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. UNITED STATES OF AMERICA, Respondent/Party.	Case No. ARB(AF)/00/1

Volume II

Tuesday, April 16, 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 9:30 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. I think today we will have the pleasure of listening to the United States present its presentation in chief, so without much further ado, I turn over the floor to the United States.

MR. CLODFELTER: Well, thank you, Mr. President, and good morning to all the members of the Tribunal. It's my privilege this morning to introduce the United States case on jurisdiction and liability. I'm going to make some general remarks and then give a brief overview of our arguments and, finally, set out how we intend to divide up our more detailed presentation among the members of our team.

Let me begin by saying that this is a case of great interest and importance to the United States Government. This is only the fourth NAFTA investor state arbitration to be brought against the United States. The decision on the matters at issue in this hearing, while it will not be binding

on future tribunals, will clearly have wide future ramifications.

That is why it is critical that this case be decided correctly, not by "giving effect to the ambitions of the NAFTA parties," as Mr. Kirby put it yesterday; not by "moving the parties to where they wanted to go," as he put it in another formulation; but strictly in accordance with the terms of the NAFTA, within the meanings that the NAFTA parties intended them to have.

ADF has presented a very difficult case to respond to, not because it's right but, with all due respect, because it's so confused.

What is the measure ADF claims breached NAFTA? Is it the 1982 statute or the regulations that implemented it? Or is it, as we learned for the first time in ADF's Reply, the U.S. Government's alleged change in position in this very case on what Buy America is--a grant or a restriction? Or is it the FTC Note of last year that was described yesterday as a "breach," notice

of which was given to ADF only on July 31st?

And with regard to the statute and the regulations, was the measure the statute and regulations themselves or only their application? It was far from clear yesterday. But it can't be the former since the statute and regulations preceded NAFTA by some 11 or 12 years. And if the measure is in their application, weren't they applied to ADF only through Virginia's contracting actions? And yet somehow they are not part of the procurement?

And what about the statute? Yesterday Mr. Kirby read excerpts of congressional debate to show that the statute was protectionist in the extreme. Yet ADF seems to complain that the Federal Highway Administration went way beyond Congress' intent, even outside the ballpark, we are told, in its protectionist regulations?

But, then, is ADF complaining that the regulations went too far in requiring 100 percent U.S. content of manufactured steel products? Or is

it that they did not go far enough because they omitted coverage of non-steel products altogether? It is far from clear.

ADF admits that the statute has been applied consistently since its implementation almost 19 years ago. Yet it claims at the same time to have been surprised when the statute was applied to its Springfield Sub-Contract--this on the basis of a legal opinion that Mr. Kirby could only describe as "not ludicrous."

And what about the regulations? Reading ADF's Memorials, one would think that the position was that because the regulations did not track regulations under a completely different domestic content statute, the 1933 law, they violated U.S. law. But yesterday we heard for the first time that, in so failing, they violated international law, although it is far from clear exactly what principle it is in international law that they violate.

There's more. As I noted earlier, ADF

would have this Tribunal "give effect to the parties' ambitions." But when those same parties told the world exactly what their ambitions had been in adopting Article 1105 in the FTC note, Mr. Kirby indicated that that note did not bind this Tribunal.

On the other hand, Mr. Cadieux has said the issue was still in play. The fact is, after two Memorials and an all-day oral presentation by ADF, we still will not know the claimant's position on this rather fundamental issue, much less the arguments in support of that position, until the last day of this hearing.

Now, we don't know whether in advancing this labyrinthine maze of arguments ADF hopes that the Tribunal will lose sight of the forest for the trees. But, Mr. President and members of the Tribunal, we submit that claims against a sovereign state that it has breached its international obligations cannot be sustained on the basis of such a confused foundation.

In our presentations today, we hope to dispel some of this confusion. I will begin this process by addressing a couple of general issues of confusion.

The first is on the topic of how the Tribunal should approach the job of interpretation. We submit that it is not the role of this Tribunal to "read up" the text of the NAFTA, to advance its meaning beyond what the parties intended. Of course, terms must be read in light of a treaty's object and purpose, but only in light of them, and not to go further than the parties themselves decided to go in drafting those terms.

It is a fallacy of an interpretation to think, as ADF apparently does, that the ordinary meaning of terms can be overcome by somehow divining the parties' unexpressed ambitions. It is also a fallacy to read aspirations, as expressed in preambles and statements of objectives, as goals to be achieved at all costs without limitation.

I would note in this regard that with

respect to investment, Article 1021(c) itself contains such limiting language, calling not for increasing investment at any cost but for substantially increasing opportunities for investment.

Moreover, not every provision of NAFTA is designed to advance every one of its objectives. We would submit that among the objectives listed in Article 102, the terms of Chapter Eleven must be judged primarily in the light of paragraph (1)(c) itself, whose very terms imply a recognition of limits and whose limits can be found in the terms of Chapter Eleven itself, the most relevant being, of course, Article 1108.

Article 1108 clearly expresses another and equally compelling objective of the parties, namely, to preserve a measure of freedom from the disciplines of Section A for procurement conducted by all levels of their governmental structure.

The second general clarification I would offer is that this case is an investment dispute,

not a trade dispute, and there are significant differences. The NAFTA is a comprehensive Free Trade Agreement. Its 21 chapter cover matters as diverse as trade in goods, government procurement, cross-border trade in services, telecommunications, financial services, competition policy, intellectual property. All of the matters I have just mentioned are subject to the state-to-state dispute resolution mechanism that is set forth in Chapter Twenty of the NAFTA.

Chapter Twenty proceedings are, therefore, relatively expansive in the breadth of the issues that may be raised concerning the NAFTA. They are also relatively expansive in their approach to those issues. Chapter Twenty panels may address in the abstract whether a given measure of a party complies with the NAFTA and may make recommendations for the resolution of the dispute. By contrast, investor state arbitrations under Chapter Eleven are limited in their scope to investment disputes. Articles 1116 and 1117 of the

NAFTA explicitly restrict the subject of such proceedings to claims of breach of the provisions of a single section of the investment chapter and certain provisions of another chapter not relevant here.

Chapter Eleven tribunals may not address in the abstract whether there has been a violation of the agreement. The issue before them is whether there has been a breach of the investment disciplines that has caused a loss to a specific investor or investment.

ADF attempts to blur the distinction between the protection of investment and the protection of trade. It would deny effect to the parties' careful provision of a separate and limited regime to govern investment protection and turn this case into a review of the effective measures on, for example, impediments to the importation of steel products, detached from their relationship to investment in the United States.

We submit that it is beyond the

jurisdiction of this Tribunal to do so, and it is vital to keep these differences clearly in mind. This is not a trade dispute case. Such cases are for Chapter Twenty tribunals. This is an investment dispute case.

The last general clarification I would like to offer concerns the particular subject of this investment dispute. Despite ADF's attempt to disassemble what happened here into separate, unrelated components, what this case is about is very clear. It's about government procurement.

ADF's only connection to the Springfield Interchange Project is through a subcontract for the provision of structural steel. Its only basis for complaint is a specification incorporated in that subcontract. That specification described what it was that the government intended to buy for use in the project: steel--produced, fabricated, and coated in the United States. Such a specification is on its face an integral part of the government's purchase of that steel. ADF's

claim, simply put, concerned nothing but government procurement, and government procurement is expressly exempt from key disciplines of Chapter Eleven.

Now, let me turn to ADF's particular claims of breach. ADF's claims are that the measure at issue violated the national treatment provisions of Article 1102, the prohibitions on performance requirements of Article 1106, and only recently the most favored nation treatment provisions of Article 1103. ADF also makes a claim under Article 1105, the basis for which is still very unclear.

Now, because what is involved here was procurement, Article 1108 disposes of the first three of these claims by making clear that the relevant strictures of Articles 1102, 1103, and 1106 do not apply to procurement by a party at all.

But ADF has not met the clear tests of Articles 1102 and 1103 even if those provisions did apply to the procurement at issue here.

Finally, ADF's 1105 claim falls because it is not based on any cognizable principle or standard of customary international law. We submit that all of ADF's claims must be dismissed in their entirety.

My colleagues on the U.S. team will address each of these claims in more detail, but I would like to give you a brief summary of our arguments.

First, we will show that ADF's 1102, 1106, and its putative 1103 claim are barred in their entirety by Article 1108's exception for "procurement by a party." ADF has failed to resolve the most fundamental contradiction in its case, and that is, why would the NAFTA parties have gone to such lengths to make sure that programs like Buy America were exempt from the national treatment, most favored nation treatment, and performance requirement disciplines of Chapter Ten, only to have them subjected to the same disciplines of Chapter Eleven?

ADF cannot resolve this contradiction because the parties made sure that Chapter Eleven did not apply by adopting Article 1108. Even ADF concedes, as it must, that the specification in the procurement contract falls within the ordinary meaning of "procurement." But in an attempt to avoid the obvious consequences of that concession, dismissal of most of its case, it offers arguments that are inconsistent with the text, the structure, and the object and purpose of NAFTA.

ADF's principal argument is that while Virginia's specification that U.S. steel would be used in the project falls within the exception for procurement by a party, the Federal Government specification to exactly the same effect is not part of that procurement. This contention finds absolutely no support in the text of Article 1108 which covers the actions of any "Party," with a capital P, a term that, as is plain from its usage in Chapter Eleven, encompasses all levels of government within the state, and does not

distinguish between Federal, provincial, state, or local governments.

ADF's view seems to be that you can attack specifications for procurement without attacking the procurement itself. But attempting to separate the Federal specifications from Virginia's contracting actions would make a mockery of Article 1108. The Federal specification is no less a part of the Springfield procurements than would be an identical Virginia State domestic content specification. Yet ADF readily concedes that such a State specification would be covered by Article 1108. So, too, must the Federal specification here.

Later this morning, Mr. Legum and Ms. Menaker will demonstrate why the arguments offered by ADF yesterday to confuse this issue are without merit.

Let's look briefly at ADF's national treatment claim. That claim is, as I just noted, barred in its entirety by the government

procurement exception. But even if it were not exempt, it is without merit in any event, both as a matter of law and as a matter of fact. Ms. Menaker will address the law in detail this afternoon. I would like to highlight here the lack of a factual basis for the claim.

ADF concedes that the measure at issue on its face does not differentiate between investments on the basis of nationality. ADF acknowledges that the measure at issue has been consistently applied by the Federal Highway Administration since it was put into place in 1983. ADF does not allege that the Federal Highway Administration has applied the measure in a manner that differentiates between investments on the basis of nationality.

Despite these concessions, ADF offers not a single shred of evidence to support its contention that any measure at issue here impacts Canadian investors any less favorably than it does U.S. investors.

I would like to remind the Tribunal as it

considers this utter lack of evidence in the record, the substantial resources that ADF required the Tribunal and the United States to devote to its request for the production of documents last fall, during a time when the United States was preparing its Counter-Memorial. According to ADF at the time, this evidence was, and I quote, "material to the outcome of the case."

In response to ADF's request for evidence, and as contemplated by the Tribunal's third procedural order, the United States produced hundreds of pages of documents and made available to ADF thousands of pages more at the Federal Highway Administration's headquarters and at the National Archives.

But ADF has not placed a single page of these documents before the Tribunal to support its Article 1102 claim, evidently because none of it does.

Given the extraordinary lengths to which ADF has gone to find evidence that might support

its case, the absence of any such evidence in the record we submit speaks volumes. If this evidence was, as ADF alleged, material to the outcome of this case, we submit that its absence is equally material to the outcome of this case. The United States simply cannot be found liable without such evidence.

Let's look at ADF's claim under Article 1105(1), which mandates treatment in accordance with international law. But this claim may not detain us for long.

ADF identifies no rule of international law that was supposedly violated by the measures here, and it scarcely attempts to defend this claim.

Finally, let's turn to ADF's claim of a violation of Article 1103's requirement for most favored nation treatment, which it purported to assert for the first time in its reply. That claim should be dismissed for several reasons.

First, it is not within the jurisdiction

of the Tribunal. No claim may be submitted to NAFTA investor state arbitration without complying with the NAFTA's procedures for submitting such claims. ADF did not. It never mentioned Article 1103 in its notice of intent, despite the explicit requirement that it do so in NAFTA Article 1119.

The United States, therefore, gave its consent--never gave its consent to submit that claim to arbitration. It cannot be admitted as an additional claim in these proceedings.

Second, the Article 1103 claim is barred in any event in its entirety by the government procurement exception of Article 1108.

Finally, ADF's contention that the United States Bilateral Investment Treaties with Estonia and Albania reflect a general treatment standard different from that in Article 1105(1) is wrong, in any event.

As Mr. Cadieux demonstrated yesterday, the U.S. Department of State has been telling the Senate of the United States consistently for years

that the fair and equitable treatment standard of United States BITs reflects customary international law. That is precisely what the NAFTA Free Trade Commission interpreted 1105(1) to signify in its binding interpretation last year. The standards of Article 1105 and the U.S. BITs are the same. There can be no 1103 claim.

As I noted at the outset, each of my colleagues will address these points in greater detail. They will make clear the multiple separate reasons why ADF's claims should be dismissed. David Pawlak will first review the facts of the case. Then Mr. Legum will begin the United States discussion of the government procurement exception of Article 1108. He'll concentrate on the plain meaning of the provision, interpreted in light of its context and the treaty's object and purpose. He will likely take us to the first coffee break.

Ms. Menaker will then unravel the multitude of arguments that ADF has offered on the government procurement exception. It is our

expectation that she will conclude her discussion of government procurement before the Tribunal breaks for lunch. We would then suggest that we break for lunch at that time, even if it's a little bit earlier than scheduled. Then after lunch, Ms. Menaker will return to discuss ADF's claims of a violation of the national treatment obligation of 1102.

Mr. Pawlak will then return to address ADF's claim violation of Article 1105(1)'s obligation of treatment in accordance with international law. He'll be followed by Ms. Toole, who will explain why the Tribunal lacks jurisdiction over all of ADF's new claims.

Then, finally, Mr. Legum will address why ADF's claimed violation of Article 1103's most favored nation treatment obligation is without merit.

I now invite the Tribunal, unless you have questions, to turn the floor over to Mr. Pawlak, who will review the relevant facts of the case.

Thank you.

MR. PAWLAK: Good morning. Mr. President, members of the Tribunal, for the next 20 to 25 minutes, I will present the facts of this case. The presentation of facts here is drawn in large part from the United States Counter-Memorial.

As a prefatory remark, I note that ADF has not disputed the United States view of the facts neither during its Reply nor yesterday in its presentation of its case.

I will organize the presentation that follows chronologically. I will address two general subject areas: first, I will describe the Federal programs providing for domestic content restrictions on government procurement in the United States that are relevant to ADF's claims; second, I will describe the principal aspects of the Springfield Interchange Project relevant here and ADF's role as supplier of structural steel to certain phases of that project.

To begin, I draw the Tribunal's attention

to two programs establishing domestic content preferences in government procurement arrangements associated with highway construction projects. The first is the 1933 Buy American Act. I have on the screen a few of the principal characteristics of the 1933 Act.

I would like to take a few minutes to highlight some of these characteristics because ADF has attempted to confuse the 1933 Act with the 1982 Act that is at issue here. I'll discuss the 1982 Act in a few moments. First, let me clarify a few points regarding the 1933 Act.

As you can see, in item number 1 on the screen, the 1933 Act is also known as the Buy American Act. As in the United States written submissions, I will refer to it simply as the 1933 Act.

Turning to line item number 3 on the screen, as you can see, the 1933 Act governs direct procurement by Federal Government agencies. The 1933 Act applies to construction of highways in

federally administered lands such as those in national parks and on Indian reservations. The 1933 Act generally favors the purchase of domestic materials over materials of foreign origin. And as shown in line item number 4 on the projection screen, under the 1933 Act materials of foreign origin are defined as materials in which foreign components comprise 50 percent or more of the total cost of a particular product.

Let's compare the 1933 Act with the 1982 Act, which, again, is the program at issue here. As we see in line item number 1 in the last column on the table, the 1982 Act is also known as the Surface Transportation Assistance Act of 1982. Also reflected in that column, we see that Section 165 of the 1982 Act is entitled "Buy America," in contrast to "Buy American," which is the name of the 1933 Act as a whole.

As we see in the screen in row 3 at application, the 1982 Act also establishes preferences for local goods in government

procurement arrangements. As we see in line 4, across from domestic content rule, under the 1982 Act 100 percent domestic content is required.

Again, it is the 1982 Act and its related regulations that are at issue here.

Members of the Tribunal, I'd like to note that we'll happily provide a copy of the slides at the end of the day if you don't care to write down the material on the table.

To continue with the discussion of the 1982 Act, the 1982 Act is part of a series of laws authorizing appropriations for the Federal Aid State Highway Program, Highway Safety, and other transportation programs. The 1982 Act provides for Federal financial assistance to states to construct and improve the national highway system. Federal aid for a particular highway construction project is contingent upon a state's compliance with a number of Federal programs.

For example, to receive Federal aid, a state must prohibit the sale of alcoholic beverages

to minors. The states must also require the revocation of driver's licenses for individuals convicted of certain drug offenses. In addition, and particularly relevant here, states must comply with the 1982 Act's preference for domestic steel products in their highway construction procurement arrangements.

Contrary to ADF's claims that Virginia was forced to accept Federal aid and its accompanying conditions on the Springfield Project, a state's acceptance of Federal aid for a particular highway project is entirely voluntary. In fact, as the United States pointed out in its Rejoinder, Federal law specifically provides for the protection of state sovereignty. 23 U.S.C. Section 145 states, "The authorization of Federal funds or their availability for expenditure shall in no way infringe on the sovereign rights of the states to determine which projects shall be federally financed."

In the event the state chooses to accept

Federal aid, as Virginia did in the case of the Springfield Project, the state must meet various requirements. One such requirement is that which is established by Section 165 of the 1982 Act. I refer the Tribunal to the projection screen once again.

As we see, specifically Section 165 of the 1982 Act entitled "Buy America" provides that, "The Secretary of Transportation shall not obligate any funds authorized to be appropriated unless steel, iron, and manufactured products used in such project are produced in the United States."

Under United States law, the Secretary of Transportation is authorized to prescribe and promulgate all rules and regulations for carrying out the Federal Aid Highway Program. The Secretary of Transportation in turn has delegated rulemaking authority with respect to the 1982 Act to the Federal Highway Administration.

With that delegated authority, after significant opportunity for public notice and

comment, the FHWA promulgated regulations to implement Section 165 of the 1982 Act. In doing so, the FHWA acted entirely in accordance with U.S. law.

In its regulation adopted after the required notice and comment period, the FHWA interpreted Section 165 of the 1982 Act as follows. Again, I refer members of the Tribunal to the projection screen.

The FHWA regulations states, "No Federal aid highway construction project is to be authorized unless at least one of the following requirements is met: 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."

Thus, to receive Federal aid for highway projects, states must require contractors to use only steel materials produced, fabricated, and coated entirely in the United States. No entity is excepted from the Buy America requirements on the

basis of its nationality or that of its owners. Thus, absent a public interest waiver of the requirements, regardless of nationality, a company wishing to supply steel to a federally funded state highway project must supply steel produced entirely in the United States.

The FHWA has consistently applied the Buy America requirements in this manner since the promulgation of its regulations nearly 19 years ago.

Now I will begin the second part of my presentation. First, I will describe briefly the Springfield Highway Interchange and the planned improvements for the interchange. Then I will describe the bid proposals for the construction and delivery of certain phases of the project. Next I will address the pertinent features of Shirley's procurement contract with the Commonwealth of Virginia and ADF's subcontract with Shirley. Finally, I will examine a few pertinent aspects of ADF International's performance of its subcontract.

The Springfield Interchange is one of the busiest and historically one of the most dangerous highway junctions in the United States. As reflected on the projection screen, the interchange is located in Northern Virginia, approximately 15 miles southwest of Washington, D.C. The interchange brings together three interstate highways, that is I-95, I-395 and I-495, and an important state highway, which is Virginia Route 644.

All traffic on I-95, which is the principal north/south highway on the East Coast, must exit into the Springfield Interchange. In addition, the area around the interchange is home to a shopping mall and large office complexes. Those complexes add substantial local traffic to the mix of national and regional traffic that must pass through the interchange.

Faced with an increasingly serious and dangerous problem with traffic congestion, in the early 1990s state and federal officials held a

series of meetings and hearings on updating the nearly 30-year-old design for the Springfield Interchange. The Commonwealth of Virginia decide to pursue federal aid for the project. As a condition of that federal aid, Virginia agreed to conduct its procurements for the project in accordance with federal requirements. In 1998 nearly 8 years after the discussion of the improvements had been initiated, Virginia received approval from the FHWA for federal financial assistance for construction of an ambitious multi-phase project to improve the safety and the functionality of the interchange.

Phase 2 and 3 of the project are the phases at issue here. Projected on the screen, you will find the interchange before the improvements. As in its written submissions, the United States will refer to Phases 2 and 3 of the project as simply "the project." The project involved construction of a series of improvements to the portion of the Springfield Interchange where

Virginia Route 644 intersects with I-95.

Now on the screen, I have the after shot, reflecting the improvements to the interchange. And an integral part of the design for the improvement was a series of ramps in the form of long bridges that were to carry traffic in the interchange over the highways below. The bridges were to be banked and curbed to allow existing vehicles to maintain speed while transferring from one highway to another. These bridges required for support steel girders custom built to exacting specifications. As indicated by the arrows in the photograph, the brownish-red colored support for the roadbed are some of the custom-built girders that ADF provided to the project.

In September 1998, Virginia's Department of Transportation issued a request for bid proposals for the construction and delivery of Phases 2 and 3 of the project. A little more than a year after the request for bids, on January 26, 1999, the bids were opened. Shirley Contracting

Corporation submitted the lowest bid at $19 million. and to answer a question posed by President Feliciano yesterday, I note that the total cost for the construction and construction engineering on the project, that is on Phases 2 and 3 of the project--those are the phases at issue here--was $112,639,000. Again, that's $112,639,000, and the federal funds for the project amounted to $98 million, which is approximately 87 percent of the total cost of the project.

On February 19th, 1999, VDOT entered into a contract with Shirley for the procurement of construction services for the project. I'll refer to Shirley's procurement contract with VDOT as the main contract. The main contract provided technical specifications for the work to be performed, including the structural steel required. Specifically, the main contract between Shirley and VDOT included a provision entitled, quote, "Use of domestic material," end quote. That provision is based on the FHWA's Buy America requirements

promulgated under the 1982 act. It required that all steel for the Springfield project be produced in the United States as follows.

I refer the Tribunal to the projection screen to an excerpt from the main contract. It reads, quote: "All iron and steel products incorporated for use on this project shall be produced in the United States of America. "Produced in the United States of America" means all manufacturing processes whereby a raw material or a reduced iron ore material is changed, altered or transformed into an item or product, which because of the process is different from the original material, must occur in one of the 50 states."

Shirley's bid proposal allocated $16.8 million for the structural steel required for the project. Shirley in turn issued request for bid proposals for a number of aspects of the project including structural steel girders. Before discussing ADF's subcontract with Shirley for the

structural steel for the project, I will provide a brief description of the steel fabrication process.

Structural steel fabrication for bridges entails the production of custom steel girders. The process of fabrication transforms unusable flat plate shapes into load-carrying structural plate girders. To start, a steel fabricator such as ADF, begins with long flexible sheets from a mill. Using special equipment, the fabricator cuts the steel into plates of a specified length. Next, the fabricator then welds the plates into an I shape, which transforms the wobbly plates into a rigid girder capable of bearing the heavy loads.

Virginia, as would be expected, approves only flawlessly welded girders for use in highway projects. The fabricator then custom fits the girders for their placement by bolting or welding elements to hold them securely in place at the bridge site. After the steel girders are custom fit, the girders are then blast cleaned to remove rust and dirt before they are painted. Finally,

the girders are inspected and coated to protect the structural steel from weather and other adverse conditions.

Sometime after Shirley issued its request for bids for the fabrication work, the lowest bid was submitted in early 1999 by ADF International. Thus Shirley chose ADF International, a Florida-based subsidiary of ADF Group, to provide the fabricated steel for the project. ADF International operates a small fabrication facility in Coral Springs, Florida. However, ADF's Florida facility lacked the capacity to fabricate many of the structural steel elements required for the project. For example, the facility was not certified to produce fracture critical structural steel, and ADF's equipment was not able to lift the heavy girders required for much of the Springfield project. In order to meet the terms of its bid for the work on the project, ADF International had to contract much of the work out to other facilities.

I now turn to the ADF International Sub-Contract.

About one month after entering into the main contract with VDOT on March 19th, 1999, Shirley signed a subcontract with ADF International to, quote, "----------,"
end quote, for the project. By signing the subcontract, ADF International agreed to ----------. One provision of the subcontract in particular merits attention here. Specifically, the subcontract between Shirley and ADF International provided that ---
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TRADE SECRET CLAIMED BY ADF: TEXT REDACTED PER PROCEDURAL ORDER NO. 1

As reflected on the projection screen, upon entering into the subcontract, ADF International was required to, quote: "----------," end quote, --------
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TRADE SECRET CLAIMED BY ADF: TEXT REDACTED PER PROCEDURAL ORDER NO. 1

Thus, the Buy America requirements came to affect ADF solely because Virginia chose to incorporate

those requirements into its procurement contract with Shirley so that Virginia could receive federal financial assistance for the project and -------
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TRADE SECRET CLAIMED BY ADF: TEXT REDACTED PER PROCEDURAL ORDER NO. 1

On March 15th, 1999, Shirley informed VDOT that ADF International would supply the structural steel for the project. Within a month of that designation ADF International begins to take various steps to avoid its contractual obligation to provide steel produced entirely in the United States. Contrary to the terms of the main contract's provision on use of domestic steel, ADF International made known its intention to fabricate the project steel in Canada. VDOT informed Shirley that it would not approve of ADF's plan. In meetings with VDOT and the FHWA, ADF International and Shirley requested that VDOT change its view, but neither VDOT nor the FHWA would agree that the specification for steel for the project could be met by steel fabricated in Canada.

Next ADF International counseled Shirley to seek a public interest waiver of the main contracts use of domestic materials provision in accordance with FHWA regulations. ADF International offered only one reason at the time to support its request for the waiver. ADF president and CEO, Pierre Paschini, wrote, quote: "We are unable to locate a steel fabricator who is capable of performing the work in the U.S. within the required time frame. We understand that all fabricators capable of performing the work are fully loaded." End quote

The FHWA and VDOT denied the request for a waiver because their own inquiries had suggested that there were in fact fabricators available to produce the steel in time in the United States. And it is now clear that the information provided by ADF International was not accurate. ADF itself acknowledged in its reply that Mr. Paschini was, quote, "proved wrong" with respect to the availability of U.S. fabricators to complete the

fabrication of the steel in time for the project. As we now know, ADF ultimately did complete its obligations under the subcontract, using its own facilities and subcontracting much of the work to U.S. fabricators. Indeed, as noted in the Rejoinder statement of VDOT's Frank Gee, Shirley has now received a $10 million bonus payment from VDOT under the terms of the main contract for timely completing its work. Before receiving payment, Shirley had to sign a release waiving any claims it may have had under the main contract, including any claims it may have raised on ADF's behalf. As a result, ADF has had to withdraw its earlier claims that the reason that ADF sought to fabricate the steel for the project in Canada was because all U.S. fabricators were--to quote from the letter from ADF's Pierre Paschini, "fully loaded," end quote. Shirley was able to satisfy the project deadline and now has received the $10 million incentive bonus from VDOT for doing so.

That concludes my prepared remarks on the

facts of this case, and unless the Tribunal members have any questions, my colleague, Bart Legum, is prepared to address NAFTA's Article 1108, government procurement exception.

MS. LAMM: I have one short question I think on the bid process, and it's kind of what I asked them yesterday, and that is, is it your contention that at the time they submitted the bid, they knew and intended to use the foreign steel, but that wasn't disclosed?

MR. PAWLAK: Well, I'll respond by saying that ADF has not put any evidence in the record that suggest they do not intend to use the steel, and in fact the timing of the delivery of the letter that was referred to, which was, I think, referred to as a legal opinion from not ADF's present counsel but from U.S. counsel, suggests that ADF was aware that they were--well, was going to attempt to use steel fabricated not in the U.S. but in Canada. It seems as if, based on that letter, ADF was preparing to fabricate the steel

outside of the United States and there's no evidence that I've seen that suggests they notified the Commonwealth of Virginia or Shirley of their intention to do so in bidding on the project.

MS. LAMM: So there was no evidence in the file at all that any kind of disclosure was made?

MR. PAWLAK: I'm not aware of any. Of course we can check that and confirm it tomorrow.

Another thing to note is that we were not in any way involved in the bid that Shirley had from ADF.

PRESIDENT FELICIANO: Could you please elaborate a little on the notion of manufacturing vis-a-vis the notion of fabrication. Can you tell me what the beginning material is as far as fabrication is concerned and what the ending product or result is? What do the operations which you describe as fabrication consist in?

MR. PAWLAK: My understanding of the fabrication process is that the fabricator will begin with a piece of raw steel, and it is a rather

involved process which can include drilling, punching, reshaping, painting, coating, in essence transforming a wobbly plate into an I-beam that can support a roadbed, as we saw in the photograph that was protected on the screen. The process, I do know is quite involved, and the end product is the product roughly what you saw in the projection screen that was delivered to the site, and that would include the need to bend the steel and blast clean it and prepare it for being in adverse conditions for many years.

Is that responsive to your question?

PRESIDENT FELICIANO: If you could give us a little bit more, I would be very appreciative. Can I shift the inquiry a little bit? If you think in terms of value-added, typically what percent of the ending value of the now fabricated product or article or good--I don't know what is the proper term, what a proper term would be--what value-added is accounted for by the fabrication process as distinguished from the condition of the product

before it underwent fabrication?

MR. PAWLAK: Well, with respect to the value-added, that has been an interesting question for us in that ADF has spoken to that issue in varying ways throughout its pleadings. At times it has referred to the value-added--or the fabrication in Canada as of minor importance. Other times they have suggested that the cost incurred for the fabrication, in other words, the value-added in the United States, after they've realized they had to subcontract the work out to five separate fabricators, was very large.

But what we have pointed out I believe in the Rejoinder is that ADF at no time had submitted the evidence of what its cost would have been to fabricate the steel in Canada relative to the total project cost.

And if I may consult one moment? Thank you.

[Pause.]

MR. PAWLAK: Well, again I note that ADF

has not, despite our challenge in the Counter-Memorial and the Rejoinder, put in any evidence with respect to cost of value-added. It's our understanding in talking with industry experts in preparing this case that the value-added of the fabrication amounts to 70 to 80 percent of the total value of the final steel in a project such as this one. Again, we have not seen any evidence from ADF on that point, but that is our understanding from experts in the industry.

PRESIDENT FELICIANO: Thank you.

MR. PAWLAK: Thank you.

PRESIDENT FELICIANO: We may have some additional inquiries just to complete or to improve our understanding of what you have just described, but we thank you for a very lucid presentation, sir.

MR. PAWLAK: Thank you.

PRESIDENT FELICIANO: Please. Who is the next person?

MR. LEGUM: Actually, Mr. President, if it

is convenient for the tribunal, what I would propose to do is to vary a little bit from the schedule that Mr. Clodfelter identified, break now for a short coffee break, and then come back, and that way we can deal with the government procurement exception in one piece, which I think might be more accurate and more conducive to understanding it, and also get a little bit more light in here, because I'm about to fall asleep myself.

[Laughter.]

MR. KIRBY: [Off microphone -- inaudible]

[Recess.]

PRESIDENT FELICIANO: Mr. Legum, you have us on pins and needles. Please begin.

[Laughter.]

MR. LEGUM: I'm afraid that we'll have to wait for just one more moment. Mr. Kirby would like to make a brief announcement.

MR. KIRBY: Mr. Chairman, thank you, simply to inform the Tribunal that Mr. Paschini,

Pierre Paschini in the Bank, the President and COO, Chief Operating Officer of ADF, he is going to have to leave this afternoon, and he just wanted me to inform the Tribunal that he had intended to stay for the entire proceeding. His departure is not meant to be indicative of any lack of interest. He would love to say, but for business reasons, he does have to leave, and he won't be here after lunch.

Thank you, Mr. Chairman.

PRESIDENT FELICIANO: I'm sure he has a lot of important things to do.

Mr. Legum?

MR. LEGUM: Mr. President, members of the Tribunal, I will, this morning, review the United States' principal contentions concerning the exceptions for procurement by a party in Article 1108. The text of the provisions that I will be discussing is now on the screen.

Paragraph 7 of Article 1108 provides that Articles 1102, 1103 and 1107 do not apply to

procurement by a party. Paragraph 8 of Article 1108 provides that certain subparagraphs of Article 1106(1) and 1106(3), the subparagraphs relied upon by ADF, do not apply to procurement by a party. This morning I and my colleague, Andrea Menaker, will demonstrate that ADF's claims concerning the Springfield Interchange are founded on government procurement.

Its claims under Articles 1102 and 1106, as well as its new claim under Article 1103, should therefore be dismissed in their entirety, for those articles do not apply to the measures at issue here.

The Vienna Convention on the Law of Treaties states the cardinal rule of treaty interpretation as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

I will begin by addressing the ordinary

meaning of the term "procurement by a party," first, by examining the meaning of procurement, then the meaning of the term "party." I will establish that the measures at issue here clearly fall within the exception.

I will then demonstrate that the context of those terms in the NAFTA, as well as the object and purpose of the treaty, confirms that measures such as those at issue here are excluded from Chapter Eleven's national treatment and performance requirement obligations.

I will conclude by asking the Tribunal to call upon my colleague, Ms. Menaker, who will address ADF's myriad and erroneous contentions concerning the government procurement exception.

First, the ordinary meaning of the word "procurement." The word "procurement" is not a word that most modern English speakers use every day. It, therefore, has--at least to my ear--something of a technical ring to it. The NAFTA's use of the term, however, shows that the parties

have nothing particularly technical in mind. As Mr. Kirby noted yesterday, the French version of the procurement exception speaks of "achat effectue par une partie." In the Spanish version, it is "compras [?] por una parte."

"Achat" and "compras" are the generic term for purchases in French and Spanish. Indeed, while the NAFTA provides no comprehensive definition of procurement, both ADF and the United States agree that the ordinary meaning of the term includes purchases. The ordinary meaning of the term "procurement," therefore, clearly includes what is a familiar concept for all of us, buying things. Buying things, as I think we all have realized, is a complex activity, really more of a process than a single act.

Allow me to explore an example. Your spouse asks you to buy a bottle of wine. This simple request immediately gives rise to a familiar, but complex, series of necessary decisions. Where shall you shop? Will the local

liquor store suffice or should you go to a specialized wine shop? What shall you buy, white or red? French, Italian, Australian, Californian or Chilean? How much do you want to pay? How shall you pay for it?

Each of these decisions is necessary for any purchase to take place. For example, if you cannot decide where to shop, you cannot even begin to make a purchase. If you cannot decide what to buy, you will leave the store with nothing in your hands. Each of these decisions is an inherent part of the process that is procurement.

The NAFTA provisions are consistent with this common-sense understanding of procurement. Chapter Ten, a chapter that is devoted exclusively to government procurement, has provisions that address aspects of each of these questions. For example, Article 1007, entitled, "Technical Specifications," addresses an aspect of what to buy, as does, in a more general manner, Article 1103's provisions on nondiscrimination in

procurement with respect to goods and suppliers.

Article 1009, entitled, "Qualifications of Suppliers," addresses an aspect of where to buy. Article 1008, entitled, "Tendering Procedures," addresses aspects of how to buy it. The measures at issue here all address the question of what to buy. The main contracts provision on use of domestic materials states that, and I quote, "All iron and steel products incorporated for use on this project, shall be produced in the United States of America." The question this provision addresses is what to buy, and the answer it provides is iron and steel produced in the United States.

The 1982 act authorizes the Secretary of Transportation--excuse me--it states that the Secretary of Transportation, "shall not obligate any funds authorized to be appropriated unless steel, iron and manufactured products used in such project are produced in the United States." Again, the same question, what to buy, and the same

answer.

The implementing regulation promulgated by the FHWA states that, and I quote, "No Federal Aid Highway Construction Project is to be authorized unless at least one of the following requirements is met: If steel or iron materials are to be used, all manufacturing processes, including application of a coding for these materials must occur in the United States, same question, what to buy, and again the same answer.

Now I'd like to pause here to address a fundamental flaw in ADF's argument. We heard time and time again yesterday that the measures in question are not procurement, but instead are a grant. I invite the Tribunal to take a close look at the measures in question, and we have on the screen the implementing regulation which is at the heart of ADF's case.

The provision ADF is complaining about is not a grant. The provision it complains of is that if steel or iron materials are to be used, all

manufacturing processes for these materials must occur in the United States. This is a specification as to one characteristic of the steel that must be bought. The Federal Aid Highway Program, of course, does provide for grants, but ADF has no problem the those grants. Those grants are not at issue in this case. The measure at issue is what you see on the screen, which implements the 1982 act, and that measure is not a grant.

Thus, the two federal measures at issue here required Virginia to decide that it would buy only U.S.-produced structural steel for the Springfield Interchange Project as a condition for federal funding for the project. The main contracts provision on use of domestic material memorialized Virginia's decision to comply with that condition and buy only U.S.-produced steel for the project.

Virginia's decision to buy U.S. steel for the project clearly falls within the ordinary

meaning of procurement. The federal measures that required that decision as a condition for funding are clearly also within that ordinary meaning, all deal with the fundamental step inherent in any procurement, the decision as to what it is exactly that you are going to buy.

A review of the specific provisions of Article 1108 and other relevant provisions of the NAFTA confirms that measures such as these are precisely what the NAFTA parties had in mind in providing for a government procurement exception.

I begin with the scope of application of Chapter Eleven, as Article 1101(1), which is now up on the screen, as that article makes clear the chapter applies only to measures adopted or maintained by a party. If a governmental action is not a measure, it is not covered by Chapter Eleven. Thus, what Article 1108 states, because it is an exception that applies to obligations in Chapter Eleven, what Article 1108 states are exceptions and reservations with respect to measures adopted or

maintained by a party.

Let's turn then to Article 1108. Paragraph 8 of Article 1108, which is now up on the screen, states that six specified subparagraphs of Article 1106 do not apply to procurement by a party. Two of these subparagraphs require a party to refrain from certain actions encouraging investments, "to achieve a given level or percentage of domestic content."

And what we have on the screen there is the provision in Article 1108(8), and then arrows indicating the subparagraphs in Article 1106(1) and 1106(3) that state obligations with respect to achieving a given level for a percentage of domestic content.

So two of the subparagraphs require a party to refrain from certain actions encouraging investments to achieve a given level or percentage of domestic content. Another two of those subparagraphs, and it is now indicated on the screen, another two of those subparagraphs require

a party to refrain from certain actions encouraging investments "to purchase, use or accord a preference to goods produced or services provided in its territory or to purchase goods or services from persons in its territory."

These subparagraphs also address domestic content, albeit a different form of domestic content. What these provisions show, we submit, is that in providing for this government procurement exception, the NAFTA parties had in mind measures that prescribe domestic content for government purchases, measures just like the 1982 act and implementing regulations.

The measures addressed by this exception in Article 1108, subparagraph 8, encourage contractors--excuse me--the measures that we're talking about here, the 1982 act and its implementing regulation, those measures encourage contractors on federally-funded state highway projects to achieve a given level of percentage of domestic content in their purchases of steel--100

percent, in fact, is what those measures require.

The measures also encourage contractors to purchase goods produced or services provided in the territory of the United States for such highway projects. The 1982 act and its implementing regulations are clearly measures that prescribe domestic content for government purchases. The exception to those provisions stated in Article 1108, paragraph 8, was designed to exclude measures precisely such as these.

Now, for these reasons, Mr. Kirby erred in suggesting, as he did yesterday, that there is an important difference between regulating an activity and engaging in that activity. It may be possible to draw a distinction between regulating an activity and engaging in an activity, but it is not a distinction that the NAFTA draws.

As we have seen, Chapter Eleven applies to measures, regulation of activity. The government procurement exceptions in Chapter Eleven necessarily also apply to measures. If Mr. Kirby

were correct and measures by their nature cannot be procurement, there would never be any occasion to apply the government procurement exception of Article 1108(8). The reason for that is Chapter Eleven's obligations apply to measures. The exception is for measures relating to government procurement or measures that constitute government procurement. If measures could never be procurement, then there would never be any occasion to apply the exception.

Mr. Kirby's interpretation would render the government procurement exceptions meaningless, a result that is contrary to the principle of effectiveness, the principle that a treaty must be interpreted to give effect to its provisions.

For all of these reasons, we submit that the measures at issue clearly fall within the ordinary meaning of procurement.

Now, thus far, my discussion has centered on the ordinary meaning of the term "procurement," the first half of the clause whose meaning is at

issue in these proceedings. I would now like to turn to the second part of the equation and examine the ordinary meaning of the term "party" in the phrase "procurement by a party."

There are, of course, three parties to the NAFTA--Canada, the United Mexican States, and the United States of America. Each is a state under international law. As is typical in international agreements like the NAFTA, the term "party" is the generic term used to refer to the states that have obligated themselves under the agreement.

In international law, the state is understood to be the entity responsible for the ensemble of government activity within the territory of the state. The International Law Commission recently described this principle of customary international law as follows, and it is up on the screen for the Tribunal's convenience.

"The conduct of any state organ shall be considered an act of that state under international law. Whether the organ exercises legislative,

executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central government or of a territorial unit of the state, the use of the term `party' in Chapter Eleven, the context for this treaty term, reflects an understanding of the term that is consistent with the ordinary meaning of the state in international law."

Article 1102(1), which is now up on the screen as one example, requires that a "party accord national treatment with respect to investments."

As Article 1102(3), which is now also on the screen, explicitly makes clear, however, "The party that bears this obligation includes the states and the provinces." Referring to the "treatment accorded by a party in paragraphs 1 and 2," this paragraph makes clear that that treatment, with respect to a state or province, means, "the most favorable treatment by that state or province

to investors and to investments of investors of the party of which it forms a part."

This clarification, obviously, would not be necessary unless the term "party" used in Article 1102(1) encompasses the states and provinces that make up part of the state in international law.

As we noted in the rejoinder, Article 1108(1) provides another example demonstrating that the term "party" in Chapter Eleven clearly encompasses states, provinces, and local governments. That provision sets forth differing exceptions for state, federal and local measures to other NAFTA obligations that, like Article 1102, are imposed on a party.

The statement of implementation of the Government of Canada summarizes rather nicely the approach to the term "party" in Chapter Eleven, and the excerpt is up on the screen.

Section A, referring to Chapter Eleven, covers measures by a party; i.e., any level of

government in Canada. Thus, the term "party," as used in Article 1108, encompasses procurement at all levels of government within the state, meaning the state in international law. Here, whether viewed as a procurement by the Commonwealth of Virginia, by the Federal Government or as a federal-state collaboration, the procurement at issue is plainly within the ordinary meaning of procurement by a party.

I would like to return, briefly, to the example of the bottle of wine that I gave earlier, but I'd like to change it all a little bit. Assume this time that instead of merely asking you to buy some wine, your spouse had instructed you instead to buy a red Cabernet Sauvignon produced, fabricated and coded entirely in Sonoma Valley, California. One could perhaps debate whether merely by providing that instruction your spouse could be considered to have purchased the wine. There could, however, be no doubt that that was a family purchase of wine, and that instruction was

an integral part of the purchase of that bottle of wine by your family.

Just as two spouses are a part of a single family, the Federal Government and Virginia are part of a single state, and that state is a party to the NAFTA. The specification as to domestically produced steel in the 1982 act and its implementing regulation plainly fall within the exception for procurement by a party.

It is noteworthy that in its presentation yesterday, ADF nowhere addressed the fact that Article 1108 does not distinguish between different levels of government of a party. Instead, we heard a number of arguments that the Federal Government was doing this, and the state government was doing that, as if that was a difference reflected in the text of the treaty.

ADF did not recognize this fact that Article 1108 does not differentiate between different levels of government because all of its arguments hinge on the false assumption that it

makes a difference for purposes of Article 1108, whether this was federal procurement or state procurement. That assumption finds no support in the text of the exception for procurement by a party. To the contrary, by using the term "party," the NAFTA makes clear that distinctions between different levels of government are irrelevant for purposes of the exception. Procurement by a party to the NAFTA is indeed what we're talking about here.

As I noted at the outset of my presentation, the Vienna Convention on the Law of Treaties requires that treaties be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for these purposes includes, of course, the text of the treaty.

An examination of the context of Article 1108's government procurement exception confirms the accuracy of the interpretation of that

provision that we have espoused here.

Chapter Ten of the NAFTA, entitled, "Government Procurement," sets forth the NAFTA principal rules on the subject. Among other things, and as ADF acknowledges in paragraph 291 of its Memorial, which is on the screen for the Tribunal's reference, "Chapter Ten contains its own national treatment and most favored nation obligations, Article 1003, and its own prohibition against performance requirements, Article 1006."

Each of these provisions in Chapter Ten was designed with procurement specifically in mind. First, Article 1003. As the Tribunal will note from the quotation on the screen, Article 1003 frames its national treatment obligation in terms of differential treatment of suppliers and goods of other NAFTA parties, as well as locally established suppliers with foreign affiliations or who offer foreign-produced goods or services.

These are the criteria that are most relevant to discriminate in government procurement.

Article 1006 addresses local content requirements. Quote: "In the qualification and selection of suppliers, goods or services, and the evaluation of bids or the award of contracts," close quote, the key areas, again, for local content requirements in procurement.

Considered in this context, one of the functions of the government procurement exceptions stated in Article 1108 is clear. The NAFTA parties intended government procurement to be disciplined only by the rules specifically drafted with procurement in mind, the rules stated in Articles 1003 and 1006. They did not want government procurement to be governed by Articles 1102 and the provisions of Article 1106 addressing local content requirements because those rules were not drafted with procurement specifically in mind. Article 1108, therefore, ensures that government procurement will be disciplined only by the national treatment and performance requirement provisions stated in Chapter Ten and drafted

specifically for procurement.

The context provided by Chapter Ten also demonstrates a second function for the government procurement exception of Article 1108. Chapter Ten in its current form applies only to measures relating to procurement by specified Federal Government entities. Although the Chapter provides a framework for adding coverage of measures relating to procurement by state and provincial government entities, state and provincial measures are not currently subject to the application of Chapter Ten.

Thus, the NAFTA parties intended to subject only certain categories of government procurement to the disciplines stated in Chapter Ten. Those categories today consist only of procurement by specified Federal Government entities. Those were the categories included within the scope of Chapter Ten and subjected to Articles 1003 and 1006. The NAFTA parties did not intend to subject other categories of procurement

measures to those rules. Notably, the parties did not intend to subject measures relating to procurement by state and provincial government entities to Chapter Ten's disciplines. They therefore did not include those categories within the scope of Chapter Ten.

Consistent with these goals, Article 1108 provides an exception from the national treatment and performance requirement provisions in Chapter Eleven for any and all government procurement. It therefore ensures that state and provincial procurement are not subjected to any such obligations, and that federal procurement is subjected only to the national treatment and performance requirement provisions that were drafted specifically with procurement in mind, those in Chapter Ten.

This understanding of Article 1008 accords with the object and purpose of the NAFTA and in particular its approach to government procurement. As Chapter Ten clearly demonstrates, the NAFTA

party is intended to take an important but measured step toward opening their markets for government procurement. While the NAFTA created more openness in government procurement markets than the NAFTA parties had ever before permitted, it clearly did not, and was not intended to, open all markets. The understanding of Article 1108's government procurement exceptions that I have explored fully accords with the NAFTA's object and purpose to open the government procurement markets, but only to the extent specified and no more.

Here it is undisputed that the Springfield Interchange Project constituted government procurement by a state government entity even though it was conducted in part with federal funds and in compliance with certain federal requirements.

Because the procurement for the Springfield Interchange was conducted by a state government entity, it was--and ADF does not dispute this--it was excluded from the national treatment

and performance requirement obligations concerning procurement by operation of the current scope of Chapter Ten.

The domestic content requirements of the main contract between Virginia and Shirley thus are in no way impermissible under the NAFTA. It would, we submit, make absolutely no sense for the NAFTA parties to exclude this state procurement from the relevant provisions of Chapter Ten, and yet at the same time subject that same procurement to the national treatment and performance requirement obligations of Chapter Eleven, but this is precisely what ADF contends. That contention, as I hope I have demonstrated this morning, finds no support in either the text or the context of Article 1108's exceptions for procurement by a party. That concludes my presentation on the ordinary meaning and context of Article 1108's exceptions for procurement by a party.

I would be happy to entertain any questions the Tribunal might have at this time.

Otherwise, I will ask the President to call upon my colleague, Ms. Menaker, to explain why the varied arguments advanced by ADF concerning the exception lacked merit, and how international law and state practice support the application of Article 1108 in this case.

Any questions?

MS. LAMM: I just want to make sure that I understand your contention with respect to the definition of procurement that's found in Chapter Ten, and specifically (5)(a) where procurement does not include any form of government assistance, and as I understand, your contention is that this is not within that general term any form of government assistance and therefore not within this definition of excluded procurement.

MR. LEGUM: Clearly there are aspects of the Federal Aid Highway Program that do fall within that provision in Article 1001. That's not the part of that program that ADF has challenged here. What they're challenging is not the assistance.

What they're challenging is a domestic content requirement that is a condition of that assistance.

MS. LAMM: So that by providing the assistance, everything related to it is not exclude?

MR. LEGUM: No.

MS. LAMM: I see. So you're really teasing apart the requirements or conditions and they are not excluded by this, but they are part of the procurement by a party that would be included in the exclusion of 1108?

MR. LEGUM: That's correct.

MS. LAMM: And so you don't think that this same definition causes us any problem by the application of the same term in 1108?

MR. LEGUM: That's correct, because what ADF is complaining about is not the grant. In fact, the grant is, as we heard this morning, a substantial source of their revenue for this project. What they're complaining about is a domestic content restriction that is attached to

that grant.

MS. LAMM: Generally the measure that is connected.

MR. LEGUM: That's correct. And the two aren't related, but I note that in Article 1106, subparagraph (3) that article refers to a condition on an advantage, and we're not addressing here whether this is a condition on an advantage or a requirement under Article 1106(1), but that article distinguishes between the condition and the advantage, and an analogous approach would not be inappropriate here.

MS. LAMM: Okay.

PRESIDENT FELICIANO: Mr. Legum, I would like just to pick up from Ms. Lamm because I too have some difficulty grasping the scope of the concepts embodied here. (5)(a) says that procurement does not include any form of government assistance including grants and loans. In this particular case, would you agree that there was a form of government assistance that was extended to

the Springfield project?

MR. LEGUM: Yes, clearly there was in the form of a grant, federal funds and federal assistance in project, but again, that's not what ADF is complaining about.

PRESIDENT FELICIANO: Well, we'll get to that in a little bit. Why are the grants of government assistance excluded from the scope of procurement? Can you explain to me what is the idea, the concept behind exclusion from the concept of procurement, any form of government assistance?

MR. LEGUM: I can. I can give you my personal view. If you'd like me to consult with my colleagues perhaps over lunch and get back to you with a more official representation, but I can at least give you my personal view at this time.

Article 1001 is a scope and coverage provision. It's not a definition provision. The definition in Chapter Ten is in the back. It's in the back somewhere.

PRESIDENT FELICIANO: [Off microphone --

inaudible]

MR. LEGUM: That's certainly true with some scope provisions. This particular scope provision is intended to make clear that for purposes of deciding whether a measure in question is direct federal procurement covered under Article 1001(1) or state or local procurement covered by another subparagraph of Article 1001(1). What paragraph (5) is telling us is that where it is procurement that is funded by one government entity to another government entity, it's to be--the mere fact that it's funded doesn't make it federal procurement. I didn't explain that in a particularly elegant way, so let me try that one again.

1001(5) serves as a signpost. It makes clear that federally funded state procurement is state procurement and not federal procurement for purposes of the application of Chapter Ten's rules.

PRESIDENT FELICIANO: That is a conclusion. I want to take me by the hand and walk

me to where you are.

MR. LEGUM: Well, I'm not sure how much further down this path I can walk you without consulting with my colleagues. Perhaps I will do that, and if it's all right, I will answer this question after the lunch break.

PROFESSOR de MESTRAL: My question follows on, and I think it's of the same order, but maybe a little more general. I might preface it by saying I've always been intrigued by the effort that was made, I think, toward the end of the NAFTA negotiating process, to bring rationality as far as possible to something that had been negotiated at many disparate tables. As I understand it, a very serious effort was made to say what ideas, what concepts, what--including rules of interpretation, run right through NAFTA from the beginning to the end, perhaps reaching right into the annexes. And at the other end of the scale what rules are highly specific, maybe relating only to very little tiny annexes, relating to the interpretation of another

annex in particular chapters. And I think part of that process was an attempt to say how chapters relate to each other, and I think we're dealing--part of the problem we have to wrestle here with is the interrelationship of the concept of investment to the concept of procurement. And so my question to you is: in your view, is Chapter Ten essentially required to be interpreted as self standing on its own terms? Procurement sits there, obviously it deals in goods in some sense. This is largely goods and services or purchase. We have other chapters that relate to goods, other chapters relating to services. And it must have some interrelationship to the investments because investments in the same way relate in some broad sense to goods and services. But in your view, is Chapter Ten required to be interpreted essentially as a self-standing chapter or are there a number of broad principles that come from elsewhere in NAFTA that must inform our understanding of Chapter Ten? Do we have to read very much in relation?

MR. LEGUM: Yes. That's a difficult question for me to answer in the abstract since the negotiation of the NAFTA proceeds my entry into government service by several years, and I don't really have any personal knowledge of the--

PROFESSOR de MESTRAL: I'm only asking you on the basis of the text, as it now stands, the rules that were include to guide interpretation.

MR. LEGUM: If it is all right with you, Professor de Mestral, I would again prefer to wait and respond to that question after the lunch break. My personal area of expertise is Chapter Eleven, which is of course the chapter that is the principal subject of this arbitration. The scope of Chapter Ten is not something that I deal with on a day-to-day basis. And with the Tribunal's permission, I would like to consult with my colleagues and provide a response to you with their input.

MS. LAMM: I just--it's a further follow up to my other question that you might want to

consider and the conceptual problem that I am having is just whether we're required to use the term "procurement" that is found in Chapter Ten in the same way as we use it in Chapter Eleven. What's the connection between the two? And I understood completely your response, and I've looked at some of the other provisions. The definition provision that you referred to, 1025, it almost--it doesn't have a definition for procurement. It does have a definition for tendering procedures. Is this a point that you're actually making, that this is kind of a tendering procedure and this wouldn't be--which is a subset, obviously, of a procurement, but not necessarily the same kind of a form of government assistance that's in the Chapter Ten definition up front.

I don't know exactly how to reconcile the definitions that are in 1025 and this scope, you know, 1001(5) and what we're being asked to then interpret under 1108, and I think it's an important question that needs to be resolved, because one

might preclude the interpretation that you advocate of 1108.

MR. LEGUM: I'd like to begin by answering that in a more general way, and then coming back to your question about tendering procedures. The definitional articles in the NAFTA, with the exception of Article 201, which states definitions of general application throughout the treaty, are limited to each of the chapters. So, for example, 1025 says, "for purposes of this chapter," and then gives a number of definitions. And one will find, if you engage in a comparative study, that where a chapter does incorporate definitions used in another chapter, there's a cross-reference. So there is no presumption that a term that is used in one chapter has the same meaning in another chapter. In terms of--

PRESIDENT FELICIANO: Will you say that again, please, your last sentence?

MR. LEGUM: Yes. There is no presumption that a term used or defined in a particular way in

one chapter has a different meaning or the same meaning in another chapter.

PRESIDENT FELICIANO: That sounds very much rather inconsistent with a lot of the stuff I learned in law school, Mr. Legum. Are you saying that because they are in different--these term "procurement" used in Chapter Ten--that the word "procurement" used in Chapter Ten should be understood differently or need not be understood differently, the term "procurement" in Chapter Eleven.

MR. LEGUM: Allow me to be more precise.

PRESIDENT FELICIANO: To the contrary, there is a general presumption that one term found in one part of a treaty and also in another part of the same treaty, they should be read together, they should be read--be given the same meaning unless there is something very specific that prevents you from doing that.

MR. LEGUM: Allow me to be more precise. What I meant to say is that where a term is given a

specific definition in one chapter, and another--the same term or a similar term is used in another chapter without incorporating that definition. There's no presumption that the specific definition of that term in a given chapter transfers to the other chapter.

Allow me to speak to the case in question here, procurement. There is no definition of "procurement" in Chapter Ten. There is a provision that says what procurement includes in the scope provision of Chapter Ten and says what it does not include, but there is no definition of "procurement." And in fact there isn't a definition of "procurement" in the procurement agreement of the WTO either. In fact that's a subject of negotiation among the parties right now, what is the definition of procurement?

So there is no definition of procurement. 1001, as I said before, is a scope provision. It's intended to describe the scope of Chapter Ten. And the word "procurement", as I said, is not defined

in Chapter Ten, it's not defined in Chapter Eleven. It therefore has its ordinary meaning in both chapters, except to the extent that it is limited by specific definitions in either one, and 1001(5), we would submit, is such a specific provision. It's describing what "procurement" means for the scope of Chapter Ten. That's its purpose. It's not purporting to define the term "procurement" which has its ordinary meaning in Chapter Ten except to the extent limited by the scope and coverage provision, and it has its ordinary meaning in Chapter Eleven, independent of this scope and coverage provision.

If I may circle back to the question about tendering procedures. When I mentioned tendering procedures, I was giving that as one of the examples of how, kind of a colloquial understanding of the term "procurement." How to buy something is translated and reflected in Chapter Ten. We don't submit that the Buy America provision at issue here is a tendering procedure as such, and to respond

more directly to your question, the definition of "tendering procedure" in 1005 is expressly limited to Chapter Ten.

PRESIDENT FELICIANO: I think we have a variety of questions, so we can--I would like to ask you a question. It might sound provocative to you, but no intent to provoke--

MR. LEGUM: No, I like provocative questions. Those are the best kind.

PRESIDENT FELICIANO: 1001(4) says that no party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this chapter, Chapter Ten. I gather that if there was a direct federal procurement contract or project involved, and because the Department of Transportation--let's assume the Department of transportation involved. I don't know whether that includes your Federal Highways Administration. It's in the schedule attached to Chapter Ten.

MR. LEGUM: Yes, the Federal Highway

Administration is part of the Department of Transportation.

PRESIDENT FELICIANO: If this project had been a direct federal project, procurement contract, could you have lawfully stuck in a local content requirement?

MR. LEGUM: Not with respect to NAFTA suppliers, NAFTA-based suppliers.

PRESIDENT FELICIANO: Thank you. In this particular case, I think both parties agree that this is a state procurement contract, a Virginia, what you call it, VDOT, Department of Transportation project.

MR. LEGUM: Yes.

PRESIDENT FELICIANO: Now, the Virginia VDOT is not subject to any of these disciplines. It can pretty much do what it wants. But in this particular case, we have the Federal Government, because it provided--what was that portion, 87 percent--87 percent of the funding, it did require the inclusion of a provision which, if it had been

stuck in a direct federal procurement contract would not have been allowable vis-a-vis a NAFTA party investment or investor. Is there any problem that arises under 1001(4) here?

MR. LEGUM: Well, I must confess that it's the first time that I've focused on 1001(4). And don't know that much about that particular provision. I am told by my more knowledgeable colleagues that the purpose of the provision is really more to address circumstances where--could you lower the shades--it speaks more to circumstances where, for example, a Federal Government entity might split contracts, split a single contract into smaller increments in order to avoid the minimum requirements, dollar amount requirements for the application of the chapter than to other issues.

Again, because I haven't seen the provision before, I'd like to consult with my colleagues. My initial reaction is that, no, there isn't a problem, because as the scope and coverage

provision makes clear, providing funds for state highway procurement isn't considered to be procurement covered by the chapter. I'm referring to 1001(5)(a). So that may be in part an answer to the question that you had asked earlier: what's the purpose of 1001(5)(a). It may be that that provision is intended to make clear that providing funds for local government and state government procurement can't be considered to be an attempt to structure the contract in order to avoid the obligations of the chapter.

But with your permission, I will educate myself and come back fortified with a more educated answer.

PRESIDENT FELICIANO: [Off microphone -- inaudible]

MS. LAMM: It's just on the exclusion of the state's, does--Article 1024(4) seems to make clear that the parties had not concluded any agreement and in fact intended to negotiate further to deal with the interests of states and state

procurement, so that they are not involved in any of the measures or any of the provisions of Chapter Ten.

MR. LEGUM: That's correct. I think the structure is 1001(1)(a) sets forth the coverage of the chapter, which applies to measures about to be maintained by a party relating to--and if you look in subparagraph (a), a state or provincial government entity set out in Annex 1001(1)(a-3), according to Article 1002(4). And there are no such entities at the current time.

MS. LAMM: And, similarly, you might consider under Article 1001(4), it appears to be prospective so that a party can't come up with some device to avoid something, but since this was a measure that was in place from 1982, it could hardly be said to be something the parties were constructing to avoid NAFTA, I think.

MR. LEGUM: Since the treaty didn't exist in 1982, it's--

MS. LAMM: Right, right.

MR. LEGUM: --hard to see how this could have been--the 1982 Act could have been structured to avoid the requirements of a non-existent treaty. I would agree.

PRESIDENT FELICIANO: Mr. Legum, I noticed that the opening clause of 1001(1) refers to measures relating to procurement. I remember some reference in one of your pleadings that this particular provision, Section 165, is a measure that relates to procurement. Now, so that the scope of application seems to be somewhat broader than simply measures constituting procurement. Is that the point that you were making in that part of your pleading? I can't identify the pleading right now. But my point is: Do you have--are you suggesting that the procurement found in 1001(5)(a), specifically the last clause of the opening sentence, opening portion procurement does not include, also has some kind of penumbra that envelops the term "procurement"? If that is part of your argument--I'm just supposing that it might

be--then where does that end? Where are the boundaries? It's another troublesome concept of procurement. I can conceive of a lot of measures which relate to procurement but which might not reasonably be regarded as, you know, caught by any discipline or structure that is found in Chapter Ten.

MR. LEGUM: Well, I think one example is provided by the Federal aid highway program at issue here. As Mr. Pawlak noted, there is a whole host of Federal programs that are promoted by that program. For example, one of the requirements in order to receive Federal aid for a state highway project is that the state must have a law on the books that prohibits persons younger than 21 years of ago from purchasing alcoholic beverages. Is that a measure relating to procurement? It could be. It could be viewed as such because it is a condition for Federal funding of state highway procurement.

Is that measure procurement? No. We

would not suggest that it is. It's a condition attached to procurement, but the condition itself doesn't relate to the use of the funds for the procurement. Instead, it's extraneous to it. That's an example of a measure that could be viewed as a measure relating to procurement but is not procurement itself because it doesn't concern an activity that is inherent to procurement, to purchasing things.

I'm not sure that I've addressed your question fully. Please let me know if I have not.

PRESIDENT FELICIANO: Okay. One last suggestion or request. When you come back after lunch, could you please also address not just the precise words we have identified, any form of government assistance and grants and loans, but the rest of (a), because it may be that the scope of (a) as a whole might throw some light on the scope of the term any form of government assistance. There are a lot of other things thrown in there, and I'm not sure they're all necessarily consistent

with each other or homogeneous in their scope. What policy or objective is being served by excluding from the coverage of procurement these things? That might throw some light.

I don't want to monopolize this, but one other question, Mr. Legum. I appreciate the point that you made that "party" as a general proposition certainly includes all subdivisions of a party as that term--as the term "state," for example, "sovereign state" is used in public international law. But in this particular case, we are looking at a very specific set of provisions found in Chapter Ten. I note that sometimes you have explicit reference to what's now found in 1001(1)(a). You have Federal Government entity. Then you have state or provincial government entity. And later you have the same words found in 1001(1)(c)(i) and (iii), and elsewhere here. What do we make out of this, the various usages, forms of words used in Chapter Ten?

MR. LEGUM: Well, I think I have to begin

by underlining that the issue before this Tribunal is not the scope of Chapter Ten. The issue before this Tribunal is the meaning of the clause "procurement by a party" in Article 1108. Of course, the Tribunal is convened under Section B of Chapter Eleven, and the issue that is before you is: Has there been a breach of Chapter Eleven's provisions?

And as I pointed out in my presentation, the provision that does govern here, which is Article 1108--and it governs because it states an exception to the claims of breach of several articles of Chapter Eleven that ADF has asserted. That provision doesn't distinguish between different levels of government.

Now, that being said, Mr. President, you're correct that Chapter Ten does in its scope and coverage provisions distinguish between different levels of government. But, again, that's not the issue here. The issue here is Article 1108. And I must confess that I've now lost the

specific question that you did ask, which I was going to--

PRESIDENT FELICIANO: 1108 itself has some provisions where the words "Federal level" as distinguished from state or province or as distinguished from local government are used. I'm looking at 1108(1)(a)(i) and (ii) and (iii). So you have the same situation found in Chapter Ten.

MR. LEGUM: What these provisions do, we submit, is confirm that the term "party" encompasses the states, the Federal Government, and the local governments. Let's take a look at Article 1108(1). It states an exception to Articles 1102, 1103, 1106, and 1107. In each of those articles, if you don't mind flipping back to them, the obligation is placed on the party. So 1102(1), each party shall accord to investors of another party national treatment. 1103, the same language with respect to most favored nation treatment. 1106, "No Party may impose or enforce..." in subparagraph (1). Subparagraph (3),

"No Party may condition the receipt..." 1107, "No Party may require that an enterprise of a party," et cetera.

In each of these cases, the obligation is on the party. What 1108(1) does is it recognizes that the term "party," as used in Chapter Eleven, encompasses the Federal Government, states and provinces, and local governments.

PRESIDENT FELICIANO: But is that because state or province and local government are separately mentioned from the party at the Federal level found in the provision in (i) and (ii) and (iii)? Or is it because of an all-inclusive scope of the term "party"?

MR. LEGUM: I would say it's the all-inclusive scope of the term "party." And these provisions serve as confirmation that that scope is, in fact, what the NAFTA parties had in mind.

Mr. President and members of the Tribunal, I'd like to thank you for listening to my presentation. You've certainly given me an excuse

to make my luncheon conversation much more interesting than it would have otherwise been.

PRESIDENT FELICIANO: We thank you, Mr. Legum. We hope that it doesn't spoil your lunch totally.

[Laughter.]

PRESIDENT FELICIANO: We'd be happy to listen to Ms. Menaker anytime you are ready.

MS. MENAKER: Mr. President, members of the Tribunal, as Mr. Legum mentioned, this morning I'll respond to ADF's arguments regarding the applicability of Article 1108's exception. I'll begin by discussing why ADF's argument that it is challenging the 1982 Act and regulations and not Virginia's procurement should be dismissed. I will then demonstrate that ADF is incorrect in asserting that because a grant of money is not procurement, the 1982 Act's buy national provisions cannot be encompassed within Article 1108's exception. In doing so, I'll explain why the various reservations and annexes--exceptions, excuse me, contained in

annexes and schedules to the NAFTA and in other agreements are all consistent with the United States' position and do not support ADF.

Finally, I will demonstrate that rules of international law and state practice support the conclusion that Article 1108 bars ADF's national treatment and performance requirement claims.

First, ADF has argued that the procurement exception should not be applied in this case because it is not challenging Virginia's procurement but is challenging the Buy America Act and regulations themselves. This argument should be rejected.

Contrary to ADF's suggestion, the 1982 Buy America Act and regulations cannot, for purposes of ADF's claims, be considered in isolation from the Virginia procurement contract into which the buy national requirements were incorporated. The 1982 Act and regulations alone do not have any effect on private individuals. They can only have an effect once a state decides to accept Federal funding for

a highway project and, in return, incorporates those provisions into its procurement contracts.

The only way in which ADF was at all affected by the 1982 Act and regulations were their incorporation into its subcontract with Shirley. If the buy national specifications had not been incorporated into its contract, ADF would not have been at all affected by the act or the regulations.

So the 1982 Act and regulations standing alone, by which I mean considered apart from their inclusion into a state procurement contract, cannot violate Articles 1102 or 1106.

Now, Article 1102 provides that--and I've displayed the language on the screen there. It provides that each party shall accord to investors of another party treatment that is no less favorable than that 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 1102(2) is the same provision, except it applies to investments of investors.

Article 1102 thus prescribes the treatment that the NAFTA parties must accord to investors and to investments of investors of another NAFTA party. The only treatment that ADF received was as a result of the incorporation of the provisions of the 1982 Act into Virginia's procurement contract with Shirley and then the subsequent incorporation of those same provisions into Shirley's subcontract with ADF.

ADF can't challenge the 1982 Act and the FHWA's regulations in isolation from the incorporation of that law's provisions into its contract because, apart from their inclusion into that contract, ADF was not treated in any manner by the United States.

Similarly, Article 1106(1) provides--and I've also displayed the language on the screen for your convenience--"No Party may impose or enforce any of the following requirements or enforce any

commitment or undertaking in connection with an investment."

By itself, the 1982 Act does not impose or enforce any requirement, commitment, or undertaking in connection with an investment. The only requirement, commitment, or undertaking that the United States could be said to have imposed or enforced on ADF was the inclusion of the term in ADF's contract that obligated it to supply only U.S. steel to the project. The 1982 Act and the FHWA regulations standing alone did not impose any requirement on ADF. Those laws do not in any way affect ADF or any other private individual.

ADF, therefore, is wrong in suggesting that an Article 1002 or an 1106(1) claim can be based on the Buy America provisions viewed in isolation from the Virginia procurement requirement--excuse me, in isolation from the Virginia procurement contract into which those provisions were incorporated.

Now, I've focused on Article 1006(1)

because that was the article that ADF focused on exclusively in its Memorial and in its Reply. Yesterday ADF also said it was relying in addition on 1106(3). Now, our same argument applies with respect to Article 1106(3). Unfortunately, I don't have that for you to look at on the screen, but essentially that article says that no party may condition the receipt or continued receipt of an advantage in connection with an investment in its territory. And, again, the United States could only be said to have conditioned the receipt of any benefit from ADF's advantage only to the extent that the requirement for--or withheld any advantage, I should say, for a benefit only to the extent that this requirement was placed in ADF's subcontract with Shirley.

Until the buy national provisions at issue here were incorporated into ADF's subcontract, the United States could not be said to have treated ADF in any manner, and it could not be said to have imposed or enforced any requirement on ADF. Alone,

those provisions cannot give rise to a claim under Articles 1102 or 1006.

I'll now turn to address another of ADF's arguments. ADF spent the majority of its time yesterday contending that the measures at issue here are a grant, and it argued a grant is not procurement. Now, Mr. Legum touched on this argument this morning, but I want to take some time to elaborate on the argument since ADF did devote such a substantial amount of its time to this argument.

So, essentially, ADF's argument is that because the Federal Government is not engaged in procurement when it gives money to a state government, this means that the measures that ADF complains of cannot be procurement. And we contend that this is not correct.

Now, both parties agree that when Virginia purchased steel for the project, it was engaged in procurement. Both parties also both agree that when the Federal Government gave money to Virginia,

the Federal Government was not engaged in procurement. But these two facts say nothing about the issue of whether the Buy America specifications that ADF complains about, and specifically the specification that only U.S. steel be used for the project, are an integral part of the procurement that Virginia was engaged in. And we submit that it was.

What's at issue in this case is not a grant. What's at issue is a domestic content restriction and whether that domestic content restriction can be challenged or whether that restriction falls within the exception for procurement by a party.

As Mr. Legum discussed, to procure is to purchase. A number of things are integral to that purchase, including the decision of what to purchase. The 1982 Act's provisions specify what is to be purchased. Those provisions are integrally tied to the procurement itself, and when a state purchases steel in accordance with the 1982

Act's specifications, it is engaged in procurement by a party.

Although the funding that the Federal Government provides to a state is not procurement, the specifications for the purchases made with these funds are an integral part of the procurement that is exempt from challenge under Articles 1102 and 1106. The Federal Government, as we noted earlier, conditions financial assistance for state highway projects on a number of different things, though not all of those things concern procurement engaged in by the state with the funds it receives.

On the other hand, some of those requirements are so integral to the procurement process that they are encompassed within the exception for procurement by a party.

Now, two of my colleagues, both Mr. Legum and Mr. Pawlak, spoke about the Federal Government condition that it only will give funds to state governments for state highway constructions if a state has a minimum age of 21 for purchasing

alcoholic beverages. If a claimant were to challenge that law, the United States would not argue that Article 1108's exception for procurement by a party applied. Even though that requirement would have been attached to Federal funding to be received by a state for highway construction, that requirement would not have been included in the state's procurement contract with any bidder. That requirement is not an integral part of the procurement conducted by the state, nor does that requirement affect or have any impact on the goods or services that the state will be procuring with the funds it receives.

Now, the requirement at issue here is very different from that requirement. Here ADF is challenging a Federal law and regulation that requires the purchase of U.S. steel for state highway projects that are federally funded. That requirement specifies the type of good that the state must procure with the funds, and it thus constitutes an integral part of the procurement

conducted by the state.

The funding that the Federal Government extended to the Commonwealth of Virginia was an entirely internal arrangement that had no effect on any investors, including on ADF. That funding plays no role in assessing whether the conditions attached to that funding are exempt from challenge under Article 1108's exception for procurement by a party.

Now, I think this point can be made clearer by displaying on a screen what the United States contends would be the illogical outcome of accepting ADF's argument.

First, there should be no dispute that if the Federal Government were to purchase goods pursuant to a Federal law that required domestic content, the Federal Government would be engaged in procurement. As we noted earlier, Federal Government procurement is covered by Chapter Ten of the NAFTA. The 1933 Buy American Act is one example of a law that contains domestic content

requirements for the Federal Government, and the United States no longer applies that law with respect to Canada or to Mexico.

The United States has never attempted to draw a distinction between that law that contains a domestic content requirement and the purchase that's actually made by the Federal Government pursuant to that law. The United States has never contended that the 1993 Act would not run afoul of provisions of Chapter Ten because the restrictions in the law itself are not procurement. Nor do I believe would any tribunal accept an argument that a distinction should be drawn in that instance between the law and the purchase. For purposes of determining whether a certain type of procurement is subject to obligations, the law requiring domestic content and the purchase of the goods in accordance with that law are treated as one and the same.

Now, ADF also acknowledged yesterday, as it did previously in its written submissions, that

if Virginia were to purchase U.S. goods in accordance with a Virginia law that provided for domestic content requirements, that would be procurement. ADF acknowledged that there was absolutely no prohibition on Virginia's doing this. ADF does not contend that if Virginia were to do this, it could challenge that Virginia law on the grounds that the conditions in that law mandating the purchase of U.S. goods were not procurement. Again, ADF would draw no distinction between the law that contained the domestic content requirement and the purchases made in accordance with that law.

Yet ADF argues here that where Virginia purchased goods pursuant to a Federal domestic content requirement, that somehow that is not procurement. That we contend makes no sense. That the restriction was contained in a Federal rather than a state law does not and cannot change the nature of the activity at issue. That activity is procurement. And the provisions requiring the use of U.S. steel fall within the procurement

exception.

That funding changed hands between the Federal and state governments does nothing to change this result. That funding was not procurement. But the fact that Virginia received money from the Federal Government says nothing about the nature of the conditions contained in the 1982 Act.

Now, it was to support that very point, that is, that conditions that are attached to grants can constitute an integral part of the procurement conducted with the funds that the United States referenced the reservation that it has taken in the Government Procurement Agreement to the WTO. I've reproduced that reservation on the screen.

The reservation provides that, "The agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects."

Now, neither the GPA nor the NAFTA

contains a definition of "procurement." You can look in the definitional sections of both agreements, and you won't find a definition of "procurement." In fact, in the case cited by ADF yesterday, the Sonar Mapping case, the panel noted in its findings, and I quote, "There was no definition of `government procurement' in the agreement." That was at paragraph 4.5.

The difference in the two agreements lies not in their containing different definitions of "procurement"; rather, the difference is in the scope of the agreements themselves. Particularly, the agreements differ with respect to the types of procurements that are covered.

Now, one primary difference in the scope of the agreement is that the GPA does govern some sub-central government procurement. Now, the NAFTA, you'll recall, does not cover any sub-central government procurement. To make certain that programs like the 1982 Act and corresponding regulations were able to remain in force, the

United States took a reservation in the GPA for such programs.

If restrictions attached to Federal funding could not be considered to be an integral part of the procurement just because the funding itself is not procurement, there would have been no need for the United States to take a reservation to an agreement that governs procurement. In doing so, the United States recognized that, absent such a reservation, programs like the 1982 Act and the regulations would be subject to the GPA, and they might run afoul of the GPA to the extent that state government procurement was covered under that agreement. This is so precisely because restrictions contained in the 1982 Act are an integral part of the procurement that a state conducts with the funds that it receives from the Federal Government.

I will now move on to address ADF's argument that a reservation taken by Mexico to the NAFTA proves its point that conditions attached to

grants of money cannot be a part of the procurement conducted with that money.

Contrary to what ADF has argued, the reservation in question does not support and, in fact, it contradicts ADF's theory that restrictions attached to funding cannot fall within Article 1108's exception for procurement by a party. The reservation at issue is contained in Mexico's schedule to NAFTA Article 1001.2b. In the reservation you can see on the screen, it excludes from Chapter Ten's coverage--it says basically that--well, it says exactly, "The chapter does not apply to procurements made pursuant to loans from regional or multilateral financial institutions to the extent that different procedures are imposed by such institutions."

Now, Mexico receives a multitude of loans from regional and multilateral financial institutions, such as the World Bank, the IMF, and the Inter-American Development Bank. With those loans, the Mexican Federal Government often

conducts procurement. We noted one such example in our Rejoinder. In the year 2000, the World Bank extended a loan to Mexico for over $200 million to a Mexican state bank to construct--for a highway construction project.

The procurement for that project was to be carried out by a Mexican Federal ministry, which is, namely, the Secretariat of Communications and Transport. That agency is subject to Chapter Ten of the NAFTA.

The World Bank, like other regional and multilateral financial institutions, imposes requirements pertaining to procurement on governments that accept funding from it. Receipt of the loans is contingent on a government's compliance with those condition.

Now, absent Mexico's annex excluding such loans from Chapter Ten's coverage, Mexico would have had to comply with both Chapter Ten's proscriptions governing procurement and any proscriptions that the World Bank or any other

multilateral financial institutions imposed on Mexico as a condition for receiving such loans. To avoid any potential conflict that might arise from different conditions being imposed on Mexico from the World Bank, on the one hand, and from Chapter Ten, on the other, Mexico excepted from Chapter Ten's coverage those types of procurements.

The existence of the schedule doesn't in any way support ADF's theory that restrictions attached to loans cannot fall within Article 1108's exception. And, in fact, it does the opposite. Mexico would not have needed to take this reservation if conditions attached to loans could not be deemed to be an integral part of the procurement itself. It was only because those conditions could be considered to be subject to procurement obligations and, therefore, could be governed by the NAFTA's obligations pertaining to procurement that Mexico needed the exception.

I will now address ADF's argument concerning the Clean Water Act. ADF argued that

the existence of a reservation in the United States' annex for the Clean Water Act's "buy national" provisions and to the lack of a similar reservation for the 1982 Act should be interpreted by the Tribunal as evidence that the 1982 Act is subject to Articles 1102 and 1106, and we submit that that is not the case.

In its description of the measures subject to the reservation, the schedule in the NAFTA provides that the Clean Water Act authorizes grants for the construction of treatment plants for municipal sewage or industrial waste. Grant recipients may be privately owned enterprises. The Act provides that "grants shall be made for treatment works only if such articles, materials, and supplies as have been manufactured, mined, or produced in the United States will be used in the treatment works."

According to the plain text of the reservation, under the Clean Water Act grants may be made to privately owned enterprises. The Clean

Water Act contains provisions that are reproduced in the reservation that mandate the purchase of articles, materials, and supplies that have been manufactured, mined, or produced in the United States.

When a private entity purchases goods, that entity is not engaged in procurement by a party. Only where a government entity purchases goods is there procurement by a party. Thus, were a privately owned entity to purchase goods in accordance with the Clean Water Act's "buy national" requirements, that entity would not be engaged in procurement by a party and that activity would not be exempt under Article 1108. A claimant could, therefore, challenge the Clean Water Act's "buy national" provisions under Article 1106, hence, the need for a specific exception in the annex.

Pursuant to the 1982 Act, however, only states may receive funds from the Federal Government. When a state like Virginia purchases

goods, it is engaged in procurement by a party. When a privately owned enterprise purchases goods, there is not procurement by a party. This explains why a reservation was needed for the Clean Water Act and yet no similar reservation was needed for the 1982 Act.

ADF's only response to this is to argue that the statement in the NAFTA's reservation is factually incorrect. Now, we submit this is a red herring. Whether or not that statement is incorrect as a matter of domestic law is irrelevant. The language in the reservation is clear. It states that such grants may be made--such grant recipients may be privately owned enterprises. If ADF is correct and grants may not be made to private entities, then at most the United States negotiated a reservation for the Clean Water Act where none was needed. That is irrelevant to the issue of whether the 1982 Act falls within the exception for procurement by a party.

Now, yesterday ADF expressed skepticism that the negotiator of that reservation could have been mistaken about the Clean Water Act, but yet realized the distinction between giving a grant to a state government, where the procurement exception would apply, and giving a grant to a private entity, where the exception for procurement by a party would not apply. And we submit that it is clear that the negotiator did appreciate that difference.

The Clean Water Act is a very large statute. The entirety of that Act is excepted from challenge under Article 1106. Yet the reservation is only four sentences long. The reservation sets forth the Buy America provisions that the negotiator obviously believed would otherwise violate Article 1106. The reservation then sets forth the fact that grant recipients may be privately owned enterprises. That was clearly an important fact for the negotiator. In a statute as large as the Clean Water Act, in the four-sentence

reservation, that is the fact that the negotiator focused on when drafting the reservation.

It's self-evident, we submit, that the negotiator considered that the Buy America provisions in the Clean Water Act would otherwise violate Article 1106 precisely because grant recipients could be privately owned entities. And, therefore, that action would not be saved by the exception for procurement by a party.

Now, that ADF's national treatment and performance requirement claims are barred by Article 1108 is also supported by rules of international law and state practice. Article 31(3) of the Vienna Convention provides that, and I quote, "There shall be taken into account, together with the context, any subsequent practice and the application of the treaty which establishes the agreement of the parties regarding its interpretation and any relevant rules of international law applicable in the relations between the parties."

As the United States has noted in its written submission, the majority of the world's nations have historically imposed domestic content requirements in their procurement. It's common for procurement to be carved out of trade agreements.

Against this backdrop, one would expect that if the NAFTA parties had intended to so greatly broaden their obligations towards one another, they would have done so in a clear and in an unambiguous manner. We submit that not only have they not done this, they have quite clearly indicated their intent to limit the types of government procurement that is subject to any obligation under the NAFTA, and they have carved out all government procurement from the chapter that provides for investor state arbitration.

Now, the NAFTA parties have all acknowledged this fact. Mexico did so in its Article 1128 submission when it stated that, and I quote, "Mexico agrees with the United States that the measures complained of by the claimant are not

within the scope of Chapter Eleven." And that was on page 2 of the 1128 submission submitted by Mexico in this case.

Now, Canada has also acknowledged this fact. It did so simultaneously with the NAFTA's implementation. On the very day that the NAFTA came into force, Canada stated in its Statement of Implementation that it was disappointed that the parties had been unable to reach agreement that would have provided Canadians access to, and I quote--I have the pertinent language on the screen-- "transportation procurements currently restricted under Buy America programs." This, we submit, is a clear recognition by Canada that the 1982 Act and regulations that ADF challenges here would not be affected by the NAFTA's implementation. Thus, application of those rules to Canadian investors and Canadian-owned investments could not constitute a violation of any of the NAFTA's provisions.

This is further evidenced by statements made by Canada on an official Web site. On that

Web site, Canada acknowledges that Canadian investors and investments--and I'll quote: "Canadian companies cannot rely on NAFTA provisions for equal treatment in this market."

Now, as ADF noted yesterday, the language on that Web site has been recently changed. I was informed that that change was made as of Friday afternoon, so the Tribunal will understand why we did not present the new language to it.

The only difference between the site as shown on the screen and the newly revised site is that the newly revised site provides that, "Canadian companies cannot rely on NAFTA Chapter Ten provisions for equal treatment in this market."

But in any event, the changes are material. Canada is telling its investors that it can't rely on Chapter Ten provisions for equal treatment in the market for federally funded state highway projects. I think we can infer that if Canada believed that its investors could rely on equivalent protections under Chapter Eleven for

equal treatment in the market in question, it would have told this to its investors.

Now, this information would have been especially important considering, of course, that investors can invoke their rights directly against the United States under Chapter Eleven. Under Chapter Ten, of course, the claimant's only recourse is to petition its government--in that case, Canada--to bring a claim directly against the United States in a Chapter Twenty proceeding. So I think Canada's statement on its Web site is consistent with its statement made in its Statement of Implementation.

Now, ADF yesterday tried to explain away Canada's admission in its Statement of Implementation by claiming that Canada never did acknowledge that the 1982 Act was not subject to the NAFTA's provisions. It did this by arguing that when Canada stated, and I quote, it does not have access to "transportation procurement currently restricted under Buy America provisions,"

it was not referring to the 1982 Act. Instead, ADF argues that Canada was actually referring to an annexes provision that excludes "procurement of transportation services that form a part of or are incidental to a procurement contract."

I will take just a few moment to explain why ADF's argument that the Canadian Statement of Implementation was not referring to the 1982 Act is incorrect.

First, transportation procurements and transportation services that are incidental to a procurement contract are two different things. The 1982 Act is the former. It provides for the procurement of steel that is used in the construction of highways. If Canada had meant to reference the procurement of transportation services that are incidental to a procurement contract in its Statement of Implementation, they would have used that language. But it did not.

Now, second, the procurement of transportation services that form a part of or are

incidental to a procurement contract are not generally referred to as Buy America programs. We gave an example of one such program in our Rejoinder, and that was the Cargo Preference Act that requires that a certain percentage of goods procured for certain government agencies be shipped on U.S. flag commercial vessels. That Act is not referred to as a Buy America program, and ADF yesterday did not dispute that that Act is not referred to as a Buy America program.

Finally, it would be odd for Canada to have expressed disappointment at this annex because Canada, as well as Mexico, took the very same reservation. All three NAFTA countries took the reservation in Annex 1001.2b. So, in short, Canada has acknowledged simultaneously with the NAFTA's implementation and subsequently on its official Web site that the 1982 Act was not subject to the NAFTA's requirements.

Now, in addition, the state practice of all three NAFTA parties also supports the view that

programs such as the one that ADF challenges here are exempt from NAFTA's obligations. The United States submitted with its Counter-Memorial expert reports from Gerald Stobo, who is a prominent Canadian attorney who specializes in international trade issues and was general counsel at the Canadian International Trade Tribunal for a number of years, and Claus von Wobeser, who is the President of Mexico's Bar Association, who specializes in the areas of foreign investment, international business transactions, and arbitration, and was a former arbitrator on a tribunal established under NAFTA's Chapter Eleven.

Now, these gentlemen opined on Canadian and Mexican law, respectively. Those reports demonstrate that both Canadian provinces and Mexican states impose domestic content restrictions in their procurement, much of which is financed in whole or in part by their respective Federal Governments.

For example, the United States introduced

evidence that the Canadian Government funds provincial highway construction. It also introduced evidence that Ontario accords a 10 percent price preference for Canadian structural steel bids in its provincial procurement. No doubt a portion of those funds is used for highway projects that the provinces administer and in which they impose domestic content requirements. And ADF has offered no evidence to refute this.

The Mexican Federal Government also funds state procurement. Pursuant to the Federal acquisitions and public work laws, Mexican states give a price preference for Mexican goods and services in their procurement. An example that was offered by Mr. von Wobeser was Baja California's imposition of a 50 percent domestic content requirement in an international bidding procedure. ADF has offered no evidence to refute these facts either.

As is thus clear, provincial and state governments in all three NAFTA parties impose

domestic content requirements in their procurement. As is also undisputed, a portion of that procurement is funded by the central governments of all three NAFTA parties. Thus, state practice supports the United States' position that the NAFTA parties did not intend to restrict the manner in which their state and provincial governments conduct their procurement, even where the Federal Government supplies the funds for that procurement.

Now, ADF recognizes that sub-central governments in all three NAFTA parties impose domestic content requirements in procurements that are funded by their central governments. Yet ADF claims that the United States should be found liable for Virginia's imposition of domestic content requirements in its procurement that was funded by the Federal Government because, it claims, the United States' Federal Government coerced Virginia into imposing those conditions and, left to its own devices, Virginia would have chosen not to do so.

This claim should be rejected for two reasons.

First, ADF has offered no evidence in support of its claim that Virginia was coerced into applying the 1982 Act's provisions. As the Rejoinder statement by Frank Gee, who is VDOT's acting chief engineer, provides, Virginia was not forced by the U.S. Federal Government to incorporate Buy America provisions into its procurement contract with Shirley. It voluntarily chose to apply those conditions in return for receiving Federal financial assistance.

It could have decided to proceed with the Springfield Interchange Project without receiving Federal financial assistance. If it had done so, there is no question that Virginia could still have chosen to demand that only U.S. steel be used for the project, or it could have chosen to allow foreign steel to be used for the project. But that Virginia was under no compunction to apply the 1982 Act's provisions in its steel procurement is

further evidenced by U.S. law, which my colleague, Mr. Pawlak, referred to earlier. And that law provides that states retain their sovereignty to determine whether to accept funding and apply corresponding conditions in their procurement for any particular project.

Now, second, whether Virginia was forced to apply the 1982 Act's provisions in its procurement contract for the project or whether Virginia would have applied similar conditions had the 1982 Act not been in existence is legally irrelevant. As Mr. Legum noted earlier, Article 1108's exception draws no distinction between procurement by different levels of government. Whether viewed as Federal, state, a Federal-state collaboration, or even federally coerced state procurement, it is all procurement by a party to the NAFTA. All government procurement is excepted from challenge under Articles 1102 and 1106.

Now, I will just make one more note in response to ADF's argument that applying this clear

language in Article 1108 and excepting all government procurement would somehow permit the Federal Government to get around its obligations. And, Mr. President, you posed a provocative question earlier to Mr. Legum, which is another reason I want to just address this in brief.

I believe that this is not the case. Not only is this application consistent with the clear language of Article 1108, but excepting this clear provision in no way permits the United States to do indirectly what it could not do directly, in the words of the claimant.

Now, first, as I just explained, which level of government imposes the domestic content requirement is irrelevant for purposes of Chapter Eleven liability since Article 1108 exempts all government procurement. So the United States' Federal Government gains no advantage in this respect.

Second, Chapter Ten's obligations only apply to the central governments of the NAFTA

parties. Apart from specifically noted exceptions, when the United States' Federal Government engages in procurement, it must comply with Chapter Ten's obligations, including those pertaining to national treatment and performance requirements.

The fact remains, however, that the NAFTA does not govern the manner in which sub-central governments conduct their procurement. Those governments are free to impose domestic content requirements in their procurement. It does not matter why those governments have chosen to adopt a "buy national" policy. The NAFTA does not constrain Virginia in any manner in which it conducts its procurement. It may impose domestic content requirements.

Even if the Federal Government were to tell Virginia to impose domestic content requirements in its procurement, it would merely be telling Virginia to do what it is entitled to do. Again, I mention this only to explain to the Tribunal that the United States' position is

entirely consistent with the NAFTA as whole.

Now, of course, the question of whether the United States complied with its Chapter Ten obligations is not before this Tribunal. The Tribunal has jurisdiction only to decide whether the United States complied with its obligations under certain articles of Chapter Eleven. And as we've demonstrated, all government procurement is exempt from challenge under Articles 1102 and 1106.

Now, not only would making a determination of liability depend on a sub-central government's motivation in adopting "buy national" policies be nearly impossible to apply, but it would result in a finding that sometimes a NAFTA party would be liable when its sub-central government adopted "buy national" policies and sometimes it would not be liable, regardless of the fact that the same exact activity would be at issue in those two circumstances. The parties, we submit, could not have intended such a result. Yet this is the result that ADF asks this Tribunal to support by

resting its claim on the unsupported suggestion that because Virginia was coerced to apply the 1982 Act, it should not matter that sub-central government procurement is not covered by the NAFTA and it should not matter that all government procurement is exempt from challenge under Articles 1102 and 1106.

We submit that the Tribunal should reject this suggestion and deny ADF's claims under Articles 1102 and 1106.

I would be happy to answer any questions that the Bank may have.

PRESIDENT FELICIANO: Thank you, Ms. Menaker.

None of us at this time have any questions to raise, Ms. Menaker. Of course, it's fairly close to lunchtime, and some questions may pop up in our minds at lunchtime. But if it is all right with the rest of you, shall we close a little early and go off to lunch? And we're supposed to be back at 2:30.

MR. LEGUM: Thank you very much.

PRESIDENT FELICIANO: Thank you.

[Whereupon, at 12:50 p.m., the hearing recessed, to reconvene at 2:30 p.m. this same day.]

A F T E R N O O N S E S S I O N

[2:30 p.m.]

PRESIDENT FELICIANO: Mr. Legum, you were to start this afternoon, yes? I assume this afternoon.

MR. LEGUM: That is correct. I was given an assignment to work on over lunch, and I am now here to report on the results of my efforts in that regard.

PRESIDENT FELICIANO: You don't have to do that at this specific moment, but please proceed with your presentation.

MR. LEGUM: Very good.

The Tribunal asked a number of questions concerning Chapter Ten, and what I would like to do is to address them by the article or the provision on which the question centered. A number of the questions related to Article 1001(5)(a). One of the questions was is there a unifying characteristic to each of the examples of government assistance that is listed in that

provision. If you would, I would like to just take you quickly through those examples, explain a bit what they are and then give you my conclusion on that point.

The first example that is listed is a cooperative agreement, and an example of a cooperative agreement is the following. The Federal Aviation Administration, for example, periodically enters into cooperative agreements with its counterpart agencies in foreign governments, for example, countries in the European Union.

The subject of some of these cooperative agreements is to conduct certain studies. Essentially, it's a form of government assistance. The different governments, in this case foreign governments and the United States Government, are assisting each other in a common endeavor. What this provision does is it makes clear that when those agreements call for, for example, a specialized agency in the European Union to provide

a certain type of service in conducting the study, that is not a procurement that is governed by Chapter Ten, and therefore doesn't have to be opened up to the specific tendering procedures and the like that are provided for in Chapter Ten. So that is some background on cooperative agreements.

I believe that grants and loans are self-explanatory. So I won't spend much time on them, and I will pass to equity infusions. Equity infusions are where there is a state enterprise with a governmental ownership interest. An example might be certain governmental entities that are set up to run nuclear power plants. In that instance, occasionally the government will, as a way of assisting this particular enterprise, infuse it with capital in order to provide it with the funds to do what that enterprise does--another form of government assistance here. The government is assisting an entity in which it has an ownership interest.

I believe, also, that guarantees and

fiscal incentives are relatively self-explanatory, so I will pass to the government provision of goods and services to persons or state, provincial and regional governments. An example of this type of program or food distribution programs that the Federal Department of Agriculture maintains with respect to school districts, the Department of Agriculture provides food stuffs to school districts in order to help them provide low-cost or no-cost meals for children--again, another form of government assistance. What this does is it makes clear that the school districts are not procuring goods or services when the Federal Government provides those goods or services to the school districts.

Now the question that immediately leaps to mind is, but the NAFTA doesn't currently cover local governments in Chapter Ten. And the answer to that is that, although the NAFTA was drafted that way--excuse me--although that is correct, the NAFTA Chapter Ten does not currently cover local

government entities like school districts, it is drafted in such a way that it could with only a change to the annex that is referenced in Article 1001(1)(a).

So those are examples of each of the specific concepts that is listed in Article 1001(5)(a). And as I've said, the unifying principle here is that each of them is, in one way or another, a form of government assistance.

I would like to call the Tribunal's attention to subparagraph (b) of 1001(5), which we haven't talked about very much. Actually, we haven't talked about it at all, and describe what that does because I think it sheds light on the issues that the Tribunal is grappling with. That provision refers to the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions and sale and distribution services for government debt.

Now there are certain services that are

essential to governmental functions; for example, sale of government debt, and that is something that most governments are not willing to allow private entities to engage in. For example, the United States Treasury, when it sells Treasury securities, does so only through the Federal Reserve banks. What happens is the Federal Reserve banks conduct an auction of Treasury debt securities. What this provision does is it makes clear that that type of activity is not covered by Chapter Ten.

Now that type of activity would normally fall within what one ordinarily thinks of as procurement. If one is a corporation and you want to do the equivalent thing, that is, sell corporate debt instruments, you must go out and procure services to sell the debt instruments. What the Federal Reserve does is really a form of procurement in the sense that Treasury is procuring the same types of services, in this particular case, from the Federal Reserve bank system. This is significant because it highlights a flaw in

ADF's approach to 1001(5).

If, as ADF suggests, 1001(5) is a definition of procurement, although it's not styled as a definition of procurement, the procurement by the U.S. Treasury and similar entities in Canada and Mexico would not be subject to the government procurement exception in Article 1108(7) and (8), although, clearly, that is the type of government activity that the NAFTA parties intended to be excluded from regulation.

This, we submit, supports our view that 1001(5) is a scope provision, just as the title of the article suggests and not a definition of procurement. It doesn't say that the acquisition of fiscal agency or depository services is not procurement for all purposes, what it's saying is it's not within the scope of this chapter.

If the Tribunal could turn to Article 1004. The reference to this provision is to government procurement covered by this chapter, which clearly suggests that the parties

contemplated that there could be such a thing as government procurement that is not covered by this chapter--activity that is procurement, but not procurement covered by the chapter. Article 1017, subparagraph (1), similarly refers to procurement covered by this chapter.

It is our submission that Article 1005 is, again, a scope provision and not a definition. Therefore, when the NAFTA parties referred to procurement by a party in Article 1108, they intended to encompass the ordinary meaning of procurement by a party and not the meaning of procurement as it has been limited by the scope of Chapter Ten, a different chapter of the NAFTA that does not apply to Chapter Eleven.

Unless the Tribunal has any questions about what I've just said, I would like to move on to the question concerning Article 1001(4).

PRESIDENT FELICIANO: Thank you very much, Mr. Legum. That was very helpful.

I just wanted to confirm my understanding

that putting aside the specific look at content requirement of Section 165, the fact that federal funds are contributed to the cost of a state project, like the Springfield project, which therefore suggests that government assistance is being given, perhaps in the form of a grant, I take it that that in itself Department of Energy snot constitute procurement in your view.

MR. LEGUM: That is correct.

PRESIDENT FELICIANO: Thank you.

Did you have any questions?

MS. LAMM: No.

PRESIDENT FELICIANO: Thank you.

Please proceed.

MR. LEGUM: The question was raised as to whether the Buy America provision of the 1982 act and its implementing regulation could be viewed as a contravention of Article 1001(4), which states that "no party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this chapter."

Having conferred with my colleagues, I can largely confirm the answers that we provided before lunch. With the Tribunal's permission, I will simply go through them seriatim in order to make sure that we have, in fact, answered the Tribunal's questions on that particular issue.

First of all, the 1982 act, and its implementing regulation, are a preexisting program that could hardly be viewed as designed or structured in order to avoid the obligations of a procurement chapter that did not exist at the time. As ADF acknowledges, the program has been consistently applied since 1983. This is not something new that was concocted to get around NAFTA's provisions.

Second, what we are talking about here really is state procurement on its face. It is federally funded state procurement, but it is state procurement. To refer to some of the factors that were discussed in the interchanges yesterday, the Commonwealth of Virginia retains title to the

highway and the bridges that are encompassed by the project. The State of Virginia is the party that has a contractual relationship with the contractors that do the work. The State of Virginia is the entity that controls the work that is done on the project, and the State of Virginia is responsible for maintaining the highway after the project has been completed. This really is a state procurement project, albeit one that is conducted with substantial federal financial assistance.

The other point that I would like to emphasize is that Article 1001(4) reinforces the point of the scope provision in Article 1001(5)(a). It makes clear that the mere provision of financial assistance by itself isn't enough to turn federally funded state procurement into direct federal procurement that would be covered by the chapter.

An additional point that I would make, and this is really in support of the notion that this is state procurement, rather than federal procurement. The source of the funds for this

program is a gasoline tax that is collected from the sales of gasoline in all of the states, and it is collected on a state-by-state basis and distributed on a state-by-state basis. The funds for those program do not come from the Federal Treasury or the general appropriations of the Federal Treasury. It comes from this special fund set up with gasoline taxes and is paid out on a state-by-state basis.

The final point that I would make about Article 1001(4) is that, of course, it does not apply in these proceedings, since we're looking at Chapter 11. We're not looking at Chapter Ten. There is on provision that would subject to investor state arbitration an alleged breach of Article 1001(4).

Now Professor de Mestral had asked before the break about whether Chapter Ten was a stand-alone chapter. I believe that I have responded to that question, at least in part, by discussing the scope provision of Article 1001(5)(a). I would

simply ask, if I have not fully responded to that question, that you let me know just so that I can further consult with my colleagues. I don't have more to tell you at this point.

Unless there are further questions, I would ask the President to call upon Ms. Menaker to address Article 1102.

PROFESSOR de MESTRAL: No, thank you. No, that is fine.

PRESIDENT FELICIANO: Ms. Menaker, please proceed.

MS. MENAKER: Thank you, Mr. President and members of the Tribunal.

For all of the reasons that Mr. Legum and I discussed this morning, ADF's national treatment claim should be denied because Article 1102 does not apply to procurement by a party. I will now show that even if the government procurement exception did not exist, ADF's national treatment claim would still fail.

Article 1102(1) of the NAFTA, which I have

reproduced on a screen there, provides that each party shall accord to investors of another party treatment no less favorable than that 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.

As I mentioned this morning, Article 1102(2) is identical, except that it discusses the treatment to be accorded to investments of investments of another party, as opposed to the investor itself.

As the language of Article 1102 makes clear, that article applies to investors and to investments of investors. It is intended to preclude discrimination on the basis of the nationality of the investor and the nationality and the nationality of the ownership of an investment. It does not preclude discrimination against goods of a certain origin or against suppliers of such goods.

There are a number of different ways that one can break down the elements of Article 1102. For purposes of this case, I have simply broken down the elements in the order in which they appear in the text of the article. So, as you can see on the screen, what I have done is just put numbers in front of the various different elements.

Now we contend that in order to prove a national treatment violation, ADF must show that the treatment it complains about was accorded to it by a NAFTA party--in this case, by the United States. It must also demonstrate that it is an investment and that it has an investment in the United States. It must establish that it has been accorded less-favorable treatment on the basis of its nationality. To demonstrate that, it must have identified domestic investors or domestically owned investments in like circumstances that received or would have received treatment more favorable than that accorded to it.

Finally, it must show that the treatment

at issue was with respect to its investment in the United States. All of ADF's arguments we submit fail for either lack of evidence or lack of legal foundation because they either misconstrue or ignore Article 1102's requirements.

I will begin my discussion by focusing on the element of less-favorable treatment in Article 1102. ADF's showing comes up far short on proving that it has been accorded less-favorable treatment than that which has been accorded to domestic investors and investments in like circumstances. ADF Group is a Canadian investor. Its investment in the United States is ADF International.

It is undisputed that ADF Group is in like circumstances with U.S. investors that own investments that supply steel to federally financed state highway projects that are subject to the 1982 act's specifications.

It is also undisputed that ADF International is in like circumstances with the U.S.-owned suppliers of steel to such projects.

The 1982 act and regulations are neutral on their face. ADF's argument that the 1982 act discriminates in favor of U.S. goods at the expense of foreign goods does not establish a case of de jure discrimination.

Article 1102 requires that the measures not discriminate on the basis of nationality of an investor or ownership of an investment. On their face, the 1982 act and regulations do not discriminate on the basis of nationality of an investor or on the basis of nationality of the ownership of the investment. There is no de jure discrimination here.

The Buy America provisions apply to all suppliers of steel without regard to the nationality of the supplier. The United States has produced uncontroverted evidence that the FHWA has consistently interpreted the 1982 act and its implementing regulations to require that all manufacturing processes, including fabrication, take place in the United States.

That means that no U.S.-owned steel supplier may provide steel that has been fabricated outside of the United States to a project that is subject to the 1982 act. No U.S.-owned steel supplier may supply steel fabricated outside of the United States to such a project, even if having that steel fabricated outside of the United States would save it money and would result in its ability to place a lower bid on a project.

ADF does not dispute that for the past 19 years or so, the FHWA has interpreted the statute and its regulations in this consistent manner. ADF has not produced any evidence that any U.S. investor or U.S.-owned investment that supplied steel to the Springfield Interchange Project or to any other federally financed state highway project, where the 1982 Buy America provisions applied, received treatment that was any more favorable than that which ADF received.

It has not produced evidence of any instance where a U.S. investor or a U.S.-owned

investment was permitted to supply steel that was fabricated outside of the United States to a federally financed highway project.

In response to this showing, ADF has made a number of arguments. While all of these arguments have been addressed by the United States in its Counter-Memorial and in its rejoinder, I would like to respond to those four arguments that ADF focused most heavily on yesterday and in their written submissions.

The problem with each of the arguments that ADF has advanced is that all either fail for lack of evidence or misconstrue or ignore the express language set forth in Article 1102.

First, while ADF must acknowledge that the 1982 act and regulations are neutral on their face and have been consistently applied without regard to nationality, ADF claims that, in effect, those provisions deny it national treatment because it and its investment are forced to make choices that U.S. investors and U.S.-owned investments do not

have to make. It, thus, argues that it has demonstrated less-favorable treatment. This assertion fails for two reasons.

First, it fails for lack of proof. ADF has not produced any evidence to demonstrate that any U.S. investor or U.S.-owned investment in like circumstances faces choices that are different from those that ADF supposedly faces. Instead, it offers only pure speculation to support its claim that, in effect, the act and the regulations accorded less-favorable treatment than domestic investors and domestically owned investments in like circumstances. Where, as is the case here, the measures are indisputably neutral on their face and as applied, evidence is required to support a showing of less favorable treatment.

We submit that ADF has failed to meet its burden here.

Second, ADF's assertion fails because it is incorrect. U.S.-owned steel suppliers face the same choices as does ADF. Consider, for example, a

U.S.-owned supplier like ADF International. That U.S.-owned supplier would not have the capacity to fabricate an amount of steel in its U.S. plant to fill a contract that was similar to ADF's subcontract. In that instance, that U.S. supplier would need to decide whether to subcontract out the work to another fabricator located in the United States, to acquire a better equipped fabricator, or to expand its own facilities in the United States to do the work itself.

These are the same choices that ADF International must make when it supplies steel for a federally financed state highway project that is governed by the 1982 Act. Thus, ADF has not met its burden of showing that, in effect, the 1982 Act accords it and its investments any less favorable treatment than that which was accorded to U.S. investors or U.S.-owned investments in like circumstances.

Now, ADF has also spent a lot of time arguing that, according to cases applying the 1933

Buy American Act, it should have been permitted to fabricate steel outside of the United States and, as a result, it has, therefore, been denied national treatment. In so arguing, ADF ignores the "in like circumstances" requirement set forth in Article 1102. The treatment accorded to ADF cannot be compared to that accorded to other investors and investments that had procurement contracts with the Federal Government governed by the 1933 Act. Those investors and investments are not in like circumstances with ADF. ADF itself admits this when it concedes in its reply--and I have reproduced the paragraph on the screen--that it is in like circumstances, and I quote, "with those investors and investments supplying steel to federally funded state projects governed by the same statutory and regulatory regime."

Investors and investments supplying steel directly to the Federal Government in accordance with the 1933 Act are not supplying steel to federally funded state projects, and those projects

are not subject to the same statutory and regulatory regime. What those cases hold with respect to manufacturing processes and fabrication is irrelevant to ADF's national treatment claim. The 1933 Buy American Act and the 1982 Buy America Act are different statutory and regulatory regimes to which different rules apply. There is not and should not be any expectation that investors and investments governed by one of those acts will be accorded treatment that is identical to the treatment accorded to an investor or an investment governed by the other Act.

Not only has the United States consistently maintained the different nature of the two Acts, the claimant's own government has noted this difference as well. As is reproduced at Tab 16 to Appendix Volume I, accompanying the United States' Counter-Memorial, and as I have excerpts reproduced on the screen there, the Government of Canada posts on its Web site a summary of the requirements of both Acts. On its Web site, Canada

notes that since the NAFTA's implementation, the 1933 Act no longer applies with respect to Canadian investors and their investments in the United States. It then goes on to explain that, unlike the 1933 Act, the 1982 Act is not affected by the NAFTA's implementation and, as a result, Canadian investors in the United States and their investments cannot expect equal treatment in the market for federally financed state highway projects.

Canada specifically notes--and you can see towards the bottom of the screen there--that the 1933 and 1982 Acts are different and are subject to, and I quote, "completely different rules." In short, ADF cannot establish a national treatment violation by comparing the treatment that it received with the treatment received by others who participated in procurement that was governed by the 1933 Act. Investors and investments governed by one Act are not in like circumstances with investors and investments governed by the other

Act.

I now want to address some of the confusion surrounding the requirement in Article 1102 that a measure must accord treatment to an investor with respect to its investment. And this comes up in a number of different ways.

First, in its Article 1102 argument, ADF is unclear about whether the alleged violation pertains to the treatment of its investor or to the treatment of its investment. To the extent that it pertains to the treatment of its investment--and that would be ADF International and the steel that it purchased in the United States--I have already addressed that. Both ADF International and the steel it purchased in the United States were accorded treatment that was no less favorable than that which had been accorded to domestic investors and investments in like circumstances.

Now, to the extent that ADF claims that ADF Group, the investor, has been denied national treatment, that claim fails because the treatment

complained of with respect to ADF Group is not treatment with respect to its investment. In its argument on this point, ADF fundamentally misconstrues Article 1102's requirement that the treatment of an investor must be with respect to that investor's investment. In order for an investor to establish a violation of Article 1102, they must demonstrate that it has been accorded treatment that is less favorable than that which is accorded to investors of the respondent party in like circumstances with it with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of its investments.

Article 1102 governs the treatment that the United States must accord to investors with respect to their investments. It does not govern the treatment to be accorded to suppliers of goods and services.

Other chapters of the NAFTA govern obligations to be accorded to persons who merely

supply goods or services. For example, Chapter Three through Eight of the NAFTA govern trade in goods. Chapter Twelve governs trade in services. And certain provisions of Chapter Ten, the procurement chapter, contain obligations concerning suppliers of goods and services.

For example, Mr. Legum noted earlier here today that Article 1003(1), which I have reproduced on the screen, provides that with respect to measures covered by this chapter, each party shall accord to goods of another party, to the suppliers of such goods, and to the service suppliers of another party treatment no less favorable than the most favorable treatment that the party accords to its own goods and suppliers and goods and suppliers of another party.

Article 1003(1) best makes clear that it was no oversight that the parties drafted Article 1102 to apply solely to investors and to investments of investors. When the parties wanted to extend obligations to cover the treatment of

suppliers of goods or the treatment of the goods themselves, they did so, as was the case in Article 1003. There is no basis to read into Chapter Eleven the investment chapter, obligations extending to those who supply goods or to goods themselves. That chapter applies exclusively to investment.

Now, yesterday ADF cited to a USTR report on trade barriers to claim that the United States conceded that "buy national" policies are discriminatory. As ADF reported yesterday, that report noted that Canadian "buy national" requirements are discriminatory policies that favor Canadian suppliers over U.S. suppliers. Not surprisingly, that statement was made in the context of a report on foreign trade barriers. "Buy national" policies are discriminatory with respect to goods, but that's a trade issue. Those policies generally don't and the 1982 Act at issue here does not discriminate on the basis of nationality of investors or their investments.

Now, I want to make clear that the United States is not arguing that there is a general exception in Chapter Eleven for claims that might involve trade in goods or services. What we are arguing, however, is that to establish a claim under Chapter Eleven generally and under Article 1102 in particular, that claim must pertain to the parties' treatment of an investment or to its treatment of an investor with respect to that investor's investment.

So while there may be a case that concerned a measure pertaining to the trade in goods and services, and also impacted an investor with respect to its investment, that is not the case here.

When ADF Group exports steel from Canada to the United States, it is acting as a supplier of a good and its activity is solely concerned with trade in goods. To the extent that ADF Group challenges the Federal law and regulations that restrict its ability to supply steel fabricated in

its factories in Canada to the United States for use in state highway projects that are federally financed, that does not constitute treatment of ADF Group with respect to its investment in the United States. Rather, that pertains solely to ADF Group's sale of goods in Canada to customers in the United States.

In other words, to the extent that ADF has been accorded any treatment by the United States by virtue of the 1982 Act and regulations, that treatment has not been accorded to ADF Group in its capacity as an investor in the United States.

That the measure's effect of prohibiting ADF Group from supplying steel fabricated in Canada to federally financed state highway projects is not treatment with respect to an investment is illustrated by the following:

There are numerous Canadian, Mexican, and other non-NAFTA companies that export steel to the United States. The requirement that only U.S. steel be used in federally financed state highway

projects affects all of those companies. The effect on those companies is the same, regardless of whether they have an investment in the United States.

Were a measure to accord treatment to an investor with respect to its investment, it would not have the same effect on all suppliers of a good or service, irrespective of whether those suppliers even had an investment in the United States. That this measure does have the same effect on all suppliers of steel to the U.S. demonstrates that the measure does not accord treatment to any one supplier with respect to any investment that that supplier may have in the United States.

Now, this fact underlies the problem with ADF's reliance on the S.D. Myers case. Before discussing that case, I'd like to respectfully remind the Tribunal that, according to Article 1131(1), the governing law in these proceedings is the NAFTA itself and applicable rules of international law. As Article 1136 makes clear,

Chapter Eleven decisions have no precedential value. Those decisions are binding only on the parties to a particular dispute.

Decisions of Chapter Eleven Tribunals, like decisions of any international tribunal or court, may be persuasive authority, but only to the extent that those decisions are soundly reasoned. In the United States' view, this Tribunal ought not to rely on the S.D. Myers decision because that Tribunal's decision regarding Article 1102 was not soundly reasoned.

One of its errors lies in the fact that it failed to recognize that Article 1102 applies to the treatment of investors only insofar as that treatment is with respect to an investment. While closing the border to the export of PCB waste prevented S.D. Myers from importing PCB waste from Canada into the United States to remediate, it did not restrict S.D. Myers' ability to make investments in Canada, including investments in companies that marketed or remediated PCB waste in

Canada.

This treatment of S.D. Myers, therefore, was not treatment with respect to its investment. Rather, the measure related to S.D. Myers' provision of its own services in the United States to customers in Canada. ADF Group is in a similar situation. The measure at issue here does not treat it with respect to its investment. Its ability to make investments in the United States, including investments in companies that fabricate steel in the United States, is not affected by the measure. The measure relates solely to its provision of its own services in Canada to customers in the United States. Failing to recognize that Article 1102 applies to treatment of investors only insofar as that treatment is with respect to that investor's investment would have the unintended result in the NAFTA's investment chapter being used to address grievances that relate solely to trade in goods and services and not to investment.

Finally, I'll briefly address ADF's argument whereby it invokes the Albania and Estonia Bilateral Investment Treaties as a basis for its national treatment claim.

ADF's argument in this regard can be easily dispensed with as it ignores Article 1102's requirements. Article 1102 requires that the treatment received by the claimant must be compared to the treatment that the NAFTA party against whom the claim is brought has accorded to its own investors and their investments.

In spite of Article 1102's express language, ADF argues that it is entitled to the treatment that has been or would have been accorded to U.S. investors in Albania and Estonia by the governments of Albania and Estonia. Accepting ADF's proposition would fly in the face of the language of Article 1102.

The obligation to accord national treatment is placed upon the parties to the NAFTA. The comparison called for in Article 1102 in this

case is that between the treatment that the United States accords to its own investors and their investments and that which the United States accords to ADF and its investments.

Now, yesterday ADF's counsel relied on the Maffezini case to urge a different result. That case, we submit, does not support ADF's argument here.

First, the national treatment clause at issue in that case was not the same as the one at issue in this case. In fact, it was a very different national treatment clause.

Second, the paragraph discussed by ADF yesterday is very terse and provides no guidance as to how the Tribunal arrived at the result at which it arrived at. It is not particularly instructive with respect to its national treatment analysis.

And, in particular, it contains no cogent explanation of how a provision in a treaty can be deemed to be treatment by the United States to one of its own investors.

And, finally, I would just note this passage in Maffezini itself to call the Tribunal's attention to. This is in paragraph 63 of that decision where the Tribunal was discussing using the national treatment clause to pertain the result that ADF counsel urges upon this Tribunal. And that Tribunal states, and I quote, "If the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North American Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause," the clause being that both the national treatment and most favored nation treatment clause that ADF's counsel discussed, "because these very specific provisions reflect the precise will of the contracting parties."

So I submit that it is not clear that even the Maffezini Tribunal would interpret the national treatment clause at issue in the NAFTA the way that

ADF's counsel urges this Tribunal to interpret that clause. There is simply, we submit, no support in the language of Chapter Eleven's national treatment provision for ADF's treatment to be compared to the treatment that the governments of Albania or Estonia accord to U.S. investors and their investments in Albania and Estonia.

For all of the reasons that I've discussed this afternoon, as well as those set forth in the United States' Counter-Memorial and Rejoinder, the United States submits that ADF has failed to establish a national treatment violation. I would be happy to answer any questions the Tribunal might have, and if you don't have any questions, I would ask the Tribunal to call upon my colleague Mr. Pawlak who will address ADF's Article 1105 claim.

MS. LAMM: The real discrepancy in positions is the way you apply--it's one of many, but one that I'm trying to reconcile is the way you apply the national treatment provision, and that is, you say because the U.S. party--or the U.S.

contractors, potentially, would have the same burden as the Canadian, therefore, there isn't any discrimination. And I think the way they've applied it is by saying you don't look at the other U.S. entities, you look at other foreign entities and compare them kind of across the board with foreign.

Is there anything in either any negotiating history or anything else that says how you compare, what are the like circumstances, who are the entities that you should be comparing with?

MS. MENAKER: Well, I think that the first issue, before you even get to like circumstances, Article 1102(1) and (2) make clear that, in the first instance, when you're looking at an investor, a treatment of an investor, you compare that investor to other investors in like circumstances. And when you're looking at the treatment of an investment, you compare that treatment to other investments, domestic investments in like circumstances.

So, for instance, in this case, when they're talking--when ADF's counsel is discussing the treatment that was accorded to ADF International--that's its U.S. subsidiary--that U.S. sub supplies steel to projects that are federally financed. The comparison to be made is that investment--the so-called foreign investment--should be compared to U.S. investments, domestic investments in like circumstances. Those U.S. investments in like circumstances are going to be U.S.-owned steel suppliers that supply steel to similar types of projects.

And when you look at the--well, I'll finish up that portion of it. And there we submit that there is no discrimination on the basis of the nationality of the investment. The Act and the regulations treat both of those investments the same, regardless of the nationality of the investment.

So, for instance, if ADF International had been owned--if its parent company were a U.S.

company, or if its parent company had been a French company or a Spanish company, it would have received exactly the same treatment. So the treatment it received was no less favorable than that received by a U.S.-owned investment that supplied steel to the Springfield Interchange Project or a similar project.

MS. LAMM: I guess the problem is they're looking at the steel as the investment, and you--do you dispute that that is what you look at as the investment?

MS. MENAKER: I think in one instance you can look at the steel; in one instance you can't. When they said yesterday their steel that they purchased that is in the United States as an investment, we agree. That steel that they purchased that's sitting in the United States has been accorded treatment no less favorable than any other steel that's sitting in the United States. That steel that's in the United States may be used for use on the Springfield Interchange Project. It

can be used for anything--you know, anything they want to do with it, they can do with that steel.

They can't take that steel, ship it to Canada, and bring it back to use in the Springfield Interchange Project, but neither can anyone else, a U.S.-owned investment that also has an investment in steel that's located in the United States, doesn't receive treatment any more favorable than ADF International receives with respect to that steel. It similarly cannot take that steel outside of the United States and bring it back in for use in the project.

Now, the second type of steel is the steel that's sitting up in Canada. Now, that steel, sure, the Buy America Act discriminates against that steel. It says use U.S. steel, don't use Canadian steel. But that's discrimination against goods. That is not discrimination against investors or investments. That steel in Canada--well, obviously it's not an investor. That steel in Canada is also not an investment as that term is

defined by the NAFTA. To be an investment, it needs to be located in the territory of the party against whom you're making the claim. So the steel that ADF Group has in Canada is not an investment that it has in the United States.

So then, when you're looking at the treatment of that steel in Canada, you're saying, sure, that's discrimination based on the origin of the good. That's not discrimination based on the nationality of the investor or the nationality of the investment.

To the extent that the parent company, ADF Group, can't ship that steel to the U.S.--and they're complaining about that--that we submit is a trade issue. That is not an investment issue. That doesn't pertain to the United States' treatment of its subsidiary ADF International. it doesn't pertain to the treatment of the United States' treatment of the steel that it purchased in the United States. That's not treatment with respect to an investment in the United States. So

that would not fall within Article 1102 or, in fact, within Chapter Eleven.

MS. LAMM: I guess analytically, if a U.S. entity owned that same steel, it would be subject to the same kind of problem or restraint.

MS. MENAKER: Exactly. Exactly. And that's why you can--you can kind of understand when something is with respect to an investment and when it is not by looking at whether it affects all foreign suppliers to the same extent.

Like, for instance, if there is a Mexican supplier of steel to the U.S., it similarly cannot export its steel to the U.S. for use in the Springfield Interchange Project. It's affected the same way that ADF Group in Canada is affected. Maybe the Mexican parent doesn't even have a sub in the United States. It may not even be an investor in the United States. But the effect on it is the same, and that's because that is a trade measure. That is not a measure that is pertaining to its investment in the United States and doesn't fall

within Chapter Eleven.

PROFESSOR DE MESTRAL: I wonder if it is possible to make such a neat analytical distinction between measures in relation to an investment and those in relation to goods. I think of the (?) case, where for 25 years people said GATT has nothing to do with investments. All of a sudden, the Canadian Foreign Investment Review Act was challenged. Somebody thought it through and said, well, those restrictive requirements on purchasing of goods in Canada only as a condition of entry--well, that's the nexus with goods, in a way, but yet what was attacked was an investment provision.

And when you think of other legal systems, the European Community law doesn't really have an investment regime. It deals with right of establishment on one side and services and movement of capital. And so all these things that are dealt with in this way here will be dealt with somewhat differently.

Although I see your argument, I'm still

struggling with the idea that we--or I'm trying to see in my mind what really is a measure in relation to investments as opposed to what you tell us are measures in relation to goods and, therefore, not appropriate for us to consider.

MS. MENAKER: I'd like to respond by first saying that we are not making any kind of categorical statement that just because a measure affects trade in goods or services, it can't also be a measure that falls within Chapter Eleven. I mean, I could envision examples where something that either looks like a trade measure or primarily seems like a trade measure still has an effect on an investment that could give rise to an investment dispute.

You could have restrictions on the transfer of monies, for example. You could prohibit the--I don't know if you would actually call it the export of money, but you could prohibit the transfer of money across borders. Something like that one might say, okay, well, that looks like a trade

issue. But, of course, a measure like that you could see not only could it have an effect on an investment, it might also have an effect on an investor with respect to its investment.

An investor, a cross-border investor may not be able to receive, you know, dividends that its subsidiary may be wanting to bring back, or something like that. So, absolutely, there is no--we are not advancing an argument that just because a measure impacts trade, it cannot also impact investment or cannot give rise to an investment dispute.

What we're saying in this case is that insofar as ADF's national treatment claim is concerned with the treatment of ADF International, that's fine, we don't have--we don't advance this defense that that is not an investment dispute. But what we do say is that ADF has not established less favorable treatment for the reasons I've expanded upon.

To the extent that it is talking about the

treatment of ADF Group, there, our position is that the impact of the measure on its relates solely to ADF Group's supply of goods into the United States and has no impact on its ability to establish an investment, to conduct its investment, to manage its investment, to invest in fabricators in the United States.

If it wants to purchase a larger fabricator in the United States, that could then supply steel to the Springfield Interchange Project or any other project, it's entitled to do that. It doesn't impact its ability to conduct or to manage its investment. So, in that respect, we would say that there is a distinction between a measure that solely implies to an investor in its capacity as a supplier of a good, which is really a trade measure, and a measure that affects an investor in its capacity as an investor.

MS. LAMM: But the language of the provision extends beyond management and conduct to operations. And if it extends to operations, isn't

that the way the investor would be operating--so that it might be caught in the language?

MS. MENAKER: I don't think that ADF here has or could advance an argument that the measure's effect on ADF Group somehow accords it less favorable treatment with respect to its operation of its investment. It's entitled to operate its investment in the same manner that it has always been entitled to operate it as the ADF Group's inability to supply steel itself, steel that it has in Canada, and to ship that steel for use in the Springfield Interchange Project is not treatment with respect to ADF Group's operation of ADF International.

MS. LAMM: Right. I guess it would be disparate in terms of how anyone else would have to operate. They are not any more burdened because they are for it in terms of what they can do to operate.

MS. MENAKER: I think, yes.

PRESIDENT FELICIANO: I'm not so sure that

that is what ADF had in mind. If I understood them correctly, they say that they are, in effect, being forced to make certain--to choose between certain options. I think Mr. Kirby had indicated three options, one of which is to forget about the business opportunity, the second one was to set up a facility in the United States. If you don't mind, am I reflecting your position correctly, Mr. Kirby?

MR. KIRBY: Mr. Chairman, I am impressed by your grasp of it, and I will leave myself entirely in your hands. What you have said to date is our position. I don't want to take up time from my--

PRESIDENT FELICIANO: You will have your own time to reply.

If I understand them correctly, it is the effective impact, as distinguished from the formal equality of operation or equality of--or the facial neutrality of the investor that is involved. I don't know whether they are assuming that an

American company, steel company or steel fabricator, or an American ADF, if you like, would naturally have its publication facility in the United States and would naturally buy U.S.-origin steel, while a Canadian ADF wouldn't.

So I don't quite know how that impacts on your position, Ms. Menaker.

MS. MENAKER: I think when ADF advanced that argument, it was talking about the treatment of ADF International. Remember, ADF International here is the one that entered into the subcontract with Shirley. It's the one that is being impacted by these measures.

PRESIDENT FELICIANO: [Off microphone.] [Inaudible.]

MS. MENAKER: The investment. I'm sorry. Excuse me?

PRESIDENT FELICIANO: [Off microphone.] [Inaudible.]

MS. MENAKER: I meant the investment, ADF International in the United States.

So it isn't one that had to supply the steel for the project. It's the one that has the contractual relationship with Shirley is the investment in the United States. And ADF yesterday said that although the measures are neutral on their face, in effect, ADF International was adversely impacted because it is at these disadvantages. It had to subcontract out the work to five different fabricators in the United States. And our response to that is that they were not disparately impacted, that the measures would treat a U.S. investment, a U.S. supplier of steel in exactly the same way.

If you had a U.S. steel supplier like ADF International, the same size as ADF International, the same type of facility, their facility in Florida isn't certified to produce some fracture-critical-type work for bridges, so if you had a similarly situated U.S. supplier of steel, and that supplier of steel entered into a contract with Shirley to supply the steel to the Springfield

Interchange Project, that supplier of steel would have the same choices to make.

It would have to decide, okay, do I subcontract out the work to another U.S. fabricator that has a larger capacity and has the requisite certifications to do the work or should I acquire a U.S. fabricator or maybe I should just expand my own facilities in the U.S. But it is treated in the exact, same manner, and ADF hasn't produced any evidence to show otherwise. As far as nationality of the investment is concerned, ADF has not been accorded any treatment that was less favorable than a U.S.-owned investment that was similarly situated.

PRESIDENT FELICIANO: Well, they will have the opportunity to elaborate on their position.

Do you have any further questions at this point?

MS. LAMM: No. I guess their contention was both that de jure and de facto discrimination exists under this provision, and I think you have

addressed very well de jure, and I am just trying to get through in my own mind the de facto effect. I think I understand completely your argument on that point. I guess there isn't anything, other than the language of the text of NAFTA itself, that you go to to resolve that question.

MS. MENAKER: I think that is right.

MS. LAMM: Okay.

PRESIDENT FELICIANO: Please proceed, Ms. Menaker. Are you finished with your portion?

MS. MENAKER: I was finished with my prepared remarks. If you have no more questions, I guess I would ask to turn the floor over to Mr. Pawlak.

PRESIDENT FELICIANO: Sure, we don't have further questions at this time, but I am sure a few more will come up later.

MS. MENAKER: Thank you.

PRESIDENT FELICIANO: Mr. Pawlak, please?

MR. PAWLAK: Thank you.

Mr. President, members of the Tribunal, I

now will address ADF's arguments presented pursuant to NAFTA Article 1105.

As we can see on the projection screen, Article 1105 is entitled, "Minimum Standard of Treatment." Article 1105(1) requires treatment in accordance with international law, including fair and equitable treatment and full protection and security. My presentation of the United States' position, with respect to ADF's claim under Article 1105, is divided into two parts.

First, I will review the requirements of Article 1105(1), as that provision has been conclusively interpreted by the FTC. That's the NAFTA Free Trade Commission;

Second, I will explain that ADF has not identified any rule of customary international law even implicated by the measures at issue here, neither in its written submissions nor yesterday in its presentation of its case.

ADF made clear in its presentation yesterday that it does not seriously contend that

it can state a claim under Article 1105(1), as interpreted by the Free Trade Commission. As we can see from the plain text of NAFTA Article 1131(2), which I have projected on the screen for you, Article 1131(2) makes it clear that the Free Trade Commission's interpretation is binding on this Tribunal.

Article 1131 is entitled, "Governing Law." Paragraph 2 of that article states, "An interpretation by the Commission of a provision of this agreement shall be binding on a Tribunal established under this section," meaning, of course, Section B of Chapter 11.

I note that in response to a question from Ms. Lamm yesterday, ADF reserved its answer as to how the Tribunal should reconcile ADF's statement that the FTC interpretation is not binding with Article 1131(2), which is projected on the screen. The United States submits that ADF's statement cannot be reconciled with Article 1131(2). That interpretation is binding on this Tribunal. The

plain text of Article 1131(2) explicitly says so.

All three parties to the NAFTA are clear on this point. I call the Tribunal's attention to the projection screen once again. The Government of Canada, in its January 18th Article 1128 submission to this Tribunal stated as follows:

"An interpretation by the Commission is the full expression of what the NAFTA parties intended, and its effect is clear. It is binding."

Similarly, the Government of the United Mexican States in its 1128 stated, and again it's projected on the screen:

"NAFTA Article 1131 sets out the governing law of the proceeding. Under paragraph 1 of the article, the Tribunal must apply the agreement and applicable rules of international law."

In addition, paragraph 2 of Article 1131 requires the Tribunal to apply an interpretation of any provision rendered by the Free Trade Commission.

In summary, contrary to ADF's suggestion

yesterday that the FTC interpretation can somehow be viewed as an affirmative defense to ADF's Article 1105 claim, there simply is no question that the FTC's binding interpretation forms part of the governing law of these proceedings.

I would now like to turn our attention to the FTC interpretation itself.

As the United States noted in its Counter-Memorial, the FTC interpretation is clear regarding the obligations incorporated into NAFTA 1105. Again, I call the Tribunal's attention to the projection screen.

In paragraph B(1) of the interpretation, the FTC stated Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party.

PRESIDENT FELICIANO: Mr. Pawlak, forgive me for interrupting.

I think it might be helpful if you project

right under that portion the text of 1105. Can you sort of so we can see both texts at the same time?

MR. PAWLAK: I'm not certain that we have that technological capacity just yet.

[Pause.]

MR. PAWLAK: I'm not absolutely certain that we'll be able to continue with the slides, but let's see how it goes. Apparently our technology is more advanced than I thought.

I was referring to the various paragraphs of the FTC interpretation, having described what paragraph B(1) of the interpretation sets forth. I would like to move to paragraph B(2) of the interpretation, and we can do that.

The FTC interpretation confirmed in paragraph B(2) that the concepts of fair and equitable treatment and full protection and security do not require treatment in addition to or beyond that which is required by the customary international law minimum standard treatment of aliens. The FTC's binding interpretation also made

clear that in paragraph B(3) that a breach of another provision of the NAFTA or of a separate international agreement does not establish that there has been a breach of 1105(1).

With respect to paragraph B(3), I note that President Feliciano questioned yesterday whether this paragraph was particularly important to this case. The United States respectfully submits that this paragraph of the interpretation is important here. ADF suggested yesterday that it would be able to establish a violation of Article 1105(1) by establishing, through operation of Article 1103s most favored nation clause, that the United States violated the provision of the Albania or Estonia Bilateral Investment Treaties.

As paragraph B(3) of the interpretation makes clear, even if ADF could demonstrate such a breach, and ADF has not, doing so "does not establish that there has been a breach of Article 1105(1)."

It is clear that to establish a violation

of Article 1105, the 1982 act and its regulations must be, as President Feliciano pointed out yesterday, taken as a fact and compared against an international obligation. ADF asserted yesterday that the standard against which the state conduct should be judged is, "Does it bother you?"

At another point in its presentation on Article 1105, ADF suggested that the standard is simply whether members of the Tribunal consider, without reference to customary international law, whether the measures in question are fair or equitable or arbitrary or discriminatory. Clearly, those are not the obligations undertaken by the NAFTA parties. As the FTC has made clear, the obligation undertaken by the NAFTA parties in Article 1105 is treatment in accordance with customary international law.

Customary international law standards, such as those prescribed by Article 1105, may be established only by a showing of a general and consistent practice of states stemming from a sense

of legal obligation, and the law is clear that it is ADF's burden to establish the existence and content of a customary international law rule. As I will now discuss, ADF has not met that burden.

ADF has made no claim in its written submissions, nor yesterday, that it has identified any customary international law rule even implicated by the measures at issue here. In fact, ADF has not cited any customary international law authority and has not offered any evidence of state practice to support its claim of a breach of Article 1105(1).

Moreover, the United States demonstrated in its Counter-Memorial, contrary to ADF's suggestions, the evidence of state practice reflects that states, in fact, restrict access to government procurements. For example, as we can see on the projection screen, Paul Carrier reported in a New York International Law Review article on the results of a comparative survey of domestic content restrictions on government procurement

arrangements.

He stated as follows, "The public procurement systems of virtually every country to protect domestic suppliers and contractors of goods, services and construction services from external competition."

Kathleen Troy, a former Chair of the International Procurement Committee of the American Bar Association's section on International Law and Practice offers a similar view. It is on the projection screen. In her article on NAFTA Chapter Ten, published in a compilation entitled, "North American Free Trade Agreement's Commentary," Ms. Troy wrote, "Public sector procurement historically has been a well-protected market in most, if not all, countries."

Clearly, the state practice recorded by these authors does not support any general sense that states consider themselves bound by law to refrain from imposing restrictions on government procurement. ADF's failure to even attempt to

address these authorities and other overwhelming evidence of state practice is telling. ADF has no support in law for its Article 1105(1) claim, and therefore ADF's claim must fail.

I would also note, however, that ADF has offered no evidence and no coherent argument to support its attack on the 1982 act or the FHWA regulations in any event. Yesterday, ADF suggested that there is some vague problem with the 1982 act. However, I note that the NAFTA does not apply to events predating NAFTA's entry into force. In addition, Articles 1116 and 1117 would bar as untimely ADF's vague complaints regarding the 1982 act.

With respect to the FHWA regulations, at paragraph 260 of ADF's reply, ADF attacks the regulations as a new rule, la new standard, a double standard. The FHWA's supposed new rule, however, was promulgated in 1983, and ADF does not dispute that for the past 19 years the regulations have been interpreted and applied consistently. In

other words, since Congress passed the 1982 act, FHWA consistently has required that all suppliers of steel to Federal Aid State Highway Projects used domestically produced steel that is fabricated in the United States. This can hardly be viewed as a new rule.

Yesterday, ADF also attempted to suggest that the FHWA regulations are somehow lacking in transparency. However, the regulations are fully transparent. In accordance with U.S. administrative rulemaking procedures, the proposed regulations were published in the federal register. Parties were provided significant opportunity for comment on those proposed regulations. Only after that notice and comment period did the FHWA promulgate its final rule.

ADF does not dispute that the FHWA adopted its regulations in full compliance with the United States' system of administrative rulemaking. As explained in the United States Counter-Memorial, that system of rulemaking permits agencies, such as

the FHWA, wide latitude in interpreting statutes that they are charged with administering.

Granted, ADF may not like the regulations that were promulgated, but ADF has offered no support for its assertions that the FHWA's action was ultra vires under United States' law. In fact, ADF's comments yesterday suggested that the FHWA adopted just the regulations called for by Congress. As ADF noted, the 1982 act was, and I quote from statements made yesterday, "a significant tightening up and reflective of the early 1980s protectionist ambitions of Congress."

ADF's comments are hard to reconcile with ADF's claim that the FHWA acted ultra vires in promulgating the regulations. Moreover, even if ADF had presented a credible challenge to the means by which the FHWA adopted its regulations under U.S. law, which ADF has not done, ADF offers no basis whatsoever for finding a violation of any customary international law rule. ADF simply has no foundation in fact or in law for its Article

1105(1) claim.

Unless the Tribunal has questions, that concludes my remarks on Article 1105.

PRESIDENT FELICIANO: Thank you very much, Mr. Pawlak. I think we do have some questions even at this time to raise with respect to the subject that you have now opened up.

Let me start by saying this particular topic is of intense interest to the Tribunal. We are, of course, quite naturally sensitive to any possibility that anyone might regard a judgment that might be, an award that might be rendered by this Tribunal, and I have no idea what kind of an award would come out from this Tribunal, would be ultra vires in any sense and to any extent. Therefore, we are almost compelled to look at this particular topic with extra care, and failure to apply applicable law is an extremely serious proposition for any Tribunal.

So it is very important for us to try to understand what exactly is involved here, what

exactly 1105 is saying, what 1131 is saying and what the FTC interpretation is saying. And I'm not assuming that we would ever actually reach this issue in the award that we render. I'm only assuming that should we reach it, these questions become of very intense interest to us.

I should like to begin by asking again the same question that I asked Mr. Kirby earlier, yesterday. We are aware that under 1131 an FTC interpretation of a prohibition of NAFTA is binding on an arbitral Tribunal created under NAFTA. The question that I pose is this: Is the same interpretation binding upon the parties to NAFTA? More specifically, sir, the question could be reformulated very slightly, is the same interpretation binding upon the courts of the state parties to NAFTA?

Let us assume that the award that emanates from this arbitral Tribunal reaches the court of one of the NAFTA's parties, and I certainly hope it doesn't reach that point, but just assume that it

does, would the courts of the state parties to NAFTA be bound by the FTC interpretation? We would be interested in finding your thinking on this particular point.

MR. PAWLAK: If I may consult with my colleagues, briefly.

PRESIDENT FELICIANO: Please.

MR. PAWLAK: Thank you.

[Pause.]

MR. PAWLAK: President Feliciano, I don't mean to disappoint you, but I think the consensus is that it's best that we, at Department of State, consult with our colleagues in other units of the government so that we can arrive at a consensus position, and perhaps we can provide you that answer as early as tomorrow or perhaps later today even.

PRESIDENT FELICIANO: [Off microphone.] [Inaudible.]

MS. LAMM: I have a number of questions. I guess I will do the very easy one first.

You referred to NAFTA as not applying to events predating its entry into force. Is there a cite to that, and what is an "event"? Does it mean the same as a measure? Would it encompass the 1982 law?

PRESIDENT FELICIANO: Well, I would refer members of the Tribunal to Article 2203, entry into force, and I can read that for you. It reads, "This agreement shall enter into force, on January 1, 1994, an exchange of written notification certifying the completion of necessary legal procedures."

MS. LAMM: But I understand the entry into force, but I am not assuming that your contention is that NAFTA only provides prospectively and not to all of the practices in existence at the time of its entry into force or the measures.

MR. LEGUM: If you don't mind, I'll answer that question.

MS. LAMM: Sure.

MR. LEGUM: There is a note to Chapter

Eleven that, for those of you that have the blue CCH NAFTA text, which I see, unfortunately, you do not, Ms. Lamm, it is on Page 393 of that book. It's Note 39, and it also is quite short, so I will just read it for you. It's entitled, "Article 1101, Investment Scope and Coverage." It says, "This chapter covers investments existing on the date of entry into force of this agreement, as well as investments made or acquired thereafter."

So that is the other provision that deals with time expressly.

MS. LAMM: Now, that addresses time with the purposes of--

MR. LEGUM: It doesn't address time with respect to purposes of looking at measures, and for that you can simply look to the provisions of the treaty. If you look at Chapter Eleven, let's pick an article, any article, Article 1102. "The obligation under Article 1102 is to accord to investors of another party treatment no less favorable than it accords in like circumstances to

its own investors."

Well, obviously, that obligation did not exist before January 1, 1994. So a measure that is put into place or applied to an investor in such a way that it constitutes treatment under Article 1102 would necessarily have to have been put into place or applied after the entry into force of the treaty. Otherwise it couldn't violate the treaty.

MS. LAMM: Well, but many--I mean, I can't tell you how many, but hundreds of clients have consulted me, sovereign clients, at the time of the passage of a treaty, they ask, "How do I need to change my law to get into compliance?"

MR. LEGUM: Perhaps I was unclear. It's not that it doesn't--that existing measures don't apply. It doesn't apply to existing measures as a general proposition. It's just that for purposes of NAFTA Chapter Eleven, for our purposes today, which is a claim under Article 1116 and 1117, that is necessarily a claim of breach of the agreement. That has to relate to something that happened after

the treaty went into force. There can't be a breach until the treaty does go into force.

MS. LAMM: Right. So it's actually the application of the measure to this particular investor?

MR. LEGUM: That's correct.

PROFESSOR de MESTRAL: But I take it that you're not suggesting that the 1982 law could not conceivably be held to be in violation of the requirements of NAFTA, and it was simply something which the United States had a duty to bring into conformity and failed to do so. Otherwise, all the provisions in the annexes on saving nonconforming laws would have no purpose, would they?

MR. LEGUM: Of course we're not taking that position. It's the application of the measure in that instance that can violate the treaty. If what ADF is talking about is an assertion that the measure was not promulgated in accordance with international law back in 1983. Well, that's not a claim that this Tribunal can entertain. If its

assertion is that the law as promulgated back then was applied in 1999 in a manner inconsistent with the treaty, that's certainly a claim that the Tribunal can entertain.

MS. LAMM: Okay. And one of their claims is with respect to the promulgation of the regulation, that it's much more extensive than permitted in the enabling statute so to speak.

MR. LEGUM: Yes. And our view--I'm sorry.

MS. LAMM: So your view would be that isn't appropriate. It's the application of that to this investment that we need to examine.

MR. LEGUM: That's correct. The other temporal provision that I should bring to your attention is Article 1116 subparagraph (2) and 1117 subparagraph (2). Those provisions set out what is essentially a prescription period, a statute of limitations if you will for investor state claims of 3 years. So, obviously, we can't be talking about a breach in 1982 that could be entertained by this Tribunal.

PRESIDENT FELICIANO: Mr. Legum, I was just going to add a little footnote that in 1101(1) reference is made to measure adopted or maintained by a party, so referring to pre-existing measures which continue to be in effect, but which might be impacted by the provisions of the NAFTA agreement.

MR. LEGUM: Yes. That is also consistent with our discussion.

MS. LAMM: Now, I have one other question that is a little bit more difficult certainly to sort through. And looking at the language of 1105, it mentions just international law. With the FTC interpretation we seem to go to customary international law minimum standard of treatment of aliens. And the question is, what's the difference? What standard should we now be applying? What case other than the earlier Mexican claims cases articulate the current customary international law for minimum treatment of aliens?

MR. LEGUM: I'll respond to that as well since I'm perhaps more the legal historian in the

group here. The case that I believe you're referring to, which I believe the President referred to yesterday is the mirror case, which is a case in the Mexican-U.S. General Claims Commission that was decided in essentially the context of a full protection and security claim. And it stated a standard in the context of addressing that claim that has been viewed by some publicists as representing a generalized view as to kind of a general standard that applies to all governmental acts. Just as a preliminary matter, that's not the way that we view that authority. We view it as limited to the context in which it was made, which is the context of one of the series of rules of customary international law that govern the treatment of aliens in the territory of a host state. The rule in that question being full protection and security.

There are a number of other such rules that have been recognized. Denial of justice claims, for example, have been recognized for many

centuries now, and still are a very active part of the body law of customary international law governing treatment of aliens. The Barcelona Traction case from the 1960s was a denial of justice case. These are not principles that are relegated to the attic of history. They are alive and well, and though there have not been perhaps since the Second World War as many mixed arbitral Tribunals that have elaborated this body of law. It's been alive in diplomatic practice and in cases like Barcelona Traction.

In decisions of the Iran-U.S. Claims Tribunal in the 1980s and 1990s and today, that Tribunal also had jurisdiction over claims, some claims based on international law. So there is a body of law out there, and it is customary international law in the sense that it meets the--the rules that are applicable meet the familiar test of customary international law. General and consistent state practice accompanied by a sense of legal obligation. And it is not the United States'

position that those standards are frozen in time. The standards do evolve, but proof of the evolution of such standards must conform to the requirements of establishing a principle of customary international law. And that is the issue that I think ADF has failed to meet here. They have not come forward with any evidence of state practice to support their assertion that this state conduct violates any principle of customary international law.

PRESIDENT FELICIANO: May I explore that a little bit with you, Mr. Legum? Could I request the young lady over there to put those two paragraphs side by side?

[Pause]

PRESIDENT FELICIANO: First of all, I understand what FTC is doing. I take it that FTC was interpreting 1105 of NAFTA paragraph (1). I look at 1105(1) and I see a reference to treatment in accordance with international law. I look at the FTC interpretation and the FTC interpretation

uses the term "customary international law minimum standard of treatment of aliens." That's a mouthful, yeah? But it is a mouthful with a long history, as our legal historian has pointed out.

Much of the history--I must confess to you I was a teacher a long time ago. But my recollection is that the case law referred to that body of case law referred--included--for instance, there was cases which came out of certain events happening, for instance, in Mexico at the time when the political situation in Mexico was somewhat troubled and you had a succession of revolutionary governments and so on. A lot of American and I think European persons, and their properties suffered injury. And the question that came up was whether the state, the Republic of Mexico, the Mexican States had any responsibility under public international law to compensate those persons who had suffered injuries to persons and injuries to their properties.

And what came out of those cases was that

the standard required by customary international law was of a certain level. That level, as it existed then, was not a particularly elevated level in the sense that it was not a particularly demanding level. My own understanding of that history plus subsequent history is that there has been in general been an uplifting, a elevating of those standards required by customary international law.

Now, to my mind, the question that arises is what is the reference of the term "customary international law minimum standard of treatment of aliens" as used in the FTC interpretation. Was the FTC referring to the standards imposed or required by customary international law at the time of that case, at the time of the development of that case law? The classical treatment of this is a book by F.S. Dunn, Frederick Dunn, minimum standard of treatment of aliens.

Or could the reference be customary international law minimum standard of treatment of

aliens as it exists today? And I suggest to you that the customary international law minimum standard of treatment of aliens today is radically different, is significantly more exacting than the standard treatment that existed much earlier.

So I have no difficulty with the FTC interpretation if it refers to--as an academic matter; I have no difficulty with it. I, of course, would follow what the FTC used. Our only problem is before we can follow something, we have to know what it is saying. I think that's a reasonable request, don't you think, Mr. Legum? So one thing that behooves the U.S. I think is to inform us what it understands by that standard, by that interpretation.

MR. LEGUM: If you can just give me one moment?

PRESIDENT FELICIANO: Oh, please, please.

[Pause]

PRESIDENT FELICIANO: Excuse me, Mr. Legum. It might be convenient for everybody if we

had a coffee break at this time.

MR. LEGUM: That sounds good.

[Laughter.]

MR. LEGUM: I was just going to interject if there are other research assignments that you would like to give me before the coffee break, I'd be happy to entertain them at this time.

PRESIDENT FELICIANO: I think it just so happens Professor de Mestral has another one.

MR. LEGUM: Oh, good.

PROFESSOR de MESTRAL: Well, just following on that request for further elucidation, can I have the confirmation that one would assume reasonably that this standard, if it is indeed the contemporary one and not simply frozen in time back in Mexico at some earlier date, is informed by the modern international law of human rights, as reflected in international custom and universally accepted international instruments.

MR. LEGUM: Thank you very much. When shall we return?

PRESIDENT FELICIANO: A half an hour would be all right.

MR. LEGUM: So 10 minutes to 5:00?

PRESIDENT FELICIANO: Yes.

[Recess]

PRESIDENT FELICIANO: May we begin now? Mr. Legum, before I give you the floor, Professor de Mestral wants to make a brief statement at this point. Please.

PROFESSOR de MESTRAL: Just a comment. We're pressing you perhaps rather hard on this one, but if we do so it's not because our minds are made up on any issue. It's more that this seems to go to jurisdiction, and as a conscientious panel we are concerned to have a clear sense of your views as to our jurisdiction and what this is. And it's in that spirit we're asking for clarification.

MR. LEGUM: Well, thank you very much for that, and of course, we're here to answer your questions. So it's my pleasure to present a considered response to the questions that you asked

before the break.

There were a few questions. The first, taking them in order, was whether the FTC interpretation is binding on the parties to the NAFTA and on their courts. And the answer to that is that it is binding on the parties. It's a agreement among the parties as to the interpretation of the treaty, and it is binding upon them. Because it's binding on the parties as a matter of international law, it is of course binding on their organs and instrumentality such as their courts. So the answer to that question is that it is binding on the parties, it is binding on the courts.

And it may be useful to take a quick look at Article 2020 of the NAFTA, which sets up a procedure where in the event that an issue of interpretation or application of the NAFTA comes up in certain court proceedings, there's a provision for the NAFTA parties to attempt to reach a consensus through the Free Trade Commission and

present a view of the Free Trade Commission, an interpretation of the Free Trade Commission to the courts in which the issue has arisen, the purpose of the provision apparently being to ensure that where possible the NAFTA parties speak with one voice and authoritatively about matters of interpretation in the application of the NAFTA.

Now, it's not stated there, that the interpretation of the Free Trade Commission is binding on the court, that clearly the underlying assumption is that it will be, if not binding, certainly of great import for the court proceedings.

Now, the question that you had asked, Mr. President, I think you specifically referred to the possibility of set-aside or enforcement proceedings concerning an arbitral award. There of course the issue would not be whether the FTC interpretation was binding on the courts, but rather whether it was binding on this Tribunal, and therefore, I hope that that responds to your question on that

subject.

The second question was the temporal issue, that is, what is the customary international law of treatment of aliens referred to in the FTC interpretation? Is it one that is frozen in time at some point in the past, or is it customary international law today?

If you look at the FTC interpretation, there is no date specified. It refers to customary international law and I think under the circumstances one can only draw the inference that the Free Trade Commission had in mind customary international law as it exists today, and that is our understanding.

That being said, I would reiterate two points, perhaps more than two points. First, as we noted in our Rejoinder, it is well established that the party advocating a rule of customary international law bears the burden of proving it. We have cited several decisions from the ICJ as well as statements of publicists in our Rejoinder

to support that proposition. ADF has not come remotely close to carrying that burden. There is no evidence of state practice that the have put forward to support any rule of customary international law that they have espoused, and therefore, for purposes of the issues before this Tribunal, there is no issue. They have not demonstrated the existence of a rule that would apply to the conduct at issue under customary international law as it exists today.

The being said, I would respectfully submit that--and again, as something of a legal historian, that I am not aware of the radical changes in customary international law concerning the treatment of aliens that, Mr. President, you referred to earlier today. For example, if you look at the law of denial of justice, the arguments made by the parties before the International Court of Justice in the Barcelona Traction case were very similar to those that were made in the mixed arbitral tribunals and other international

tribunals established both before the turn of the 20th century and in the first half of the 20th century. If you look at the law of expropriation, there have been some changes, but I would submit that they are not radical ones, but rather incremental ones.

That being said, one could have an interesting debate about to what extent customary international law has evolved since the first half of the 20th century to today, but that's not a debate that's relevant for purposes of this case because there is nothing for the United States to debate. There is no state practice before this Tribunal that would support to existence of a rule of customary international law that ADF espouses.

In terms of the content of the rules that are envisaged by the Free Trade Commission interpretation, first of all, to respond to Professor de Mestral's question, it is not our view that human rights law is included within the customary international law minimum standard of

treatment of aliens. That's considered to be a different body of law. That governs obligations owed by states to all states with respect to all humans in their territory. It does not address the obligation owed by one state to another state with respect to their own nationals. There are different rules that apply to one set of obligations than another set of obligations.

Second, conventional international law is not included within the body of law described by the FTC interpretation of Article 1105(1). In fact, the interpretation expressly excludes the application of conventional law. So to the extent that ADF purports to rely upon provisions of BITs with Albania and Estonia under the heading of Article 1105(1), that argument cannot be sustained.

And finally--and I will speak to this a little bit more later on when I discuss ADF's arguments. Under Article 1103, customary international law, as it has currently evolved, does not contain any general obligation that states

act in a way that, to use ADF's expression, doesn't bother someone. There is no obligation to refrain from conduct that is unfair or inequitable in a subjective and intuitive sense.

So those are my answers. I'd be happy to entertain other questions if you'd like.

PRESIDENT FELICIANO: Well, I think your remarks have been helpful, Mr. Legum, and we thank you for them. As I have already mentioned before, our discussing this matter at all does not mean that we find it necessary to go there. That's not something that we have arrived at. We want to be sure that our backs our covered in a question of jurisdiction or admissibility or in acting ultra vires is not one of my favorite pastimes. Having said that, it may well be that if we may find it not necessary to go there at all.

Now, I don't know if any of my colleagues would like to add a bit. Please, Armand.

PROFESSOR de MESTRAL: Not to pursue this much further, but when I mentioned, just to

clarify, when I mentioned universal instruments, I did so in the sense that one might argue, as indeed many distinguished scholars do, that certain of these instruments reflect customary standards, beginning with the universal declaration of human rights, where they claim a cert. be made by a wide range of scholars and others as well, which I won't go into. It was in that sense that I raised them, not to suggest that various formal texts had been incorporated.

MR. LEGUM: Understood. And I believe that the United States has taken the position that a number of human rights obligations are in fact customary international law. My only point is that that is a different body of customary international law from the body of law that would apply here.

PRESIDENT FELICIANO: Well, if this were a class in public international law 401, I'm sure he would give you a vigorous argument on that, but fortunately, it isn't so. We can go to more immediate concerns. I believe Ms. Toole is going

to take care of some additional point. Please now proceed.

MR. LEGUM: Thank you very much.

MS. TOOLE: Mr. President, Members of the Tribunal, I will address ADF's new claims. The claims I am referring to are those with respect to other projects than the Springfield Interchange project which ADF asserts for the first time in its Memorial, and ADF's new claim under Article 1103, asserted for the first time in ADF's Reply.

As I will demonstrate, the United States' consent to arbitration in this case is limited by the requirement that an investor specify its claim in its notice of intent. From the beginning, ADF's claims have concerned the Springfield Interchange Project, and the only alleged breach as properly before this Tribunal are ADF's claims under NAFTA Articles 1102, 1105 and 1106.

I will divide my presentation into three parts. First I will address the procedural requirements found in Chapter Eleven for securing

the United States' consent to arbitration with an investor of another party. Second, I will show how ADF has not met these requirements with respect to its claims regarding projects other than those--other than the Springfield Interchange Project.

And third, I will show how ADF has similarly failed with respect to its new Article 1103 claim. Upon my conclusion, Mr. Legum will come back to address why ADF's new Article 1103 claim is meritless in any event.

To begin, I will explain why ADF's new claims are not within the scope of the arbitration agreement in this case. The Chapter Eleven mechanism for obtaining the United States' consent to arbitrate is clear. Article 1122(1) says, and I'll quote: "Each Party"--and this is capital P Party, meaning the United States, Canada and Mexico--"consents to the submission of a claim to arbitration in accordance with the procedures set out in this agreement." Article 1121, Sections (1)(a) and (2)(a), require the same in order to

gain the consent of the investor. In order for ADF to gain the United States' consent to arbitrate its claims and in order for ADF to express its own consent, it had to comply with Chapter Eleven's procedures. And those procedures are straightforward.

Relevant to this discussion is Article 1119, which is now on the screen, and it provides the disputing investor, here ADF, shall deliver to the disputing party, the United States, written notice of its intention to submit a claim to arbitration which notice shall specify--and if you'll look at the underlined portion, (b), the provisions of this agreement alleged to have been breached and any other relevant provision, and (c) the issues and the factual basis for the claim.

This means that if ADF sought to claim a breach of Article 1103, Article 1119(b) requires it should have specified as much in its notice of intent. If ADF sought to arbitrate with respect to the other projects, it should have under (c)

specified the factual basis for those claims. ADF has done neither.

Setting Article 1119(b) to the side for a moment, let us see how ADF's Notice of Intent holds up against Article 1119(c), the plain test of which requires that ADF, quote, "shall specify the factual basis for its claim." I have provided each of you with copies of ADF's Notice of Intent, and I believe the Secretary has given those to you? Is that correct? Okay.

If you'll please turn to page 4, we can see part C of ADF's notice, factual basis for the claim begins on page 4, and if you flip through this section, which you can feel free to do, you'll see that ADF took great care, spending 5 pages discussing the facts surrounding its claim. It includes names, dates and events, all of which were related to the Springfield Interchange Project. There is not a single reference to the Lorton Bridge Project, the Brooklyn-Queens Expressway Bridge Project, or the Queens Bridge Project, not

one, or any project other than the Springfield Interchange Project.

If you were to flip through all of ADF's Notice of Intent, you would not find even the name of a single other project. ADF clearly failed to specify the factual basis for its claims with respect to any project other than the Springfield Interchange Project in its Notice of Intent.

Now, ADF argues that the United States had specific notice of ADF's intent to make claims for the Lorton, Brooklyn-Queens and Queens Bridge Projects. If you could please turn to page 15 of the Notice of Intent and look at paragraph 62. I think we're all there.

According to ADF, despite the plain language of Article 1119, the following language somehow provided the United States with that specific notice. I'll quote: "Continued application of the law, regulations and administrative policies and practices referred to herein will cause additional damage to ADF

International, limiting its ability to fully participate in all future federal aid highway construction projects."

You'll notice this language does not even appear in part C of ADF's notice which is the factual basis for its claim, but rather in its quantum of damages section. This language is neither specific, nor does it allege a factual basis for the claims relating to those three other projects. ADF does not even mention the names of the other projects or any agency, any person involved with the projects, much less when the purported breaches occurred or what the events were which gave rise to the alleged breaches.

The United States submits that the jurisprudence of the International Court of Justice is instructive here, and let me explain why. Article 38 of the ICJ Rules of Courts, much like Article 1119 of the NAFTA, requires specificity in applications to institute proceedings before the Court. Article 38 too requires an application to,

and I quote, "specify the precise nature of the claim together with a succinct statement of the facts and grounds on which the claim is based."

In the Nauru case, discussed in the United States Rejoinder on pages 36 and 37, Nauru sought to add to its claims against Australia, a claim based on overseas assets of the British Commissioners who had managed the phosphate in Nauru when Nauru was a trust territory. The ICJ found that because Nauru made no references to these assets in its application, the new claim was not within the competence of the Courts.

As I have just demonstrated, we have the same situation here. ADF did not, as Article 1119(c) requires, specify the factual basis for its claims with respect to projects other than the Springfield Interchange Projects. ADF's failure to specify the factual basis for its claims with respect to other projects causes prejudice to the United States' defense. To this date, as defense counsel for the United States, I know no more than

the names of these projects. From the tone of its Reply, ADF implies that there may be additional projects that it has yet to name. I do not know what, if any, measures were applied in these cases. I don't know what agencies were involved. I don't even know when the alleged breaches occurred under these facts. The United States' defense did not receive this information, critical to formulating its defense because ADF did not provide a factual basis for these claims in its Notice of Intent.

And speaking of when these alleged breaches occurred, that leads me to my next point, which is that knowing the date of breach is critical in determining this Tribunal's jurisdiction in any event. Let's look at the language found in ADF's quantum of damages section again. It's projected on the screen this time.

ADF states that its ability to participate--and I've highlighted future--participate in future projects will cause additional damage. But claims for future losses

are not permitted under the NAFTA. Or I should clarify. Claims for future alleged breaches are not permitted under the NAFTA.

And we're moving to the next slide. What you see now on the screen is language that appears in Articles 1116(1) and 1117(1). We can see that these articles only allow an investor to submit a claim once an obligation has allegedly been breached and after the investor has allegedly incurred loss or damage by reason of or arising out of that breach. I've highlighted the past tense with breached and past tense with incurred loss or damage if you look on the screen.

Let us now look at Article 1120, also on the screen, appears right below. Again, we see that a claim must be based on an alleged breach which occurred in the past. If you look at the underlined portion, we find that 6 months must pass from the events giving rise to a claim before that claim may even be submitted. If we look at each article in Section B of Chapter Eleven, we will

find the same. Claims must be related to past breaches, not possible future breaches. ADF's new claims with respect to the Lorton, Brooklyn-Queens and Queens Projects or any other project, are not within the Tribunal's competence in this arbitration.

And I will now turn to the final part of my presentation, which is that ADF may not assert a new claim under Article 1103. Let us return to NAFTA Article 1119(b). It's back on the screen. It requires, and I'll quote, "The disputing Investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration, which notice shall specify, (b) the provisions of this agreement alleged to have been breached and any other relevant provision."

ADF has not done this, and in order to make this point clear, I'd ask you to turn to page 3 of ADF's Notice of Intent. The title of that section is Breaches of Obligations. ADF lists Articles 1102, 1105 and 1106. These are the

provisions ADF alleged had been breached by the United States, no others. ADF also identifies other relevant provisions in its Notice of Intent, including 1116, 1117 and 1119. Those are on page 2 and those are all procedural articles. It's not really necessary to turn to that page.

Article 1103 does not appear once in the whole of ADF's Notice of Intent, not as a provision to have been breached or any other relevant provision. ADF has not complied with Article 1119(b) and thus did not obtain the United States' consent to arbitrate and 1103 claim.

Now, ADF argues that its failure to even mention Article 1103 in its notice is of no consequence, because it announced its 1103 claim in its Memorial. ADF's argument is inconsistent with the plain language of Article 1119. Nevertheless, according to ADF, the United States is estopped from objecting now because it did not object in its Counter-Memorial.

ADF is wrong for two reasons. First,

Article 46 of the ICSID Additional Facility Arbitration Rules allows a party to object with respect to an ancillary claim as late as the filing of a Rejoinder. Failure to object in the Counter-Memorial does not constitute a waiver of the right to object.

Second, ADF did not even present an 1103 claim in its Memorial. Nowhere in the table of contents, for example, is there a mention of Article 1103. We do find a short reference to Article 1103 on page 55 of ADF's Memorial, but it is not an articulation of an 1103 claim, as ADF asserts. On page 54 ADF begins a discussion entitled "Textual, Contextual and Purposeful Interpretation of Article 1105." And we have that section, excerpts from that section presented on the screen for you.

Within that discussion, ADF references Article 1103 briefly, on page 55, in connection with its flat argument that 1105 provides protections beyond those found in customary

international law. ADF does not mention Article 1103 again, certainly not as a claim.

But just to be sure, let's take a look at Part 3 of ADF's Memorial, and you don't have to turn to it because I'm going to project it on the screen. And Part 3 of ADF's Memorial is entitled "Breach of Chapter Eleven Obligations by the Party." So we have that section up there.

Here ADF lists the same articles listed in its Notice of Intent: "...the Investor claims that the Party has breached its obligations under Article 1102, Article 1105 and Article 1106..." And just to be thorough, let's turn to ADF's conclusion, the next slide. We can see that ADF requests the Tribunal to find a breach of Articles 1102, 1105, and 1106. ADF nowhere relies on Article 1103 as a basis for relief.

As a result, ADF has failed to meet Rule 38(3) of the ICSID-Additional Facility Arbitration Rules, which require a Memorial to contain submissions. Under this rule, if ADF sought to

make a claim under Article 1103, it should have in its Memorial listed Article 1103 along with Articles 1102, 1105, and 1106.

As ADF did not include Article 1103 in its submissions, this left nothing for the United States to respond to in its Counter-Memorial.

Now, ADF asserted a somewhat different argument with respect to its 1103 claim yesterday. Mr. Cadieux said that, because the FTC interpretation was both "an affirmative defense set up by the United States" and a "change in circumstances," ADF could now invoke Article 1103 in response as its own affirmative defense.

ADF has provided no basis for this argument under the law that governs this Tribunal. And I think we've pretty much resolved this, but the governing law for this Tribunal has been a question on everyone's mind. It's come up from time to time. So, once and for all, let's take a look at Article 1131. I've got the screen here for us. It's projected there.

First of all, as Mr. Pawlak mentioned earlier, an FTC interpretation is binding on this tribunal, and we see that Article 1131(2) provides an interpretation by the Commission of a provision of this agreement shall be binding on a Tribunal established under this section.

Article 1131(2) was not created for the purpose of the United States defense in this case. Article 1131(2) was among the procedures that ADF expressly consented to abide by when it submitted its claim.

ADF knows that an FTC interpretation could come at any time. Furthermore, as the FTC interpretation only clarified what the NAFTA parties intended Article 1105 to mean, it did not change the meaning of Article 1105 in any event. There were no changed circumstances, and I think Mr. Legum addressed that just a few moments ago.

Now let us look at Article 1131(1), and Ms. Menaker touched on this article earlier today. I'm going to quote. "A Tribunal established under

this section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law."

ADF cites no NAFTA article or any applicable rule of international law to support its contention that it may ignore Article 1119's procedural requirements. All ADF cites is Canadian case law. ADF's Canadian cases, whether you look at the appellate or trial levels, offer no support for ADF's argument in any event.

Those cases said that Canadian courts have much discretion to award additional remedies not originally pleaded. They do not say that Canadians may add additional claims. ADF has provided no support under the NAFTA or international law that it has the right to subvert Article 1119(b)'s specific procedural requirements, and those are to specify the articles alleged to have been breached in its Notice of Intent.

To conclude, Article 1119 is clear. ADF was required to specify in its Notice of Intent the

factual basis for its claims and the Articles it alleges were breached by the United States. Because ADF did not do so, the United States has not consented to arbitration of ADF's claims with respect to projects other than the Springfield Interchange Project. And the United States has not consented to arbitration of ADF's new Article 1103 claim. These claims are not within this Tribunal's jurisdiction.

That concludes my presentation, so I'd be happy to answer any questions you may have.

PRESIDENT FELICIANO: Just for clarification, Ms. Toole, if I understand you correctly, your basic argument is that 1127, which is subtitled "Notice"--is that what you--

MS. TOOLE: I'm actually referring to Article 1119, which is the Notice of Intent to Submit a Claim to Arbitration, and that is one of the procedural requirements under Chapter Eleven that each disputing investor must comply with to show that it has consented to arbitration and also

to gain the United States consent to arbitration, and that in part forms the arbitration agreement, which in turn provides this scope.

PRESIDENT FELICIANO: In other words, in effect, you are saying that 1119, the requirements there set forth are jurisdiction in character, they are compliance with 1119 as a condition precedent for jurisdiction to vest in the Tribunal.

MS. TOOLE: Correct.

PRESIDENT FELICIANO: And you make that argument because it relates--to the extent that compliance with these requirements relates to the consent of the other party.

MS. TOOLE: Correct. The arbitration, the scope of this arbitration is limited to the arbitration agreement, and the way that the arbitration agreement is formed, we can look at Articles 1122 and 1121, and one of those requirements is if you look at 1122(1), each party--and that is, you know, here would be the United States--consents in accordance with the procedures

set out in this agreement. In the section that deals with an investor's consent, which is 1121, they may submit a claim--if we look at 1121(a), it has to be in accordance with the procedures set out in this agreement. If we look at 1121(2)(a), same thing, with the procedures set out in this agreement.

So in order for ADF to show its consent, in order for ADF to gain the United States' consent, it must comply with each procedure, and that includes Article 1119's requirement that it specify in its Notice of Intent the factual basis for its claims and also those Articles it alleged were breached. Is that clear?

PRESIDENT FELICIANO: Yes, yes.

MS. TOOLE: Okay.

PRESIDENT FELICIANO: That is clear. I suppose tomorrow they will have some responding--Mr. Kirby is going to make some responding arguments on that.

MS. TOOLE: Sure.

PRESIDENT FELICIANO: Fine.

MS. LAMM: I have a question. This caused me to think of a question hearing this in terms of it being jurisdictional. Does that mean it's your contention that they could not amend their notice at any time or their submission to include additional claims if they felt it necessary? And if so, is there a procedure that they would have to follow to obtain your consent?

MS. TOOLE: Right, they would need to obtain our consent, but I'd like to confer with Mr. Legum for a moment.

[Pause.]

MS. TOOLE: There is on procedure explicitly provided for, but there is a requirement that they would have to obtain our consent.

MS. LAMM: To obtain your consent, because this is the mechanism for obtaining a consent under a Chapter Eleven claim. So unlike others where you find it in a BIT or something, there isn't any.

MS. TOOLE: Right.

MS. LAMM: And this is the process.

MS. TOOLE: Right, right.

MS. LAMM: Okay.

MS. TOOLE: Any other questions?

PRESIDENT FELICIANO: Perhaps not at this point.

MS. TOOLE: Okay. Well, I'd be happy to answer any in the future, and I guess I'll turn the floor over to Mr. Legum, who will address why ADF's 1103 claim is meritless in any event.

PRESIDENT FELICIANO: Fine. Mr. Legum, please.

MR. LEGUM: Thank you, Mr. President, members of the Tribunal. I would like to add just a few words to what Ms. Toole just expressed on the subject of the new claim of denial of most favored nation treatment that ADF asserted for the first time in its Reply. Because that claims is not within the Tribunal's jurisdiction and is meritless in any event, I will be quite brief.

The Article 1103 claim should be dismissed

for three reasons:

First, as Ms. Toole has demonstrated, the claim is not within the scope of the parties' agreement to arbitrate. The claim is, therefore, not within the Tribunal's jurisdiction and may not be entertained in this arbitration.

The second reason why the claim should be dismissed is that it is barred by the express terms of the government procurement exception of Article 1108. Now, I suspect that by this time Article 1108, subparagraph (7) has been burned into the retina of everyone in this room, but in the event that it has not, I have it up on the screen once more.

As you can see, paragraph (7) of that article explicitly provides that Article 1103 does not apply to procurement by a party. For all of the reasons that we outlined this morning as to why ADF has no claim under Article 1102 or 1106, it also has no claim under Article 1103. ADF's are about government procurement. Article 1103 does

not apply to government procurement. Article 1108 by its plain terms precludes ADF's most favored nation treatment claim.

The final reason why ADF's Article 1103 claim fails is that it has not demonstrated any difference in substance between the standard of the BITs and the standard of Article 1105(1) of the NAFTA, a standard that, as Mr. Pawlak demonstrated earlier this afternoon, ADF does not even attempt to meet.

This third ground for dismissal is set forth in some detail in our Rejoinder, and I do not propose to rehearse the arguments there, that are made there. What I would like to do is to make one general observation about ADF's contention that the United States, Canada, Mexico, and other countries would nonchalantly agree to a standard that amounts to "Does it bother you?" And I'm quoting Mr. Cadieux in his presentation from yesterday.

The United States, of course, is a democracy, as is Canada and Mexico. Every day in

the legislatures of the United States, Canada, and Mexico, legislation passes. Every day legislation passes with dissenting votes, with the votes of legislators who did not vote for the legislation because they didn't think it was fair, they didn't think it was equitable, they thought that the legislation bothered them, and, therefore, they did not vote for it.

The governments of none of the United States, Canada, or Mexico permit dissenting legislators, legislators who didn't vote for legislation because it bothered them, because they thought it was unfair, because they thought it was inequitable--they don't permit those legislators to challenge that legislation just based on that fact. It would, we submit, be an extraordinary thing for a government to accord to another country or to an arbitral panel the authority to review its legislation with nothing more to guide them than their conscience, with no standard at all, to guide their deliberations other than does it bother you.

Now, Mr. Cadieux referred yesterday to a proposition originally stated in the Wimbledon case of the Permanent Court of International Justice, the proposition that an attribute of sovereignty is the power to give it away if a country wants to.

We submit that that is an accurate statement of the law, but it would require extraordinarily clear language before any decisionmaker could find that a country has given to another country or to an arbitral panel the authority to review its legislation with nothing more than the guide of whether or not the legislation bothers the other countries or the Tribunal.

There's nothing that remotely approaches that language in either the NAFTA or in the BITs that ADF has referred to. There's nothing that remotely suggests that the parties to those treaties had something so radical in mind.

Now, I would submit also that the language of those treaties refutes the proposition. The

concept of allowing a dispute resolution panel to decide a case based on nothing more than whether something bothers them, it's not a concept that is unknown. In fact, it's mentioned in the Additional Facility Rules that govern these proceedings, and the provision I have in mind is Article 55, subparagraph (2).

That provision says, "The Tribunal may decide ex iquo et bono if the parties have expressly authorized it to do so and if the law applicable to the arbitration so permits."

There is no evidence of any kind of express authorization in the NAFTA or in the BITs to submit to ex iquo et bono dispute resolution. To the contrary, Article 1105(1) of the NAFTA states the standard is treatment in accordance with international law. The standard that must be applied is one that is based on law, not on intuition, not on gut feelings, not on whether something bothers someone. The law. And the BIT provisions that ADF refers to similarly clearly

state a standard that is based in law.

For this reason, as well as for all of the other reasons that are set forth in our pleadings and have been espoused today, we submit ADF's Article 1103 claim is baseless and should be dismissed.

I'd be pleased to answer any questions that the Tribunal might have about Article 1103 or anything that I've said.

MS. LAMM: It may be my own misunderstanding, but I thought they definitely made the argument that you just articulated about you can do whatever you think is--you know, assess it as to whether or not it's unfair. I thought that was addressing their 1105 claim on the minimum standard of treatment when I asked them how do you define that. Is it also with respect to 1103?

MR. LEGUM: My understanding is that, yes, they are making that assertion.

MS. LAMM: Okay.

MR. LEGUM: But that's a question that, of

course, can be directed to them.

MS. LAMM: Right. Okay.

MR. LEGUM: Mr. President, if there are any questions that the Tribunal has of any member of the U.S. delegation based on anything that we've said today, we'd be happy to entertain them.

PRESIDENT FELICIANO: Yes. Well, I think on this side of the table we've heard a great deal today, and we probably need a little time to digest everything that has been said.

Did you want to--oh, yes.

MS. LAMM: Sorry to always have questions. The one thing that I am trying to discern is your contention is that this Chapter Eleven relates to investment disputes, not trade disputes. How do you distinguish the two? I guess other than applying the plain language of the provisions, but I--because given their claim that this steel that they've invested in is an investment, how do you know where investment law stops and trade law starts?

MR. LEGUM: Well, why don't I answer that very quickly in the first instance, and then ask Ms. Menaker to expand on what I'm going to say, which is I believe, Ms. Lamm, that you've got it right, that what the Tribunal should do is apply the plain language of the NAFTA. We're not contending that there's an exception in Chapter Eleven for trade measures. That's not our contention. Our contention is that in order to establish an Article 1102 claim, they have to prove the elements of Article 1102.

Article 1102 doesn't talk about suppliers. It doesn't talk about goods. The NAFTA parties knew how to draft provisions like that, and the fact that they didn't use that language here suggests that they had something different in mind.

The only thing that we're asking for is for claimants to try to meet the standards that are set forth in the provisions. It's not treatment with respect to supplies. It's not treatment with respect to goods. It's treatment with respect to

investments. And now I'll turn it over to Andrea.

MS. MENAKER: I'll just add to what Mr. Legum just said that--I mean, it is an important distinction between a case that is a trade case and one that is an investment case. And while it is true that steel that ADF purchases in the United States may be an investment in the United States, Article 1102 does not preclude discrimination against different types of goods.

What it does is preclude discrimination against investors and their investments on the basis of the nationality of the investor and the nationality of the investment.

So, sure, the Buy America Act says use U.S. steel. Now, on the face of that, that discriminates against Canadian steel. But that, we submit, is not an investment issue.

What ADF needs to demonstrate to prove a violation of Article 1102 is that the measure accords it less favorable treatment than U.S. investor in like circumstances on the basis of its

nationality; or, second, that the measure accords its investment on the basis of the nationality of the owner of that investment less favorable treatment than investments owned by U.S. owners who are in like circumstances with it. And that, we submit, is a very important distinction that we urge this Tribunal to keep in mind. Like I mentioned earlier, failing to keep that distinction in mind would essentially enable any claimant to turn a trade dispute into an investment dispute. And that clearly was not the purpose of the NAFTA or the purpose of Chapter Eleven in particular.

I hope that's clarified that issue somewhat.

MS. LAMM: Yes, thank you.

MR. LEGUM: Are there any further questions?

PRESIDENT FELICIANO: Not today--oh, I'm sorry. Yes, we do have some.

PROFESSOR DE MESTRAL: Not for immediate answer, but if overnight any cases that might

assist in dealing with this issue, how do you distinguish--what are the parameters of the investment dispute, what are the parameters of the trade dispute, what characterizes--maybe that is the better way of putting it, what characterizes a trade dispute as opposed to an investment dispute, if any cases, any other authority comes to mind overnight, it might be helpful to us to have it.

MR. LEGUM: We'd be happy to look into that.

PROFESSOR DE MESTRAL: Thank you.

MR. LEGUM: Anything further?

PRESIDENT FELICIANO: If the enterprise is precisely set out for the purpose of trading, importing and exporting, in addition to manufacturing, I suggest that you may have some very gray zones. I'm talking about this trade versus investment sort of thing. But then, of course, the question goes back to you actually have--what does the specific provision allege to have been breached provide at the end of the day?

I don't think you are necessarily suggesting that it is possible to decide a case on the basis of whether it is an investment dispute or whether it's a trade dispute. That's not what you are saying. Am I right?

MR. LEGUM: I would agree with that, with what you just said, Mr. President. It so happens that the only article in this case in which this debate has arisen is Article 1102, which contains very explicit provisions that require that the supposedly different treatment be with respect to certain aspects of investments. And our position is that in order to demonstrate a violation of that article, you have to demonstrate what the article requires.

PRESIDENT FELICIANO: I suggest that today we can adjourn a little earlier than yesterday. Tomorrow we will have some additional points to make. Excuse me.

[Pause.]

PRESIDENT FELICIANO: Yes, our Secretary

wishes to remind everyone that tomorrow we start at 9:00 instead of 9:40. Is that correct? It says 9:30.

MR. ONWUAMAEGBU: I'm sorry for the confusion, but the idea was to start at 9:00 tomorrow to give the respondents more time during lunch to absorb what is said in the morning. But if it's going to prove--if it's going to cause any difficulties, then perhaps we can revisit that.

MR. LEGUM: Well, certainly we have no objection to starting at 9:00. And, in any event, we would request a half an hour longer than usual in order to respond to what we're going to hear for the first time tomorrow morning.

MR. ONWUAMAEGBU: That was the idea. Lunch was meant to be two hours tomorrow instead of one and a half hours like we've had today and yesterday.

MR. KIRBY: I'm trying to absorb the impact of all that was said today, how much do I have to work tonight, what do I have to do tomorrow

morning. I'm reading the timetable at the same time, and I'll roll the dice and say that I can be here at 9 o'clock tomorrow morning if my friends think that that would be more appropriate.

MR. LEGUM: Alternatively, one could start at 9:30 and then break a little bit later, or break and then we could--break at the scheduled time, and then we can take a little bit longer for lunch.

The likelihood is that we will not be able to speak for as long as ADF. They have greater endurance than we do.

PRESIDENT FELICIANO: So you are being very nice, Mr. Kirby. 9:30 I guess is fine, so you can have a little more time.

MR. KIRBY: Thank you, Mr. Chairman.

PRESIDENT FELICIANO: Thank you. 9:30, then?

MR. LEGUM: 9:30. Thank you very much.

[Whereupon, at 5:49 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Wednesday, April 17, 2002.]