the U.S. Its ability to comply with the contractual requirements was blocked by the facial requirement to provide only U.S. steel. So we're also saying, of course, that de facto in its operation it was discriminatory.

PRESIDENT FELICIANO: But you never intended to take any steel other than U.S.-origin steel.

MR. KIRBY: That's correct.

PRESIDENT FELICIANO: You had never intended to take Japanese steel or Canadian steel or Mexican steel, or whatever.

MR. KIRBY: No. At the time.

Now, if you were to ask me could we have done so, at the time we were trying to comply, the company was trying to comply with what it thought the requirements were in good faith, purchase U.S. steel, did not consider that the regulation went so far as to reach the fabrication portion. So it had U.S. steel. Now what does it do?

You're coming to the point of the impact of what we're arguing for, that if we are correct, you won't be able to claim U.S. steel even. That discrimination would require you to permit the use of Canadian or Mexican steel in Buy America contracts.

Now, you could continue to discriminate vis-a-vis the rest of the world. But if the U.S. takes the position that the measure--well, the

position that we are taking with respect to the measure is that this is a violation of national treatment and it can't be applied. We're not saying it's a violation only in respect of the fabrication work. We're saying that the measure itself by requiring U.S. content violates the treaty.

The fact of the matter is that at the time the business decision was made to buy U.S. steel.

PROFESSOR DE MESTRAL: We're dealing with a chapter on investment services and related matters. The language, the operative language speaks of "with respect to" conduct, operation, sale, disposition, that sort of thing, and the "with respect to" is repeated twice or three times.

Now, as you doubtless recall, we distinguish in Canada in a number of circumstances, and probably in American law, too, in certain circumstances, between a law which might be in relation to something and a law which may merely affect, and certain consequences might flow if you

characterize it on one side or characterize it on the other.

To get to the point of my question, we're dealing with a chapter that covers investments and a rather broad list of acquisition, establishment, acquisition, et cetera. But in the continuum beginning with "in relation to" and ending with "affecting," where do you put "relating to"?

MR. KIRBY: Very close to "affecting," if not absolutely smack on top of "affecting." Where the provision--our position is that clearly this is a measure in relation to, with relation to investments. That's what it's designed to do. It's designed--in our case, for example, it's designed to force ADF to open investment facilities in the U.S. if it wanted to engage in the market.

The NAFTA case law has consistently taken that approach, that it's close if not synonymous with "affecting." We don't need to show a direct link between the measure and the investment. The indirect link that we have here is close enough.

And if you'll recall, Professor, when we talked about the grant in respect of grants and subsidies and how the 1102 issue was--grants and subsidies were excluded, but under 1108, the conditioning of performance requirements. Just go back to 1106(3). These measures, conditioning of performance requirements, are--again, the language there actually--the language there is "in connection with an investment." In 1102 we're looking at language, with respect to all these various activities of the investment, not necessarily with respect to the investment itself.

The scope of the chapter talks about measures relating to investors. I think it was in the S.D. Myers case that the panel...no, let's just look at the--S.D. Myers case was an export prohibition on PCB waste. That was found to trigger national treatment issues, measures related to investments. Why? Because it impacted the investment. And there was a demonstration that there was an intent to favor domestic production

over foreign production. The reason the ban was imposed was so that the domestic producers could transform the waste in Canada rather than ship the waste to the United States to allow it to be transformed in the United States.

Pope & Talbot, the export licensing system, licensing system for the export of wood affects everybody, but it was a measure relating to investments.

So do we have a definition of, you know, to what extent can we reach out and get these measures? This is clearly a measure which is designed to reach down into industry at the factory level and determine what kind of goods are going to be produced within factories in the United States. They're meant to encourage the factories. We have an establishment in the United States. It is an investment. This measure is clearly designed to reach down in there and have an effect on that investment. That's the connection in terms of "with relation to."

In fact, if we look for a moment at the S.D. Myers case, because we've said in our Memorial that S.D. Myers is to a large extent a mirror image of the present case. S.D. Myers was an import ban--the result of S.D. Myers was an export ban. The result of this measure is effectively an import ban on steel.

The cases found at Tab 6 of Volume II-B.1 of the investor's material--at page 60 of the decision, paragraph 241, the Tribunal looked at the argument which is put forward here by the United States that the measure affects everybody equally. Canada argues that the interim order merely established a uniform regulatory regime under which all were treated equally; no one was permitted to export PCBs, so there was no discrimination.

SDMI--that's S.D. Myers--contends that Article 1102 was breached by a ban on the export of PCBs that was not justified by bona fide health or environmental concerns, but which had the aim and effect of protecting and promoting the market share

of producers who were Canadian and who would perform the work in Canada.

The Tribunal response to that, "Canada's submission is one dimensional and does not take into account the basis on which the different interests in the industries were organized to undertake their business."

The panel then goes on to look at the like situation, the like circumstances case, and states, at paragraph 250, "The Tribunal considers the interpretation of the phrase `like circumstances' in Article 1102 must take into account the general principles that emerge from the legal context of NAFTA, including its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns."

Later on in that paragraph, "The concept of like circumstances invites an examination of whether a non-national investor complaining of less favorable treatment is in the same sector as the national investor."

The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of economic sector and business sector. And it concludes on that issue, the panel concludes: "From the business perspective, it is clear that SDMI and Myers Canada were in like circumstances with Canadian operators such as Chem Security and Syntec. They were all engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to Canadian operators because it could offer more favorable prices and because it had extensive experience and credibility. It was precisely because SDMI was in a position to take business away from its Canadian competitors that Chem Security and Syntec lobbied the Minister to ban exports when the U.S. authorities opened the border."

Change the names and insert ADF's name and insert some U.S. fabricators' names, and you've got the identical situation. This is a policy that's

designed to assist U.S. fabricators and to deny business to Canadian fabricators.

And then the Tribunal later goes on to discuss in the same page the impact of protectionist motive or intent and says at paragraph 254, "Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favor nationals over non-nationals would give rise to a breach of Chapter 1102 of NAFTA if the measure in question were to produce no adverse effects"--I'm sorry--"would not give rise...if the measure in question were to produce no adverse effects on the non-national complainant." The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not necessarily a motive or intent that's a violation of Chapter 11.

In the present case, we have an impact, we have a direct impact, the inability of ADF to complete its contract in the manner in which it agreed to do at an enormous cost, suffered an

impact, had to subcontract work to its U.S. competitors, and as a result, lost a substantial amount of money in the process.

What's the message to ADF? The message to ADF is if you want to participate in these projects, expand your operation in the United States. That's the message. The message is also do not think about taking steel to Canada and fabricating it in Canada and bringing it back here because we will not accept it.

If you look at the question of like circumstances within the context of the Vienna Convention, one of the things you have to look at is the objects and purposes of NAFTA. And we've looked at that earlier on this morning. Once again, that purposeful view of the provisions of NAFTA would have you say that measure, that discriminatory measure, is a violation of Article 1102.

Finally, to close on this point, we would like to just remind the Tribunal that it is not

simply ourselves that consider that Buy America measures and measures of its ilk are violations of national treatment and are discriminatory. No less a source than the USTR also considers that these measures are discriminatory.

USTR regularly puts out trade reports on trade-distorting measures in various foreign governments and reserves a special place, and we've cited this in our materials at Volume II-A, Tab A19.

I'm sorry. We've reproduced a quote from it in our Memorial at page 43. USTR in its 2001 National Trade Estimates Report on Foreign Trade Barriers describes the "buy national" policies of Canadian provincial governments, and you'll recall that Mr. Stobo in his expert report noted that some provincial governments have buy national policies, although I underline they have them voluntarily. They're not forced upon those provinces by the Federal Government. USTR states, "Canadian provinces maintain `Buy Canada' price preferences

and other discriminatory procurement policies that favor Canadian suppliers over U.S. and other foreign suppliers."

So we're not alone in claiming that these provisions discriminate and these provisions violate national treatment. We're supported.

The key question before this Tribunal is, I would suggest, to determine how--whether these measures in question are saved by the various exemptions that we've seen earlier on this morning, because, I would submit, if the measures are not saved by an exemption--and I would also submit that the exemption needs to be specific, clear, unambiguous, and direct. If the measure is not saved, then the measure violates any number of provisions of NAFTA--well, any number. It violates Article 1102, it violates Article 1106, and it violates Article 1105.

When the Tribunal is looking at that issue as to the scope of the exempting provision for procurement by a party, one of the things that it

ought to bear in mind in that exercise is the care that the NAFTA drafters have taken to try to insert into NAFTA the requirement of a purposeful examination of the treaty. Article 1102 is a specific direction in that respect. The drafters could just as well have relied on Article 31 of the Vienna Convention. They have asked tribunals such as this Tribunal to look at the object and purpose of NAFTA and to hold up measures that are contested against the standard of whether or not those measures foster the objects and purpose of NAFTA or whether they actively hinder those objects and purpose.

We submit, Mr. Chairman and members of the panel, that there is no question that the measures in question violate the provisions that we have cited and that there is no question that those measures are not saved by any of the exempting provisions cited by my friends. We ask, therefore, that you rule in favor of the claimant and that you direct the arbitration to move to a second phase,

that of the calculation of damages.

Thank you very much, Mr. Chairman, members of the Tribunal.

PRESIDENT FELICIANO: [Inaudible comment off microphone.]

MR. KIRBY: That concludes our presentation in chief, and we have time for a rebuttal and the response to some of the questions that were raised, and that will be done on Wednesday morning. In other words, the answer is yes, but we'll come back Wednesday morning with responses to the questions and rebuttal to our friend's presentation tomorrow, if that's necessary.

PRESIDENT FELICIANO: We would rather you respond to the questions this afternoon or this evening before you go back to your hotel, Mr. Kirby.

MS. LAMM: I think there's just confusion about the questions. The three questions that you said at the outset that you reserved are those that

you would respond to on Wednesday morning.

MR. KIRBY: Exactly.

MS. LAMM: As distinguished from any additional questions that we might have now in the time that we reserved to--

MR. KIRBY: Oh, I'm sorry. I was working on the assumption that I had exhausted all of you and you had no more questions. No, by all means, any questions that you now have, I'm ready to answer.

PRESIDENT FELICIANO: Will you set out again please those three questions that you have reserved?

MR. KIRBY: Three questions. 1131. Ms. Lamm asked whether--how our position in respect of 1105 is impacted by the provision in 1131, which states that an interpretation of the Commission is binding on panels. Okay?

You then raised issues with respect to Mr. Cadieux's presentation involving the distinction between what a panel can do in respect of municipal

law versus what a panel can do with respect to international law, and how that affects this particular proceeding, and, in particular, interpretations that we are putting forward in respect of the legislation. We're not putting forward interpretations, but our reading of the legislation. That was number two.

And number three was Professor de Mestral's question which related to Article 1104 wherein Article 1104 says that investors are entitled to the better of treatment under 1102 and 1103, but Article 1104 does not mention Article 1105.

PRESIDENT FELICIANO: You can defer answering those three questions until Wednesday, I guess it is.

MR. KIRBY: It will be Wednesday.

PRESIDENT FELICIANO: Were there some additional questions you wanted to pose at this time, Carolyn?

MS. LAMM: I just had a few questions that

have arisen as a result of both your written pleadings and your oral submissions today.

As I read the provisions, the Buy America and the Buy American provisions, your contention is the Buy America obviously are much stricter than the Buy American because with Buy American there's this 50 percent requirement and almost a substantial transformation approach that is absent certainly in the Buy America provisions under the Federal Highway Acts.

Is your position that both would be a problem?

MR. KIRBY: I see what you're getting at. Abstractly, if the legislators decide, for example, that we are going to enact a provision which covers three categories of product and gives that to the regulators to make regulations and regulations are properly made, and then another statute has another provision, again, given to the regulators and given to be made, not generally a problem--not a problem certainly that this panel could tackle, when it's

done properly.

What happened in the instant case, however, is that the normal practice where the regulator makes--where the legislator makes law and says, for example, in the present case, steel, iron, and manufactured products, that's what the Congress said. Then when you start going down the stream, normally what would have happened is when the Congress says manufactured products, what will happen is that somebody somewhere in the process will say, wait a second, we need a rule. Why? Because it is impossible to implement that kind of a law without an origin rule. I say impossible. I'm sure we have all read the rules of origin under NAFTA, and the reason why the rules of origin under NAFTA are becoming bricks is because it is extremely difficult to find any manufactured product which is 100 percent origin of any country. A television might come from six countries. Even watches have workings within them from Hong Kong.

So the legislators give three products

that they want to affect in the legislation: steel, iron, and manufactured products. And I say go off and do it. Normally that would trigger just--the necessity of having some way to deal with that kind of a law, normally that would trigger this rulemaking process whereby we'd start to find some rules about what's the content of a manufactured product.

You don't need those rules with respect to the output of a steel mill. The output of a steel mill is clean. It comes out the back door of the steel mill. And you know because you've got a mill certificate, that's where the steel is made. So there's not that same question of, well, how do you determine the origin.

So that's what Congress did. We're saying the problem now occurs when it sweeps down into the regulators and into the administrators, and instead of saying, wait a second, we need some content rules in order to be determined--in order to be able to determine what is a manufactured product

from the United States, because we can't work with 100 percent rule, and that would have happened. Instead of doing that, what the regulators did is say what we'll do is we will strip out all other manufactured products and deal only with steel. And instead of talking about steel manufactured products, we'll just say all steel, thereby denying us the benefit of obtaining origin rules that normally would have been obtained had the congressional intent been respected. That's our argument on national treatment.

MS. LAMM: And are you saying, then, that the regulators effectively went beyond the grant of authority in the enabling statute?

MR. KIRBY: We're coming very close to the municipal law and the international law issue.

MS. LAMM: Right. I'm just trying to understand exactly what--

MR. KIRBY: What I'm saying--okay. Let me--yes, I am saying that the regulators basically have been allowed to overstep their authority.

Now, there's an obligation on the lawmakers to do something about that when that overstepping of authority is impacting investors. There's an obligation to fix the damage. So the regulators, we submit, went beyond their authority and were not corrected by the lawmakers.

MS. LAMM: So the statute is now the objectionable part. It's really the regulation that implements the statute.

MR. KIRBY: No. In this narrow area on this narrow argument--

MS. LAMM: Yes, yes.

MR. KIRBY: --it's the regulation. We're not saying that national treatment is a violation because--you know, we're not--in comparison with the Buy American statutes, we're not saying that there's something in the head statute which is a violation. Why are we not saying that? Because we're--you know, those statutes are separate. But what we're saying is given that Congress put in manufactured products, that normally would have

triggered a requirement for content rules which we would have been entitled to have the benefit of. We've been denied that benefit. Why? Because when the laws went down through the regulatory stream, basically they said we cannot deal--no, basically they didn't say we cannot deal with them. They said we won't deal with manufactured products. We will not do it. And we will restrict the application of the law just to steel and iron. Okay. In doing that--but we will still as a practical matter apply it to something other than the output of mills, and we'll apply, you know, the same rule that we would apply to the output of mills to steel. We're going to consider that steel manufactured products are steel.

We submit that we were denied the benefit of that rulemaking exercise which would have been necessary had the administrators done what Congress told them to do.

PRESIDENT FELICIANO: Mr. Kirby, I am now thoroughly confused. I'm afraid that's my normal

condition, Mr. Kirby. But it seems to me that the existence of the phrase "manufactured products" can readily be read to refer to manufactured products regardless of what the raw materials are, maybe non-steel raw materials.

MR. KIRBY: Absolutely.

PRESIDENT FELICIANO: So that I don't suppose you would use a lot of wood in product, but maybe plastic materials and so on. What I understand you to be saying is that the Federal Highway Administration decided to forget about, you know, imposing any requirement of American origin or American--how you say, having been mined or produced--

MR. KIRBY: In the United States.

PRESIDENT FELICIANO: --in the United States, and they decided to focus only on iron and steel.

MR. KIRBY: And steel products.

PRESIDENT FELICIANO: And steel products, although in doing so they decided to capture not

just the manufacture of steel products or from the original--I don't know what you call--

MR. KIRBY: Mill. Mill.

PRESIDENT FELICIANO: --metallurgical products which go into the mill and from where steel comes out. So in a sense, they decided to forget about the non-steel items and then--but in that sense they restricted their authority because they could have done so. They could have imposed--

MR. KIRBY: Yes, they could.

PRESIDENT FELICIANO: --Buy American requirement with respect to the non-steel manufactured products.

MR. KIRBY: Yes, absolutely. They could have passed a regulation in respect of manufactured products, and they chose not to do so.

PRESIDENT FELICIANO: So, in a sense, they were generous in that, in refusing to restrict those particular non-steel, non-iron products to American--

MR. KIRBY: Generous to one group of

people, and--

PRESIDENT FELICIANO: Right. Okay. Now, my real inquiry is: Does the relative cost of doing the fabrication, does that figure at all in here? If you were to do the fabrication, if ADF were to do the fabrication itself in Canada, I presume you would have X profit or return.

MR. KIRBY: That's correct.

PRESIDENT FELICIANO: Because you--

MR. KIRBY: I hope, because they'll have to pay my fees. I'm sorry.

PRESIDENT FELICIANO: Oh, I certainly hope they'll pay your fees, Mr. Kirby. It would be disastrous if they didn't.

What about the cost of the U.S. fabricators? Was there any price differential?

MR. KIRBY: Are you talking about what actually happened?

PRESIDENT FELICIANO: Would there have been a natural tendency to utilize U.S. fabricators in this particular case?

MR. KIRBY: I am not certain I understand the question. Let me just briefly review the facts. We won a competitive tender by submitting a bid which was found to be the best bid that was submitted. So we bid a price that I presume was not higher than the competitors because otherwise we likely would not have been chosen, although the reputation of ADF does carry some weight. So, if the bids were close enough, we might even get chosen.

In any event, that bid was based on the cost of fabricating the steel in Canada at the facilities in Canada. We have two facilities in Canada. When that was unable to occur, we then had to use the steel, which was now steel in the United States, for the most part, and now send it to five different fabricators or five or six different fabricators throughout the United States and have those fabricators fabricate the steel. We paid them to do that, and we paid handsomely.

PRESIDENT FELICIANO: Oh, I see, because

ADF had to use U.S. fabricators--

MR. KIRBY: That's correct.

PRESIDENT FELICIANO: --the costs went up and were absorbed.

MR. KIRBY: If you can imagine, the costs went up and were absorbed by ADF. The costs went up because of transportation. We had to transport steel--now not to one place, but to five different places. When you cut steel, you have waste. When you cut steel in five different places, you have five times as much waste. You have huge issues of logistics, et cetera, et cetera. So all of this went to increase the price, plus our competitors were not giving us the most favored pricing because they probably were aware of the fact that we needed steel in a hurry and everybody was busy at the time.

All of this is not my testimony, but it is a recounting I think of the various affidavits that have been filed.

MS. LAMM: I want to go back to just this

discrepancy between the statute and the reg for one minute. It seems that while Congress did say nanufactured products, what the regulators transformed that into is all manufacturing processes, which--

MR. KIRBY: Of steel products.

MS. LAMM: Of steel products--

MR. KIRBY: That's correct.

MS. LAMM: --which is obviously--

MR. KIRBY: Exactly. What they did was say, if the universe is manufactured products--

MS. LAMM: Right.

MR. KIRBY: What I assume they did was to say, if the universe if manufactured products, we're going to have to have some fairly easy-to-apply rules or a lot of rules for different products. In NAFTA, we have rules according to each tariff item or you can say it's 60 percent or it's 30 percent, but at least we'll know. We will know what the rules are.

They said they couldn't do that or,

rather, they chose not to do that. So they take off the table everything, and they leave back on the table, now there is a much smaller universe, well, now we can live with 100-percent rule because it's not terribly difficult to make 100-percent steel products, so we'll do it.

But the thing is had they not taken that manufactured product grouping off the table, they wouldn't have been able to impose that same sort of requirement on the--not that they wouldn't have been able to do it, they theoretically could have done it, but it would have been an enormous burden. And, in fact, I think in the administrative rule where they talk about doing it, they talk about the fact that one of the reasons why they are doing this is that it would be a huge burden, that it's very difficult to find manufactured products, most manufactured products that are 100-percent U.S. origin.

MS. LAMM: Now the thing that is somewhat troublesome here is that in the directions for the

preparation of the bid that you quote on Page 4 of your Memorial, it refers to this question of manufacturing processes for the steel, and it draws a fairly definite distinction between domestic and foreign.

MR. KIRBY: Yes.

MS. LAMM: So that at the time you were submitting your bid, you had to disclose, it seems to me, that you were going to use foreign manufacturing processes. Did you do that?

MR. KIRBY: The answer to that is twofold. In the material, there is an opinion, not from myself, but from a lawyer which certainly suggested to the company that what they were proposing to do was in conformity with the regulations, and the theory behind that, and it's a theory that isn't exactly, perhaps we should say it's not completely ludicrous, the theory being that the object and purpose of this statute, and if you read through the congressional record, the object purpose, the goal is the American steel industry. It's a

measure designed to promote the output of U.S. steel companies, steel mills.

So, when they were buying U.S.-origin steel and simply fabricating that steel, the thought was, well, wait a second, when we come back to the U.S., we will have a mill certificate. That mill certificate will say that this steel came from Bethlehem Steel. It's U.S.-origin steel. So this issue of did the fabrication change, it is possible to interpret the regulations to say that all manufacturing processes to produce the steel is a reference, including the reference to coating, is a reference to mill activities only, and that was the intention of the statute, and that's it.

Now that argument was also bolstered by the three cases that we have cited, which by American legislation is treated, I agree, but they all deal with the issue of does fabrication change the origin of steel, and in that case it was Japanese steel came to the U.S., was fabricated, remained Japanese steel. The U.S. steel goes to

the U.K., was fabricated, remains U.S.-origin steel, and the other was an undefined foreign steel being fabricated in the U.S. It remains foreign steel.

So going back, this question of did they knowingly get themselves into this jam because the contractual documents tell them you've got to produce U.S. steel, there was a rationale behind the bid. It wasn't reckless. What they thought, they had consulted a lawyer in the U.S. who said, given this interpretation, you can fabricate in the United States. The legislation itself would tend to indicate that who is being protected, steel mill workers, not steel fabricators, steel mill workers, and the three cases that we have cited would also tend to indicate that fabrication, as an activity, won't change the origin of steel.

MS. LAMM: Well, so--

MR. KIRBY: But they made a mistake.

MS. LAMM: --your position was basically that these manufacturing processes, the

fabrication, wasn't a substantial transformation of the product so that it would be Canadian origin. To do that analysis, one usually looks at how much value was added by the fabrication. How does that compare to what the raw product was worth and how much value was added by the fabrication process? What kind of a change was it? Did it take it to a new tariff category?

MR. KIRBY: I recognize the roots of the analysis--

MS. LAMM: Right.

MR. KIRBY: --but that's not applicable in this situation. When this provision, when they bid for the contract, et cetera, they were working under their U.S. counsel that gave them the advice, and a previous experience with other Buy American statutes that seemed to permit it under different things--

MS. LAMM: Right.

MR. KIRBY: But the question of this substantial transformation, now one looks at the

Federal Highway policy, there is nothing that you could do to that steel that could effectively, if you did anything to that steel in Canada, it loses its ability to qualify under the contract anything, it would appear, any manufacturing, any cutting, coating. Basically, you can't take it out of the United States.

So, in hindsight, and we're all gifted with 20/20 hindsight, they could have avoided this wrangle by not bidding on the contract or basically opening a new facility in the United States in order to get this kind of work, that is true. But the reality is that the existence of this measure of this measure, whether or not ADF made a mistake, the existence of this measure violates NAFTA, caused damage to the investor and that damage is recoverable under Chapter Eleven.

MS. LAMM: And you contend that the steel is an investment because it was U.S. origin, and the U.S. investor bought it and was going to sell it profitably for the business it was conducting

here.

MR. KIRBY: And part of the definition of "investment" relates to any property, tangible or intangible.

MS. LAMM: Right.

MR. KIRBY: Steel is property, and I'm only talking about the steel that did not leave the United States because there is an issue if the steel came to Canada, it's no longer an investment in the territory, but certainly there was a significant amount of steel that remained in the United States.

Additionally, the interest in the contract also qualifies as an investment under Chapter Eleven. That contractual interest, that's property, that's an investment.

MS. LAMM: And there is not any question of raising this as an issue in a waiver application as a violation of public policy and therefore the waiver should be granted.

MR. KIRBY: I actually was involved in the

waiver application, but that was sort of as the, and I met most of the participants here today, when we sought a waiver, but just the exercise is a good example of how this thing played out.

We first went to VDOT and said, you know, what can we do about this because we have a very serious problem, and we made the arguments that I have just recounted to you, that congressional intent was such to only produce the mills, that we have a mills certificate that says it is U.S. origin, all of those kinds of arguments, and it simply didn't work.

But Virginia basically said, "It's not our issue. It's Federal Highway. They are the guys that will decide whether or not this steel qualifies. They are the guys that will make that call," and on the waiver we had to go to Federal Highway, through Shirley, through VDOT, and it disappeared into the Federal Highway Department and came back after we had submitted some information, responded to some questions, it came back and it

was denied. My understanding is that that was not unusual, that most waiver requests would be denied. I am not suggesting that they told us otherwise, but it was an exercise that we had to do.

Could we have litigated in the United States on that issue? Possibly. We chose to abandon our right to litigate in the United States, which we have done by way of a waiver, and to bring it before a panel here. I think you probably have a good sense of our chances of success in the United States.

MS. LAMM: Yes. And there wasn't a 25-percent price differential, I take it--

MR. KIRBY: No.

MS. LAMM: Not there.

MR. KIRBY: It was U.S. steel--

MS. LAMM: Right.

MR. KIRBY: That was the problem.

MS. LAMM: And you made the short supply argument. They rejected it.

MR. KIRBY: We tried.

MS. LAMM: Yes, which is not the public policy, it's violation of NAFTA.

MR. KIRBY: That's correct. And the chances of getting redress within the system within the United States, clearly, was not there. It simply wouldn't happen. Personally, I'm of the opinion that a significant part of the United States, political class, if you want to call it that, would not be at all averse to finding that this measure is a violation and can disappear from the requirements under Federal Highway in respect of Canada and NAFTA. It gets rid of an irritant. It is certainly something that, from a public policy perspective, we've just, the United States has just implemented safeguard measures.

The problem is to find the political will to deal with these, and oftentimes that political will is found by saying there was nothing we could do. The NAFTA panel told us it violated NAFTA.

MS. LAMM: Thank you.

MR. KIRBY: Thank you. Thank you.

PRESIDENT FELICIANO: I don't think we have any further questions at this point, Mr. Kirby.

MR. KIRBY: Thank you very much.

I would like to thank the panel for their extraordinary attention span and energy. Thank you very much.

PRESIDENT FELICIANO: Thank you, Mr. Kirby. I guess tomorrow we will just start at--is 9:40 acceptable?

MR. LEGUM: Or 9:30 would be fine, whatever is--

PRESIDENT FELICIANO: Is 9:30 all right? Well, I think we could be here at 9:30, Mr. Legum. Why don't we do that. We'll all be here at 9:30--give you an extra 10 minutes.

MR. LEGUM: Hopefully, we won't need it.

PRESIDENT FELICIANO: Thank you.

[Whereupon, at 6:20 p.m., the proceedings were adjourned, to reconvene at 9:30 a.m., Tuesday, April 16, 2002.]